No. 15-961

IN THE
Supreme Court of the United States

VISA INC., ET AL.,
Petitioners,

v.

SAM OSBORN, ET AL.,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

REPLY BRIEF

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PRELIMINARY STATEMENT

Respondents' allegations of conspiracy, accepted by the D.C. Circuit as sufficient, are indistinguishable from allegations rejected by at least three other courts of appeals. And their insistence that a conflict among the circuits on this question does not exist is futile. While respondents attempt to paper over the conflict by highlighting their allegations' inclusion of the word "agreed," this conclusory "recitation of a cause of action's elements will not do," as this Court held in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 545 (2007). Respondents' other distinctions are nothing more than artful rephrasing of the same alleged conduct—conduct that is part and parcel of being an association member and thus following association rules. That is exactly what the Ninth, Fourth and Third Circuits held insufficient to allege a conspiracy in violation of Section 1 of the Sherman Act, in direct conflict with the decision below.

This Court should grant the petition and reverse the judgment of the Court of Appeals, which effectively brands associations of all stripes "walking conspiracies" and makes their members' routine procompetitive conduct fodder for costly litigation under Section 1. As further explained by *amicus* American Society of Association Executives ("ASAE") and *amici* Antitrust Law Professors, the Court of Appeals' decision threatens to diminish the many well-documented efficiencies that flow from businesses participating in associations. Left undisturbed, the division among the courts of appeals will precipitate burdensome but meritless litigation and deprive consumers of the fruits of pro-competitive innovation and cooperation.

ARGUMENT

I. The Circuit Split On Whether Allegations of Membership and Participation in a Business Association Are Sufficient to Plead an Antitrust Conspiracy Is Irreconcilable

The D.C. Circuit's construction of the allegations necessary to plead a conspiracy in an association context conflicts with decisions of at least three other circuits—and respondents do nothing to reconcile this conflict. Respondents contend that they have alleged "much more" than unsuccessful plaintiffs in *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042 (9th Cir. 2008); *SD3, LLC v. Black & Decker (U.S.) Inc.*, 801 F.3d 412 (4th Cir. 2015), *petition for cert. filed*, 84 USLW 3423 (U.S. Jan. 27, 2016) (No. 15-942) ("*SawStop*");[1] and *In re Insurance Brokerage Antitrust Litigation*, 618 F.3d 300 (3d Cir. 2010). Resp. Br. 8-14. But these purported additional allegations are either conclusory recitations of Section 1's element of

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[1] This Court called for a response to the petition filed by some of the defendants in *SawStop* on March 22, 2016. *Black & Decker (U.S.) Inc. v. SD3, LLC*, No. 15-942 (filed Jan. 27, 2016). As noted in the petition in this case, the one narrow conspiracy that the majority of the *SawStop* panel found adequately pleaded—a ruling being challenged in the *SawStop* petition before this Court—was supported by much more specific and extensive allegations than those made here. *See* Pet. Br. 15-17. Therefore, if this Court were not inclined to grant this petition but were inclined to grant *SawStop* defendants' petition, this Court should hold this case pending the disposition of *SawStop*. If petitioners in *SawStop* ultimately prevail, this petition should be granted, the decision below should be vacated, and the case remanded for further proceedings in light of *SawStop*.

"agreement" or repetitions of allegations presented to (but found insufficient by) the other circuits.

A. Respondents' Conclusory Allegations of an "Agreement" Cannot Mask the Division Among the Courts of Appeals

Respondents argue the "critical[]" distinction between this case and *Kendall* is their "allegation" that "the rules of the former bankcard associations were *agreed* to by the banks themselves." Resp. Br. 9. But the unadorned statement that the banks "agreed" to membership rules adds nothing to the allegation that those banks were association members, besides a recitation of the "agreement" element of Section 1. *See Summit Health, Ltd. v. Pinhas*, 500 U.S. 322, 330 (1991) ("the essence of any § 1 violation is the illegal agreement itself"). As this Court held in a Section 1 context, "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of a cause of action's elements will not do." *Twombly*, 550 U.S. at 545 (alteration in original*); accord Mayor & City Council of Baltimore, Md. v. Citigroup, Inc.*, 709 F.3d 129, 135-36 (2d Cir. 2013) (dismissing Section 1 complaint because "[t]he ultimate existence of an 'agreement' under antitrust law . . . is a legal conclusion, not a factual allegation"). And while respondents characterize their allegations as "overwhelming[ly]" more detailed, they identify nothing but this same conclusory boilerplate. Resp. Br. 11.

Moreover, respondents have done nothing to reconcile this case with *Kendall*, where plaintiffs also conclusorily alleged that banks agreed to fix prices

through adherence to the bankcard associations' policies. As the Ninth Circuit observed, the *Kendall* plaintiffs alleged that "the Banks 'knowingly, intentionally and actively participated in an individual capacity in the alleged scheme' *to fix the interchange fee or merchant discount fee*," but held "this allegation is nothing more than a conclusory statement. There are *no facts* alleged to support such a conclusion." *Kendall*, 518 F.3d at 1048 (emphasis added); *see* First Amended Compl., *Kendall v. Visa U.S.A. Inc.*, No. C 04-04276 JSW, ¶ 11 (N.D. Cal. filed Apr. 25, 2005) (alleging that banks gave "consent to" certain practices of Visa and MasterCard, allegedly benefiting banks). The same is true here: respondents alleged no facts to support their allegation that the Bank Defendants "agreed" amongst themselves to "adopt" the challenged rules. Resp. Br. 9-10.

Similarly, as respondents acknowledge, the alleged "agreement" in *Kendall* concerned Visa and MasterCard rules and practices at a time when banks allegedly appointed members to their boards—before Visa's and MasterCard's respective IPOs in 2006 and 2008. Resp. Br. 11. Respondents likewise allege here that prior to Visa's and MasterCard's respective IPOs, when Bank Defendants allegedly appointed members to their boards, Visa and MasterCard promulgated the Access Fee Rules. Pet. App. 56a, 86a-87a ¶¶ 6, 108-109. The conspiracy allegations in *Kendall* and here are thus indistinguishable, but the results conflict.

B. Respondents' Allegations of Active Participation in a Business Association Do Not Distinguish This Case

Shorn of the conclusory allegation that Bank Defendants "agreed" with each other, respondents offer only the following allegations to distinguish their complaint from *Kendall*: (1) Bank Defendants "agreed to . . . [the Access Fee Rule] and to apply it in setting their prices" and (2) the Access Fee Rule "fix[es] [Bank Defendants'] own prices" whereas the fees in *Kendall* were set by Visa or MasterCard. Resp. Br. 10, 11. The first allegation is simply another way of describing association membership: to participate in a bankcard association (indeed, any association) one must agree to follow its rules. Moreover, the Ninth Circuit considered and rejected indistinguishable allegations. *See Kendall,* 518 F.3d at 1048 (rejecting as insufficient allegations that "[b]anks adopt[ed] the interchange fees" set by Visa and MasterCard).

Nor does respondents' second argument identify any material difference: while this case and *Kendall* challenged different fees, the allegations of conspiracy in the two cases are the same. In both instances, bankcard association policies allegedly influence the pricing behavior of banks. Yet the Ninth Circuit held that allegedly following these rules, without more, does not plausibly state a horizontal conspiracy *among the banks* and the D.C. Circuit reached just the opposite conclusion.

The Court of Appeals' decision thus squarely conflicts with *Kendall*, and respondents cannot avoid this Court's review by "pitch[ing] [this issue] as per-

taining to no more than the particulars of [their] individual complaint." *SawStop*, 801 F.3d at 443 (Wilkinson, J., dissenting (warning antitrust plaintiffs often seek to avoid this Court's review on these grounds)).

C. The Court of Appeals' Decision Also Conflicts With Decisions of the Fourth and Third Circuits

Respondents' efforts to minimize the conflict with the decisions of the Fourth and Third Circuits likewise rest on semantics, not substance. Respondents argue they alleged "far more" than plaintiffs in the Fourth Circuit's *SawStop* decision because they allege the Bank Defendants "agree[d] to a specific rule." Resp. Br. 13. If these allegations seem familiar, it is because they parrot the allegations made by plaintiffs in *SawStop*. *See* 801 F.3d at 437 (discussing plaintiffs' allegations that "a collective decision was made" by defendants to adopt association rules and "agree[] to vote as a bloc" on the rule). And, unlike the Court of Appeals below, the Fourth Circuit held that these "conclusory and non-specific" allegations insufficiently pleaded a Section 1 conspiracy because they "impl[ied] nothing beyond ordinary participation in lawful standard-setting processes." *Id.* at 435.

Respondents' attempt to distinguish the Third Circuit's decision in *Insurance Brokerage Antitrust* fares no better. According to respondents, this case is distinguishable because they "have identified an agreement, . . . quoted its relevant language," and offered "reasons for that agreement"—for example, that "this horizontal conspiracy is only effective because Bank Defendants and Bank Conspirators know

that their competitors are also complying." Resp. Br. 14.

Yet plaintiffs in *Insurance Brokerage Antitrust* also identified a trade association rule adopted by the defendants, quoted it, and alleged that the defendants "agreed horizontally" to this rule. 618 F.3d at 313. Additionally, *Insurance Brokerage Antitrust* plaintiffs urged the court to infer an agreement because each alleged participant "knew that every other [participant]" had adopted the association's rules. *Id.* at 326 (citation omitted). The Third Circuit rejected these allegations because it recognized them for what they are: entirely consistent with lawful participation in a business association. *Id.* at 349. Accordingly, the D.C. Circuit's decision below conflicts with the Fourth Circuit's decision in *SawStop* and the Third Circuit's decision in *Insurance Brokerage Antitrust.*

* * *

In short, respondents cannot and do not demonstrate that they have alleged any material facts that were not considered and rejected by the Ninth, Fourth, and Third Circuits as bases for pleading an agreement. Their purported distinctions—including the conclusory word "agreed" or artful reformulation of allegations that defendants participated in an association—elevate form over substance and reduce pleading to semantic games. By contrast, the important legal question these cases present is real and recurring. This Court's review is necessary to resolve the conflict this question has caused among the courts of appeals.

II. The Decision Below Was Incorrect, and Respondents Have Not Shown Otherwise

A. Respondents Did Not Plead Facts Supporting a Plausible Inference of Agreement

Respondents cannot—and do not attempt to—defend a legal principle that alleged association membership adequately pleads a horizontal conspiracy among the members with respect to association rules. Instead, they defend the D.C. Circuit's decision by arguing that an unlawful agreement can be inferred from three other allegations: (1) "the banks continued to issue Visa- and MasterCard-branded cards" and adhere to the Access Fee Rules at their own ATMs; (2) the banks work with the Network Defendants by routing transactions over their respective networks; (3) "banks' adoption of the Access Fee Rules makes sense only if they knew that their competitors were also adopting the same rules." Resp. Br. 16-17.

As an initial matter, these three allegations describe nothing more than the act of belonging to the Visa and MasterCard associations and adhering to the associations' rules. At a minimum, this is a lawful and "obvious alternative explanation" for the Bank Defendants' conduct—and it involves no horizontal conspiracy. *Twombly*, 550 U.S. at 567.

Moreover, these allegations played no part in the D.C. Circuit's conclusion that respondents plausibly alleged a conspiracy; they were discussed, instead, in connection with petitioners' withdrawal defense based on Visa's and MasterCard's IPOs—a matter not raised in this petition. *See* Pet. App. 21a-23a. The district court, however, *did* consider these alle-

gations on the issue of agreement and found that they *did not* render a conspiracy plausible. Pet. App. 50a (allegations that the Bank Defendants issue Visa- or MasterCard-branded cards in exchange for "favorable network fees . . . support a conclusion that entering into agreements with these networks is in the banks' individual interests"); *id.* 204a-205a ("[e]ven if Visa or MasterCard were pressuring [the Bank Defendants] to do something that is ultimately anticompetitive and not in the consumers' interest, what alleged facts suggest that any individual bank would only want to do it as long as other banks did it?").[2]

Moreover, as *amici* Antitrust Law Professors explain, none of these allegations make respondents' conspiracy claims plausible. Antitrust Law Prof. Br. 8-11. Respondents do not dispute that the Bank Defendants continue to compete over the level of ATM access fees charged to cardholders—and that nothing in the Access Fee Rules prevents them from doing so or in any way restrains the access fee charged by any particular ATM.

Instead, respondents' claim is principally about competition among the ATM networks—not among the banks. *See, e.g.*, Pet. App. 85a ¶¶ 102, 104 ("if the Restraints are removed . . . ATM networks would compete for transactions by offering ATMs higher net interchange"); *id.* 79a-82a ¶¶ 88-93 (describing how

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[2] In purporting to summarize the district court's opinion, respondents note only that the district court relied on "the timing of the agreement" to explain why it twice found their claims were implausible. Resp. Br. 5-6. The district court, however, unambiguously held that respondents' conspiracy allegations were implausible irrespective of timing. *See* Pet. App. 49a-51a, 196a-206a.

the Access Fee Rules purportedly restrain competition among ATM networks on fee rates offered to ATM operators). Thus, the Complaint's allegations do not state a plausible agreement *among Bank Defendants* to restrain competition. *Cf. Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 498 (1988) (recognizing the plausibility of members of a business association using the association as a pretext to agree to limit competition *with each other*).

Respondents belatedly endeavor to cure this deficiency at the certiorari stage, arguing that the Access Fee Rules were somehow designed to "protect banks from competition with each other over the types of network bugs offered on bank cards." Resp. Br. 4. But nowhere in the Complaint do respondents make this allegation. Respondents' reference to paragraphs 80 and 116-17 for support (Resp. Br. 4) is simply puzzling because those paragraphs either allege the Access Fee Rules restrain competition "*at the network level*" (Pet. App. 77a ¶ 80 (emphasis added)) or do not mention competition at all. *See* Pet. App. 89a ¶¶ 116-17.

B. The Court of Appeals' Approach Makes Associations "Walking Conspiracies"

Respondents mischaracterize the petition when they contend that petitioners seek to "immunize all trade associations from the antitrust laws." Resp. Br. 17. Petitioners seek no such relief. They simply ask that a well-pleaded complaint allege facts that plausibly show that each alleged member of the conspiracy, separate and apart from its status as an association member, "conscious[ly] commit[ted] to a common scheme aimed at achieving unlawful ends."

Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 768 (1984).

Kendall and *SawStop* offer clear guideposts. Both cases held that plaintiffs must allege facts that "answer the basic questions: who, did what, to whom (or with whom), where, and when" for their Section 1 claims to be plausible. *Kendall*, 518 F.3d at 1048; *see also SawStop*, 801 F.3d at 430 (same). Answering those basic questions provides "further circumstances pointing toward a meeting of the minds," so the plaintiff is not merely speculating a conspiracy into existence. *Twombly*, 550 U.S. at 557.[3]

By contrast, respondents' approach (and the Court of Appeals' decision below) would expose any association member to antitrust litigation on the basis of conduct inherent in association membership. Absent this Court's intervention, no limiting principle would distinguish complaints alleging conduct indistinguishable from mere association membership from complaints with factual allegations that plausibly state members' conscious commitment to join in anticompetitive conduct. Courts have repeatedly declined to treat business associations this way. *See, e.g., Viazis v. Am. Ass'n of Orthodontists*, 314 F.3d 758, 764 (5th Cir. 2002) (an association "is not by its

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[3] Respondents argue they have met this standard, in part, by alleging that the agreement was made at some unidentified time "prior to Visa and MasterCard's IPOs in 2006 and 2008." Resp. Br. 12 n.4. This argument strains credulity (would an allegation that a conspiracy was formed "prior to" a complaint's filing suffice?), and this Court already rejected it in *Twombly*, 550 U.S. at 557 ("a conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality").

nature a 'walking conspiracy'"); *see also In re Musical Instruments & Equip. Antitrust Litig.*, 798 F.3d 1186, 1196 (9th Cir. 2015) ("If we allowed conspiracy to be inferred from [voting on and adopting association rules] alone, we would have to allow an inference of conspiracy whenever a trade association took almost any action." (citation omitted)). Here, because the Bank Defendants' alleged conduct is entirely consistent with lawful participation in an association, respondents' approach "impose[s] a presumption of guilt on antitrust defendants who now must bear the burden of proving a negative when the burden properly lies with the party bringing the claim." *SawStop*, 801 F.3d at 444 (Wilkinson, J., dissenting).

III. Respondents Do Not Dispute That This Case Is Important to the National Economy

The Court of Appeals' decision casts a shadow of uncertainty on business associations and the many thousands of businesses that participate in them. As *amicus* ASAE observes, "the purported distinction drawn by the Court of Appeals between 'mere membership' and the allegations here is one without a difference . . . [p]articipating in an association often entails adopting things like rules or bylaws . . . ." ASAE Br. 5. The Court of Appeals' decision thus "encourages plaintiffs to label any association a conspiracy and tells them how easily they can avoid a motion to dismiss in the process." *Id.* at 3. It thereby deters participation in associations and dissipates their widely-recognized economic benefits, including innovation through collaboration. *See SawStop*, 801 F.3d at 437.

CONCLUSION

The Petition should be granted.

Respectfully submitted,

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