Nos. 15-961, -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 THE NATIONAL RETAIL FEDERATION, THE RETAIL LITIGATION CENTER, INC., AND THE NATIONAL ASSOCIATION OF CONVENIENCE STORES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

JAMES A. WILSON*
ROBERT N. WEBNER
VORYS SATER SEYMOUR AND PEASE, LLP
52 E. Gay Street
Columbus, OH 43215
(614) 464-5606
jawilson@vorys.com

Counsel for All Amici Curiae
**Counsel of Record*

DEBORAH R. WHITE
RETAIL LITIGATION CENTER, INC.
1700 N. Moore Street
Suite 2250
Arlington, VA 22209
(703) 600-2067

Counsel for Amicus Curiae Retail Litigation Center, Inc.

MALLORY DUNCAN
NATIONAL RETAIL FEDERATION
1101 New York Avenue, NW
12th Floor
Washington, DC 20005
(202) 626-8106

Counsel for Amicus Curiae National Retail Federation

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES:

TABLE OF AUTHORITIES – Continued

INTEREST OF *AMICI CURIAE*[1]

The National Retail Federation ("NRF") is the world's largest retail trade association. It represents discount and department stores, home goods and specialty stores, Main Street merchants, grocers, wholesalers, chain restaurants and Internet retailers from the United States and more than 45 countries. Retail is the nation's largest private sector employer, supporting one in four U.S. jobs, comprising 42 million working Americans. Contributing $2.5 trillion to annual gross domestic product, retail is a daily barometer for the nation's economy.

The Retail Litigation Center, Inc. ("RLC") is a public policy organization that identifies and engages in legal proceedings that affect the retail industry. The RLC's members include many of the country's largest and most innovative retailers. The member entities whose interests the RLC represents employ millions of people throughout the United States, provide goods and services to tens of millions more, and account for tens of billions of dollars in annual sales.

The National Association of Convenience Stores ("NACS") is a trade association organized under the laws of Virginia with its principal place of business in

---

[1] All parties have consented to the filing of this brief. Pursuant to Supreme Court Rule 37.6, no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici*, their members, or their counsel made a monetary contribution intended to fund this brief's preparation or submission.

Alexandria, Virginia. NACS is an international trade association representing more than 2,200 retail and 1,600 supplier company members. NACS member companies do business in nearly 50 countries worldwide, with the majority of members based in the United States.

The NRF, RLC, and NACS (together, "the Merchant Associations") regularly monitor pending cases and submit *amici curiae* briefs in cases, like this one, that present legal issues that could have a significant impact on the retail industry. Here, *amici's* members have a strong interest in maintaining the established legal standards that protect the retail community from the anticompetitive practices of Visa and MasterCard. If Visa and MasterCard are successful in exempting their anticompetitive practices from antitrust liability, it will be the retail industry, its customers, and its employees that literally pay the price.

The Merchant Associations also submit this brief to rebut the argument that a ruling against Visa and MasterCard would have negative effects on trade associations as a whole. As trade associations themselves, the Merchant Associations are uniquely well-positioned to address why Visa's and MasterCard's effort here to cloak themselves in the generic mantle of "business associations" is a classic example of a predatory wolf seeking to hide in sheep's clothing. A ruling adhering to the current legal standards (which, contrary to the concerns of Petitioners and their supporting *amici*, have not opened the floodgates to specious

lawsuits against trade associations and other beneficial organizations) will in no way affect the Merchant Associations' ability to continue to promote and advocate on behalf of the retail industry and to disseminate information to their members, nor will it harm the legitimate functioning of other trade associations.

SUMMARY OF ARGUMENT

Petitioners seek to justify their new argument asking this Court to redraw the line between prohibited concerted conduct and permitted unilateral conduct by raising the specter of a non-existent threat to trade associations and other business organizations that are in no way jeopardized by the court of appeals' decision below. In *American Needle, Inc. v. NFL*, 560 U.S. 183, 191-202 (2010), this Court unanimously set a workable framework for distinguishing concerted conduct from unilateral conduct. Because Petitioners have reframed this appeal to revisit the Court's six-year-old standard on that element – rather than address the standard for pleading concerted action on the part of an association of competitors, which is what was presented in the petition for writ of *certiorari* – the Court should either dismiss this appeal as improvidently granted or summarily affirm the decision below based on *American Needle*.

Even if the newly raised issue was properly before the Court, Visa and MasterCard are not appropriate entities to raise concerns about whether potential

antitrust liability might affect the legitimate activities of beneficial business associations. Visa and MasterCard are unlike traditional trade associations in many ways, including the fact that both Visa and MasterCard have been the subjects of multiple government and private antitrust challenges and investigations of anticompetitive conduct, several of which ended in civil judgments, consent decrees, or the payment of billions of dollars in settlements.

In reality, *bona fide* trade associations, such as the Merchant Associations, would not benefit from the rule Petitioners and their *amici* advocate. The court of appeals decision does not create any new uncertainty as to potential antitrust liability for legitimate business associations, and the current standards provide important protections for trade associations and their members from the predatory practices of Visa and MasterCard.

ARGUMENT

The Merchant Associations strongly believe in the value of *bona fide* trade associations – organizations that disseminate valuable information to their members, advocate for their members' unique interests before all branches of government, and help to promote and develop a trade or industry. The Merchant Associations also believe that, when competitors are in fact engaging in illegal concerted activity, they should not be able to shield their illegal conduct from antitrust

liability by invoking trade association status or by otherwise trading on the good will generated by the activities of legitimate, procompetitive business associations.

And that, at bottom, is what Visa and MasterCard are attempting to do in their appeal in this case. Visa and MasterCard state in their brief that they are structured as joint ventures that were originally organized as associations of their competitor-members. Visa and MasterCard, however, seek now to establish a rule that would allow entities who engage in anticompetitive activity, including those dressed as trade associations, to escape liability that would otherwise attach when that same activity is not so draped.

These organizations can be equated with true trade associations only at a level of abstraction that blurs meaningful legal differences to the point where reality itself becomes unrecognizable. The vast majority of true trade associations are not billion-dollar enterprises. The vast majority of true trade associations do not promulgate rules and practices that set prices, preclude fair competition, and directly produce staggering revenues for their members. And the vast majority of true trade associations have not been found liable for antitrust violations, faced repeated governmental investigations of anticompetitive conduct in the United States and abroad, and agreed to consent decrees and enormous settlements to resolve litigation about their predatory practices.

Visa and MasterCard are like *bona fide* trade associations only in the same sense that a man-eating tiger is like a kitten. True trade associations and other business associations that do not engage in anticompetitive behavior do not need, and should not want, the new rule that Visa and MasterCard urge this Court to adopt because such a rule would prevent members of legitimate trade associations, as well as other consumers and businesses, from challenging anticompetitive depredations under the antitrust laws.

I. THE COURT SHOULD NOT ADOPT A NEW STANDARD THAT SHIELDS COMPETITORS THAT ADOPT ANTICOMPETITIVE RULES FROM LIABILITY

Petitioners' *certiorari* petition asked this Court to review whether the complaints below pled enough facts to plausibly suggest that their members participated in a conspiracy. Now that *certiorari* has been granted, Petitioners have shifted gears and ask the Court to fundamentally rewrite the definition of concerted activity under Section 1 of the Sherman Act, 15 U.S.C. § 1, in a way that would prevent American companies and their customers from using the Act to protect against harmful anticompetitive behavior.

Petitioners would have this Court narrow the scope of a "contract, combination in the form of trust or otherwise, or conspiracy" to a limited range of obvious offenses, and exclude from the definition many of the agreements and arrangements among joint venturers

and other business associations that this Court and others have found to be actionable. No such redefinition is required or wise.

The allegations below, as in numerous other cases involving the anticompetitive actions of Visa, MasterCard and their members, satisfy the well-established definition of concerted action under the Sherman Act that was elucidated by this Court's unanimous decision just six years ago. The new pleading test offered by Petitioners as an alternative to this rule simply is not necessary for the protection of business or trade associations and their members. Rather, the test Petitioners advocate would place consumers at various levels in the economy at risk of harm from business combinations whose central or ancillary purpose is to raise prices to consumers.

A. In *American Needle*, a Unanimous Court Answered the Question Petitioners Now Pose

Just six years ago, this Court unanimously adopted a test for determining whether conduct constituted concerted or unilateral action. *Am. Needle, Inc. v. NFL*, 560 U.S. 183, 191-92 (2010). The Court in doing so reaffirmed cases finding concerted action in the context of professional associations and trade groups. *Id.* at 192 nn. 3-4 (citing *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447 (1986), *Arizona v. Maricopa County Med. Soc'y*, 457 U.S. 332 (1982), *Nat'l Soc'y of Prof'l Eng'rs v.*

United States, 435 U.S. 679 (1978), and *Goldfarb v. Va. State Bar*, 421 U.S. 773 (1975) as examples of concerted action by professional associations and citing *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492 (1988), *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, 364 U.S. 656 (1961) (per curiam), and *Fashion Originators' Guild of America, Inc. v. FTC*, 312 U.S. 457 (1941) as examples of concerted action by trade groups).[2]

Nowhere in seeking *certiorari* did Petitioners suggest that the question presented was one that would require overturning the substantive test recently set by the unanimous *American Needle* Court. Now they do. Therefore, the most appropriate response to Petitioners' attempt to impose a new, substantive test as to when the actions of multiple, separate entities constitute concerted action would be to withdraw the Court's grant of *certiorari* as improvidently granted.

---

[2] Petitioners' position would turn the *American Needle* Court's reaffirmation of this jurisprudence on its head. Under Petitioners' test of whether the individual entities have a common economic interest, none of these cases would have been found to have met the requirement of a "contract, combination . . . , or conspiracy," because in each of these cases the members of the associations, and the associations themselves, would contend that they had some independent economic interest in the anticompetitive rules adopted, or the anticompetitive requirements imposed, by the associations.

B. Visa's and MasterCard's Concerted Actions to Raise Prices and Diminish Competition Make Them Poor Examples of "Business Associations" That Could Be Exposed to Unfair Antitrust Claims

A central issue in the case before the Court is the Petitioners' claim that Visa and MasterCard are simply "business associations" whose members have unfairly been subject to the potential for antitrust liability in this case. From this premise, several *amici*, including the American Society of Association Executives and the American Veterinary Medical Association, broadly postulate that all trade associations' members are at risk of a flood of specious antitrust claims if the Court does not overturn the decision below. This concern is meritless. Visa and MasterCard have a decades-long history of engaging in anticompetitive conduct that has produced substantial litigated judgments, consent decrees, and billions of dollars in settlement payments – a history that is not shared by legitimate trade associations. In view of that history, Visa and MasterCard cannot plausibly urge the adoption of a broad rule of law that would immunize their anticompetitive activities on the ground that the new rule is needed to protect true trade associations or other business associations that are engaged in procompetitive or competitively neutral activities from being sued on spurious antitrust claims.

At the time the rules challenged below were adopted, Visa and MasterCard were both associations,

nominally organized as not-for-profit entities, controlled by their member banks. Although they characterized themselves as "not-for-profit associations," they generated and earned billions of dollars in revenue. And they had been subject to numerous antitrust challenges to their activities. In a decision affirming the imposition of liability for other exclusionary rules, the Second Circuit held in 2003 that Visa and MasterCard:

> are not single entities; they are consortiums of competitors. They are owned and effectively operated by some 20,000 banks, which compete with one another in the issuance of payment cards and the acquiring of merchants' transactions. These 20,000 banks set the policies of Visa U.S.A. and MasterCard. These competitors have agreed to abide by a restrictive exclusivity provision. . . . *The restrictive provision is a horizontal restraint adopted by 20,000 competitors*.

United States v. Visa U.S.A., Inc., 344 F.3d 229, 242 (2d Cir. 2003) (emphasis added); *see also Osborn* Pet. App. 55a-90a (Proposed Compl. ¶¶ 2, 22, 33, 38, 45, 47, 76, 79-83, 88, 94, 98, 108-10, 113, 114, 119); *Stoumbos* Pet. App. 109a-150a (Proposed. Compl. ¶¶ 2, 35-36, 69-70, 78, 80, 89-91, 94, 95, 101-03). The results of a number of other litigated cases and government enforcement actions reflect that Visa's and MasterCard's activities constituted concerted action under Section 1 of the Sherman Act. *See*, *e.g.*, *Discover Fin. Servs. v. Visa U.S.A., Inc.*, No. 04-cv-7844, (S.D.N.Y.) (case related to *U.S. v. Visa* that settled for $2.75 billion);

In re Visa Check/MasterMoney Antitrust Litig., 2003 U.S. Dist. LEXIS 4965, at *19 (E.D.N.Y. 2003); *United States v. Am. Express*, No. CV-10-4496 (E.D.N.Y. 2011) (Final Judgment as to Defendants MasterCard International Incorporated and Visa Inc.) (available at https://www.justice.gov/atr/case-document/final-judgment-defendants-mastercard-international-incorporated-and-visa-inc).

Perhaps the most bizarre twist in Petitioners' argument is the assertion that because Visa and MasterCard reconstituted themselves as separate corporate entities through initial public offerings, their pre-IPO conduct could not have been concerted. Petitioners argue that the rules adopted by collective action ***before*** the IPOs should now be analyzed as if they were unilateral actions by the thousands of banks that currently comprise their membership. Pet'rs Br. at 38. This suggestion is an obvious *non sequitur*. The fact that a single firm could decide to engage in conduct under certain circumstances does not change the reality, or the increased anticompetitive risk, of *competitors* joining to take such an action. *See*, *e.g.*, *Am. Needle*, 560 U.S. at 190-91 (distinguishing the risk of competitive harm between unilateral and concerted action); *W. Penn Allegheny Health Sys., Inc. v. UPMC*, 627 F.3d 85, 103-04 (3d Cir. 2010) (reversing a Rule 12(b)(6) dismissal after holding that "[t]he complaint also alleges that Highmark paid West Penn depressed reimbursement rates, not as a result of independent decisionmaking, but pursuant to a conspiracy with UPMC"); *In re Cardizem CD Antitrust Litig.*, 105 F. Supp. 2d 618, 648 (E.D.

Mich. 2000) (denying motion to dismiss and holding that "[d]efendants' . . . causation theories likewise ignore a basic antitrust principle that, in antitrust cases such as this, the only difference between legal and illegal conduct is the existence of an agreement to do the same thing the parties could have done unilaterally and thus legally."), *aff'd*, 332 F.3d 896, 911-15 (6th Cir. 2003). Furthermore, the argument ignores the D.C. Circuit's express finding that Respondents sufficiently alleged a conspiracy that continued after the IPOs because Visa and MasterCard continued to coordinate their member banks' activities after their reorganizations. *See Osborn* Pet. App. 22a-23a.

Finally, the argument assumes the IPOs actually changed the concerted nature of Visa's and MasterCard's activities. Applying this Court's *American Needle* analysis, one distinguished commentator has reached precisely the opposite conclusion:

> [T]he MasterCard and Visa IPOs have the characteristics of centrally managed cartels. In substance, the central organization has the power to control the independent business of the individual issuing shareholders. The individual members have the ability to withdraw, which they can accomplish by selling their shares and dropping the card. Further, it is unnecessary that the individual issuing banks coordinate their behavior with one another; the central organization solves that problem. Control runs from the organization to the individual members, limiting their

> independent business activity with respect to the issuance and management of bank cards.

Herbert Hovenkamp & Christopher R. Leslie, *The Firm as Cartel Manager*, 64 VAND. L. REV. 813, 871-72 (2011).

At a minimum, the issue of whether Visa and MasterCard functioned as unilateral decision makers pursuing their own economic interests after the IPOs or whether they acted as cartel managers coordinating anticompetitive conduct by direct competitors is an issue for the finder of fact below to determine.

II. ASSOCIATIONS THAT FOCUS PRIMARILY ON EDUCATING MEMBERS AND THE PUBLIC DIFFER SIGNIFICANTLY FROM ASSOCIATIONS THAT SET PRICING REGIMES

The Merchant Associations respectfully disagree with the *amici* supporting Petitioners. Contrary to the suggestion of these *amici*,[3] the D.C. Circuit's decision did not rely solely upon "mere membership" in an

[3] *See* Brief of Financial Industry Association as *Amici Curiae* in Support of Petitioners at 5 ("The D.C. Circuit's decision can be interpreted as lowering the bar for pleading an antitrust conspiracy under Section 1 of the Sherman Act by holding that mere membership in a collaborative activity and adherence to applicable rules is sufficient"); Brief of the American Society of Association Executives and the American Veterinary Medical Association as *Amici Curiae* in Support of Petitioners at 6 ("Through these rules, the court of appeals held, allegations amounting to nothing more than participation in an association 'satisfy the plausibility standard' ").

association to hold that the concerted action requirement of Section 1 was satisfied. Thus, affirmance of the lower court's decision would not create a world where companies would be afraid to join trade associations because doing so could automatically subject them to conspiracy allegations.

Further, Petitioners' *amici* misconstrue the issue presented on appeal, at least as Petitioners now seek to reframe that issue. The issue that Visa and MasterCard would now have the Court decide is not the standard for pleading whether an individual member of an association plausibly participated in an unlawful conspiracy; rather, Petitioners seek to create a new and dangerous substantive rule that would raise significant barriers to showing that an association of multiple independent competitors is engaged in concerted action. Conflating true trade associations with entities like Visa and MasterCard illustrates the breadth of the rule Petitioners are asking the Court to adopt.

Although there are many differences between what true trade associations do and what Visa and MasterCard are alleged to have done, one difference is crucial: true trade associations do not (and should not) engage in establishing rules that determine the prices their members charge for goods or services. Indeed, the charters or bylaws of many associations explicitly disclaim any interest in engaging in anticompetitive conduct. However, if trade associations did set prices or the terms of pricing for their members, there can be little doubt that they should be liable under the antitrust laws. *See FTC v. Super. Ct. Trial Lawyers Ass'n*,

493 U.S. 411 (1990); *Arizona v. Maricopa County Med. Soc'y*, 457 U.S. 332 (1982); *Goldfarb v. Va. State Bar*, 421 U.S. 773 (1975). Likewise, it is well established that trade associations face antitrust liability for setting rules that indirectly raise prices to consumers. *See*, *e.g.*, *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447 (1986); *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679 (1978).

Business associations of various types serve salutary purposes. The Merchant Associations have spent decades advancing the interests of merchants and their customers by, among other things: providing retail perspective on important issues such as data security and trade policy to each branch of the government; educating the public as to the importance of retail in the national economy; filing *amicus curiae* briefs to this Court and others that have been cited; and educating the industry as to advances in technology that can improve retail efficiency and the customer experience. Trade associations can perform important information-gathering functions that are difficult for members to perform individually. Trade associations often represent members before legislative bodies and governmental agencies, a competitively-neutral activity that may serve the socially desirable function of improving the information upon which governmental decisions are made.

This Court should recognize that not all associations are created equal: associations can engage in a wide variety of activities that can pose varying risks to

competition. *Compare Gregory v. Fort Bridger Rendezvous Ass'n*, 448 F.3d 1195, 1202-03 (10th Cir. 2006) (holding that economic interest of members in excluding competitors sufficient for antitrust liability), *with Jack Russell Terrier Network of Northern Cal. v. American Kennel Club*, 407 F.3d 1027, 1034-36 (9th Cir. 2003) (holding that because members were not competitors, no conspiracy existed). There is no need for a special rule to shield trade associations – much less billion-dollar cartel managers like Visa and MasterCard – from scrutiny under the antitrust laws. Associations that focus primarily on educating members are significantly different from associations that establish pricing regimes or impose strict rules that limit competitive practices in an industry. Nothing in the court of appeals' decision as to Visa and MasterCard puts the legitimate activities of trade associations at risk.

This Court's precedents make it abundantly clear that trade associations should not expect to avoid antitrust scrutiny if they adopt rules directing or impacting their members' pricing. Under Petitioners' proposed test, an agreement to raise prices arising out of the collective pricing power of the association would not adequately plead a violation of Section 1 if it were in the individual interest of the members to raise prices. This test flies in the face of the Court's precedents and is the very definition of a cartel. Under such a test, it is difficult to see ***any*** situation in which illegal concerted action would ever survive a motion to dismiss because individual companies will always have an independent economic interest in raising prices or

avoiding competition. In other words, Visa and MasterCard are not asking for clarity in order to protect the innocent activities of true trade associations, but rather for a free pass that would have the perverse effect of encouraging members to use associations to engage in collective pricing or other illegal practices. No such change in the law is needed to protect the procompetitive, socially beneficial activities of the Merchant Associations and countless other "business associations" that are in no way linked to facilitating collusion among their members.

In reality, the Petitioners and their supporting *amici* confuse the roles of true trade associations, which should not be setting the prices of its members, and joint ventures, which may in some circumstances of economic integration (which the Court in a number of cases has made clear) adopt rules that have an ancillary impact on price. In neither scenario, however, are association members and consumers served by a rewriting of Section 1 of the Sherman Act that would have the effect of converting the actual concerted actions of independent companies into conduct that can no longer be reached under the antitrust laws.

III. PLEADING CONCERTED ACTION SHOULD BE CONTROLLED BY THE PRINCIPLES SET FORTH IN *AMERICAN NEEDLE*

The *American Needle* Court already established a sound and useful test for determining whether actions by multiple entities constitute concerted action under

Section 1 of the Sherman Act. The Merchant Associations believe that there is no need to modify that test – and, indeed, that departure from the test would create confusion as to the scope of what is lawful.

In *American Needle*, the Court found concerted action based upon facts remarkably similar to those presented here: thirty-two teams (all of the participants in the relevant market) that operated as independent businesses forming a common vehicle (the National Football League Properties ("NFLP")) to (allegedly) raise the prices of their intellectual property and exclude plaintiff. 560 U.S. at 198.

In seeking to rewrite the *American Needle* standard here,[4] Petitioners selectively quote from that decision. In doing so, they seek to create the impression

[4] Petitioners also take the position that pleading the following is not sufficient "direct evidence" of concerted action: that an association adopted rules that limit the pricing options of their members, that the members took part in the governance of the association, and that the member banks thereby gained supracompetitive profits from following those rules. The Merchant Associations respectfully disagree. If the Respondents had alleged that the banks were part of an association that set interest rates, that the banks took part in reaching an agreement on a common interest rate, and that the banks thereby gained supracompetitive profits from doing so, there would be little doubt that such allegations pled concerted action by the banks. *See*, *e.g.*, *Gelboim v. Bank of Am. Corp.*, 823 F.3d 759 (2d Cir. 2016). The only distinction here is that Visa and MasterCard claim that the anticompetitive effects of their pricing rules are outweighed by the procompetitive effects of their ATM networks. That argument, however, as discussed *infra*, conflates the issue of direct evidence of concerted action with the question of whether the restraints arising from the concerted action are, on balance, anticompetitive.

that the decision leaves room for a test that permits a group of separate firms to be treated as if they are not acting in concert, even if a plaintiff plausibly alleges that those separate firms have joined together to set and implement a rule that specifically limits price competition. Petitioners ask this Court to incorporate into the established test for concerted activity a new codicil that courts "must rely on allegations about the rules' nature or effects in order to infer that the members of each network 'act[ed] on interests separate from those of' the network." Pet'rs Br. at 23. Petitioners make clear that, in their view, this proposed test sets an extraordinarily high standard for pleading antitrust claims that can survive a motion to dismiss: for example, Petitioners assert that "the allegation that banks appointed members of each network's board does not suggest the boards pursued the separate interests of those banks." *Id.* at 25. Such a test has nothing to do with the protection of legitimate trade association activities. The Merchant Associations believe in competition – it is essential to their mission. The Merchant Associations would be loath to have the purposes for which they were formed be subverted by Petitioners' proposed rule.

Petitioners' approach turns the *American Needle* decision on its head. Indeed, Petitioners urge the Court to fall into precisely the trap that leading antitrust scholars have warned about:

> The emphasis of substance over form is critical when analyzing cartels. When cartels employ a centralized decisionmaking vehicle –

> whether a trade association, a joint sales agent, or an incorporated management structure – it may appear that a single entity is in control or that all the relevant agreements are vertical rather than horizontal. . . . 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.

Herbert Hovenkamp & Christopher R. Leslie, *The Firm as Cartel Manager*, 64 VAND. L. REV. at 850.

Central to the Court's decision in *American Needle* was the fact that "[u]nlike typical decisions by corporate shareholders, NFLP licensing decisions effectively require the assent of more than a mere majority of shareholders." 560 U.S. at 201. The same is true of Visa's and MasterCard's network rules: all of the member banks have to assent to them and implement them for the rules to have the desired effect of raising member prices. This illustrates the Court's observation in *American Needle* regarding the efficiencies that a joint venture with a single management structure will provide to a cartel because it will decrease the risks that a party to an illegal agreement will defect. 560 U.S. at 202. Petitioners' test ignores these concerns.

There are many restraints that further joint venture interests and restrain competition outside the market in which the venture competes. Section 1 undeniably should reach those restraints, which should

then be evaluated under the rule of reason to determine whether they are lawful. *See* ABA Section of Antitrust Law, ANTITRUST LAW DEVELOPMENTS 484 (7th ed. 2012) (collecting cases) ("Agreements among parents of a venture not to compete in markets other than the joint venture market, however, generally have been invalidated as naked restraints of trade."). Petitioners and their *amici* remain free to seek dismissal of frivolous antitrust lawsuits on the ground that a plaintiff's allegations are insufficient to plausibly support the conclusion that the agreement in question is anticompetitive. Petitioners chose not to take that approach here, presumably because doing so would have focused the courts below on the fact that the unlawful conduct alleged here is not the formation of ATM networks, but rather the ancillary rules that Respondents alleged raised the price of ATM use.

Although Petitioners note that *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), urges caution in permitting antitrust cases to survive Rule 12(b)(6) motions due to the cost of discovery, the core of that decision simply asks reviewing courts to assess whether the claim of concerted anticompetitive activity is plausible. The allegations of the Complaints in this case clearly satisfied the plausibility standard; there is no need for a new rule of law that would make alleging concerted action by competitors who belong to a "business association" a practical impossibility. And where, as here, antitrust claims have met that pleading standard, business association rules should then

be analyzed under standard antitrust principles consistent with the standards set by *American Needle*.

CONCLUSION

Reversal of the decision below may allow Visa and MasterCard to adopt any of a variety of anticompetitive restraints. Such a result cannot be in the interest of any "business association" that does not engage in anticompetitive conduct or in the interests of consumers. For the foregoing reasons, the judgment below should be affirmed or the petition should be dismissed as improvidently granted.

Respectfully submitted,

JAMES A. WILSON*
ROBERT N. WEBNER
VORYS SATER SEYMOUR
AND PEASE, LLP
52 E. Gay Street
Columbus, OH 43215
(614) 464-5606
jawilson@vorys.com

Counsel for All Amici Curiae
**Counsel of Record*

DEBORAH R. WHITE
RETAIL LITIGATION CENTER, INC.
1700 N. Moore Street
Suite 2250
Arlington, VA 22209
(703) 600-2067

Counsel for Amicus Curiae
Retail Litigation Center, Inc.

MALLORY DUNCAN
NATIONAL RETAIL FEDERATION
1101 New York Avenue, NW
12th Floor
Washington, DC 20005
(202) 626-8106

Counsel for Amicus Curiae
National Retail Federation