No. 15-961, 15-962

IN THE

VISA INC., .,

SAM OSBORN, .

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

# BRIEF OF AMICI CURIAE ANTITRUST-LAW PROFESSORS AND ECONOMISTS IN SUPPORT OF RESPONDENTS


GARY J. MALONE

JEFFREY I. SHINDER
ANKUR KAPOOR
CONSTANTINE CANNON LLP
335 Madison Avenue, 9th Floor
New York, New York 10017
(212) 350-2700
gmalone@constantinecannon.com



268620

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

## TABLE OF CONTENTS

TABLE OF CONTENTS . . . . . . . . . . . . . . . . . . . . . . . . . . i

TABLE OF CITED AUTHORITIES . . . . . . . . . . . . . . iii

STATEMENT OF INTEREST OF . . . 1

SUMMARY OF ARGUMENT . . . . . . . . . . . . . . . . . . . . . .5

ARGUMENT . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . .9

I. Under , parties acting in concert are subject to § 1 of the Sherman Act when they are "separate economic actors" and their concerted action "deprives the marketplace of independent centers of decisionmaking" . . . . . . .9

II. Under , because Visa/MasterCard member banks were (and are) separate economic actors which have agreed to abide by rules restricting their independent decision-making, they are subject to § 1 . . . . . .13

A. The banks are separate economic actors . .13

B. The banks agreed to refrain from independent decision-making by adhering to the ATM Access Fee Rules . . . . . . . . . . . . . . . . . . . . . . . . . . . . .14

III. Petitioners' arguments are contrary to this Court's long-standing precedent . . . . . . . . . . . .18

A. Petitioners' position would effectively overrule ..............18

B. The Court's jurisprudence on the application of § 1 to joint ventures and other business associations has not chilled procompetitive cooperation among businesses ....................22

CONCLUSION ................................25

## TABLE OF CITED AUTHORITIES

### CASES

,
486 U.S. 492 (1988) . . . . . . . . . . . . . . . . . . . . . . . . . . . . .24

,
560 U.S. 183 (2010) . . . . . . . . . . . . . . . . . . . . . . .

,
441 U.S. 1 (1979) . . . . . . . . . . . . . . . . . . . . . . . . . . . . . .21

,
284 F.3d 47 (1st Cir. 2002) . . . . . . . . . . . . .12, 13, 21, 23

,
518 F.3d 1042 (9th Cir. 2007) . . . . . . . . . . . . . . . . . . . .18

,
1993 U.S. Dist. LEXIS 11964 (S.D.N.Y) . . . . . . . . . . .17

,
465 U.S. 752 (1984) . . . . . . . . . . . . . . . . . . . . . . . . . . . . .12

,
792 F.2d 210 (D.C. Cir. 1986) . . . . . . . . . . . . . . . . . . 17, 18

,
561 U.S. 358 (2010) . . . . . . . . . . . . . . . . . . . . . . . . . . . . . .6

,
547 U.S. 1 (2006). . . . . . . . . . . . . . . . . . . . . . . . . . . . . .21

,
388 U.S. 350 (1967). . . . . . . . . . . . . . . . . . . . . . .

,
224 U.S. 383 (1912) . . . . . . . . . . . . . . . . . . . . . . . . . . . . .23

,
405 U.S. 596 (1972) . . . . . . . . . . . . . . . . . . . . .15, 18, 21, 22

,
344 F.3d 229 (2d Cir. 2003) . . . . . . . . . . . . . . . . . . . . . .16

**STATUTES**

15 U.S.C. § 1 . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . .

**OTHER AUTHORITIES**

VII Phillip E. Areeda & Herbert Hovenkamp,

(3d ed. 2010). . . . . . . . . . . . . . . . . . . . . . . . . 7, 12, 17, 21

## STATEMENT OF INTEREST OF AMICI CURIAE[1]

Amici curiae are the following 28 professors of law and economics:

- Rebecca Haw Allensworth, Associate Professor of Law at Vanderbilt University Law School;

- Joseph P. Bauer, Professor of Law Emeritus at Notre Dame Law School;

- Darren Bush, Law Foundation Professor of Law at the University of Houston Law Center;

-

- Joshua Davis, Associate Dean for Academic Affairs and Director, Center for Law and Ethics, at the University of San Francisco School of Law;

- Nicholas Economides, Professor of Economics at the New York University Leonard N. Stern School of Business;

- Aaron Edlin, Richard Jennings Professor, Department of Economics and School of Law, University of California - Berkeley;

- Einer R. Elhauge, Carroll and Milton Petrie Professor of Law at Harvard Law School and Founding Director of the Petrie-Flom Center for Health Law Policy, Biotechnology and Bioethics;

- Harry First, Charles L. Denison Professor of Law and Co-Director of the Competition, Innovation, and Information Law Program at the New York University School of Law;

- Eleanor M. Fox, Walter J. Derenberg Professor of Law at the New York University School of Law;

- Andrew I. Gavil, Professor of Law at the Howard University School of Law;

- Th d

- Thomas J. Horton, Professor of Law and Heidepriem Trial Advocacy Fellow at the University of South Dakota School of Law;

- Herbert Hovenkamp, Ben V. and Dorothy Willie Chair at the University of Iowa College of Law;

- John B. Kirkwood, Professor of Law at the Seattle University School of Law;

- Marina Lao, Professor of Law at the Seton Hall University School of Law;

- Christopher R. Leslie, Chancellor's Professor of Law at University of California - Irvine School of Law;

- Roger Noll, Professor Emeri Emq f e ot

- Abraham L. Wickelgren, Bernard J. Ward Centennial Professor at the University of Texas at Austin School of Law.

(Institutions are listed for identification purposes only.)

Amici focus their research and teaching in antitrust law, policy, and economics, including in the application of antitrust law to business associations. They share the view that competition and balanced enforcement of antitrust law are critical for the economy and the public welfare, both by preventing the unlawful exercise of market power to deprive businesses and consumers of wealth and by promoting innovation which creates wealth and benefits the public.

In , 560 U.S. 183 (2010), this Court struck a proper balance as to when joint ventures and other business associations of competitors are subject to analysis as concerted action under § 1 of the Sherman Act. The Court directed that the "inquiry is one of competitive reality," not the form of the venture or association, at 196, and that the effects of competitors' action are subject to analysis under § 1 where they have formed a cooperative association and agreed to rules that "deprive[] the marketplace of independent centers of decisionmaking," at 195. The Court did not hold that businesses would be liable for such joint action, but only that it would be appropriate to analyze the balance of that action's anticompetitive and procompetitive effects and that the action would not be immune from § 1.

Under well-established Court precedent, dating back to the earliest days of the Sherman Act, such conduct has

always been subject to antitrust review to determine its effects on the economy, other businesses, and the public. Were it otherwise, any organization of competitors that integrated some functions, but still operated to suppress competition, would have been free from antitrust scrutiny. That is the danger posed by adoption of Petitioners' argument. Amici respectfully submit this brief to avoid that danger and to support the Court's reasoning in that the appropriate solution is to examine the effects of competitors' joint action, not grant them immunity.

## SUMMARY OF ARGUMENT

Competing banks, as owners and members of Visa and MasterCard and their associated ATM networks, promulgated and agreed to rules which prevent both bank and non-bank ATM operators from charging ATM cardholders less for ATM access through cheaper networks than Visa and MasterCard (the "ATM Access Fee Rules"). The ATM Access Fee Rules thereby assure Visa, MasterCard, and their owner/member banks that their networks will not lose ATM transaction volume to price competition. The competitor banks adopted those rules in response to competition from non-bank ATMs.

Petitioners' Brief ("Pet. Br.") argues that because the ATM Access Fee Rules further Visa/MasterCard's ATM networks' interests "as a 'whole'" and not just the banks' individual interests as owners and members of Visa/MasterCard, the conduct is that of a "single entity" and not subject to analysis under § 1. Pet Br. 10. But the Court expressly rejected such an argument in ,
reasoning that "illegal restraints often are in the common

interests of the parties to the restraint," 560 U.S. at 198, and therefore such conduct requires analysis. That is especially true in this case, where competitors have agreed to abide by rules which prevent price competition. There is no justif cation for immunizing Petitioners' conduct, or any other joint conduct among competitors, from § 1. Just the opposite: §

behavior. Not every joint venture among competitors requires scrutiny; neither does everything such a joint venture does. But certainly there are some joint ventures—especially those among competitors—whose conduct must be analyzed under § 1 for its competitive effects. The Court has done just that it in myriad cases throughout its 100+ years of Sherman Act jurisprudence.

In short, under (and perhaps self-evidently), independent competitors which agree to join a venture or other association and adhere to rules which affect competition among them have, at a minimum, acted in concert for purposes of § 1, and the courts should evaluate those rules' competitive effects. Petitioners would require more: allegations that a joint venture acted solely in its members' individual interests and not to further joint-venture objectives "as a 'whole.'" Pet Br. 10. But Petitioners have it backwards. Section 1 should reach all joint-venture conduct that restricts members' ability to compete with one another. Under Petitioners' proposed standard, §1 would reach only joint-venture conduct that is a sham because it serves no purpose beyond facilitating cartelization at the member level. Everything else would be immune from §1. Numerous practices that arguably further joint-venture objectives while also restricting competition at the member level would escape antitrust scrutiny. There is simply no authority for that extreme proposition, and Petitioners offer none.

In addition to having been rejected by the Court in , 560 U.S. at 198, that requirement would swallow § 1 whole. As the Court stated in , "illegal restraints often are in the common interests of the parties to the restraint." Removing

the NFLP joint venture and the NFL and NFLP's status as legally distinct entities, the teams were acting in concert under § 1 because they (a) remained "separate economic actors" and (b) their conduct affected a matter of competition among them:

> As exemplifies, "substance, not form, should determine whether a[n] . . . entity is capable of conspiring under § 1." This inquiry is sometimes described as asking whether the alleged conspirators are a single entity. That is perhaps a misdescription, however, because the question is not whether the defendant is a legally single entity or has a single name; nor is the question whether the parties involved "seem" like one firm or multiple firms in any metaphysical sense. The key is whether the alleged "contract, combination . . . , or conspiracy" is concerted action--that is, whether it joins together separate decisionmakers. The

under a single umbrella or into a structured joint venture." at 195-96. "[T]he inquiry is one of competitive reality." at 196.

In holding that the NFL teams acted in concert, the Court reasoned that the NFL teams were not fully economically integrated: "The NFL teams do not possess either the unitary decisionmaking quality or the single aggregation of economic power characteristic of independent action. Each of the teams is a substantial, independently owned, and independently managed business." It did not matter that the NFL teams also "have common interests such as promoting the NFL brand"; "they are still separate, prof t-maximizing entities, and their interests in licensing team trademarks are not necessarily aligned." at 198.

Thus, the existence of lawful joint-venture business objectives common to all the joint venture's members does not change this competitive reality: separate, prof t-maximizing entities' acts in furtherance of joint-venture objectives are concerted if they also affect a matter of competition among those independent economic actors. The Court recognized that "illegal restraints often are in the common interests of the parties to the restraint." Removing agreements that deprive the market of independent, competitive "centers of decisionmaking" from scrutiny under § 1, simply because they further some colorable joint-venture objective, would invite the corporatization of cartels and shield them from § 1. That plainly would be contrary to the Sherman Act and this Court's century-long interpretation of it.

It makes sense to apply § 1 to economically separate, horizontal competitors that have entered into a joint

> Here, it is MLS that has two roles: one as an entrepreneur with its own assets and revenues; the other (arguably) as a nominally vertical device for producing horizontal coordination, , limiting competition among operator/investors.
>
> From the standpoint of antitrust policy, this prospect of horizontal coordination among the operator/investors through a common entity is a distinct concern. . . . This does not make MLS a mere front for price f xing, but it does distinguish by introducing a further danger and a further argument for testing it under section 1's rule of reason.

284 F.3d at 57-58.

## II. Under American Needle, because Visa/MasterCard member banks were (and are) separate economic actors which have agreed to abide by rules restricting their independent decision-making, they are subject to § 1.

### A. The banks are separate economic actors.

Regarding the f rst, "structural" inquiry of , there is no serious dispute that Visa/MasterCard member banks are "separate economic actors pursuing separate economic interests" when it comes to providing their customers access to customers' bank accounts through ATM cards. Banks compete vigorously for customer accounts and funds which the banks then lend and use to build relationships with their customers for other f nancial products and services.

Banks also compete with one another by joining multiple ATM networks, which allows banks' customers to access their accounts through more ATMs around the world. Part of that competition could have been price competition—banks joining networks with lower fees for non-bank ATM operators (banks typically do not charge their customers fees for using bank-owned ATMs) so that those independent ATM operators could charge the banks' customers a lower access fee for using those networks. But as discussed below, the banks instead used their control of the Visa and MasterCard boards to establish binding rules preventing that price competition.

### B. The banks agreed to refrain from independent decision-making by adhering to the ATM Access Fee Rules.

Regarding the second, "behavioral" inquiry of , Respondents alleged, according to the court of appeals below: (a) "Visa and MasterCard were owned and operated as joint ventures by a large group of retail banks at the time that the Access Fee Rules were adopted"; and (b) "[a]lthough these member banks later relinquished direct control over the bankcard associations through public offerings, the IPOs did not alter the substance of the Access Fee Rules, which remain intact to this day." 797 F.3d 1057, 1061 (D.C. Cir. 2015). The D.C. Circuit correctly reasoned from that the banks' development and adoption of the Access Fee Rules when the banks controlled Visa and MasterCard pled a horizontal agreement to restrain trade when those rules affected competition among the banks:

> The rules served several purposes. First and foremost, the rules protected Visa and

MasterCard from competition with lower-cost ATM networks, thereby permitting Visa and MasterCard to charge supra-competitive fees. Osborn Prop. Compl. ¶ 80. The rules also benefited the banks, who were equity shareholders of the associations (and therefore financial beneficiaries of the deal). ¶¶ 116-117. And the rules protected banks from competition with each other over the types of [ATM network] bugs offered on bank cards.

¶ 80 (alleging that "banks were assured that their MasterCard customers would not have to pay more in fees than their Visa cardholders, and they would not face competition at the network level").

That the rules were adopted by Visa and MasterCard as single entities does not preclude

operates independently; there is no pooling of earnings, profts, capital, management, or advertising resources.");
, 388 U.S. 350, 352 (1967) (internal citations omitted) ("If we look at substance rather than form, there is little room for debate. These must be classifed as horizontal restraints. There are

The Areeda treatise is in accord with the D.C. and Second Circuits, distinguishing Visa/MasterCard from unilateral trade-association activity: "The situation is quite different when 'thousands of separate f nancial institutions all of whom are competitors' form an association to create the MasterCard credit card network from which all rivals' cards are excluded. . . . The Supreme Court's decision clearly conf rms the result." Areeda & Hovenkamp ¶ 1477, at 339-40 (discussing , 1993-2 Trade Cas. ¶ 70,352, 1993 U.S. Dist. LEXIS 11964 (S.D.N.Y.)). In , the district court held MasterCard's rules subject to § 1, consistently with , because they affected competition among MasterCard's member banks. 1993 U.S. Dist. LEXIS 11964, at **7-8. It did not matter that "MasterCard may be acting as a 'single entity.'" at *8.

, 792 F.2d 210 (D.C. Cir. 1986), provides an analogous horizontal arrangement to Visa/MasterCard. The defendant, Atlas Van Lines, operated a national network for the transportation of used household goods. at 211. Atlas used independent moving companies throughout the country to provide nationwide coverage, and those companies agreed to Atlas's rates, operating procedures, maintenance specif cations, and other bylaws, rules, and regulations. The Atlas Board of Directors, which adopted the challenged policy, "consisted of actual or potential competitors of Atlas," and "all but two members of the board represented separate legal entities that competed in interstate commerce." at 215. The D.C. Circuit rejected Atlas's argument that it acted as a single

venture of "separately controlled, potential competitors with economic interests that are distinct from [the joint venture's] financial well-being." , 560 U.S. at 200-01. In the former, "rare cases," a complaint must plead something more to hold the firm subject to § 1. For example, multiple firm employees may have conspired among themselves to deal with the firm's suppliers only in exchange for kickbacks, to another supplier's exclusion. In the latter case, holds that a complaint must plead only that separate economic actors have acted in concert to refrain from independent decision-making.

In short, Petitioners position seems to be that joint-venture members' conduct cannot be concerted where the members are somehow acting in the venture's interests "as a 'whole'"—regardless of whether they are also simultaneously furthering their own individual interests—and that there may be an exception for conduct "that affected competition" among the members and therefore that "might permit an inference that the [members] were acting in their own interests." Pet. Br. 11-12; at 18 ("A plaintiff might show, for example, that the only market affected by the challenged conduct is one in which the venture's members compete").

Petitioners would thus remove, from the Sherman Act § 1's scope, any restraint among horizontal competitors whenever the restraint furthered a joint venture's interests in addition to individual competitors' interests. That is unjustified and would effectively overrule and a century of the Court's precedent on the application of the Sherman Act § 1.

Petitioners actually have it backwards. When the conduct only affects competition in the market in which the

is incorrect. Those cases also involved additional markets in which the joint ventures competed, yet this Court held them subject to § 1 because of the effects where the joint venture members did compete.[3]

### B. The Court's jurisprudence on the application of § 1 to joint ventures and other business associations has not chilled procompetitive cooperation among businesses.

Petitioners argue that if the Court does not adopt their position as the law, "the threat of suit would chill legitimate and procompetitive cooperation to the detriment of consumers and the purposes of the [Sherman] Act." Pet. Br. 13. But joint ventures of independent competitors have been subject to the Sherman Act § 1 for i223(t)-6(u)-17(r)-26(14.8f c)4(o)
over a century, , 560 U.S. at 192 Pdlnn-7(u)-18(r)-2(e)-5(s o)16(f i)-14, 59(0

colluded in violation of section 1 involved a showing that the challenged rule or standard promulgated by the association ' 'was deliberately distorted by competitors of the injured party, sometimes through lies, bribes, or other improper forms of inf uence, in addition to a . . . showing of market foreclosure.''" Br. for Antitrust Law Professors as Amici Curiae in Supp. of Pet'rs, at 5.

That is incorrect. Although some cases do involve "improper" behavior by association members, many others do not, as and the cases cited by the Court in demonstrate. 560 U.S. at 187-88 (holding subject to § 1 both the NFL and its member teams with respect to trademark licensing); , 224 U.S. 383 (1912) (holding liable, under § 1, both the association formed for the purpose of acquiring railroad terminals' property and the association's members); , 284 F.3d 47 (1st Cir. 2002) (holding subject to § 1 both professional sports league and league members with respect to league rules).

Associations and ventures among horizontal competitors have rightly received additional antitrust scrutiny which other associations have not. "[I]n § 1 Congress 'treated concerted behavior more strictly than unilateral behavior.' This is so because unlike independent action, '[c]oncerted activity inherently is fraught with anticompetitive risk' insofar as it 'deprives the marketplace of independent centers of decisionmaking that competition assumes and demands.' And because concerted action is discrete and distinct, a limit on such activity leaves untouched a vast amount of business conduct. As a result, there is less risk of deterring a f rm's necessary conduct;

courts need only examine discrete agreements . . . ."
, 560 U.S. at 190.

Even industry standard setting, which can be and has been procompetitive, has "a serious potential for anticompetitive harm."

## CONCLUSION

Because the court of appeals below correctly held Petitioners' joint conduct subject to analysis under the Sherman Act § 1 as construed by this Court's precedent, its decision should be aff rmed.

Respectfully submitted,

Gary J. Malone

Jeffrey I. Shinder
Ankur Kapoor
Constantine Cannon LLP
335 Madison Avenue, 9th Floor
New York, New York 10017
(212) 350-2700
gmalone@constantinecannon.com