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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 AMERICAN ANTITRUST INSTITUTE AS *AMICUS CURIAE* SUPPORTING RESPONDENTS

RICHARD M. BRUNELL
Counsel of Record
AMERICAN ANTITRUST INSTITUTE
1730 RHODE ISLAND AVE., NW
SUITE 1100
Washington, D.C. 20036
(202) 600-9640
rbrunell@antitrustinstitute.org

Counsel for Amicus Curiae

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

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INTEREST OF AMICUS CURIAE

The American Antitrust Institute ("AAI") is an independent, nonprofit organization devoted to promoting competition that protects consumers, businesses, and society. It serves the public through education, research, and advocacy on the benefits of competition and the use of antitrust enforcement as a vital component of national and international competition policy. AAI is managed by its Board of Directors, with the guidance of an Advisory Board that consists of over 130 prominent antitrust lawyers, law professors, economists, and business leaders. *See* http:/www.antitrustinstitute.org.[1]

AAI submits this brief in support of affirming the D.C. Circuit's holding that respondents' complaints challenging certain operating rules of Visa and MasterCard state a claim under § 1 of the Sherman Act. This case is important to AAI's mission because petitioners' theory fundamentally misconstrues the limitation on the single-entity defense this Court unanimously adopted in *American Needle, Inc. v. NFL*, 560 U.S. 183 (2010). Petitioners' theory would create an immunity for joint venture conduct that has long been subject to § 1. In *American Needle* and other

[1] The written consents of all parties to the filing of this brief have been lodged with the Clerk. Individual views of members of AAI's Board of Directors or Advisory Board may differ from AAI's positions. Certain counsel for the Non-Consumer Respondents are members of AAI's Advisory Board but they played no role in AAI's deliberations with respect to the brief. No counsel for a party has authored this brief in whole or in part, and no person other than amicus curiae has made a monetary contribution to fund its preparation or submission.

recent antitrust cases this Court has rejected threshold immunities for certain categories of business behavior in favor of a more discriminating analysis under the rule of reason or other doctrines. It should do so here as well.

INTRODUCTION

In their merits brief petitioners ask this Court to turn its recent decision in *American Needle* on its head by refashioning it into a broad "single entity obstacle" to antitrust enforcement against anticompetitive conduct of joint ventures and trade groups. Accepting petitioners' theory would overturn well-settled antirust principles for analyzing joint ventures. Rather than evaluate the competitive effects of a joint venture rule under the rule of reason, petitioners propose to immunize such a rule if it *at all* advances the procompetitive or *anticompetitive* interests of the joint venture as an entity.

The Court granted certiorari on the narrow question whether an antitrust complaint challenging a business association's allegedly anticompetitive rule could be sustained under § 1 based on "allegations that members . . . agreed to adhere to the association's rules and possess governance rights in the association, without more." Osborn Pet. i. The court of appeals held that respondents' complaints challenging the ATM Access Fee Rules of Visa and MasterCard, which restrict member banks' ability to offer discounted access fees for less expensive non-Visa or non-MasterCard network transactions, stated a claim under § 1. Petitioners contended that the court of appeals' decision conflicted in particular with a ruling of the Ninth Circuit, which held that allegations against

member banks of Visa and MasterCard were insufficient to state a claim against them in connection with a challenge to merchant discount fees because "'membership in an association does not render an association's members automatically liable for antitrust violations committed by the association. Even participation on the association's board of directors is not enough by itself.'" *Id.* at 13 (quoting *Kendall v. Visa U.S.A., Inc*., 518 F.3d 1042, 1048 (9th Cir. 2008)) (brackets omitted).

Petitioners' new theory, purportedly drawn from *American Needle* (a case they failed to cite in their petition or reply brief, or argue affirmatively below), is that an agreement among members of a joint venture to restrict competition among themselves is not concerted action unless it is intended exclusively to serve the separate interests of the members rather than the interests of the venture "as a whole." Petitioners' problem with respondents' complaints is no longer that they fail to allege "who, did what, to whom (or with whom), where, and when." Cert. Reply Br. 11. Now, what matters according to petitioners is "why." How the Visa and MasterCard boards decided to adopt the rules at issue and the roles played by the Bank Defendants' board representatives, a key omission of the complaints according to the petition, *see* Pet. 7-8, is beside petitioners' new point. Now, what counts is "whose *interests* the parties were pursuing when they made the decision." Pet. Br. 16.

According to petitioners, the complaints fail to state a claim under § 1 because they fail to plausibly suggest that the boards of Visa and MasterCard adopted the allegedly anticompetitive rules to promote the

independent interests of banks rather than those of Visa and MasterCard as networks. Judicial acceptance of this argument would eviscerate *American Needle*'s sound application of the principle announced in *United States v. Sealy, Inc.*, 388 U.S. 350 (1967), that decisions by competitors that control a joint venture constitute horizontal agreements.

SUMMARY OF ARGUMENT

1. *American Needle* holds that conduct of a joint venture is concerted action when it is controlled by competitors with independent economic interests. The ATM Access Fee Rules of Visa and MasterCard restricting the competitive behavior of their member banks are horizontal restraints under this standard because the rules were imposed by the boards of Visa and MasterCard when they were controlled by the banks. Petitioners' contrary argument that a joint venture rule is not concerted action if competitors pursue "the interests of that venture as a whole" misreads *American Needle* and other joint venture cases.

In *American Needle*, this Court found that the licensing decisions of NFL Properties [NFLP] constituted concerted action because the teams controlling NFLP and making the decisions *had* independent economic interests, not because they necessarily acted on those interests instead of pursuing the interests of the league or NFLP as a whole. The Court did not inquire into *why* the teams chose to license their trademarks collectively. On the contrary, the Court declared that "[t]he justification for cooperation is not relevant to whether that cooperation is concerted or independent action." *American Needle*,

560 U.S. at 199. Whether the conduct at issue actually promotes the interests of the venture *is* relevant to antitrust analysis, but it is relevant to the rule of reason inquiry, not the question of concerted action. A restriction on competition among members of a joint venture may be justified under the rule of reason if it is reasonably necessary to achieve the procompetitive purposes of the venture "as a whole."

Petitioners' effort to distinguish *American Needle*, as well as *Sealy* and *Topco*, on the ground that the conduct in those cases affected only a single market in which the venture's members competed does not withstand scrutiny. In *American Needle*, the Seventh Circuit had found that the NFL teams were a single entity in collectively licensing their team logos because they did so to promote the league in competition with other forms of entertainment. In overturning the Seventh Circuit, this Court specifically rejected this justification for immunizing the teams' conduct. Likewise, in *Sealy* and *Topco*, the Court rejected the joint ventures' efforts to justify their intra-venture restraints on the ground that they were necessary for the ventures to compete in a broader interbrand market. *Sealy* is particularly instructive in that the Court specifically rejected the theory that joint venture rules are unilateral when the competitor-decisionmakers are wearing their "venture hats."

Petitioners' radical proposal to immunize joint venture restraints designed to advance the *anticompetitive* purposes of the venture as a whole calls into question fundamental antitrust principles and cases outlawing blatantly anticompetitive conduct. It would suggest that decisions of cartels that maximize

the profits of the cartel, but not necessarily those of each member, would be immune. It would imply that a joint venture's restrictions on members' competition that increase the venture's profitability, but are not reasonably ancillary to its procompetitive purposes, would be *per se* lawful. And it would also suggest that group boycotts designed to ensure that a member does not compete against the venture would be immune. Petitioners' argument is also squarely at odds with numerous cases finding joint venture exclusivity rules designed to protect the venture "as a whole" from competition to be unreasonable horizontal restraints.

2. Assuming, *arguendo*, that respondents are required to plausibly allege that the challenged rules serve the banks' independent interests, the complaints easily satisfy such a requirement because they allege anticompetitive harm in markets in which the banks compete (ATM access and debit cards). Petitioners' argument that the allegations are insufficient because the complaints *also* allege anticompetitive harm at the network level is baseless and illogical. Petitioners' invocation of *Twombly* and *Matsushita* to suggest that allegations of mixed or multiple motives require dismissal is meritless. *Twombly* and *Matsushita* are inapt because they deal with distinguishing between merely parallel oligopoly behavior and conspiracy—which are mutually exclusive categories—not sorting out whose interests a rule serves, which does not necessarily admit of one answer. A rule that would foreclose antitrust liability when a joint venture rule has anticompetitive effects at the venture level and the member level makes no sense.

3. Petitioners' policy arguments for expanding the single-entity defense lack merit. Petitioners argue that "routine conduct" of joint ventures should not be subject to § 1, but the conduct at issue here is hardly routine. Rather, it involves rules that limit the competitive behavior of the banks. More generally petitioners and their amici argue that *Copperweld* immunity should be expanded for joint ventures in order to deter frivolous lawsuits and avoid chilling procompetitive behavior and the use of the joint venture structure. They offer no evidence that joint ventures are under siege from meritless lawsuits. And their "solution" does not merely foreclose meritless litigation; it would immunize blatantly anticompetitive conduct and call into question much of the precedent on joint ventures. In any event, the policy arguments are the same ones made by the NFL (and respondents as amici) in *American Needle*. This Court wisely rejected them in *American Needle*, teaching that a properly structured rule of reason inquiry is the solution to any perceived risks of overdeterrence.

ARGUMENT

I. PETITIONERS' EXPANSIVE SINGLE-ENTITY THEORY IS ERRONEOUS

A. A Joint Venture Rule Adopted by Competitors with Independent Interests is a Product of Concerted Action

In *Copperweld*, this Court abolished the intra-enterprise conspiracy doctrine and held that a parent and its wholly-owned subsidiary are a single entity for purposes of § 1 of the Sherman Act. *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752 (1984). *American Needle* held that the "single-entity defense" does not apply to the conduct of a joint venture when it is controlled by members with independent economic interests. It followed a long line of this Court's cases holding (or assuming) that rules or policies of organizations controlled by competitors constitute concerted action. *Am. Needle*, 560 U.S. at 192 & nn. 3, 4 (citing cases).

For example, in *NCAA v. Bd. of Regents*, 468 U.S. 85, 99 (1984), this Court explained that "the policies of the NCAA with respect to television rights are ultimately controlled by the vote of member institutions. By participating in an association which prevents member institutions from competing against each other on the basis of price or kind of television rights that can be offered to broadcasters, the NCAA member institutions have created a horizontal restraint—an agreement among competitors on the way in which they will compete with one another." *See also In re N. Texas Specialty Physicians*, 140 F.T.C. 715, 737-38 (2005) ("When a single organization is

controlled by a group of competitors, antitrust law treats the organization as the agent of the group."), *aff'd*, 528 F.3d 346 (5th Cir. 2008); *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 214-16 (D.C. Cir. 1986) (Bork, J.) (van line's policy of prohibiting affiliates from competing with its network was a horizontal restraint where policy was adopted by board of directors comprised of actual or potential competitors); *United States v. Visa U.S.A., Inc.*, 344 F.3d 229, 242 (2d Cir. 2003) (Visa and MasterCard exclusivity rules constituted horizontal concerted action), *cert. denied*, 543 U.S. 811 (2004).[2]

Accordingly, it is clear that the ATM Access Fee Rules constituted horizontal restraints when they were originally imposed on the member banks by the boards of directors of Visa and MasterCard, which were comprised at the time exclusively or almost exclusively of member bank representatives with independent interests. *See* Stoumbos Pet. App. 145a (¶ 90). To be sure, this does not necessarily resolve the status of the restraints following the ventures' IPOs, or whether any particular member would be liable for the restraints if

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[2] That the rules in *U.S. v. Visa* were a product of concerted action was so obvious that the point was never challenged by Visa or MasterCard. In fact, Visa conceded that it "is indisputably correct" that the bylaw at issue was "a restraint imposed (horizontally) by Visa's members . . . . Indeed, given Visa's joint venture structure, it scarcely could be otherwise." Reply Br. for Defendant-Appellant Visa U.S.A., Inc. 10-11, *Visa,* 344 F.3d 229 (No. 02-6074).

they are judged to be unreasonable,[3] but these issues are irrelevant to petitioners' new theory.[4]

Quoting snippets from *American Needle*, petitioners read it to require that, in addition to showing that controlling members of a joint venture *have* independent economic interests, a plaintiff must prove that the members actually "'act[ed] on interests separate from those of' the venture." Pet. Br. 22 (brackets in original). Petitioners claim that if competitors are involved in a "joint venture—whether a business association, trade group, or other organization—and pursued the interests of *that venture* as a 'whole,' then their conduct counts as 'unilateral,' and cannot be the basis for a Section 1 claim." Pet. Br. 16; *see id.* (whether a decision of a joint venture is concerted action "depends on whose *interests* the parties were pursuing when they made the decision"). According to petitioners, *American Needle* held that decisions of NFLP regarding the teams' separately

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[3] As the court of appeals recognized, mere membership in an association does not automatically render a member liable for the association's unreasonable restraints. "[M]ost courts have required evidence of the member's actual knowledge of, and participation in, the unlawful conduct to find liability." ABA Antitrust Section, *Antitrust Law Developments* 53 (7th ed. 2012); *see, e.g.*, *FTC v. Cement Institute*, 333 U.S. 683, 718-20 (1948) (where Institute was liable for establishing a multiple basing point delivered price system, particular members that were less involved than others were still liable because they "cooperated in carrying out the objectives of the . . . system").

[4] Petitioners acknowledge that the legal effect of the IPOs is not presented by the petition. Pet. Reply Br. 8 ("withdrawal defense based on Visa's and MasterCard's IPOs [is] not raised in this petition").

owned intellectual property constituted concerted action "because they advance the 'separate economic interests' of each team, as opposed to the interests of the league as a 'whole.'" *Id.* at 34. Petitioners' reading of *American Needle* is incorrect.

B. Petitioners' Reading of *American Needle* and Other Joint Venture Cases is Wrong

American Needle held that NFLP's licensing decisions constituted concerted action because, although NFLP was a separate corporation with its own management, "NFLP's licensing decisions are made by the 32 potential competitors" who *have* economic interests distinct from those of the venture, not because they necessarily *acted* on those separate interests in connection with the conduct at issue. *Am. Needle*, 560 U.S. at 200.

The Court explained that the "teams operating independently through the vehicle of the NFLP are not like the components of a single firm that act to maximize the firm's profits." *Id.* at 201. It acknowledged that NFLP may have "'served as the single driver of the teams' promotional vehicle,' 'pursuing the common interests of the whole.'" *Id.* at 198 (quoting NFL brief) (internal quotation marks omitted). However, in exercising control over NFLP, "each team's decision reflects not only an interest in NFLP's profits but also an interest in the team's individual profits." *Id*. at 201; *see also id.* at 198 ("Although NFL teams have common interests such as promoting the NFL brand, they are still separate, profit-maximizing entities, and their interests in licensing team trademarks are not necessarily aligned. Common interests in the NFL brand *partially* unite the

economic interests of the parent firms, but the teams still have distinct, potentially competing interests." (internal quotation marks, citations, and brackets omitted)).[5]

The Court did not inquire into *why* the teams chose to license their trademarks collectively or voted to authorize NFLP to grant exclusive licenses (i.e. whether the teams had their individual interests or the interests of the venture as a whole in mind). Rather, the Court recognized that "'the business interests of' the teams 'will *often* coincide with those of the' NFLP 'as an entity in itself,'" 560 U.S. at 201 (quoting *Los Angeles Mem. Coliseum Comm'n v. NFL*, 726 F.2d 1381, 1389 (9th Cir. 1984)), but what was decisive was the fact that "choices . . . nominally made by NFLP[] are for all functional purposes choices made by the 32 entities with *potentially* competing interests," *id*. at 202 n.9 (emphasis added).

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[5] Petitioners (*e.g.*, Pet. Br. 16) cite the following paragraph in *American Needle* in support:

> We generally treat agreements within a single firm as independent action on the presumption that the components of the firm will act to maximize the firm's profits. But in rare cases, that presumption does not hold. Agreements made within a firm can constitute concerted action covered by § 1 when the parties to the agreement act on interests separate from those of the firm itself . . . .

560 U.S. at 200. However, insofar as the use of the word "act" may be interpreted to mean "actually act" rather than "potentially act," it is clear that the "rare cases" to which the Court referred involve intrafirm agreements within a traditional firm, not agreements among competitors operating joint ventures, which "'have no immunity from antitrust laws.'" *Id.* at 199 (quoting *NCAA*, 468 U.S. at 113).

To be sure, whether the conduct at issue actually promotes the interests of the venture as a whole *is* relevant to antitrust analysis; but it is relevant to the rule of reason inquiry. After all, a restriction on competition among the teams may be justified if it is reasonably necessary to achieve the procompetitive purposes of the venture. *See Am. Needle*, 560 U.S. at 202 (need for teams to cooperate to ensure success of league "provides a perfectly sensible justification for making a host of collective decisions"); *see generally* FTC and U.S. Dep't of Justice, *Antitrust Guidelines for Collaborations Among Competitors* § 3.2 (2000) (an agreement among competitors in an "efficiency-enhancing integration of economic activity" that is "reasonably necessary to achieve its procompetitive benefits" will be analyzed under the rule of reason). But lawful rules that serve the procompetitive interests of the joint venture—for example by "preserv[ing] the character and quality of the 'product,'" *NCAA,* 468 U.S. at 102—are no less concerted than anticompetitive rules adopted to protect the separate interests of the teams.

Petitioners seek to distinguish *American Needle*'s finding of concerted action on the ground that NFLP's licensing of the teams' trademarks "affected only a *single* market in which the venture's members competed." Pet Br. 33. They claim "there was no suggestion that those decisions affected any other market, besides the market for intellectual property in which the teams competed." *Id.* at 34. However, the Seventh Circuit had made just such a suggestion, explaining that "the NFL teams collectively license their intellectual property to promote NFL football," as to which "the NFL teams share a vital economic

interest" because "the league competes with other forms of entertainment." *Am. Needle Inc. v. NFL*, 538 F.3d 736, 743-44 (7th Cir. 2008). And the Court specifically rejected the premise that single-entity treatment could be justified insofar as collective trademark licensing by NFLP was necessary to promote NFL football in the market for sports entertainment. Rather, the Court said, "defining the product as 'NFL football' puts the cart before the horse." *Am. Needle*, 560 U.S. at 199 n.7. "The justification for cooperation is not relevant to whether that cooperation is concerted or independent action." *Id.* at 199.

Nor does *Sealy* or *Topco* support petitioners' position. As with *American Needle*, petitioners argue that there was no suggestion in either case that the exclusive territorial restraints at issue "affected any other market besides the market in which the licensees competed." Pet. Br. 33. Again, petitioners are wrong. In each case defendants maintained that the restraint was intended, indeed necessary, to promote the success of the venture as a whole. But that contention, even if true, was irrelevant to the concerted-action question.

Thus, in *Sealy*, the dissent argued that "Sealy has wholly legitimate interests and purposes of its own; it is engaged in vigorous interbrand competition with large integrated bedding manufacturers and with retail chains selling their own products. Sealy's goal is to maximize sales of its products nationwide, and thus to maximize its royalties." *Sealy,* 388 U.S. at 361-62 (Harlan, J., dissenting). And the majority recognized that "the licensees had an interest in Sealy's effectiveness and efficiency, and, as stockholders, they

welcomed its profitability." *Id.* at 353.[6] Nonetheless, the Court rejected the argument—similar to the one made by petitioners here—that there is no horizontal restraint because "the stockholders and directors wore a 'Sealy hat' when they were acting on behalf of Sealy." *Id.* The Court explained, "We seek the central substance of the situation, not its periphery; and in this pursuit we are moved by the identity of the persons who act, rather than the label of their hats." *Id.* (quoted by *Am. Needle*, 560 U.S. at 191-92). The substance of the situation was, as *American Needle* observed, "the entity was controlled by a group of competitors." *Am. Needle*, 560 U.S. at 191; *see Sealy*, 388 U.S. at 353 ("Control does not reside in the licensees only as a matter of form.").[7]

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[6] That the licensing restraints at issue *may* have served the interests of the joint venture as a whole was evidenced by the fact that the restraints had been originally adopted when Sealy was owned by an independent entity and before it was acquired by its licensees. *Sealy*, 388 U.S. at 360-62 & n.3. (Harlan, J., dissenting).

[7] *Sealy* disposes of petitioners' argument that directors' fiduciary duty to act in furtherance of the venture as an entity precludes or presumptively militates against a determination of concerted action. Regardless of such a duty, *Sealy* assumed that the directors would act primarily based on their firms' economic interests, as antitrust presumes. *See Town of Hallie v. City of Eau Claire,* 471 U.S. 34, 45 (1985) ("A private party . . . may be presumed to be acting primarily on his or its own behalf."); *N.C. State Bd. of Dental Exam'rs v. FTC*, 135 S. Ct. 1101, 1114 (2015) ("the structural risk of market participants' confusing their own [private] interests with the State's policy goals" when they control a state regulatory board precludes immunity absent active state supervision, notwithstanding their professional ethical and public legal duties to act in the public interest); Zenichi Shishido, *Conflicts of Interest and Fiduciary Duties in the Operation of a*

Likewise in *Topco* the dissent emphasized the district court's finding that the restraint was necessary for the venture as a whole to survive. *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 623-24 (1972) (Burger, C.J., dissenting). But even if this were true, it was not only irrelevant to the concerted-action issue, it was irrelevant to the entire matter as the Court held that the horizontal territorial restraint was *per se* illegal and could not be saved by a procompetitive justification. *Id.* at 610-11 (majority opinion); *see id.* at 623 n.11 (Burger, C.J., dissenting) (agreeing with majority that arrangement was a "combination"); *cf. Rothery Storage*, 792 F.2d at 221, 224 (holding that van line's policy of exclusive territories was a horizontal agreement, but it was lawful because it was ancillary to legitimate purposes of the venture and enhanced the efficiency of the van line).

Petitioners' reliance on *Dagher* is also misplaced. There, the Court did *not* hold that the joint venture's pricing policy was unilateral conduct under § 1; it held only that the policy was not *per se* illegal and therefore had to be challenged under the rule of reason. *Texaco Inc. v. Dagher*, 547 U.S. 1, 7 (2006). To be sure, the Court referred to the policy as equivalent to price setting by a "single entity," but that was a functional description with implications for the merits, not a statement about the applicability of § 1. *Cf. Broadcast Music, Inc. v. CBS, Inc.*, 441 U.S. 1, 22 (1979) (blanket license offered by joint venture of competing composers

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Joint Venture, 39 Hastings L.J. 63, 73 (1987) (noting that directors and officers of joint venture employed by a parent company may have conflicting duties, and in practice "are likely to give the interests of their parent companies the higher priority").

was not price fixing because it was "a different product" than what could be offered separately by composers, and therefore had to be analyzed under the rule of reason). In any event, the pricing policy at issue in *Dagher* is not at all like the restraints at issue here because the policy did not restrict or affect the behavior of the members as competitors.

As discussed in the next part, petitioners' theory is inconsistent with numerous other cases that have found joint venture conduct to be unlawful concerted action where the conduct benefitted the venture as a whole either in addition to, or rather than, individual members.[8]

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[8] Petitioners' theory is also impractical. Petitioners propose to make the purpose of a joint venture rule a necessary element to be pled and proved before a court ever reaches the merits of whether the rule unreasonably restrains trade when intent ordinarily may be relevant, at least "to the extent it helps us understand the likely effect of the" conduct. *United States v. Microsoft Corp.*, 253 F.3d 34, 59 (D.C. Cir. 2001). Indeed, it seems particularly unrealistic to expect plaintiffs to plead the intent of the decisionmakers before any discovery. This Court has eschewed intent evidence in determining threshold immunities. *See, e.g.*, *N.C. Dental*, 135 S. Ct. at 1113 (state action immunity will not be decided "on the basis of ad hoc and *ex post* questioning of [officials'] motives for making particular decisions").

C. Immunizing Joint Venture Restraints that Serve the Anticompetitive Interests of the Venture as a Whole is Insupportable

Petitioners' theory of concerted action is more radical than the NFL's, which would have opened a "loophole [to] permit league members to escape antitrust responsibility for any restraint entered into by them that would benefit their league or enhance their ability to compete even though the benefit would be outweighed by its anticompetitive effects." *N. Am. Soccer League v. NFL*, 670 F.2d 1249, 1257 (2d Cir. 1982). Petitioners argue not only that a joint venture restraint adopted to advance the *procompetitive* purposes of the venture as a whole is immune from scrutiny under § 1 (presumably without regard to whether the restraint actually serves its intended purpose), but that a joint venture restraint intended to serve the *anticompetitive* purposes of the venture as a whole would also be immune. *See* Pet. Br. 26 (claiming that complaints' allegations that ATM rules result in supracompetitive network prices and volume is exonerating because it shows that the "rules were in each network's best interests").

Such a rule would be peculiar indeed, as it would imply that a cartel's price and output decisions that maximize the cartel's profits but not necessarily the profits of each member would not be concerted action.[9]

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[9] *Cf.* Herbert Hovenkamp, *Exclusive Joint Ventures and Antitrust Policy*, 1995 Colum. Bus. L. Rev. 1, 54 ("[T]he price and output

But cartels are *per se* illegal, no matter whose interests they further. *See American Needle*, 560 U.S. at 201-02.

Petitioners' approach would also suggest that anticompetitive restraints that are not ancillary to a legitimate joint venture, but which are designed to increase its profitability, would be lawful, even though this Court has squarely held such restraints to be unreasonable. *E.g., NCAA*, 468 U.S. at 100 n.22, 116-18 (television plan that restricted output held unlawful where it was not justified by procompetitive purpose; NCAA maximized revenues like a "monopolist"); *see also Polygram Holding, Inc. v. FTC*, 416 F.3d 29 (D.C. Cir. 2005) (joint venture partners' agreement to restrict marketing of competing products in order to increase profitability of venture held to be unreasonable restraint).

And petitioners' approach would suggest that a joint venture's decision to expel a member because the member has chosen to do business with the venture's rival (and thus the expulsion would be in the interests of the venture as a whole) would be immune from scrutiny under § 1, even though this Court has suggested that such a boycott by firms with market power is likely to be illegal. *See Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.*, 472 U.S. 284, 296 n.7 (1985) (retailer's claim that it was expelled from a wholesale purchasing cooperative in retaliation for the retailer's decision to engage in an independent wholesale operation was "more troubling"

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decision that is profit-maximizing for the cartel as a whole is not the same as the decision that is profit-maximizing for any individual member.").

and should be evaluated under rule of reason); *cf. Silver v. N.Y. Stock Exch.*, 373 U.S. 341, 347-48, 354 n.9 (1963) (finding unlawful group boycott where members of stock exchange complied with exchange directive to cease connection with non-member broker dealer claimed to be unqualified; exchange rule authorized such conduct if the connection "might cause the interest or good repute of the Exchange to suffer").

Moreover, petitioners' approach is squarely at odds with numerous cases finding joint venture exclusivity requirements—designed at least in part to protect the venture as a whole from competition—to be unlawful horizontal restraints. *See, e.g., Radovich v. NFL*, 352 U.S. 445 (1957) (holding that complaint stated a § 1 claim where NFL allegedly organized a boycott of a player in order to thwart competition from a competing league); *Visa*, 344 F.3d 229 (striking down Visa's and MasterCard's exclusivity rules prohibiting member banks from issuing cards of rival Discover and American Express networks where rules impaired competition in the market for network services); *N. Am. Soccer League,* 670 F.2d 1249 (holding that NFL's cross-ownership ban violated § 1 where it was designed in part to protect the league from competition from competing league; single-entity treatment explicitly rejected).

II. THE COMPLAINTS PLAUSIBLY ALLEGE THAT THE ATM RULES SERVE THE BANKS' INDEPENDENT INTERESTS

Assuming, *arguendo*, that respondents are required to plausibly allege that the challenged rules serve the banks' independent economic interests, the complaints easily satisfy such a requirement. Indeed, petitioners

apparently concede that the allegations that the rules limit competition among the banks in markets in which the banks compete (ATM access and debit cards) *alone* would be sufficient to infer that they were adopted to serve the banks' interests. *See* Pet. Br. 32-35. However, petitioners claim the allegations are insufficient because the complaints *also* allege anticompetitive harm at the ATM network level. Since such harm would be in the interests of the "venture as a whole," the complaints purportedly fail under *Twombly* because of "[t]he need at the pleading stage for allegations plausibly suggesting (not merely consistent with) agreement." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007); *see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986) (to survive summary judgment, a complaint alleging a conspiracy based on circumstantial evidence "must present evidence 'that tends to exclude the possibility' that the alleged conspirators acted independently"). *See* Pet. Br. at 32 ("[I]t is just as possible, indeed far more so, that each networks' board members were pursuing the *network*'s interest in *that* market when they adopted each rule. That is fatal to respondents' claims.").

Petitioners' argument is meritless. *Twombly* and *Matsushita* are entirely inapt because they deal with distinguishing between merely parallel oligopoly behavior and conspiracy, whereas the issue under petitioners' proposed standard is essentially whether an *express* agreement among competitors (viz. a rule adopted by the board of directors of a joint venture) restricting how they may compete with one another is "an agreement in the 'antitrust sense.'" Pet. Br. 40 (quoting *Dagher*, 547 U.S. at 6.). Moreover, the

question of whether parallel conduct is the product of conspiracy or merely parallel oligopoly behavior involves mutually exclusive categories, whereas the question of whose interests a joint venture rule serves does not necessarily admit of one answer.

Petitioners' argument amounts to saying that a plaintiff must plausibly allege (and presumably prove) that a joint venture rule adopted by competitors does *not* serve interests of the joint venture as a whole.[10] However, a rule that would foreclose antitrust liability when a joint venture rule has anticompetitive effects at the member level, but also is in the anticompetitive interest of the venture "as a whole" makes no sense.

As noted above, there is no basis to immunize joint venture conduct under § 1 when it is anticompetitive at the venture level. There is even less logic to expand that immunity to cover conduct that is anticompetitive at *both* the venture and member levels. For example, a joint venture might expel a member because the member began to compete aggressively against the other members *and* because it chose to compete directly against the venture itself. Petitioners have offered no rational reason why the latter effect should immunize the former from scrutiny under § 1.

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[10] Indeed, petitioners go so far as to suggest that respondents must plausibly allege that the rule is "contrary to each network's independent interest." Pet. Br. 31-32.

III. PETITIONERS' POLICY ARGUMENTS FOR EXPANDING THE SINGLE-ENTITY DEFENSE LACK MERIT

Petitioners argue that it does not serve the purposes of the Sherman Act "to treat the routine conduct of joint ventures as an ongoing conspiracy." Pet. Br. 28. But the conduct at issue in this case is hardly the kind of routine conduct of buying and selling by a joint venture that some courts and commentators have suggested should be considered to be that of a single entity.[11] Rather, it involves restrictions on the competitive behavior of the members of the ventures adopted by the members themselves.[12] In any event,

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[11] *See, e.g.*, *AD/SAT, A Div. of Skylight, Inc. v. Associated Press*, 181 F.3d 216, 234 (2d Cir. 1999) ("'[T]o the extent that trade associations are buying and selling products and services in their own right, they can fairly be regarded as single entities whose selling decisions are not "price-fixing conspiracies" and whose buying decisions are not "boycott conspiracies" of rejected suppliers.'" (quoting 7 Phillip E. Areeda et al., *Antitrust Law* ¶ 1477, at 348) (brackets omitted))); *see also* 7 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 1478, at 357 (3d ed. 2010) ("[T]he NFL's decisions to hire a new director or office manager, or to purchase new vehicles for NFL officials should be regarded as unilateral because, unless deeper probing shows otherwise, these decisions have no impact on the market behavior of the individual teams.").

[12] Commentators who would treat routine buying and selling decisions as unilateral conduct would treat "organizational decisions as continuing agreements among the members to the extent those decisions bear on the competition among or, in some cases, with the members." 7 Areeda & Hovenkamp ¶ 1478, at 338. At the same time, decisions of a legitimate joint venture that are delegated to managers with no independent interests presumably would not satisfy *American Needle*'s control requirement. *See id.*

treating even routine conduct as concerted action when it is controlled by competitors with independent interests raises no meaningful antitrust risks for joint ventures because such behavior will rarely raise competitive concerns. *See, e.g., In re N. Texas Specialty Physicians*, 140 F.T.C. at 738 ("Associations can . . . negotiate prices for office facilities or wages for employees; agents can establish prices for services that the association provides for members or non-members. These are matters of no antitrust significance, because there is no conceivable anticompetitive impact.").

More generally petitioners and their amici argue that *Copperweld* immunity should be expanded for joint ventures in order to deter frivolous lawsuits and avoid chilling procompetitive behavior and the use of the joint venture structure. Pet. Br. 28, 40; Osborn Pet. 20-25; *see also* Br. for [Four] Antitrust Law Professors as Amici Curiae in Support of Petitioners 7 ("Because . . . associations necessarily involve some collective action by competitors, plaintiffs may be quick to claim an antitrust conspiracy whenever they do not like an association rule. Strict enforcement of *Twombly* is thus necessary to avoid burying associations and their members in discovery over meritless claims.").

These are the same arguments that the NFL and others—including petitioners here—made in *American Needle* in support of a robust single-entity defense for highly integrated joint ventures. *See* Brief of

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¶ 1477, at 339 ("[W]here the alleged conspirators are the officers of a trade association who have no independent interests, *Copperweld* would ordinarily apply.").

MasterCard Worldwide and Visa Inc. as *Amici Curiae* in Support of Respondents 18, *American Needle*, 560 U.S. 183 (2010) (No. 08-661) ("The consequences of Petitioner's rule, if adopted, will be an unchecked rise in litigation costs, less incentive to collaborate, and an overall reduction in efficiency in many industries—especially financial services."); *id.* at 23 ("the threat of Section 1 litigation and liability could cause firms not to enter procompetitive joint ventures in the first place"); *see also* Brief for the NFL Respondents 37-38, *American Needle*, 560 U.S. 183 (2010) (No. 08-661) (narrow single-entity defense would "subject to full rule of reason review not only routine business decisions of professional sports leagues . . . , but also routine business decisions of other highly integrated entities"). Then, as now, the arguments were not supported by evidence that joint ventures are under siege from meritless lawsuits.[13] And petitioners' "solution" does not merely foreclose meritless litigation; it would immunize blatantly anticompetitive conduct and call into question much of the precedent on joint ventures.

In any event, the Court decisively rejected these policy arguments as a reason to interpret the agreement requirement so as to immunize certain conduct by sports leagues or other highly integrated

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[13] As an example of the costly litigation to which Visa and MasterCard were subject, they cited the interchange fee and merchant discount antitrust litigation. *See* MasterCard and Visa *American Needle* Br. at 13. But Visa and MasterCard subsequently agreed to settle that matter for $7.25 billion. *See In re Payment Card Interchange Fee and Merchant Discount Antitrust Litig.*, 2016 WL 3563719 (2d Cir. June 30, 2016) (rejecting settlement because of inadequate class representation).

joint ventures, or to provide a special mechanism for "early termination" of supposedly meritless litigation.

As the Court explained, "Football teams that need to cooperate are not trapped by antitrust law." *American Needle*, 560 U.S. at 202. Rather, "[t]he fact that 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, provides a perfectly sensible justification for making a host of collective decisions." *Id*. Instead of a special immunity for certain joint ventures, the Court clarified the applicable substantive rule "[w]hen restraints on competition are essential if the product is to be available at all." *Id.* at 203 (internal quotation marks omitted). In those circumstances,

> *per se* rules of illegality are inapplicable, and instead the restraint must be judged according to the flexible Rule of Reason. In such instances, the agreement is likely to survive the Rule of Reason. And depending upon the concerted activity in question, the Rule of Reason may not require a detailed analysis; it can sometimes be applied in the twinkling of an eye.

Id. at 203 (internal quotations and citations omitted); *see also NCAA*, 468 U.S. at 117 ("most of the regulatory controls of the NCAA are justifiable means of fostering competition among amateur athletic teams and therefore procompetitive" under the rule of reason).

In short, *American Needle* teaches that an appropriately structured rule of reason inquiry is the solution to any perceived risks of deterring

procompetitive behavior by joint ventures and business associations.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the court of appeals or dismiss the petitions for certiorari as improvidently granted.

Respectfully submitted,

RICHARD M. BRUNELL
Counsel of Record
AMERICAN ANTITRUST INSTITUTE
1730 RHODE ISLAND AVE., NW
SUITE 1100
Washington, D.C. 20036
(202) 600-9640
rbrunell@antitrustinstitute.org

Counsel for Amicus Curiae

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