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

BRIEF OF CONSUMER RESPONDENTS

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QUESTION PRESENTED

Do specific allegations of an agreement among competitors to fix prices plausibly allege an illegal horizontal agreement under Section 1 of the Sherman Act, 15 U.S.C. § 1, where the agreement came in the form of the rules of business associations and the complaints allege conduct beyond mere membership in the associations?

RULE 29.6 STATEMENT

Consumer Respondents are Sam Osborn, Andrew Mackmin, Barbara Inglis, and Mary Stoumbos.

Pursuant to this Court's Rule 29.6, Consumer Respondents state that no Consumer Respondent has a parent company, and no publicly-held company owns 10% or more of the stock in any Consumer Respondent.

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INTRODUCTION

This case concerns agreements among competing banks to restrain themselves from lowering the ATM access fees that they can charge to consumers. The result, as intended by the banks, is the reduction of competition over ATM access fees, which in turn has led to consumers paying record-high fees. The restraints are therefore classic price-fixing agreements, subject to scrutiny under Section 1 of the Sherman Act.

Petitioners argue that the challenged restraints are immune from Section 1 scrutiny solely because the agreements came in the form of the rules of business associations made up of the banks, and because the agreements benefited the associations as a whole. However, agreements of a joint venture almost always benefit the venture itself, meaning that Petitioners' theory would effectively create a joint-venture exception to Section 1. But for decades, this Court has consistently held that joint ventures are subject to Section 1 scrutiny. Most recently, in *American Needle, Inc. v. National Football League*, 560 U.S. 183 (2010), this Court held that joint-venture decisions were concerted action under Section 1. And *American Needle* expressly rejected the idea that a joint venture does not engage in concerted action simply because the action benefits the venture as a whole—controlling language Petitioners simply ignore. They likewise ignore that their theory would effectively immunize a broad category of conduct that unreasonably restrains competition, in conflict with the text and purpose of Section 1. Accordingly, there is no legal basis to adopt Petitioners' theory and thereby grant antitrust immunity for competing banks to use the rules of

business associations to agree on their own prices that they charge consumers.

STATEMENT

A. Factual Background

1. In 1996, Visa and MasterCard were facing a new competitive environment in the ATM services market. At that time, Visa and MasterCard were associations comprised of member banks that competed with each other in, among other things, offering ATM services and issuing ATM cards to their customers. *Osborn* Pet. App. 65a ¶ 45, 88a ¶ 113. While state laws and network rules had formerly prohibited ATM operators from charging "access fees"—fees paid by consumers to access a "foreign" ATM not owned or operated by their own bank—those laws and rules were about to be changed to allow ATM operators to charge them. *Osborn* Pet. App. 71a ¶¶ 65-66. And because of these changes, the member banks anticipated the arrival of new entrants into the market: independent, non-bank ATM operators, or Independent Service Organizations (ISOs). *Stoumbos* Pet. App. 121a ¶ 43.

The banks, including Petitioners Bank of America, J.P. Morgan Chase, and Wells Fargo, sat on Visa and MasterCard's board of directors. *Osborn* Pet. App. 60a ¶ 22, *id.* 62a ¶ 33, *id.* 63a-64a ¶ 38, *id.* 64a ¶¶ 39, 43, *id.* 65a ¶ 46 (Visa); *id.* 63a-64a ¶ 38, *id.* 65a ¶ 46 (MasterCard). Because, at the time, the banks themselves owned nearly all ATMs (*Osborn* Pet. App. 77a ¶ 80), they knew the ISOs might attempt to compete with bank-owned ATMs by charging lower access fees. And ISOs could afford to do that if they routed ATM transactions over networks other than Visa and MasterCard's.

When conducting a transaction with a foreign bank, ATM operators receive a "net interchange" fee: the gross interchange fee paid by the cardholder's bank, less any network fee charged by the ATM network. *Osborn* Pet. App. 70a ¶ 63. MasterCard and Visa have the highest network fees, which means they pay ATM operators the lowest net interchange fees of any network. *Id.* 79a ¶ 88, 82a ¶ 93; *see also id.* 81a ¶ 92 (noting that sometimes the net interchange fee is actually negative for Visa and MasterCard transactions). Several competing networks charge much lower network fees, thus enabling an ATM operator to collect a higher net interchange fee when it routes transactions over the those networks. *Id.* 80a-81a ¶ 91. Indeed, because of the difference in network fees between Visa and MasterCard and other ATM networks, the costs to an ATM operator can vary by as much as $0.60 per transaction. *Osborn* Pet. App. 80a-81a ¶ 91, *id.* 83a ¶ 97; *Stoumbos* Pet. App. 80a-81a ¶¶ 74-75. Whenever possible, ATM operators will, of course, choose to route transactions over those networks that pay them higher net interchange fees. *Osborn* Pet. App. 69a ¶ 59.

2. Threatened with competition over ATM access fees, both from ISOs and each other, the banks took collective action. *See Osborn* Pet. App. 77a ¶ 80; *Stoumbos* Pet. App. 140a ¶ 78; *see also* Petitioners' Br. 5 (acknowledging Access Fee Rules were adopted "[i]n wake of these developments").

First, the member banks of Visa and MasterCard agreed to rules ("Access Fee Rules") that, as a condition of accessing Visa or MasterCard's ATM networks, prohibit ATMs—including the banks themselves—from competing for customers on the basis of the level of access fees. *Osborn* Pet. App. 86a-

87a ¶ 109. Specifically, the Access Fee Rules prohibit ATM operators from charging less for cash withdrawals processed over a rival network than they charge for cash withdrawals processed over Visa and MasterCard's networks.

The challenged Visa rule states:

> **4.10A Imposition of Access Fee**
>
> An ATM Acquirer may impose an Access Fee if:
>
> It imposes an Access Fee on all other Financial Transactions through other shared networks at the same ATM;
>
> The Access Fee is not greater than the Access Fee amount on all other Interchange Transactions through other shared networks at the same ATM . . . .

Stoumbos Pet. App. 82a ¶ 78. The challenged MasterCard rule states:

> **7.14.1.2 Non-Discrimination Regarding ATM Access Fees**
>
> An Acquirer must not charge an ATM Access Fee in connection with a Transaction that is greater than the amount of any ATM Access Fee charged by that Acquirer in connection with the transactions of any other network accepted at that terminal.

Stoumbos Pet. App. 135a ¶ 64.

Based on the clear language of the Access Fee Rules, even though the banks receive a greater net interchange fee from other networks, they cannot pass this along to consumers in the form of lower ATM fees. In addition, independent ATM operators must enter

into agreements with the banks as a prerequisite for access to the dominant Visa and MasterCard ATM networks, and these agreements effectively impose the Access Fee Rules on independent ATM operators. *Stoumbos* Pet. App. 64a ¶ 42. To this day, even though Visa and MasterCard became private companies (with IPOs in 2008 and 2006, respectively), the Access Fee Rules remain in place. *Osborn* Pet. App. 90a ¶¶ 118-19.

Second, the member banks, who also issue ATM cards[1] to consumers, entered into agreements with Visa and MasterCard to issue "single bug" cards. *Osborn* Pet. App. 78a ¶ 83. Bugs are logos on the back of bank cards that indicate the ATM networks to which the cards are linked, *Stoumbos* Pet. App. 120a-121a ¶ 40, which means that the banks' single-bug cards would work solely over either Visa or MasterCard's ATM network, *Osborn* Pet. App. 55a ¶ 3. Petitioners Bank of America, JP Morgan Chase, and Wells Fargo all entered into agreements with Visa to issue only single-bug cards. *Id.* 78a-79a ¶¶ 83-85. MasterCard also offered similar single-bug cards. *Id.* 79a ¶¶ 86-87.

While in a competitive market consumers would select ATMs based on the cost of the transactions over the ATM network, and select ATM cards based on the card that offered access to the lowest-cost networks, the Access Fee Rules prevent either type of competition. *Osborn* Pet. App. 83a-84a ¶ 98, *id.* 85a ¶¶ 102, 104. ATM operators would understandably prefer

[1] Throughout this brief Consumer Respondents use "ATM cards" to refer to PIN debit cards that initiate ATM transactions. As the complaints explain, all ATM transactions are PIN debit transactions, and only cards with PIN debit capability can be used in an ATM. *Osborn* Pet. App. 68a ¶ 55.

not to route ATM transactions over Visa and MasterCard's high-cost networks, because, like sellers of any good or service, ATMs set prices based on their costs, and therefore would like to influence consumers—by discounts or otherwise—to make purchases where the operators' costs are lower. *Id.* 82a ¶ 95.[2] The Access Fee Rules prohibit them from doing so (*id.* 85a ¶ 103), and instead force operators to charge higher ATM fees to consumers to make up the lost revenue they would have gotten by using a lower-cost (i.e., higher net interchange fee) network. *Id.* 79a-80a ¶¶ 88-89. As a result, by 2012, ATM access fees for consumers rose to their highest level ever. *Id.* 84a ¶¶ 99-100. In fact, the GAO concluded that "consumers are facing ever increasing fees to access their own money," and could pay as much as $5.00 to $10.00 each time they use an ATM. *Id.* 84a ¶ 99 (quoting *Automated Teller Machines: Some Consumer Fees Have Increased* (Apr. 2013)).[3]

B. The District Court Proceedings

Respondents filed three separate class-action complaints under Section 1 of the Sherman Act, 15 U.S.C. § 1, challenging Petitioners' Access Fee Rules. Respondents allege that the Access Fee Rules were, in the alternative, horizontal restraints of trade, hub-and-spoke agreements, and vertical agreements. *Osborn* Pet. App. 107a-111a; *Stoumbos* Pet. App. 95a ¶ 113; *id.* 159a-162a; *see also id.* 70a ¶ 53 (describing

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[2] Thus, while Petitioners characterize such conduct as "discriminatory" (Br. 12, 28), the conduct they describe is nothing more than pricing based on a seller's costs.

[3] Since the complaints were filed, ATM fees have continued to rise even further. *See* http://www.bankrate.com/finance/checking/2016-checking-account-survey-1.aspx.

hub-and-spoke allegations). Two of those complaints were filed by groups of consumers ("Consumer Respondents") who allege that they paid higher ATM access fees as a result of the Access Fee Rules. Independent (non-bank) ATM operators also filed a complaint and have submitted a separate brief to this Court. This appeal concerns only the allegations of horizontal restraints.

On February 13, 2013, the district court dismissed the First Amended Complaints without prejudice. *See Osborn* Pet. App. 158a-207a. On December 19, 2013, the district court denied Respondents' motions for leave to amend. *Id.* 26a-51a. The district court's opinion focused entirely on whether the complaints allege an agreement *after* the IPOs. Specifically, the district court held that "[a]llegations that the member banks made a *prior* agreement when they were members of the bankcard associations do not suffice to allege a *current* agreement." *Id.* 47a (emphases added). And the court reiterated its prior holding that membership in a "defunct association" was insufficient to establish the existence of an ongoing agreement. *Id.* 48a. While acknowledging that the complaints allege the Access Fee Rules are contrary to any individual bank's self-interest because a bank not bound by the restraints could compete with other banks on the basis of cost, *see id.* 49a, the district court found those allegations insufficient because the "banks have reasons to join or stay in the Visa and MasterCard networks based on their individual interests." *Id.* 50a.

C. The Court Of Appeals Decision

On August 4, 2015, the U.S. Court of Appeals for the D.C. Circuit (Wilkins J., joined by Tatel and Srinivasan, JJ.) reversed, holding that the complaints stated claims for violation of the antitrust laws.

Osborn Pet. App. 3a-25a. With respect to Respondents' allegations of agreement, the court stated that antitrust plaintiffs must allege that "'the challenged anticompetitive conduct stems from . . . an agreement, tacit or express.'" *Osborn* Pet. App. 18a (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 553 (2007)) (internal quotation marks and brackets omitted; alteration in original). It further noted that "[t]he complaints are sufficient if they contain 'enough factual matter (taken as true) to suggest that an agreement was made.'" *Id.* (quoting *Twombly*, 550 U.S. at 556).

The court then explained why the complaints satisfy this standard. *Osborn* Pet. App. 18a-23a. It noted that the complaints allege "the member banks developed and adopted the Access Fee Rules when the banks controlled Visa and MasterCard,"[4] and that the Access Fee Rules served "several purposes." *Id.* 18a. *First*, they "protected Visa and MasterCard from competition with lower-cost ATM networks, thereby permitting Visa and MasterCard to charge supra-competitive fees." *Id.* *Second*, they "also benefited the banks, who were equity shareholders of the associations (and therefore financial beneficiaries of the deal)." *Id.* 19a. *Third*, they "protected banks from competition with each other over the types of bugs offered on bank cards." *Id.*

The court then held: "That the rules were adopted by Visa and MasterCard as single entities does not preclude a finding of concerted action." *Id.* It recognized that *American Needle* required the court to

[4] Petitioners mischaracterize this quotation and erroneously claim that the court "recognized that the Access Fee Rules were adopted by each network, rather than by their individual member banks." Br. 9 (citing *Osborn* Pet. App. 19a).

engage in "'a functional consideration of how the parties involved in the alleged anticompetitive conduct actually operate.'" *Id.* (citing *Am. Needle*, 560 U.S. at 191). It noted that "'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.* (quoting *Am. Needle*, 560 U.S. at 191 (alterations in original)). The court therefore concluded: "The allegations here—that a group of retail banks fixed an element of access fee pricing through bankcard association rules—describe the sort of concerted action necessary to make out a Section 1 claim." *Id.*

The court further explained that the complaints are *not* based on bare allegations of membership in a trade association. The court held that while mere membership does not suffice, "Plaintiffs here have done much more than allege 'mere membership.'" *Id.* 20a. "They have alleged that the member banks *used* the bankcard associations to adopt and enforce a supra-competitive pricing regime for ATM access fees." *Id.* (emphasis in original). The court therefore concluded that the complaints allege "enough to satisfy the plausibility standard." *Id*.

Finally, the court rejected the notion that allegations of an agreement first made at a time when Visa and MasterCard were business associations were insufficient to allege a current agreement that has continued unabated after both companies became publicly-held corporations. The court recognized that the question of whether Petitioners have withdrawn from an agreement is typically a question of fact for the jury, and that the allegations established such a fact question here. *Id.* 21a-22a. The court noted the allegations that the member banks knew other

member banks would continue to be bound to the Access Fee Rules before and after the IPOs, that the banks continue to issue Visa- and MasterCard-branded cards and to comply with the Access Fee Rules at their own ATMs, and that the banks continue to work with Visa and MasterCard to route more transactions over those networks. *Id.* 22a. The court thus held: "The Plaintiffs have adequately alleged an agreement that originated when the member banks owned and operated Visa and MasterCard and which continued even after the public offerings of those associations." *Id.* 23a (footnote omitted).

Petitioners did not challenge, and the D.C. Circuit did not address, the sufficiency of the alternative allegations that the Access Fee Rules are vertical and/or hub-and-spoke agreements in violation of Section 1, *see id.* 23a n.3, and Petitioners do not raise that issue here.

On September 28, 2015, the D.C. Circuit denied Petitioners' petitions for rehearing *en banc*. *Id.* 1a-2a. This Court granted certiorari on June 28, 2016.

SUMMARY OF ARGUMENT

Respondents' complaints properly allege an agreement among banks to set ATM fees, in violation of Section 1 of the Sherman Act. Petitioners brought their petition for certiorari on the theory that the complaints allege essentially nothing more than mere membership in the business associations. But Petitioners have largely abandoned that theory in their merits brief. Instead, they now argue that regardless of whether the banks actually agreed to the Access Fee Rules, this would not qualify as concerted

action under Section 1 because the business associations are single entities. Both of Petitioners' theories fail under well-established law.

I. The complaints allege detailed facts about the banks' agreement to the Access Fee Rules that more than suffice to plead an agreement under *Twombly*. Respondents provide the specific language of the Access Fee Rules, and include factual allegations detailing that Petitioners established, agreed to, adhered to, and enforced those rules. Indeed, Defendant banks were board members of and effectively controlled the business associations that created the Access Fee Rules in the first place. This Court has consistently held that the rules of a joint venture, like those at issue here, are concerted action of the members of the venture, subject to Section 1 scrutiny.

Moreover, Respondents' complaints went even further in demonstrating the existence of an agreement. They explained that adherence to the Access Fee Rules by any individual bank would be irrational in the absence of agreement. In particular, it would be contrary to any bank's self-interest to unilaterally refrain from offering consumers lower access fees on lower-cost networks—and thereby attract additional customers without losing revenue—unless it knew that other banks would also agree to the same restriction. Thus, the existence of an agreement is the only reasonable explanation, and it is certainly a plausible one.

II. The agreement of Petitioners to constrain the ATM fees that each bank can charge to customers constitutes concerted action under Section 1. As *American Needle* held, the test for concerted action

is whether the action deprives the market of independent centers of decisionmaking. Petitioners ignore this test, which is clearly satisfied here because (as the complaints allege) the banks are separate, profit-maximizing entities that would compete with each other and with the independent ATMs on the basis of ATM fees but for their agreement to the Access Fee Rules.

Petitioners argue that there is no concerted action because the banks acted in the interests of the business associations in adopting the Access Fee Rules. However, *American Needle* recognized that joint-venture conduct is usually in the interest of both the members individually and the venture itself, and that the common interests do not belie concerted action. Here, likewise, the rules benefited both the banks, by reducing competition over ATM access fees, and the business associations, by removing the comparative cost advantages of the lower-cost networks. There is no legal or rational basis for ignoring the harm to competition in ATM access fees simply because the rules also aided the business associations themselves.

Whatever the benefits to the business associations, they achieved those benefits by preventing the banks from competing over price, taking away competition from the market. That is the central concern of Section 1. Accordingly, Petitioners' argument for a broad immunity from Section 1 scrutiny for joint-venture conduct—regardless of whether that conduct unreasonably restraints competition by its members—conflicts with this Court's precedents as well as the fundamental purpose of the antitrust laws.

Even if Respondents were required to allege that in agreeing to the Access Fee Rules the banks acted in

their own interests, the complaints plainly do so. The banks are separate, profit-maximizing entities, and the rules insulate them from competition among themselves and with independent ATMs in providing ATM services and in issuing ATM cards. That the rules may also benefit the profit interests of the Visa and MasterCard payment networks, by protecting them from competition on the network level, does not change the fact that they likewise benefit the banks. In short, it makes no logical or practical sense to find that the banks could not have agreed to the Access Fee Rules simply because the rules also benefit the networks.

ARGUMENT

I. RESPONDENTS ALLEGE AN AGREEMENT AMONG THE BANKS TO SET PRICES

The complaints in this case provide factual allegations that more than suffice to plead an agreement among Petitioners to set prices for ATM fees.

1. The standard for pleading an antitrust claim is the usual, notice-pleading standard of Rule 8 of the Federal Rules of Civil Procedure. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007). A Section 1 claim "requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made." *Id.* at 556.

An agreement subject to Section 1 can take many forms. This Court has long recognized the breadth of the meaning of concerted action in Section 1:

> The essential combination or conspiracy in violation of the Sherman Act may be found in a course of dealings or other circumstances as

> well as in an exchange of words. Where the circumstances are such as to warrant a jury in finding that the conspirators had a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement, the conclusion that a conspiracy is established is justified.

Am. Tobacco Co. v. United States, 328 U.S. 781, 809-810 (1946) (internal citation omitted). There is such a meeting of the minds where, "knowing that concerted action was contemplated and invited, the [defendants] gave their adherence to the scheme and participated in it." *United States v. Masonite Corp.,* 316 U.S. 265, 275 (1942) (internal quotation marks omitted). More recently, the Court has described concerted action as including conversations or conduct that "suggests that each competitor failed to make an independent decision." *Brown v. Pro Football, Inc.*, 518 U.S. 231, 241 (1996) (internal citations omitted).

Twombly likewise recognized that an agreement can simply be "'conduct [that] indicates the sort of restricted freedom of action and sense of obligation that one generally associates with agreement.'" 550 U.S. at 556 n.4 (citation omitted). But *Twombly* held that the complaint at issue there did not suffice because "plaintiffs rest their § 1 claim on descriptions of parallel conduct and not on any independent allegation of actual agreement among the ILECs." *Id.* at 564. Here, in contrast, Respondents allege not simply parallel conduct, but "independent allegation of actual agreement" to specific, written agreements that unlawfully restrain trade.

2. The exact terms of the agreements are spelled out in the complaints. The challenged rules state that the banks may not charge an ATM access fee for

transactions over the Visa and MasterCard networks greater than the access fee they charge for transactions over other networks. *Stoumbos* Pet. App. 82a ¶ 78, 135a ¶ 64. The complaints also specifically allege that these rules were agreed to by Petitioners. For instance, Respondents allege:

> The unreasonable restraints of trade in this case are horizontal agreements among the Bank Defendants and the Network Defendants, and their members, to adhere to rules and operating regulations that require ATM Access Fees to be fixed at a certain level. These restraints originated in the rules of the former bankcard associations agreed to by the banks themselves.

Osborn Pet. App. 65a-66a ¶ 47.

Respondents also allege that Defendant banks established the rules through their control of the Visa and MasterCard Board of Directors:

> From the beginning of their existence until their IPOs, Visa and MasterCard's member banks elected a Board of Directors composed exclusively or almost exclusively of competing member banks. That Board of Directors, with the cooperation and assent of the member banks, in turn established, approved, and agreed to adhere to rules and operating regulations, including the ATM Restraints that eliminated horizontal, interbrand competition between the member banks as described above.

Stoumbos Pet. App. 145a ¶ 90; *see also Osborn* Pet. App. 86a-87a ¶ 109; *id.* 65a ¶ 45 (describing participation on the board of all bank Petitioners).[5]

The complaints also allege that the banks consistently enforce the Access Fee Rules. In particular, the banks enter into agreements with ISOs that require ISOs to comply with the Access Fee Rules, knowing that Visa and MasterCard can detect violations and that they will vigorously enforce their network rules and expel ATM operators who violate them. *Osborn* Pet. App. 83a-84a ¶ 98. In short, the complaints allege that Petitioners "established," "approved," "agreed to," "adhered to," and "imposed" those rules. Thus, the rules plainly create a "sense of obligation that one generally associates with agreement." *Twombly*, 550 U.S. at 557 n.4 (internal quotation marks and citation omitted).

The D.C. Circuit correctly held that these allegations satisfy the element of concerted action under Section 1. The court recognized that "'[m]embership in an association does not render an association's members automatically liable for antitrust violations committed by the association.'" *Osborn* Pet. App. 20a (quoting *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1048 (9th Cir. 2008)). But the court held that Respondents allege more than mere membership by providing specific allegations of the banks' agreement to the Access Fee Rules, including that the banks "*used* the bankcard associations to adopt and enforce

[5] While Petitioners dispute the importance of the allegations regarding their positions on the boards of Visa and MasterCard (Br. 25), they do not dispute that these allegations support that Petitioners in fact established and agreed to the Access Fee Rules.

a supra-competitive pricing regime for ATM access fees." *Id.* 20a (emphasis in original).[6]

3. This Court has repeatedly held, for almost a century, that the rules and bylaws of a joint venture that bind the members of the group are concerted action under Section 1. For instance, in *Chicago Board of Trade v. United States*, 246 U.S. 231 (1918), this Court applied Section 1 scrutiny to the rule of a commodities exchange, which required members of the exchange to sell only at the pre-closing price when the exchange was closed. *Id.* at 237. In *Associated Press v. United States*, 326 U.S. 1 (1945), the Court applied Section 1 to bylaws of an association of newspapers that granted each member powers to block its non-member competitors from membership, holding that "[t]he by-laws of AP are in effect agreements between the members." *Id.* at 4, 11 n.6 (quoting district court's findings of fact). And in *National Society of Professional Engineers v. United States*, 435 U.S. 679, 694-97 (1978), this Court subjected to Section 1 scrutiny the ethical rules of an association of engineers, which prohibited competitive bidding by its members. *Id.* at 694-97. Numerous other cases have likewise treated joint-venture conduct as concerted action under Section 1. *See, e.g.*, *Am. Needle*, 560 U.S. at 184 (licensing activities of the NFL); *Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 781 (1999) (ethics rules for members of association of dentists); *Nw. Wholesale Stationers v. Pac. Stationery & Printing Co.*, 472 U.S.

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[6] Petitioners acknowledge that showing the associations were "a mere vehicle for the members' pursuit of their own separate interests" (Br. 19) indicates agreement, but insist that Respondents must also show the agreement affected only the market in which the banks compete. For the reasons set forth in Section II.D.2, there is no support for Petitioners' position.

284, 293-96 (1985) (by-laws of office-supply retailers' purchasing cooperative); *Arizona v. Maricopa County Med. Soc'y*, 457 U.S. 332, 356-57 (1982) (rule of corporation, comprised of competing physicians, to set maximum fees by majority vote of its members); *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 24 (1979) (licensing of associations of owners of copyrighted musical works); *Goldfarb v. Va. State Bar*, 421 U.S. 773, 778 (1975) (minimum fee schedule promulgated by a state bar); *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 602 (1972) (bylaws of cooperative association of supermarket chains restricting territory for its members); *United States v. Sealy, Inc.*, 388 U.S. 350, 351-53 (1967) (creation of exclusive territories by corporations comprised of manufacturer-licensees); *Silver v. N.Y. Stock Exch.*, 373 U.S. 341, 343-44, 347 (1963) (rules of stock exchange constraining stock exchange members).

Nothing in *Twombly* changes these longstanding precedents. *Twombly* itself recognized that "'[t]erms like "conspiracy" . . . might well be sufficient in conjunction with a more specific allegation—for example, identifying a written agreement.'" 550 U.S. at 557 (quoting *DM Research, Inc. v. College of Am. Pathologists,* 170 F.3d 53, 56 (1st Cir. 1999)).[7]

[7] As the Fourth Circuit explained, when addressing an agreement to the rules of a multiple listing service ("MLS") by real estate brokerages, *Twombly* is inapposite where a specific agreement is alleged: "The complaints do not rest on evidence of parallel business conduct but on allegations that the MLS board members conspired in the form of the MLS rules, the very passage of which establishes that the defendants convened and came to an agreement." *Robertson v. Sea Pines Real Estate Cos.,* 679 F.3d 278, 289 (4th Cir. 2012) (Wilkinson, J.). "Circumstantial evidence sufficient to 'suggest[ ] a preceding agreement,' is thus

Respondents allege just such a written agreement. And as discussed above, they did far more than simply use the term "conspiracy."

Indeed, the allegations here are far stronger than in the vast majority of antitrust cases. In most cases, an agreement among competitors is oral and informal, so as to evade antitrust scrutiny. *See, e.g.*, *Robertson*, 679 F.3d at 289-90 ("Conspiracies are often tacit or unwritten in an effort to escape detection, thus necessitating resort to circumstantial evidence to suggest that an agreement took place."). Here, in contrast to the usual allegations of parallel conduct with some arguable "plus" factor, the agreement was written and express.

4. Even setting aside the written Access Fee Rules, and viewing the allegations as based on parallel conduct, the existence of an agreement here is more than plausible. Specifically, Respondents allege that "[t]his horizontal conspiracy is only effective because the Bank Defendants and Bank Co-Conspirators know that their competitors are also complying. It would be contrary to any one bank's self-interest independently to agree to the [Access Fee Rules], unless it knew that its competitors were also agreeing to it." *Osborn* Pet. App. 83a ¶ 98. The reason is that "[a] bank that was not bound by the [Access Fee Rules] could charge lower prices for transactions conducted over networks that pay a higher net interchange fee, and attract customers away from banks that complied with the [Access Fee Rules]." *Id.* 83a-84a ¶ 98; *see also, e.g.*, *Stoumbos* Pet. App. 86a ¶ 87 ("The ATM Access Fee restraints prevent ATM operators from maximizing

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superfluous in light of the direct evidence in the by-laws of the agreement itself." *Id.* (quoting *Twombly*, 550 U.S. at 557).

revenue by prohibiting them from implementing a revenue-maximizing Access Fee pricing structure that properly reflects the variability of ATM costs and revenues depending on which of the various competing ATM Networks is used for the transaction."). Thus, there is no reason for a bank to deprive itself of the ability to charge lower ATM fees for use of lower-cost networks—and thereby attract more ATM usage without reducing its own profits—unless other banks had agreed to do the same.

The complaints further allege that the banks ensured the Access Fee Rules function as intended by agreeing to issue "single bug" cards that could only be accessed on Visa or MasterCard's networks. By doing so, "ATM operators have no choice but to run those transactions over a high-cost network run by Visa or MasterCard." *Osborn* Pet. App. 79a-80a ¶ 88. In fact, even though the banks no longer directly control Visa and MasterCard, the banks continued to issue single-bug cards when, absent the Access Fee Rules, there was no reason for them to do so. *Id.* 78a-79a ¶¶ 83-85, 87.[8] Once again, these factual allegations support

[8] Petitioners argue (Br. 38) that the persistence of the Access Fee Rules after the Visa and MasterCard IPOs suggests the rules were not a product of concerted action. In fact, it only further supports the existence of concerted action. In the absence of agreement, there is no explanation for why the banks continued to enforce the rules and issue single-bug cards, even though doing so is against their own self-interest. Moreover, the complaints explain that the former member banks continue to hold non-equity membership interests in Visa and MasterCard subsidiaries and the largest ones also hold equity interests and seats on MasterCard's and Visa's boards of directors. *Osborn* Pet. App. 65a ¶ 46. Visa and MasterCard continue to refer to their bank customers as "members" and continue to operate principally for their benefit. *Id.* 65a-66a ¶ 47. Thus, at a minimum, it is plausible that the banks understood their agreement to the

the existence of an agreement among the banks to favor Visa and MasterCard over lower-cost networks.

In sum, Respondents allege an express agreement to fix prices, detailing precisely what that agreement entailed and why the existence of an agreement is the only rational explanation for the behavior. These allegations go far beyond the requirement of plausibility that this Court set forth in *Twombly*.

5. In the court below and in their petition for certiorari, Petitioners argued that Respondents had not alleged that the member banks actually agreed to the Access Fee Rules, but only that they were members of the associations. Contrary to their position at the certiorari stage, Petitioners now concede (Br. 23 & n.3) that the D.C. Circuit ruled, consistent with other circuit courts, that "mere membership" in a joint venture does not suffice to plead an agreement. And Petitioners no longer argue that Respondents allege only mere membership. Indeed, apart from the newly-minted, single-entity argument discussed *infra* Part II, Petitioners make no argument at all as to why the allegations of written rules initiated, adhered to, and enforced by the banks do not suffice for concerted action.

The only challenge Petitioners now make to the existence of an agreement is to say there is an explanation for the Access Fee Rules outside of concerted action. Specifically, Petitioners argue that "the complaints identify legitimate, independent reasons that a bank would voluntarily abide by the rules in the absence of concerted action. Abiding by the rules may be a cost of being part of a network." Br.

Access Fee Rules would survive the IPOs. *See, e.g.*, *Stoumbos* Pet. App. 149a ¶ 103.

36 (internal citation omitted). But this is a *non sequitur*: the idea that the rules are required to be part of the network says nothing about whether the banks would agree to them but for concerted action.

At most, Petitioners' assertion that abiding by the Access Fee Rules was the price to gain the benefits of the Visa and MasterCard networks (Br. 36-37) is an attempt to justify *why* the banks engaged in the concerted action. But this justification ignores the fact that the Visa and MasterCard networks were associations of the banks, and thus the banks imposed the Access Fee Rules on themselves in the first place. In any event, "[t]he justification for cooperation is not relevant to whether that cooperation is concerted or independent." *Am. Needle*, 560 U.S. at 199. As this Court has long recognized, "acquiescence in an illegal scheme is as much a violation of the Sherman Act as the creation and promotion of one." *United States v. Paramount Pictures*, 334 U.S. 131, 161 (1948); *see also, e.g.*, *United States v. Masonite Corp.*, 316 U.S. at 275 ("And as respects statements of various appellees that they did not intend to join a combination or to fix prices, we need only say that they must be held to have intended the necessary and direct consequences of their acts and cannot be heard to say the contrary.") (internal quotation marks omitted); H. Hovenkamp & C. Leslie, *The Firm as Cartel Manager*, 64 VAND. L. REV. 813, 850 (2011) ("From an antitrust standpoint, there is no difference between agreeing to abide by the ringleader's decisions and agreeing to cede decisionmaking authority to a separate entity that runs the cartel. Either way, an independent firm has agreed to not compete on price.").

II. THE BANKS ENGAGED IN CONCERTED ACTION UNDER SECTION 1 WHEN ACTING THROUGH A BUSINESS ASSOCIATION TO FIX THEIR OWN PRICES

The above suffices to establish that the complaints pled the existence of an agreement under Section 1. Petitioners' principal argument that the above allegations are insufficient (Br. 10-11) is 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 and cannot form the basis of a claim." *See also id.* 14-19. This new, single-entity theory was not raised in the petition for certiorari before this Court. And while it concerns the element of agreement, it is not fairly included within the question presented, which says nothing at all about in whose interest the members are acting. Indeed, the single-entity argument is not that Respondents failed to sufficiently allege agreement to the challenged restraints as a factual matter—the issue addressed in the petition for certiorari—but rather that the banks are incapable of agreement as a legal matter based on their supposedly aligned interests as part of the associations. This argument is thus based on an entirely different idea of what is supposedly deficient in the complaints. Accordingly, Petitioners' new theory should not be considered by this Court. *See* S. Ct. R. 14.1(a) ("Only the questions set out in the petition, or fairly included therein, will be considered by the Court.").

But if this Court does consider Petitioners' single-entity theory, it should be rejected as legally baseless, as it clearly conflicts with this Court's precedents as

well as the text and purpose of Section 1 of the Sherman Act.

A. The Banks Are Independent Centers Of Decisionmaking And Thus Are Capable Of Conspiring Under Section 1

This Court has held that parties are capable of conspiring within the meaning of Section 1 where they represent independent centers of decisionmaking, regardless of whether they were acting partly in the interests of the joint venture.

In *American Needle*, this Court considered National Football League Properties ("NFLP"), a joint venture created by the 32 teams of the National Football League to license and sell the teams' intellectual property. 560 U.S. at 187-88. To begin with, this Court recognized that "we have repeatedly found instances in which members of a legally single entity violated § 1 when the entity was controlled by a group of competitors and served, in essence, as a vehicle for ongoing concerted activity." *Id.* at 191. "[T]he question is not whether the defendant is a legally single entity or has a single name." *Id.* at 195. Instead, this Court made clear precisely the test to apply: "The question is whether the agreement joins together independent centers of decisionmaking. If it does, the entities are capable of conspiring under § 1, and the court must decide whether the restraint of trade is an unreasonable and therefore illegal one." *Id.* at 196 (internal quotation marks and citations omitted). The reason is that where "the agreement deprives the marketplace of independent centers of decisionmaking, and therefore of diversity of entrepreneurial interests," the result is the elimination "of actual or potential competition," which is the "central

evil addressed by Sherman Act § 1." *Id.* at 195 (internal quotation marks and citations omitted).

Applying the test on the summary-judgment record, the Court held that the NFL teams' agreement deprived the marketplace of independent centers of decisionmaking and was therefore subject to Section 1 scrutiny. The Court explained that "[e]ach of the teams is a substantial, independently owned, and independently managed business," and that they "compete in the market for intellectual property." *Id.* at 196-97 (internal quotation marks omitted). The teams' agreement on how to license their intellectual property thereby "depriv[es] the marketplace of independent centers of decisionmaking, and therefore of actual or potential competition." *Id.* at 197 (internal quotation marks and citations omitted).

The same is even more obviously true here than it was in *American Needle*. The banks are separate, independently owned businesses that compete with each other in numerous ways, including in the market for ATM transactions. And there is no question that in the absence of the alleged agreements, the banks could have competed over the price they would charge in the form of ATM fees. As Respondents allege, they would have done so for basic economic reasons. *See supra* at 5-6. Thus, the agreements deprived the marketplace of competition over price that could have (and would have) otherwise existed—the very essence of concerted action that Section 1 was intended to cover.

In *American Needle*, there was at least a question of whether the combining of separately-owned intellectual property and sharing of profits made the NFLP's decisions regarding the combined product unilateral. The Court held that it did not because, absent the

agreement to work together through the NFLP, the teams could make their own market decisions about their intellectual property. *See* 560 U.S. at 200-01. Here, not only can the banks make their own decisions about ATM fees, but there is no question at all of whether the joint venture can make decisions about how to sell a shared product because the agreements at issue do not concern any kind of shared property or shared profits. They concern only the prices that the banks can charge to their own customers for their own ATM services, the quintessential decision of separate competitors.

This point also explains why Petitioners' reliance on *Texaco Inc. v. Dagher*, 547 U.S. 1 (2006), is misplaced. Petitioners argue that "when two companies pool their capital to form a joint venture to sell a product, the venture's 'pricing policy may be price fixing in a literal sense,' but 'it is not price fixing in the antitrust sense.'" Br. 15 (quoting *Dagher*, 547 U.S. at 6). That may be true; it is also irrelevant. Here, the agreements did not concern the business associations setting a price for a product that the associations were selling. Rather, they concerned setting the prices for products that the banks were selling separately and for which the banks were not sharing profits. To put it another way, there was no lost competition in *Dagher* "because Texaco and Shell Oil did not compete with one another in the relevant market . . . but instead participated in that market jointly through their investments in Equilon." 547 U.S. at 5-6. Here, the banks plainly do compete with each other in the ATM services market, and thus agreements on prices in that market are a loss of competition.

B. The Banks' Interest In The Success Of Visa And MasterCard Does Not Immunize Them From Section 1 Scrutiny

Petitioners ignore entirely whether the alleged agreements deprive the market of independent centers of decisionmaking and actual or potential competition, even though *American Needle* repeatedly states that this is the test that determines whether there can be concerted action under Section 1. Instead, Petitioners argue (Br. 15-22) that the only thing that matters is that the banks acted in the interests of the business associations. To the extent Petitioners are arguing that the banks act *solely* in the interests of the business associations, that clearly conflicts with the allegations stated in the complaints, as well as the common sense notion that banks try to maximize their own profits when selling their own products. *See infra* Part II.D.

To the extent Petitioners are arguing that the banks act *partly* in the interests of the business associations, that may be true, but *American Needle* expressly refutes the idea that this would immunize them from scrutiny under Section 1. *American Needle* recognized that the NFL teams "have common interests such as promoting the NFL brand." 560 U.S. at 198. But that did not suffice to defeat a Section 1 claim, as "illegal restraints often are in the common interests of the parties to the restraint, at the expense of those who are not parties." *Id.*; *see also id.* at 201 ("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.") (internal quotation marks omitted). Thus, the teams were not a single entity for purposes of Section 1 despite the fact that "[c]ommon interests in the NFL

brand *partially* unite the economic interests of the parent firms" because "the teams still have distinct, potentially competing interests." *Id.* at 198 (internal citation, quotation marks, and brackets omitted). Likewise, here, any *partial* alignment of the interests of the banks does not deny the existence of "distinct, potentially competing interests."

The existence of separate interests matters, but *only* to the extent that the absence of *any* separate interests would allow for a single-entity argument. For example, a wholly-owned subsidiary of a corporation has no separate interest from its parent because they share the same ultimate interest in maximizing the profit of the entire corporation. *See Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 771-72 (1984). As a result, an agreement between the two does not take away any independent center of decisionmaking or any competition that might otherwise exist. *Id.*; *see also Am. Needle*, 560 U.S. at 194.

This is the context from which the *American Needle* language relied on by Petitioners comes. Namely, Petitioners rely on a single word from that decision to argue that "if instead the parties acted in the context of a joint venture . . . and pursued the interests of that venture as a 'whole,' then their conduct counts as 'unilateral,' and cannot be the basis of a Section 1 claim. Br. 16 (quoting *Am. Needle*, 560 U.S. at 196, and *Copperweld*, 467 U.S. at 769). In fact, the full quotation from *American Needle* is simply a discussion of *Copperweld*, noting that Section 1 does not "cover 'internally coordinated conduct of a corporation and one of its unincorporated divisions,' because '[a] division within a corporate structure pursues the common interests of the whole.'" *Am. Needle*, 560 U.S. at 195-96 (quoting *Copperweld*, 467 U.S. at 770).

Thus, acting in the interests of the whole matters for divisions of a single corporation. But *American Needle* explicitly held that it does not matter for a joint venture made up of separate, profit-seeking entities: even if the NFLP was "pursuing the common interests of the whole," still "decisions by the NFLP regarding the teams' separately owned intellectual property constitute concerted action." *Id.* at 198, 201 (internal quotation marks omitted).

Many other cases from this Court likewise refute the idea that acting in the interests of the venture provides an exemption from Section 1. In this Court's joint-venture cases, there is almost always some benefit to the venture itself from the restriction being challenged, but there has never been any suggestion that this meant that the members of the venture could not form an agreement under Section 1. For instance, in *Sealy*, this Court recognized that the defendants "had an interest in Sealy's effectiveness and efficiency, and, as stockholders, they welcomed its profitability . . . [b]ut that does not determine whether they as licensees are chargeable with action in the name of Sealy." 388 U.S. at 353.[9] Likewise, in *Northwest Wholesale Stationers*, the joint venture shared profits with its members, 472 U.S. at 286, and the disclosure rules at issue "may well provide the cooperative with a needed means for monitoring the creditworthiness of its members," *id.* at 296. But that did not change the fact that the expulsion of a member for violating those

[9] *Sealy* thus likewise dispenses with Petitioners' argument (Br. 26) that, as members of the boards of Visa and MasterCard, the banks owed fiduciary duties to the associations, and thus the banks could not have agreed to rules that also benefitted themselves. *See* 388 U.S. at 356 (finding Sealy to be "an instrumentality of the individual manufacturers").

rules was subject to scrutiny under Section 1 to determine whether it was anticompetitive. *Id.* at 297-98. And in *National Collegiate Athletic Association v. Board of Regents of University of Oklahoma,* 468 U.S. 85 (1984), the Court recognized that the challenged regulations might support the defendants' legitimate "interest in maintaining a competitive balance among amateur athletic teams," which is plainly an interest of the NCAA joint venture itself. *Id.* at 117. But the Court nonetheless analyzed the agreement under Section 1 and held that it was unlawful. *Id.* at 117-20.

Thus, this Court has uniformly scrutinized agreements within the context of a joint venture without any consideration of the particular interest being pursued by the challenged agreement. That is consistent with *American Needle*'s holding that the question is whether the defendants "not only [have] an interest in [the joint venture] profits but *also* an interest in [their] individual profits." 560 U.S. at 201 (emphasis added). Where, as here, the members have individual profit interests, they represent independent centers of decisionmaking, and they are thus capable of conspiring within the meaning of Section 1.

C. The Text And Purpose Of The Sherman Act Refute Petitioners' Position

Petitioners' approach would conflict not only with decades of precedent, but also with the text and purpose of Section 1.

First, Section 1 states: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1. This Court does not interpret this language literally to forbid any agreement that

restrains trade in any way, instead limiting Section 1 to "only *unreasonable* restraints." *Dagher*, 547 U.S. at 5 (internal quotation marks omitted). But this limitation does not alter what constitutes an agreement in the first place. Instead, this Court has held that "[t]he meaning of the term contract, combination . . . or conspiracy is informed by the basic distinction in the Sherman Act between concerted and independent action that distinguishes § 1 of the Sherman Act from § 2." *Am. Needle*, 560 U.S. at 190 (internal quotation marks omitted). This distinction between whether action was made in concert or independently has nothing to do with what interests are motivating the defendants' agreement.[10] Indeed, Petitioners' approach would fundamentally change the words of Section 1 by inserting a requirement that plaintiffs plead and prove the motive for the challenged restraint. Such a change would defy Congress' choice not to include any kind of scienter requirement in Section 1.

Second, Petitioners' approach would undermine the purpose underlying Section 1. "The antitrust laws were enacted for 'the protection of *competition*, not *competitors*.'" *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 338 (1990) (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)). But Petitioners' rule, whereby any common interest among the joint venture members gives their agreements

[10] The *Copperweld* exception conforms to the language of the statute because "[w]ith or without a formal 'agreement,' the subsidiary acts for the benefit of the parent, its sole shareholder," and thus "the very notion of an 'agreement' in Sherman Act terms between a parent and a wholly owned subsidiary lacks meaning." 467 U.S. at 771. But this rationale obviously does not apply to the banks here because absent agreement they would not act for each other's benefit.

antitrust immunity, would thwart this overriding purpose. Even if there is a shared interest in the joint venture, that does not change the fact that the members could have competed but for the agreement. This loss of competition is precisely what the antitrust laws are designed to prevent.

Indeed, Section 1 was written broadly because of the variety of threats to competition. *See Standard Oil Co. v. United States*, 221 U.S. 1, 50 (1911). As *Standard Oil* explained, "the contracts or acts embraced in [Section 1] were not expressly defined, since the enumeration addressed itself simply to classes of acts, those classes being broad enough to embrace every conceivable contract or combination which could be made concerning trade or commerce or the subjects of such commerce." *Id.* at 60. Accordingly, it would defy the intended breadth of the statute to carve out of Section 1 a broad exemption for joint ventures.

Third, Petitioners' approach would turn joint ventures into a ready tool to evade the antitrust laws. It is clear that, outside the context of a joint venture, if competing parties like the banks agree on prices they will charge to consumers, it is an agreement subject to the antitrust laws. But under Petitioners' approach, all that competing parties must do to immunize themselves from antitrust scrutiny is to form a joint venture and adopt price agreements through that venture. If they do, and the joint venture has some legitimate operations such that the members can claim to be acting in the interests of the venture, then that would be the end of the matter. However, this Court has made clear that "competitors 'cannot simply get around' antitrust liability by acting 'through a third-party intermediary or "joint venture."'" *Am. Needle*, 560 U.S. at 202 (quoting *Major*

League Baseball Properties, Inc. v. Salvino, Inc., 542 F.3d 290, 336 (2d Cir. 2008) (Sotomayor, J., concurring in judgment)).

Indeed, Petitioners' description of what it would take to plead this new element of an antitrust claim shows precisely how this approach would be the death knell for antitrust claims against joint ventures. According to Petitioners (Br. 17), to plead "direct evidence" that "the parties were pursuing separate interests," plaintiffs would have to plead something like: "at a meeting of the joint venture, the parties stated that the purpose of some decision was to advance their interests separate from the venture." That is, quite simply, absurd.[11] Plaintiffs are rarely, if ever, at the meetings where defendants discuss the decision to collude in violation of the antitrust laws. And at those meetings, it is highly doubtful that defendants specifically state in whose interests they are acting. Furthermore, while Petitioners recognize the possibility of using "indirect evidence" on this issue, the bar they set for pleading such evidence is extraordinarily high: it "must 'tend[] to exclude the possibility' that the parties to the venture were acting unilaterally," taking into account the "decidedly procompetitive effects" of joint ventures. Br. 18 (quoting *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984)). In short, Petitioners not only suggest a new scienter requirement for antitrust claims against joint ventures, but suggest a heightened pleading standard for meeting it. This would,

[11] Similarly absurd is Petitioners' suggestion that Respondents can plead "that a board member selected by a bank lobbied her colleagues to adopt the rules for the purpose of advancing the interests of individual banks separate from those of the network." Br. 22-23.

contrary to law and logic, give joint ventures a *de facto* exception to the antitrust laws.

Finally, Petitioners' only rationale (Br. 17-18) for adopting their theory is that joint ventures may have procompetitive effects—though notably they fail to identify any benefit to *competition* (as opposed to a benefit to Visa and MasterCard) from the Access Fee Rules. Regardless, Petitioners' argument conflates two separate issues: "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 (emphasis added). Petitioners' argument that the pricing restrictions were made for the benefit of the business associations, and this will supposedly benefit competition, might apply to the second question, but it does not apply to the first. As this Court explained, "[t]he justification for cooperation is not relevant to whether that cooperation is concerted or independent action." *Am. Needle*, 560 U.S. at 199. That is true even if the cooperation is "necessary or useful to a joint venture." *Id.*[12] Indeed, the rationale for cooperation was much stronger in *American Needle* than here, but that did not affect the analysis of whether there was an agreement. *See id.* at 202 (noting that the "NFL teams share an interest in making the entire league successful and profitable, and that they must cooperate in the production and scheduling of games"); *see also, e.g.*, *Nat'l Soc'y of Prof'l Eng'rs*, 435 U.S. at 695-96 (holding that the supposed importance of the restraints did not justify rules

[12] While it is not relevant to the existence of agreement, "necessity of cooperation is a factor relevant to whether the agreement is subject to the Rule of Reason." *Am. Needle*, 560 U.S. at 199 n.6.

"doing away with competition"). Thus, whether or not there are positive aspects of business associations, they are not insulated from Section 1 scrutiny when they create restraints on the competition of their members.

Furthermore, it is crucial to note that Petitioners' strict test for concerted action *precludes* inquiry into whether the effects are procompetitive or anticompetitive. Under Petitioners' approach, unless a plaintiff can plead and ultimately prove that the joint venture members are acting solely in their own interests, then even agreements among the members with enormous anticompetitive effects would be shielded from the antitrust laws. There is no basis in the text of the Sherman Act, this Court's case law, or the purpose of the antitrust laws to allow this result.

D. Even If Respondents Were Required To Allege The Banks Acted In Their Own Self-Interest, The Complaints Do So

As discussed above, the proper test is not based on the interests being pursued, but whether the agreement deprived the market of independent centers of decisionmaking. But even assuming *arguendo* that Respondents were required to allege that the banks acted in their own interest, the complaints readily satisfy such a requirement.

1. To begin with, the banks are clearly separate, profit-maximizing entities, which was the key factor recognized in *American Needle* to show that there was not a single entity under Section 1. *See* 560 U.S. at 195. Furthermore, the complaints specifically allege that "it was and is in the member banks' best interest to agree or continue to agree to be bound by the ATM Access Fee Restraints." *Osborn* Pet. App. 90a ¶ 119.

The complaints also explain precisely why it was in the banks' interest.

First, the Access Fee Rules help the banks by restricting competition over ATM fees. In particular, the rules ensure that the banks, all of whom charge access fees to consumers (*Osborn* Pet. App. 72a ¶ 67), do not have to compete on the level of those fees charged to consumers at their ATMs. *Id.* 77a ¶ 80; *see also Stoumbos* Pet. App. 93a ¶ 105. And in the absence of the Access Fee Rules, there would be such competition, resulting in lower prices for lower-cost networks. *See, e.g.*, *Osborn* Pet. App. 83a ¶ 97. As such, the rules are a classic price-fixing agreement that work in Petitioners' interests just like any other: by reducing competition over prices. *See, e.g.*, *Salvino*, 542 F.3d at 335 ("An agreement to eliminate price competition from the market is the essence of price fixing.") (Sotomayor, J., concurring) (citation omitted).

Second, the Access Fee Rules help the banks by insulating them from competition in the issuance of ATM cards. As Respondents allege, the rules "shield[] banks (as issuers of cards) from facing interbrand competition (from other banks using more efficient ATM networks) on the basis of the kind of debit card each bank" issues. *Stoumbos* Pet. App. 149a-150a ¶ 103. In particular, the rules motivated the banks to issue single bug cards that run over only Visa and MasterCard's networks. *See Osborn* Pet. App. 78a-80a ¶¶ 83-88. In a competitive world, banks would compete for customers not only on the basis of interest rates and promotional offers, but also on the basis of the networks their ATM cards can access. *Id.* 85a ¶ 104. Because of the Access Fee Rules, which hinder the growth of rival networks, banks do not.

2. Petitioners' arguments to the contrary fail because, even if correct as a factual matter, they show only that Petitioners acted in part in the interests of the business associations. None of Petitioners' arguments even suggests that Petitioners are not *also* acting in their own self-interest. Thus, they are all premised on the idea that the banks had to act *solely* in their own interests, and not at all in the interests of the business association. *See, e.g.*, Br. 32-33 (stating that it suffices to defeat concerted action that it is "possible" the banks were pursuing the interests of MasterCard and Visa). As discussed above, such a test is legally erroneous. In most joint-venture cases (including *American Needle* and here), the party acts in the interests of both itself and the venture, and that does not belie the existence of concerted action. *See, e.g.*, *Am. Needle*, 560 U.S. at 198.

In particular, Petitioners argue that it benefited the networks operated by Visa and MasterCard to restrict the banks' ability to charge lower fees on lower-cost networks. Br. 26-28.[13] While this may be true, it does not change the fact that the Access Fee Rules also benefit the banks in offering ATM services and ATM cards. Similarly, while Petitioners argue that "[a]ny

[13] Petitioners use euphemisms like "safeguard[ing] its brand—and the cardholders whose foreign ATM transactions are routed over its network—from discriminatory pricing," Br. 27-28, but in fact what the Access Fee Rules do (by their own terms) is to prevent banks from charging lower ATM fees for any other network. *See supra* at 4-5. To the extent Petitioners assert other purported benefits of the Access Fee Rules—ensuring that cardholders have a "positive experience" when using ATMs, preventing ATM operators from engaging in bait-and-switch tactics, and neutralizing the advantage rival networks had from adopting similar rules (Br. 27)—these do not appear anywhere in the record.

network services provider would prefer that issuers offer single-bug cards limited to its network," Br. 34, the fact remains that single-bug cards were also in the banks' interests, so long as there was an agreement among them. Petitioners argue (Br. 30 n.5) that the agreements to issue single-bug cards were "vertical" and therefore do not evidence a horizontal agreement. However, as the Second Circuit recently explained: "[I]t is well established that vertical agreements, lawful in the abstract, can in context 'be useful evidence for a plaintiff attempting to prove the existence of a horizontal cartel,' . . . particularly where multiple competitors sign vertical agreements that would be against their own interests were they acting independently." *United States v. Apple, Inc.*, 791 F.3d 290, 319-20 (2d Cir. 2015) (citations omitted). This is what the complaints allege.[14]

Petitioners also err in arguing (Br. 18-19) that the existence of two markets here—one for network services and one for ATM services—differentiates this case from others where there was concerted action. This Court has expressly rejected the idea that benefits in one market justified a joint venture's restraints in another market:

> The District Court determined that by limiting the freedom of its individual members to compete with each other, Topco was doing a greater good by fostering competition

[14] Plaintiffs also allege that the vertical agreements here were themselves violations of the antitrust laws. *See Osborn* Pet. App. 107a-111a ¶¶ 155-170; *Stoumbos* Pet. App. 159a-162a ¶¶ 125-134. The D.C. Circuit declined to address those allegations, *see Osborn* Pet. App. 23a n.3, and Petitioners concede (Br. 10 n.2) that the vertical agreements are not at issue in the appeal to this Court.

> between members and other large supermarket chains. But, the fallacy in this is that Topco has no authority under the Sherman Act to determine the respective values of competition in various sectors of the economy.

Topco, 405 U.S. at 610-11. Indeed, contrary to Petitioners' suggestion (Br. 34), *American Needle* itself considered a separate market from the market for intellectual property in which the teams competed. In particular, *American Needle* held that the benefit to the market in which the NFL as a whole competes—through the NFL brand—did not belie the existence of concerted action. 560 U.S. at 198.

Furthermore, as to Petitioners' suggestion (Br. 31) that the networks would have imposed the Access Fee Rules as they did without the agreement of and benefit to the banks, there is no legal or rational support for making such a hypothetical the test for concerted action. In any event, Petitioners' argument is based on a factual assertion that appears nowhere in the complaints. To the contrary, the complaints make clear that, absent agreement, "[i]t 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 ¶ 53.[15]

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[15] Petitioners err in relying (Br. 17-18) on *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984), and *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), for the proposition that evidence must exclude the possibility of unilateral action and that "ambiguous evidence" cannot support concerted action. *Monsanto* and *Matsushita* were summary-

Finally, Petitioners err (Br. 28) in attempting to immunize the Access Fee Rules by positing that they were "routine market conduct." *Twombly* held that the individual competitors' actions were routine because they were the "natural, unilateral reaction of each" competitor. 550 U.S. at 566. Here, as the complaints allege, the adoption of the Access Fee Rules was a completely irrational action for each bank to take in the absence of concerted action. *See supra* at 19-21.

More generally, the existence of concerted action here does not mean that every action of a joint venture is subject to Section 1. Rather, the question is whether the action deprives the market of independent centers of decisionmaking. If, for instance, Visa or MasterCard simply agreed to pay for a service, that would not be concerted action. But when they agree to constrain the competition of their member banks, then it is concerted action.[16] *See Am. Needle*, 560 U.S. at 190 ("[B]ecause concerted action is discrete and

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judgment cases, and there is no legal basis for importing the summary-judgment standard concerning evidence to the motion-to-dismiss standard for judging the allegations in a complaint. Moreover, as Petitioners concede (Br. 17), these evidentiary rules apply only where "a plaintiff will have to rely on inferences drawn from circumstantial evidence to establish that the alleged conduct was concerted." They are inapposite where, as here, the complaints cite to direct evidence of a written agreement to which Petitioners agreed and adhered. *See, e.g.*, *In re Publ'n Paper Antitrust Litig.*, 690 F.3d 51, 63 (2d Cir. 2012) ("Of course, 'the standards established in *Matsushita* do not apply at all when a plaintiff has produced *unambiguous* evidence of an agreement to fix prices.'").

[16] Contrary to Petitioners' suggestion (Br. 11, 25), the Access Fee Rules are not rules "with respect to how the venture will be run." They are rules with respect to the prices that the banks can charge.

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 . . . ."). As Professor Hovenkamp has explained, "Visa, Inc. might decide to purchase a toaster manufacturer and operate it as a subsidiary, or it might decide to build a new office building for its corporate headquarters. As long as such a decision had no impact on how the individual shareholder banks conduct their business, it would be regarded as unilateral." Hovenkamp, 64 VAND. L. REV. at 871. "By contrast, any decision that limited the ability of shareholders to compete in their separate business would be addressable under Section One of the Sherman Act." *Id.* And in the many decades in which joint ventures have been subject to the antitrust laws, there has been no flood of litigation based on the truly routine conduct of joint ventures. Indeed, if fixing of members' prices were characterized as "routine market conduct" immune from Section 1 scrutiny, then seemingly any action of a joint venture would be so immune. This result would conflict with nearly a century of precedent and substantially undermine the antitrust laws.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully Submitted,

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