No. 15-961

IN THE

Supreme Court of the United States

VISA, INC., *et al.*,

Petitioners,

v.

SAM OSBORN, *et al.*,

Respondents.

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

BRIEF OF THE AMERICAN SOCIETY OF ASSOCIATION EXECUTIVES AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

The American Society of Association Executives (ASAE) is a membership organization of more than 21,000 association professionals and industry partners representing more than 9,300 organizations. Its members manage leading trade associations, individual membership societies, and voluntary organizations across the United States and in roughly 50 countries around the world. ASAE's mission is to provide resources, education, ideas, and advocacy to enhance the power and performance of the association community. ASAE is a leading voice on the value of associations and the resources they can bring to bear on society's most pressing problems. To that end, ASAE has participated as an *amicus* in this Court and other courts in cases implicating the conduct of associations, see, *e.g.*, *Cal. Dental Ass'n* v. *FTC*, 526 U.S. 756 (1999), and is highly interested in cases that affect the legal rules governing associations and their members.

This is one of those cases. In a few paragraphs that are as striking for their breadth as they are for their brevity, the decision below dials back critical limits on the pleading requirements for a Sherman Act conspiracy and puts a target on the backs of associations of all kinds, as well as their members. It has long been true that associations are not by definition anti-

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* state that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amicus curiae*, their members, and their counsel, made any monetary contribution towards the preparation and submission of this brief. Pursuant to Rule 37.2(a), petitioners and respondents received timely notice of and have granted consent to this *amicus* brief in letters accompanying this filing.

competitive conspiracies, and it is widely recognized that they, in fact, offer many procompetitive benefits to their members. According to the court of appeals, however, an association and its members are plausibly alleged to have engaged in concerted action in violation of Section 1 of the Sherman Act merely because they act like an association—namely, because the association passes rules, through a vote of its members, and asks members to follow those rules. That encourages plaintiffs to label *any* association a conspiracy and tells them how easily they can avoid a motion to dismiss in the process.

That is a profoundly troubling result. Associations are everywhere, and "the contributions made by trade, professional, philanthropic, and other nonprofit membership organizations to [the country's] economy, government, and society have been enormously important." Jerald A. Jacobs, *Association Law Handbook* xi (5th ed. 2012). They petition government, educate the public, engage in joint research efforts, hash out industry standardizations, and conduct many, many other invaluable and procompetitive activities. *Id.* The notion that these organizations *and their members* can be blamed for acting like associations without any indication of complicit design, imperils the good that associations do and risks chilling the societal benefits that come with them. ASAE has a strong interest in seeking to ensure that these ramifications do not come to pass.

The sweeping and careless logic of the decision below checks all of the boxes for certiorari: it splits with holdings of several other courts of appeals; it is wrong; and it addresses an important issue. The risk of being called a conspiracy and the protracted litigation that comes along with such an allegation is now much greater for thousands of associations across the

country, including *amicus* and its members. The Court should grant certiorari and reverse.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW SPLITS STARKLY WITH THE DECISIONS OF OTHER COURTS OF APPEALS AND OF THIS COURT.

1. Section 1 of the Sherman Act says that "[e]very contract, combination . . . , or conspiracy, in restraint of trade [is] illegal." 15 U.S.C. § 1. Notwithstanding the apparent breadth of that language, however, this Court "has not taken a literal approach" to it. *Texaco Inc.* v. *Dagher*, 547 U.S. 1, 5 (2006); see also *Am. Needle, Inc.* v. *NFL*, 560 U.S. 183, 189 (2010) ("even though, 'read literally,' § 1 would address 'the entire body of private contract,' that is not what the statute means"). Instead, the Court has explained, the Act draws a "basic distinction between concerted and independent action," the latter of which "is not proscribed." *Monsanto Co.* v. *Spray-Rite Serv. Corp.*, 465 U.S. 752, 761 (1984).

By requiring concerted action, moreover, the Act does not label every instance in which entities come together as a conspiracy. Like the word "conspiracy" itself, the very phrase "*concerted* action" denotes purpose—presumably an untoward one—rather than mere collective action. See, *e.g.*, *Black's Law Dictionary* 349 (10th ed. 2014) (defining "concerted action" as "action that has been planned, arranged, and agreed on by parties acting together to further some scheme or cause"). And this Court has repeatedly articulated the Sherman Act's reach in this way: it requires that defendants share "a conscious commitment to a common scheme *designed to achieve an unlawful objective*." *Monsanto*, 465 U.S. at 764 (emphasis added)

(quoting *Edward J. Sweeney & Sons, Inc.* v. *Texaco, Inc.*, 637 F.2d 105, 111 (3d Cir. 1980)); see also *Copperweld Corp.* v. *Indep. Tube Corp.*, 467 U.S. 752, 771 (1984) (requiring "a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement") (quoting *Am. Tobacco Co.* v. *United States*, 328 U.S. 781, 810 (1946)); *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 595–98 (1986).

These principles have important implications for associations, which by their very nature tend to "involve[] collective action by competitors." *Consol. Metal Prods., Inc.* v. *Am. Petroleum Inst.*, 846 F.2d 284, 293 (5th Cir. 1988). Such activity, however, does not constitute an anticompetitive scheme all by itself. Rather, courts have regularly declined to read the Sherman Act in a manner that would effectively turn associations into "walking conspirac[ies]," see, *e.g.*, *id.* at 293–94; *Am. Dental Ass'n* v. *Cigna Corp.*, 605 F.3d 1283, 1295–96 (11th Cir. 2010), and have insisted upon showings like "some evidence of actual knowledge of, *and participation in*, the illegal scheme," *AD/SAT, Div. of Skylight, Inc.* v. *Associated Press*, 181 F.3d 216, 234 (2d Cir. 1999) (per curiam) (rejecting "membership-ratification theory" basis for antitrust liability). In short, it follows directly from the strictures of Section 1 that "every action by a trade association is not concerted action by the association's members." *Id.*

These parameters, of course, apply at *every* stage of litigation. A "conclusory allegation of agreement at some unidentified point" is not good enough from the outset; plaintiffs need factual allegations and, ultimately evidence, demonstrating an "*illegal* agreement." *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 556–57 (2007) (emphasis added).

2. The decision below erases these settled ground rules despite paying lip service to them. The alleged antitrust violations in this case are predicated upon rules allegedly adopted by Visa and MasterCard when they formerly were bankcard associations comprised of member banks. See Pet. App. 7a, 19a, 47a–48a, 196a–198a; see also *id.* at 48a n.9 (explaining MasterCard and Visa completed IPOs in 2006 and 2008, respectively, and became independent corporations). Despite recognizing that "[m]ere membership in associations is not enough to establish participation in a conspiracy with other members of those associations," the court of appeals thought the allegations here did more than that because plaintiffs had alleged "that the member banks *used* the bankcard associations to adopt and enforce" purportedly anticompetitive rules. *Id.* at 20a (alteration in original). Specifically, the D.C. Circuit identified plaintiffs' allegations that the "rules of the former bankcard associations were agreed to by the banks themselves" and that the banks appointed representatives to MasterCard's and Visa's "Boards of Directors, which in turn established the [allegedly] anticompetitive . . . rules." *Id.* (emphasis omitted).

The purported distinction drawn by the court of appeals between "mere membership" and the allegations here is one without a difference. Participating in an association often will entail adopting and voting on things like rules, bylaws, and directors (who, in turn, may vote on rules and bylaws). Indeed, "[i]t is a rare trade, professional, or similar membership organization or association that has not at some time in its history adopted a business or professional code, code of ethics, or other guide for conduct or practices in the industry, profession, or field represented by the group." Jacobs, *supra*, at 326; see also 1 George D.

Webster, *The Law of Associations* §§ 2.03[1], 2.03[1][e] (Nov. 2013) (describing by-laws and Board rules and policies); John E. Lopatka, *Antitrust and Professional Rules: A Framework for Analysis*, 28 San Diego L. Rev. 301, 307 (1991) ("Professionals tend to form associations. These private associations establish rules that prescribe requirements for initial membership, or eligibility requirements."). Concluding that such conduct demonstrates a violation of Section 1 of the Sherman Act, therefore, effectively punishes membership alone.[2]

In drawing this artificial distinction between the mundane acts of association members and mere membership, moreover, the D.C. Circuit adopted an interpretation of Section 1's requirements—and what it takes to plead such a claim—that breaks sharply with the precedent of the other courts of appeals and of this Court. As the petition explains, many other courts of appeals have taken the right approach. See Pet. 10–19.

In the Ninth Circuit, for example, conclusory allegations about member banks' "knowing[], intentional[] and active[] participat[ion]" in Visa and MasterCard were "insufficient as a matter of law to consti-

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[2] As associations formerly composed of for-profit bankcard issuers, Visa and MasterCard perhaps would not be considered prototypical associations. Regardless, nothing in the D.C. Circuit's opinion is cabined to the manner in which Visa and MasterCard were formerly (or are) structured or their function. The D.C. Circuit's rule likewise would apply to any other association, including non-profits and professional associations, whose rules assertedly had anticompetitive effects. Even without the rule here, a range of such associations have been subject to antitrust claims brought by private plaintiffs or the government. *See*, *e.g.*, *N.C. State Bd. of Dental Examiners* v. *FTC*, 135 S. Ct. 1101 (2015); *Viazis v. Am. Ass'n of Orthodontists*, 314 F.3d 758 (5th Cir. 2002).

tute a violation of Section 1 of the Sherman Act." *Kendall* v. *Visa U.S.A., Inc.*, 518 F.3d 1042, 1048 (9th Cir. 2008). In *Kendall*, as here, the plaintiffs alleged that the bank defendants "'participat[ed] in the management of" MasterCard and Visa, and "adopt[ed]" the fee rules set by MasterCard and Visa. *Id.* The Ninth Circuit rightly recognized that these allegations were akin to a claim that rested on "membership in an association." *Id.* (reiterating that "participation on the association's board of directors is not enough by itself" for liability). The allegations found deficient in *Kendall* are not materially different from those the D.C. Circuit held satisfied *Twombly* here. Rather, as the district court summarized, "[p]laintiffs here argue that they have alleged much more than what was asserted in *Kendall*, but they have not. Indeed, they allege less." Pet. App. 200a (internal citation omitted).

Whether a member's conduct is characterized principally as "[a]ctive participation" in an association or as voting for associational rules and for board members, such ordinary conduct should not be enough to state a claim against the association and its members. Similarly, in the Third and Fourth Circuits, neither membership in an association that adopts industry standards, *SD3, LLC* v. *Black & Decker (U.S.) Inc.*, 801 F.3d 412, 436–38 (4th Cir. 2015), nor participation in a trade organization that adopts policies to which members allegedly adhere, *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 313, 328–29, 349 (3d Cir. 2010), is sufficient to allege a plausible antitrust conspiracy.

The law is now different in the D.C. Circuit, where allegations amounting to nothing more than participation in an association "satisfy the plausibility standard." Pet. App. 18a–21a. The rationale for that

conclusion was breezy. To start, the court declared that allegations "that a group of retail banks fixed an element of access fee pricing through bankcard association rules . . . describe the sort of concerted action necessary to make out a Section 1 claim." *Id.* at 19a. After citing a handful of decisions allowing conspiracy claims against organizations, including Visa and MasterCard, *id.* at 19a–20a, the D.C. Circuit, as noted, acknowledged that membership in associations does not establish a conspiracy, *id.* at 20a. The court, however, found it decisive that plaintiffs here alleged "that the member banks *used* the bankcard associations to adopt and enforce" purportedly anticompetitive rules. *Id.* Those few sentences were all it took to reverse the district court's careful analysis dismissing plaintiffs' allegations as implausible. See *id.* at 47a–50a, 196a–207a.

This is all wrong. A Sherman Act conspiracy involves "a conscious commitment to a common scheme *designed to achieve an unlawful objective*." *Monsanto*, 465 U.S. at 764 (emphasis added); see also *Copperweld*, 467 U.S. at 771. Yet the court of appeals' reasoning ignores that facet of concerted action entirely. Plaintiffs' complaint does not allege who agreed to what or why, and it does not tie any allegations about associational conduct, like service on the board, Pet. App. 197a, to any supposedly anticompetitive outcome. On the contrary, as the district court appreciated, "plaintiffs did not allege facts to allow the Court to infer an unlawful agreement, such as facts showing that the actions of the participants represented a radical shift from the industry's prior business practices or that they were against the participants' own interests." *Id.* at 47a. If anything, "other alleged facts indicate that banks have reasons to join or stay in the Visa and MasterCard networks

based on their individual interests." *Id.* at 50a (recognizing that the asserted "facts support a conclusion that [the challenged agreements with the associations were] in the banks' individual interests"). Such allegations did not show "a conscious commitment to a common scheme designed to achieve an unlawful objective," *Monsanto*, 465 U.S. at 764, and the court of appeals erroneously failed demand such a showing.

The remainder of the court of appeals' analysis was no better. The fact that association members *can* engage in unlawful concerted action—or even that Visa and MasterCard were found to have done so in a past life, Pet. App. 19a–20a—is a non-starter because no one thinks associations are inherently immune from Sherman Act liability. At the same time, however, association members do not sign onto a Sherman Act conspiracy the minute they join an association, approve its rules, or vote for its board members. Yet the consequence of the court of appeals' reasoning here is that liability can be imposed on account of conduct that is part and parcel of being an association. See *supra* at 5–6 (describing the ubiquity of such rules for associations). Doing what associations do, in other words, meant the associations were engaged in unlawful agreements under the Sherman Act.

The decision below cannot be squared with this Court's precedent or common sense, and it conflicts with the decisions of many other courts of appeals. Certiorari should be granted.

II. THE SWEEPING RATIONALE OF THE DECISION BELOW PORTENDS DANGEROUS CONSEQUENCES FOR ASSOCIATIONS AND THEIR MEMBERS.

Review is warranted not only because the decision below creates conflicts and is incorrect, but also be-

cause it is dangerous for associations and their members. As observed *supra* at 6 note 2, the D.C. Circuit's decision is in no way limited to the unique structure of the bankcard associations before that court; rather, the principle it adopted—namely that an association and its members may be liable under the Sherman Act for doing no more than participating in selecting board members and adopting association rules—sweeps broadly across all sorts of associations. There are many reasons why that decision promises an unstable and harmful state of affairs.

To begin with, the sheer terseness of the "analysis" employed here should be discouraged. This Court has recognized that "conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." *Matsushita*, 475 U.S. at 588. Courts are supposed to look skeptically upon antitrust conspiracy allegations because "infer[ring] conspiracies when such inferences are implausible . . . often . . . deter[s] procompetitive conduct." *Id.* at 593; see also *Twombly*, 550 U.S. at 556–58.

Next, these principles should have equal, if not special, force where, as here, plaintiffs make threadbare allegations about the supposed anticompetitive conduct of associations and their members. Compare Pet. App. 49a–50a (district court's contrary conclusion that conduct was in defendants' individual self-interest). Indeed, according to the FTC's own guidance, "[m]ost trade association activities are procompetitive or competitively neutral." FTC, *Spotlight on Trade Associations*, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/dealings-competitors/spotlight-trade (last viewed Feb. 26, 2016); see also, *e.g.*, *Princo Corp.* v. *ITC*, 616 F.3d 1318, 1335 (Fed. Cir. 2010) (en banc) (listing

procompetitive benefits for research joint ventures). Associations seek to influence government policy and action, to guide industry, to educate, and to collaborate on important research, among other objectives. Jacobs, *supra*, at xi. These and other intangible benefits that flow from membership and participation in associations of all kinds are among the reasons why ASAE has tens of thousands of members. Much of the time in business, as in professional settings, "many minds [are] better than one." *SD3*, 801 F.3d at 455 (Wilkinson, J., dissenting); see also *Maple Flooring Ass'n* v. *United States*, 268 U.S. 563, 583 (1925) (rejecting conspiracy claims against trade association and explaining that "[i]t was not the purpose or the intent of the Sherman Anti-Trust Law to inhibit the intelligent conduct of business operations").

The court of appeals, however, did not so much as hint at these possibilities here. Rather than acknowledging—as the district court did, see Pet. App. 47a–50a, 196a–207a—Petitioners' economic self-interests and viewing plaintiffs' allegations "with 'great caution and a skeptical eye,'" *Nat'l Parcel Servs., Inc.* v. *J.B. Hunt Logistics, Inc.*, 150 F.3d 970, 971 (8th Cir. 1998), the court of appeals did the opposite. See Pet. App. 18a–21a.

In doing so, the court of appeals' decision threatens to deter and chill socially beneficial conduct by associations given the risk that quasi-strict liability will extend throughout the entire membership chain (at least during the motion to dismiss stage). Notwithstanding *Twombly* and its progeny, antitrust complaints fail to wane. See U.S. Courts, *Judicial Business 2014* tbl.C-2A (Sept. 30, 2104) (showing about 800 new antitrust cases brought in 2013 and 2014). Moreover, plaintiffs remain invested in "targeting trade associations and the relationship between the

association and its constituent members." Am. Bar Ass'n Section of Antitrust Law, *Guilt by Association: Trade Associations, Liability, and Protections* 35, 35 (Winter 2001) (calling the degree of such attacks "unprecedented"). After all, for plaintiffs to do so (i) is minimally burdensome because associations and their members—unlike many potential antitrust defendants—certainly have agreed to *something*, and (ii) increases the potential number of pockets that may be forced into the intolerable expense of discovery. See, *e.g.*, Hebert G. Smith II & John B. Williams III, *Assessing a Trade Association's Tort Liability Risk*, N.Y. Soc. of Ass'n Executives, Apr. 2011 (noting that plaintiffs' attorneys "have taken aim at trade associations" "[b]ecause of the possibility of collecting from an additional defendant, and one with seemingly deep pockets"); see generally *Twombly*, 550 U.S. at 558–59 (explaining the discovery costs and settlement pressures that accompany lax enforcement of motion-to-dismiss standards).

Beyond the threat of litigation costs, which are significant for any antitrust defendant, associations face unique disadvantages in attempting to vindicate themselves in litigations that survive dismissal. For example, for professional associations, the bad publicity associated with antitrust claims can redound across the profession in a manner that makes continued litigation far more untenable than it would be for a for-profit entity. These threats against associations—especially non-profit ones—"will push [them] to settle even anemic cases" early. *Twombly*, 550 U.S. at 559. In turn, the "potential for expanded liability may . . . have a significantly chilling effect on the free flow of information between members and their trade association, undermining many of the benefits of participation." *Guilt by Association*, *supra*, at 35. That is

unacceptable. The Court should grant certiorari to bring the D.C. Circuit back into line with precedent from other courts of appeals and this Court.

CONCLUSION

For the foregoing reasons, and those stated by Petitioners, the Court should grant the petition for certiorari and reverse the judgment of the court of appeals.

Respectfully submitted,

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