No. 23-120

In the Supreme Court of the United States

UNITED STATES SOCCER FEDERATION, INC.,
PETITIONER,

v.

RELEVENT SPORTS, LLC, ET AL., RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF PETITIONER

Tara S. Morrissey
Tyler S. Badgley
U.S. CHAMBER LITIGATION CENTER
1615 H St., NW
Washington, DC 20062
(202) 463-5337

Katherine C. Yarger
Counsel of Record
LEHOTSKY KELLER COHN LLP
700 Colorado Blvd., #407
Denver, CO 80206
(512) 693-8350
katie@lkcfirm.com

Gabriela Gonzalez-Araiza
LEHOTSKY KELLER COHN LLP
200 Massachusetts Ave., NW, Suite 700
Washington, DC 20001
(512) 693-8350

Counsel for Amicus Curiae

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INTEREST OF AMICUS CURIAE

The Chamber of Commerce of the United States of America is the world's largest business federation.[1] It represents approximately 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in important matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files briefs as amicus curiae in cases, like this one, that raise issues of concern to the Nation's business community.

Proper adherence to the requisite pleading standard for each substantive element of a claim under the Sherman Act ensures that such claims are not used to deter or punish business activities that are essential to innovation and economic growth. The requirements for pleading a horizontal conspiracy are among the most important because they serve a critical gatekeeping function that prevents implausible and unmeritorous antitrust actions—with their attendant threat of civil or ciminal liablity, treble damages, and sweeping injunctive relief—from undermining legitimate ventures.

SUMMARY OF ARGUMENT

This Court has previously granted a petition for writ of certiorari to resolve the question presented here. *See*

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[1] In accordance with Rule 37.6, no counsel for any party has authored this brief in whole or in part, and no person or entity, other than amicus, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. Counsel of record received timely notice of the intent to file this brief pursuant to Rule 37.2.

Visa Inc. v. Osborn, 137 S. Ct. 289 (2016). The Second Circuit exacerbated an extant circuit split, and this Court should once again grant review to resolve this important antitrust issue.

The Court of Appeals held that Respondents adequately pleaded a horizontal conspiracy against Petitioner simply by alleging that FIFA's "adoption of the policy [that official league matches must be played within the territory of the respective member assocation] combined with the member leagues' prior agreement, by joining FIFA, to adhere to its policies, constitutes an agreement" that unlawfully restrains trade. *Relevent Sports, LLC v. United States Soccer Fed'n, Inc. et al.*, 61 F.4th 299, 307 (2d Cir. 2023).

The Petition canvasses the acknowledged circuit split on what is required to plead a Section 1 claim, under factual circumstances similar to those here, and explains why the Second Circuit's decision fails to comply with this Court's existing precedent. The Chamber agrees with those points.

The Chamber, as the world's leading business association, further submits this amicus curiae brief to elucidate the broad significance of the contested Section 1 pleading standard to lawful association activities beyond the facts of this particular case involving the rules of international soccer. If the Second Circuit's decision stands, it will have significant ramifications for a wide array of businesses and industry associations.

As this Court has explained, Section 1 draws a "basic distinction between concerted and independent action," the latter of which "is not proscribed." *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 761 (1984). To plead "concerted action"—as distinct from permissible

independent parallel conduct or lawful cooperation—a Secton 1 plaintiff must plead facts that taken as true, show the defendants' "*conscious* commitment to a common scheme designed to achieve an *unlawful objective*." *Id.* at 764 (emphasis added) (quotation marks and citation omitted). Thus, when a defendant has joined an association, a Section 1 plaintiff must plead knowing and active participation by the defendant in the association's promulgation of an allegedly anticompetitive rule or policy to survive a motion to dismiss.

A mere allegation that (i) independent entities joined an association, and (ii) the association subsequently promulgated an allegedly anti-competitive rule or policy falls short of this requirement. Yet, the decision below finds precisely such allegations to be sufficient as a matter of law, thereby departing from this Court's precedent and undermining the substantive elements of a claim under the Sherman Act. *See, e.g.*, *Relevent Sports*, 61 F.4th at 307 ("[T]he adoption of a binding association rule designed to prevent competition is *direct evidence* of concerted action."). In so doing, the holding dissuades businesses from joining any association and exposes any number of lawful collaborators across industries to crippling litigation risk, including the risk and overwhelming burden of antitrust discovery—risks that such ventures can ill afford and that the law does not contemplate in any event.

The Court should grant the petition for writ of certiorari with a view towards reversing the judgment of the Court of Appeals.

ARGUMENT

I. The Decision Below Improperly Threatens Lawful and Procompetitive Business Conduct.

This Court has already recognized that the prospect of "sprawling, costly, and hugely time-consuming" Section 1 litigation can deter the very procompetitive business activities the antitrust laws are designed to protect. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 560 n.6 (2007). The "plausibility" standard, when combined with proper adherence to the elements of a Section 1 claim, balances the Sherman Act's scrutiny of concerted action with its goal of "evolv[ing] to meet the dynamics of present economic conditions," *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 899 (2007), such as those that require competitors to work together to ensure product interoperability or to develop other important rules or standards. *Twombly*, 550 U.S. at 556-57.

The Second Circuit's decision upset this critical balance. It focused almost entirely on the assertion that in joining an association, members "surrender to the control of the association," *Relevent Sports*, 61 F.4th at 309 (internal quotation marks, alteration, and citations omitted), and concluded the association's promulgation of a rule or policy as a condition of membership is sufficient to satisfy the requirement of an anticompetitive "agreement" among those bound by the association's rules. *Id.* The problem with this holding is that it vitiates the requirement of a "*conscious* commitment to a common scheme designed to achieve an *unlawful* objective." *Monsanto*, 465 U.S. at 764 (emphases added) (quotation marks and citation omitted).

The Ninth, Fourth, and Third Circuits, by contrast, have preserved the substantive import of a "conscious

commitment," under similar circumstances, by requiring facts suggesting "[k]nowledge and participation" by the defendant, *Kline v. Coldwell, Banker & Co.*, 508 F.2d 226, 232 (9th Cir. 1974), or "improper forms of influence [such as lies or bribes], in addition to a further showing of market foreclosure," *SD3, LLC v. Black & Decker (U.S.) Inc. ("SawStop")*, 801 F.3d 412, 436 (4th Cir. 2015), *cert denied*, 579 U.S. 917 (2016) (internal citation and quotations omitted), but certainly something more than "collaborat[ive] effort" through an association, *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 350 (3d. Cir. 2010).

Treating membership in an association along with the promulgation of a rule or policy by that association as a proxy for "concerted action" threatens a range of lawful activities. Many industry rules, standards, and policies—whether they involve patents, safety protocols, or market capitalization or similar risk mitigation requirements—have price or exclusionary effects incident if not essential to their legitimate mandates. That is *not enough* to subject them to Section 1 scrutiny. As this Court explained in *Twombly*: Section 1 prohibits "only restraints effected by a contract, combination, or conspiracy." 550 U.S. at 553 (internal quotation marks and citation omitted).[2] This standard is not met where an antitrust plaintiff's allegations of cooperation among members of an association are just as consistent with unilateral action. *See Am. Needle Inc. v. Nat'l Football League*, 560 U.S. 183, 196-99 (2010).

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[2] "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1.

The Second Circuit attempted to diminish the scope of its holding. It purported to distinguish between "a policy or rule" that is "in service of a plan to restrain competition" and a mere "policy or rule" that "is the agreement itself." *Relevent Sports*, 61 F.4th at 308 (emphasis omitted). In the former situation, the court said there must be "additional facts to show that agreement to such a plan exists." *Id.* But in the latter circumstance, no further evidence of agreement (apart from a prior agreement to be bound by the association's decisions) is required. *Id.*

This is a distinction without a difference. The Second Circuit acknowledged that whether further evidence of agreement will be required turns not on the Sherman Act but instead on plaintiff's own conclusory pleading—a mere assertion that the policy or rule *is* the anticompetitive agreement will suffice. *Id.* But this Court has admonished that a Section 1 complaint must plead "allegations plausibly suggesting (not merely consistent with)" an unlawful conspiracy. *Twombly*, 550 U.S. at 557. And because Section 1 conspiracies require a *conscious commitment*, there must be pleaded facts evidencing some conduct to meet that element. An act by an association does not, without more, plausibly allege a *conscious* commitment of the members to that act. For example, this Court has held that even a *joint venture's* "pricing policy may be price fixing in a literal sense" but "*is not* price fixing in the antitrust sense." *Texaco Inc. v. Dagher*, 547 U.S. 1, 6 (2006) (emphasis added).

By failing to require pleaded facts plausibly alleging a *conscious commitment*, the opinion below subjects lawful ventures to the formidable threat of antitrust discovery, and thus risks "chill[ing] the very conduct the antitrust laws are designed to protect," *Matsushita Elec.*

Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 594 (1986), and creating "irrational dislocation[s] in the market," *Monsanto*, 465 U.S. at 764.

The danger of this deviation from the elements of Section 1 and the requisite federal pleading requirement cannot be overstated. Antitrust suits and class actions are proliferating, and the costs and potential costs of such actions have enormous consequences for industry. *See, e.g.*, Eleanor Tyler & Jaquelyn Palmer, *Analysis: Antitrust Cases Are on an Upswing Over 2019,* Bloomberg Law (July 16, 2020), https://perma.cc/FN3B-P5EW; Carlton Fields Class Action Survey 5, 14 (2023), https://perma.cc/RP75-KM57 (noting the rising trend of class actions per company beginning in 2015).[3]

Although cooperation with regard to standard setting, licensing, or intellectual property is not entirely the same as cooperation among members of an association to set geographic boundaries, it is nonetheless instructive. As the Federal Trade Commission and U.S. Department of Justice observed in a Joint Report on antitrust considerations for patent pooling and licensing ventures:

> Industry standards are widely acknowledged to be one of the engines driving the modern economy. Standards can make products less costly for firms to produce and more valuable to

[3] *See also* Daniel B. Asimow, C. Scott Lent, Sonia Kuester Pfaffenroth, Laura Shores, Matthew Tabas, Dylan S. Young, *Developments in US Antitrust Litigation—2021 Year in Review*, Arnold and Porter (Jan. 26, 2022), https://perma.cc/X8UL-9E9H (noting that 2021 was the third highest antitrust filing year in the past fourteen years); Department of Justice, *Antitrust Division, FY 2024 Performance Budget Congressional Justification (CJ) Submission* 3, https://perma.cc/L45H-42W7 (requesting a $100 million increase in funding for 2024, a 30% increase from the 2023 budget).

> consumers. They can increase innovation, efficiency, and consumer choice; foster public health and safety; and serve as fundamental building blocks for international trade. Standards make networks, such as the Internet and wireless telecommunications, more valuable by allowing products to interoperate.[4]

The same Joint Report goes on to make two useful and enduring observations: First, "[t]he most successful standards" are those that provide "solutions to technical problems."[5] Second, industry standards may avoid many of "the costs and delays of a standards war."[6] The Report then notes distinguishable factual circumstances where cooperation may result in liability—specifically where there has been "manipulation of the standard setting *process* or the improper *use* of the resulting standard to gain competitive advantage over rivals," neither of which is alleged to be present here.[7]

Consistent with these observations, courts and regulators across jurisdictions and administrations have calibrated their antitrust enforcement efforts to account for lawful association and joint venture activity in areas ranging from "electrical plugs and outlets"[8] to "tires,"

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[4] DOJ & FTC, *Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition* 33 (2007), https://perma.cc/TQX6-JVEQ (quotation marks and citations omitted).

[5] *Id.*

[6] *Id.* at 34.

[7] *Id.* at 35 (emphasis added).

[8] Remarks of Deborah Platt Majoras, Chairman, Federal Trade Commission, *Recognizing the Procompetitive Potential of Royalty*

"printer cartridges," and "wireless communications."[9] As these authorities recognize, "many industries turn to collaborative development through standard setting organizations" because allowing standards to "arise de facto in the marketplace" may impede "R&D" and result in poorer "technical standards."[10] *See also Golden Bridge Tech., Inc. v. Motorola, Inc.*, 547 F.3d 266, 273 (5th Cir. 2008) ("Potential procompetitive benefits of standards promoting technological compatibility include facilitating economies of scale in the market for complementary goods, reducing consumer search costs, and increasing economic efficiency.").

It is thus no surprise that federal antitrust guidelines recognize that cooperation is often essential to provide industry participants with affordable access to the intellectual property necessary to meet industry standards and sell multi-component products, for example.[11] It is similarly unsurprising that the Justice Department routinely approves such arrangements through Business

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Discussions in Standard Setting 2 (Sept. 23, 2005), https://perma.cc/GYQ7-HWGT.

[9] Opening Remarks of Commissioner Edith Ramirez, *Federal Trade Commission Workshop on Intellectual Property Rights in Standard Setting* 1–2 (June 21, 2011), https://perma.cc/382J-94T7.

[10] *Id.* at 2 & n.2 (citing authorities).

[11] DOJ & FTC, *Antitrust Guidelines for the Licensing of Intellectual Property* § 5.5 (Apr. 6, 1995) ("These [cross-licensing and patent-pooling] arrangements may provide procompetitive benefits by integrating complementary technologies, reducing transaction costs, clearing blocking positions, and avoiding costly infringement litigation. By promoting the dissemination of technology, cross-licensing and pooling arrangements are often procompetitive."), https://perma.cc/4MQV-G4BD.

Review Letters.[12] The same type of collaboration has allowed the Nation's telecommunications systems to evolve and grow following the AT&T divestiture. *See also* Kimberly Gleason et al., *Evidence of Value Creation in the Financial Services Industry Through the Use of Joint Ventures and Strategic Alliances*, 38 The Fin. Review 213, 213 (2003) ("Joint ventures and strategic alliance are an increasingly important mechanism for growth" in the financial services industry).

Associations and their procompetitive cooperation, although distinct in certain circumstances from the examples above, are nonetheless similarly central to successful American economic life: "Participants in a wide variety of industries and professions ranging from actors, to banks, to cardiologists" join associations. Pet. at 19. And this Court has recognized that associations can be "beneficial [both] to . . . industry and to consumers." *Maple Flooring Mfrs.' Ass'n v. Unted States*, 268 U.S. 563, 566 (1925). *See also, e.g.*, *Broadcast Music, Inc. v. Columbia Broadcast. Sys., Inc.*, 441 U.S. 1, 23 (1979) ("Joint ventures and other cooperative arrangements are also not usually unlawful."); *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 102 (1984) (emphasizing the importance of joint ventures and associations in "enabl[ing] a product to be marketed which might

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[12] *See, e.g.,* Letter from Charles A. James to Ky P. Ewing, Esq. (Nov. 12, 2002) (3G patent platform), https://perma.cc/93B7-EX9Y; Letter from Renata B. Hesse to Michael A. Lindsay, Esq. (Feb. 2, 2015) (patent policies update of the IEEE Standards association), https://perma.cc/E3NE-WKV7; Letter from Joel I. Klein to Gerrard R. Beeney, Esq. (June 26, 1997) (MPEG-2 technology), https://perma.cc/V697-SMZ2; Letter from Thomas O. Barnett to William F. Dolan & Geoffrey Oliver (Oct. 21, 2008) (RFID Consortium), https://perma.cc/6RED-YVQW.

otherwise be unavailable."). *See also* Sanjukta Paul, *Antitrust as Allocator of Coordination Rights*, 67 UCLA L. Rev. 378, 427–29 (2020) (discussing the importance of procompetitive associations).

A Section 1 pleading standard that subjects companies to antitrust discovery based on mere membership in an association where that organization promulgates an allegedly anticompetitive rule or policy will undeniably deter critical procompetitive cooperation. *See, e.g.*, *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 441 (1978) ("[S]alutary and procompetitive conduct . . . might be shunned by businessmen who chose to be exclusively cautious in the face of uncertainty.").

II. The Court Should Clarify What is Required to Plead the Concerted Action Element of a Sherman Act Claim Against Association Members.

Antitrust suits—like the class actions that antitrust complaints increasingly embrace—pose a high "risk of 'in terrorem' settlements" that extinguish any opportunity for defendants to vindicate their conduct in merits litigation. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011). As this Court has recognized, "antitrust discovery can be expensive" and involve "massive factual controvers[ies]," so the "threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching [merits] proceedings." *Twombly*, 550 U.S. at 558-59 (quotation marks and citation omitted); *see also In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods Liab. Litig.*, 55 F.3d 768, 784 (3d Cir. 1995) ("[C]lass actions create the opportunity for a kind of legalized blackmail."). It is therefore particularly important for the Court to resolve this case in a manner that explains what Section 1 plaintiffs in association

cases must plead to take the claim "across the line from conceivable to plausible." *Twombly*, 550 U.S. at 570.

The Court should begin by reaffirming that members of an association (particularly where those members are not necessarily direct competitors) have not engaged in "concerted action" merely because the association promulgates a rule or policy. The plaintiff must plead facts that make an "illegal agreement" more plausible than lawful collaboration in furtherance of legitimate interests. *Id.* at 556-57 (noting allegations that remain "merely consistent with" concerted action in restraint of trade "stop short of the line between possibility and plausibility of entitlement to relief" (quotation marks, alterations, and citations omitted)). To do so, the plaintiff must plead some "further circumstance pointing toward a meeting of the minds." *Id.* at 557. A "meeting of the minds" is part in parcel of the requisite "conscious commitment to a common scheme designed to achieve an unlawful objective. *Monsanto*, 465 U.S. at 768. This means a plaintiff pursuing a Section 1 claim must plead "some evidence of [association members'] actual knowledge of, and participation in, [an] *illegal scheme*" as distinct from legitimate organizational activity. *AD/SAT, a Div. of Skylight, Inc. v. Associated Press*, 181 F.3d 216, 234 (2d Cir. 1999) (emphasis changed) (requiring facts sufficient to show that "association members, *in their individual capacities*, consciously committed themselves to a common scheme designed to achieve an unlawful objective" (emphasis added)). Plaintiffs who adequately plead such conduct must then plausibly allege that the concerted action restrained trade in a way that is "unreasonable and therefore illegal." *Am. Needle*, 560 U.S. at 196.

This Court's holdings in *Allied Tube* and *Hydrolevel* are instructive because they differ so significantly from

the factual circumstances here. Both involved "*manipulation* of the standard-setting process or the *improper use* of the resulting standard to gain competitive advantage over rivals. *Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition*, *supra*, 33 (footnotes and quotation marks omitted). In *Allied Tube*, this Court affirmed a jury verdict finding Section 1 liability where the defendant had met with its competitors, collectively agreed with them to seek to exclude the plaintiff's product from the applicable industry standard, and recruited and paid for hundreds of individuals to attend the annual meeting of the standard-setting association solely to vote to exclude the plaintiff's product. *Allied Tube & Conduit Corp., v. Indian Head, Inc.*, 486 U.S. 492, 495-98 (1988). These efforts to "'subvert' the consensus standard-making process of the Association" implicated Section 1. *Id.* at 498. Similarly, in *Hydrolevel*, this Court affirmed a judgment against a trade association where an association subcommittee plotted with a member to use the procedures of the association to disadvantage a competing manufacturer, including by mispresenting whether the competitor's product complied with association safety standards. *Am. Soc. of Mech. Eng'rs, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 560-64 (1982).[13] These are precisely the sort of additional circumstances that go beyond mere membership in an association that promulgates an allegedly anticompetitive rule or policy.

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[13] Courts have likewise allowed Section 1 claims against association members to proceed based on factual allegations that the defendants subverted or otherwise abused normal association or joint venture processes for their own anticompetitive purposes. *See, e.g.*, *SawStop*, 801 F.3d at 420, 430, 433-34.

Under the Court of Appeals' approach, however, many collaborative ventures would face unwarranted antitrust scrutiny for pursuing common interests and standards, rather than serving as vehicles for unlawful collusion among "separate economic actors pursuing separate economic interests." *Am. Needle*, 560 U.S. at 195 (quotation marks and citation omitted); *see generally In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 349 (3d Cir. 2010) (dismissing claims against trade association members because the complaint did not plead facts plausibly suggesting that "each broker acted *other than independently* when it decided to incorporate the [trade group's] proposed approach" (emphasis added)). This Court should correct the lower court's error and reiterate the importance of assessing allegations of concerted action in a rigorous and "functional" way. *Am. Needle*, 560 U.S. at 191.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

Tara S. Morrissey
Tyler S. Badgley
U.S. CHAMBER LITIGATION CENTER
1615 H St., NW
Washington, DC 20062
(202) 463-5337

Katherine C. Yarger
Counsel of Record
LEHOTSKY KELLER COHN LLP
700 Colorado Blvd., #407
Denver, CO 80206
(512) 693-8350
katie@lkcfirm.com

Gabriela Gonzalez-Araiza
LEHOTSKY KELLER COHN LLP
200 Massachusetts Ave., NW, Suite 700
Washington, DC 20001
(512) 693-8350

Counsel for Amicus Curiae

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