No. 23-120

In the Supreme Court of the United States

UNITED STATES SOCCER FEDERATION,

Petitioner,

v.

RELEVENT SPORTS, LLC,

Respondent.

On Petition for Writ of Certiorari to the
U.S. Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The petition for certiorari frames the question presented as follows:

> Whether allegations that members of an association agreed to adhere to the association's rules, without more, are sufficient to plead the element of conspiracy in violation of Section 1.

For the reasons explained below, there is no disagreement among the lower courts on this question, and it is not presented here.

RULE 29.6 DISCLOSURE STATEMENT

Relevent Sports, LLC is a privately held company wholly owned by RSE Ventures, LLC, which is not publicly traded. No publicly traded corporation holds more than 10% of the stock of Relevent Sports, LLC.

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INTRODUCTION

The question in the petition is not subject to any disagreement among the circuits, and it is not presented here. U.S. Soccer contends that the Second Circuit found concerted action based on the allegation that "members of an association agreed to adhere to the association's rules, *without more*." Pet. i (emphasis added). Not so. The complaint here alleged "more." Much more, in fact. It alleged that an association of competitors (at U.S. Soccer's behest) adopted a written rule that explicitly restrained competition by dividing geographic markets—a per se violation of Section 1.[1]

This makes all the difference. The Second Circuit's decision follows a long and unbroken line of cases allowing Section 1 challenges to written association rules that explicitly restrain competition among association members. *See, e.g.*, *Cal. Dental Ass'n* v. *FTC*, 526 U.S. 756, 759–60, 779–81 (1999); *Nat'l Soc'y of Pro. Eng'rs* v. *United States*, 435 U.S. 679, 681, 692–96 (1978); *Associated Press* v. *United States*, 326 U.S. 1, 8, 14–16 (1945). The court in such a case need not infer the existence of a conspiracy through circumstantial evidence. The plaintiff has something better: *direct* evidence. *The rule itself* is the concerted action.

This critical distinction demonstrates the fallacy in what U.S. Soccer and its amici incorrectly describe as a conflict among the circuits. That conflict is illusory today, just as it was seven years ago when the Court granted a writ of certiorari in *Visa* v. *Osborn*. The petition here urges this Court to follow the *Osborn* path.

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[1] *United States* v. *Topco Assocs.*, 405 U.S. 596, 608 (1972) ("One of the classic examples of a *per se* violation of § 1 is an agreement * * * to allocate territories in order to minimize competition.").

But it largely ignores where that path ended: in a dismissal of the writ as improvidently granted. *Visa, Inc.* v. *Osborn*, 579 U.S. 940, *cert. dismissed as improvidently granted*, 580 U.S. 993 (2016). The history confirms that there is no circuit split here that warrants this Court's attention.

Like the petition by U.S. Soccer, the *Osborn* petition argued that the D.C. Circuit had departed from the Ninth Circuit and others by finding adequate allegations of concerted action based solely on an agreement to adhere to association rules. It framed the question as follows:

> Whether allegations that members of a business association agreed to adhere to the association's rules and possess governance rights in the association, without more, are sufficient to plead the element of conspiracy in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, as the Court of Appeals [for the D.C. Circuit] held below, or are insufficient, as the Third, Fourth, and Ninth Circuits have held.

Petition for Writ of Certiorari at i, *Osborn*, No. 15-961.

By the time they filed their merits brief, though, petitioners' counsel apparently recognized that such a conflict did not exist. *Osborn* involved a challenge to written association rules, which provided direct evidence of concerted action. *See Osborn* v. *Visa Inc.*, 797 F.3d 1057, 1066–67 (D.C. Cir. 2015). By contrast, in *Kendall*—the Ninth Circuit case supposedly on the other side of the split—the claim against the banks was *not* a challenge to written association rules; it was a challenge to merchant access fees that each bank had set individually. *See Kendall* v. *Visa U.S.A., Inc.*, 518 F.3d 1042, 1045, 1049–50 (9th Cir. 2008). So, while

the *Osborn* plaintiffs could point to the rules themselves as *direct* evidence of the conspiracy they were challenging (797 F.3d at 1066), the *Kendall* plaintiffs were asking the court to infer a conspiracy from *circumstantial* evidence, without "any evidentiary facts beyond parallel conduct" (518 F.3d at 1048–50). As the Solicitor General later explained, there was never any conflict between these decisions. *See* Brief for United States as Amicus Curiae Supporting Respondents at 11–18, *Osborn*, No. 15-961. They were just different in a dispositive way.

Apparently recognizing this, the *Osborn* petitioners filed a merits brief that changed the question presented to omit any reference to a circuit split. *See* Brief for Petitioners at i, *Osborn*, No. 15-961. The brief acknowledged that *all* courts—including both the Ninth *and* D.C. Circuits—agree that mere membership in an association is not enough by itself to plead a conspiracy. *See id.* at 23–24, 23 n.3 (citing circuits that the petitioners had previously claimed were in conflict). The brief then challenged the D.C. Circuit's judgment on different grounds. As a result of the shift in arguments, the Court dismissed the writ.

U.S. Soccer's petition makes the same mistake that the *Osborn* petition did. It asserts that the D.C. Circuit (and now the Second) departed from the Ninth Circuit by finding concerted action based solely on association membership and a commitment to adhere to association rules. Pet. 4. That is simply not so. This case and *Osborn* involved challenges to written association rules that explicitly restricted competition among members. Thus, the plaintiffs could present direct evidence of the concerted action by pointing to the rules themselves. But contrary to U.S. Soccer's argument, *Kendall* and the other cases did *not* involve "plaintiff[s] challenging an association rule" (*id.* at 12).

The plaintiffs there were challenging unwritten conspiracies and attempted to plead them through circumstantial evidence. *Ibid.* All the cases are thus consistent; there is no conflict to resolve.

Moreover, even if there were a circuit split on this issue, this case would be a poor vehicle for resolving it. Relevent's amended complaint alleges far more evidence of the alleged conspiracy than just association membership and an anticompetitive association rule. It includes detailed facts showing U.S. Soccer's involvement in promulgating and enforcing the policy. U.S. Soccer directly solicited the policy's adoption, and it had a powerful incentive to do so—to insulate its member Major League Soccer from competition. U.S. Soccer's executives communicated extensively with other FIFA members about the policy before its adoption, and then they invoked the policy to prevent Relevent from promoting games in the United States. Indeed, the Department of Justice expressly warned FIFA and U.S. Soccer that applying the policy could violate U.S. antitrust laws—and yet they proceeded to do so anyway. Relevent is not seeking treble damages from entities that merely agreed to follow FIFA rules, like "the English Premier League or FC Tokyo" (*id.* at 3); it is seeking damages from U.S. Soccer and FIFA, the very entities that spearheaded and enforced the challenged restraint on competition.

In short, even if "more" were required to plead U.S. Soccer's assent to the FIFA market division policy, Relevent provided it. The question in the petition thus will not impact the outcome of this case.

The petition should be denied.

STATEMENT

A. The business of international soccer

The Fédération Internationale de Football Association ("FIFA") is a private association made up of more than 200 national soccer associations, each of which includes that country's professional soccer leagues and teams. Pet. 58a–59a.[2] Through FIFA, national associations and leagues adopt rules and policies that govern professional soccer around the world. Pet. 58a. These include everything from rules for game play—like the size of the field and the number of players—to policies dictating how leagues compete with one another. *Ibid.*

FIFA adopts its rules and policies through two policymaking bodies. The first is FIFA's main legislative body, the FIFA Congress. Pet. 59a. The Congress is made up of one delegate selected by each national association, each of whom has one vote. *Ibid.*

The other policymaking body is the FIFA Council. Pet. 60a. The thirty-seven-member Council is made up of individuals elected by FIFA's six "confederations"—regional governing bodies roughly coextensive with the continents—from a pool of candidates put forward by each national association. Pet. 58a–61a. The Council has the authority to interpret the FIFA Statutes and to adopt rules and policies that the existing statutes do not address. Pet. 60a.

U.S. Soccer (or USSF) is the FIFA-authorized national association for the United States, and it participates in the adoption of FIFA rules and policies. Pet. 59a, 77a. It belongs to one of the six confederations,

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[2] All citations in this section of the Statement and the next are to the amended complaint, as reproduced in the petitioner's appendix. *See* Pet. 50a *et seq.*

the Confederation of North, Central, and Caribbean Association Football, which elects five of the Council's thirty-seven members. Pet. 59a, 61a.

Each national association that belongs to FIFA (including U.S. Soccer) has agreed to "comply fully with the Statutes, regulations, directives and decisions of FIFA bodies." Pet. 60a. The national associations have also agreed to require their members to abide by FIFA's rules and policies. *Ibid.* Failure to comply with any FIFA rule or policy can result in suspension or expulsion from FIFA, including exclusion from its most prestigious tournament: the FIFA World Cup. Pet. 60a, 81a–82a. U.S. Soccer's bylaws require its members to comply with FIFA rules and policies. Pet. 60a.

B. FIFA's 2018 market division policy

Relevent is one of the premier soccer event promoters in the world, staging games between FIFA-affiliated professional teams. Pet. 56a. Relevent has built its business largely by hosting "friendly" soccer matches—exhibition games that do not affect the official standing of teams in their leagues. Pet. 56a, 79a–80a.

American soccer fans have welcomed these matches. A 2014 friendly that Relevent hosted in Ann Arbor, Michigan—between Real Madrid (Spain) and Manchester United (England)—was the most highly attended soccer game in U.S. history, drawing more than 109,000 fans. Pet. 56a. Indeed, friendlies between foreign teams account for three of the five highest-attended professional soccer games ever played in the United States. *Ibid.*

Recognizing the enthusiasm of American fans for foreign soccer teams, Relevent decided to promote official-season games in the United States as well. *Ibid.* Unlike low-stakes "friendlies"—exhibition games that

do not affect teams' standing in their leagues and offer little incentive to field the best players—official-season games have much greater stakes and offer a higher level of play. Pet. 80a.

To launch this effort, Relevent entered into a joint venture with La Liga, Spain's top-tier men's professional soccer league. Pet. 56a. Under this agreement, Relevent sought to host an official-season game in Miami in 2018 between two La Liga teams: Barcelona and Girona. Pet. 85a.

To proceed with this game, Relevent had to ask U.S. Soccer to "sanction" (or permit) the event, as U.S. Soccer acts on behalf of FIFA to authorize professional soccer games in the United States involving FIFA-affiliated leagues and teams. Pet. 70a–71a. But there was a problem: U.S. Soccer's member Major League Soccer ("MLS") had a monopoly on regular-season games in this country. Pet. 77a. From U.S. Soccer's perspective, an official-season game between teams from another league, like the Barcelona–Girona game, would threaten MLS's monopoly over U.S. fans and sponsors. Pet. 86a. This could also have adverse economic consequences for U.S. Soccer itself. For example, U.S. Soccer and MLS jointly marketed their broadcast and sponsorship rights through a shared marketing partner, Soccer United Marketing, which represented U.S. Soccer's largest source of revenue. Pet. 83a–85a.

When Relevent informed U.S. Soccer that it wanted permission to promote a foreign regular-season game in the United States, it was met with resistance. U.S. Soccer's then-President, Carlos Cordeiro, instructed Relevent to first seek approval from Spain's national association and the FIFA confederation for Europe. Pet. 85a. Shortly after this meeting, FIFA President Gianni Infantino announced that he "would prefer to

see a great MLS game in the U.S. rather than La Liga being in the U.S." Pet. 86a.

U.S. Soccer then proceeded to solicit the adoption of an explicit FIFA geographic market division policy that would prevent the type of foreign official-season game that Relevent sought to promote. Along with two of the confederations, U.S. Soccer presented the matter to the FIFA Council and the Football Stakeholders Committee. *Ibid.* That committee advises the FIFA Council and is made up of representatives of several national associations and leagues (including Cordeiro and MLS Commissioner Don Garber, who was also a U.S. Soccer board member). Pet. 64a. Acceding to the request from U.S. Soccer, the Football Stakeholders Committee recommended that the FIFA Council prohibit official-season games outside a league's home territory. Pet. 63a–66a.

As the committee's urging (*ibid.*), the FIFA Council then adopted a written geographic market division policy prohibiting FIFA-affiliated leagues from allowing or participating in any official-season games held outside the league's home territory ("2018 Policy"). Pet. 87a. "Consistent with the opinion expressed by the Football Stakeholders Committee," the policy stated that "the Council emphasised the sporting principle that official league matches must be played within the territory of the respective member association." *Ibid.*

After FIFA published the policy on its website, Barcelona withdrew from its commitment to play in the United States. While it "remain[ed] willing to play a La Liga match in Miami," it pointed to "a lack of consensus"—a reference to the 2018 Policy—for its change of plans. Pet. 89a.

Relevent then tried again, this time identifying two teams from Ecuador's top-tier professional soccer league, LigaPro Serie A, who wanted to play an official-season game in the United States. Pet. 90a. Relevent secured approval from LigaPro, Ecuador's national association, and the South American governing confederation. *Ibid.* The game was scheduled for May 2019 in Miami, and in early 2019, Relevent sought U.S. Soccer's permission for the event. *Ibid.* Again, U.S. Soccer denied the application, expressly invoking the 2018 Policy. Pet. 92a. U.S. Soccer also communicated with FIFA about the proposed event and had FIFA confirm that the game was prohibited by the 2018 Policy. *Ibid.* U.S. Soccer has also enforced the 2018 Policy against at least one other promoter that also sought to host an official-season game between two LigaPro Serie A clubs. Pet. 92a–93a.

In 2020, the Football Stakeholders Committee, of which Cordeiro and Garber were still members, recommended that the 2018 Policy be made part of the FIFA Statutes. Pet. 95a. Garber publicly acknowledged this effort, telling the media that "the [majority of the] respective leagues [including MLS] don't believe it's in their best interest" to compete for official games outside their home markets. Pet. 66a, 94a–95a. He acknowledged that "[t]here may be one or two" leagues that feel differently, but MLS was not among them. Pet. 66a.

In response to these comments, the Antitrust Division of the Department of Justice warned FIFA and U.S. Soccer of its "concern[] that FIFA could violate U.S. antitrust laws by restricting the territory in which teams can play league games." Pet. 95a.

C. The district court's dismissal

After its efforts to import official-season games were thwarted, Relevent sued U.S. Soccer in the Southern District of New York. Relevent later filed an amended complaint that added FIFA as a defendant. *See* Pet. 50a *et seq*. The amended complaint asserted a violation of Section 1 of the Sherman Act based on allegations that FIFA and U.S. Soccer, "in combination with numerous FIFA-affiliated men's top-tier professional soccer leagues and teams, * * * have entered into an agreement to divide geographic markets." Pet. 51a. Relevent alleged that as a result, "only MLS—the sole men's professional soccer league sanctioned by [U.S. Soccer] as top-tier (Division I)—and its teams are able to conduct official season games" in the United States. Pet. 53a. Because of this, "MLS faces *no* competition in the U.S. for men's top-tier official season professional soccer league games." *Ibid.* To establish the challenged agreement, Relevent alleged that the "anticompetitive market division agreement is directly evidenced in * * * the [2018] written market division policy adopted by the FIFA Council," coupled with "the admitted agreement of [U.S. Soccer] to adhere to the market division policy, [and] the FIFA rules which require the agreement of all the National Associations and their leagues and teams to adhere to all policies adopted by the FIFA Council." Pet. 109a.

FIFA and U.S. Soccer moved to dismiss, and the district court granted the motion. The district court rejected Relevent's argument that the 2018 Policy, coupled with the agreement by U.S. Soccer and other FIFA members to follow FIFA rules, sufficed as direct evidence of concerted action. Pet. 36a–41a. In the district court's view, Relevent also had to "plausibly allege an antecedent 'agreement [among horizontal competitors] to agree to vote a particular way to adopt such

a policy,'" and Relevent had not done so. Pet. 37a–44a (citation omitted).

D. The Second Circuit's decision

Relevent appealed, and the Second Circuit vacated the district court's decision, finding that Relevent had adequately alleged "concerted action" and remanding for further proceedings on the merits of Relevent's claim. Pet. 19a. The court appropriately treated the question of "concerted action" as separate from the question of whether the action was unlawful, and it "express[ed] no view on the latter question," which will be resolved as the case progresses. Pet. 9a n.5.

In finding concerted action, the court of appeals recognized that "how the plaintiff frames a challenge affects how [the court] analyze[s] the adequacy of its pleadings." Pet. 12a–13a. The court rightly understood that Relevent's claim challenged "the 2018 Policy directly." Pet. 13a. Under those circumstances—where the challenge relates to a written rule, rather than to a secret agreement to be proved by circumstantial evidence—this Court's precedent made clear that "the adoption of a binding association rule designed to prevent competition is *direct evidence* of concerted action. No further proof is necessary." Pet. 11a (emphasis in original) (collecting cases). "[T]he adoption of the policy, combined with the member leagues' prior agreement, by joining FIFA, to adhere to its policies, constitutes an agreement on the part of all—whether they voted in favor of the policy or not—to adhere to the announced restriction on competition." Pet. 12a. Nothing would be gained by requiring Relevent "to allege a prior 'agreement to agree' or conspiracy to adopt the policy," and the district court had erred in doing so. *Ibid.*

The Second Circuit's decision found support in an amicus brief filed by the Department of Justice. Pet. 15a (quoting Brief for the United States of America as Amicus Curiae in Support of Neither Party at 11–12 (2d Cir.)). Among other things, that brief confirmed that "a plaintiff challenging an association rule governing members' separate businesses need only identify the rule, because the rule itself is 'direct evidence' of agreement." Brief for United States of America as Amicus Curiae in Support of Neither Party at 15 (2d Cir.).

U.S. Soccer moved unsuccessfully for rehearing. It then moved to stay the mandate pending disposition of its petition for a writ of certiorari, arguing that the decision had deepened a circuit split as to whether mere membership in an association suffices to allege concerted action for purposes of a Section 1 claim. That request was also denied.

REASONS FOR DENYING THE PETITION

I. This case does not implicate a circuit split.

The petition here purports to assert the same circuit split "that this Court granted certiorari to resolve in *Osborn*." Pet. 12–19. But there was and is no such split. The cases supposedly implicated in the split came out differently because they were different in a dispositive way.

As the Second Circuit recognized, "how the plaintiff frames a challenge affects how [the court] analyze[s] the adequacy of its pleadings." Pet. 13a. Naturally, it is more difficult to establish through circumstantial that competitors conspired in secret than it is to plead direct evidence showing they did so in writing, out in the open. All the circuits properly appreciate this distinction, as does the Solicitor General. *See* Brief for

United States as Amicus Curiae Supporting Respondents at 11–18, *Osborn*, No. 15-961. For decades, in fact, this Court has treated written association rules restricting the competitive activities of members as concerted action subject to Section 1. There is no circuit split for this Court to resolve.

A. There is no conflict between the Second Circuit's decision and the decisions of the Third, Fourth, and Ninth Circuits.

1. The Second Circuit's decision does not conflict with any of the decisions the petition cites. The cases came out differently because they involve different types of conspiracy claims and evidence.

For pleading purposes, courts treat cases challenging a *secret, undisclosed agreement* differently from cases challenging an *explicit, written rule* adopted by competitors through their associations. In "secret agreement" cases, plaintiffs often must attempt to show concerted action through circumstantial evidence because direct evidence of the conspiracy is unavailable. But in "written rule" cases, the concerted action is already out in the open, so circumstantial evidence is unnecessary. Courts uniformly (and rightly) distinguish between these two types of cases in determining what a Section 1 plaintiff must do to plead the element of concerted action.

Ask a person on the street what an illegal conspiracy looks like, and they probably envision a smoky room where people conspire in secret. In such a case, direct evidence of the conspiracy will not likely be available—unless someone spills the beans—so the plaintiff has to rely on circumstantial evidence. This is not easy, as "the existence and substance" of an alleged secret agreement is often "speculative." *Robertson* v. *Sea Pines Real Est. Cos.*, 679 F.3d 278, 289 (4th

Cir. 2012) (Wilkinson, J.). It is not enough to allege that competitors acted in parallel—for example, by charging similar prices. By itself, parallel conduct does not show concerted action, because the competitors might have been making their parallel decisions independently. The "crucial question is whether the challenged anticompetitive conduct stem[s] from independent decision or from an agreement." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 553 (2007) (quotation omitted).

This was the issue in *Twombly*, where this Court clarified what is required of a plaintiff pleading an agreement through circumstantial evidence. *See id.* at 564. Because parallel conduct, "[w]ithout more, * * * does not suggest conspiracy," the plaintiff must allege facts "that raise[] a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action." *Id.* at 556–57.

But when the challenge is to a written association rule that explicitly restricts members' competitive behavior, the analysis is materially different. Such a written rule is *direct* evidence of concerted action. *See, e.g.*, *Associated Press* v. *United States*, 326 U.S. 1, 11 (1945) ("[T]he By-Laws in and of themselves were contracts in restraint of commerce."); *Nat'l Collegiate Athletic Ass'n* v. *Bd. of Regents of Univ. of Okla. ("NCAA")*, 468 U.S. 85, 99 (1984) ("[T]he policies of the NCAA with respect to television rights" are "a horizontal restraint—an agreement among competitors on the way in which they will compete with one another."); *Nat'l Soc'y of Pro. Eng'rs* v. *United States*, 435 U.S. 679, 683 (1978) ("Evidence of [the alleged unlawful] agreement is found" in the professional society's ethics code). Case after case treats association rules that restrict the members' competitive behavior "as concerted decisions by the members." Phillip Areeda & Herbert

Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶¶ 1475a, 1477 (4th ed. 2018).

In such cases, the written rule itself is direct evidence of the agreement, and "the concerted conduct is not a matter of inference or dispute." *Robertson*, 679 F.3d at 290. Because the policy is out in the open, no circumstantial evidence is needed to make its existence plausible. *See Llacua* v. *W. Range Ass'n*, 930 F.3d 1161, 1180 n.30 (10th Cir. 2019) (distinguishing cases based on circumstantial evidence from cases based on "an explicit agreement, typically set out in an association rule or otherwise enforced by the association"). When the agreement is explicit—set out in a written association rule—evidence of a preceding "agreement to agree" would be "superfluous." *Robertson*, 679 F.3d at 289; *see also* Brief for the United States of America as Amicus Curiae in Support of Neither Party at 14–15 (2d Cir.).

This Court has never limited "written rule" challenges to cases where every member was conscious of the specific rule when it joined the association. *Contra* Pet. 27–28. The rule represents concerted action because the association's members have "surrendered [their] freedom of action * * * and agreed to abide by the will of the association[]." *Anderson* v. *Shipowners' Ass'n of Pac. Coast*, 272 U.S. 359, 364–65 (1926); *accord Associated Press*, 326 U.S. at 19; *see also NCAA*, 468 U.S. at 99 ("By participating in an association which prevents member institutions from competing against each other * * * the NCAA member institutions have created a horizontal restraint."). Here, because FIFA members have "already agreed to abide by all association rules, there [is] no need for the member[s] to agree to any particular rule to be bound by it."

Brief for the United States as Amicus Curiae in Support of Neither Party at 11–12 (2d Cir.). Any other approach would enable competitors to restrain competition by hiding behind their association. *See, e.g.*, *Am. Needle, Inc.* v. *Nat'l Football League*, 560 U.S. 183, 202 (2010) ("[C]ompetitors 'cannot simply get around' antitrust liability by acting 'through a third-party intermediary or joint venture.'") (citation omitted).

2. The Second Circuit appreciated the distinction between direct evidence cases and circumstantial evidence cases and correctly put this case in the former category. *See* Pet. 10a (explaining that concerted action can be shown by "either 'direct evidence that the defendants entered into an agreement' or 'circumstantial facts supporting the *inference* that a conspiracy existed.'") (citation omitted) (emphasis added). Relevent challenges the 2018 Policy—a written rule that FIFA's members are bound to follow. Pet. 13a–14a. No further allegation of concerted action is required.

The court correctly recognized that "promulgation of the [2018 Policy], in conjunction with the members' 'surrender[] * * * to the control of the association,' sufficiently demonstrates concerted action." Pet. 15a (quoting *Associated Press*, 326 U.S. at 19). Relying on decades of this Court's precedent, the panel explained that "the adoption of a binding association rule designed to prevent competition is *direct evidence* of concerted action," and "[n]o further proof is necessary." Pet. 11a (collecting cases). If "the plaintiff adequately alleges that the policy or rule *is* the agreement itself"—as Relevent did—"then it need not allege any further agreement." Pet. 13a.

At the same time, the Second Circuit emphasized that not every association rule creates antitrust liability. *Ibid.* ("not every decision by an association violates federal antitrust laws," and "a trade association

is not by its nature a walking conspiracy") (quoting *N. Am. Soccer League, LLC* v. *United States Soccer Fed'n, Inc.*, 883 F.3d 32, 40 (2d Cir. 2018)). Indeed, many association policies do not implicate Section 1 "because they do not affect any aspect of the market activity of the members." Brief for the United States of America as Amicus Curiae in Support of Neither Party at 12 (2d Cir.). For example, policies that govern an association's "ordinary day-to-day decisions" or apply when it is "buying and selling in [its] own right" will not lead to antitrust liability. *See* Areeda & Hovenkamp, *supra*, ¶ 1477.

If all this were not clear enough, the Second Circuit also reiterated its long-standing approach to secret-agreement cases based on circumstantial evidence (Pet. 13a), reaffirming that in those cases, "[p]arallel action is not, by itself, sufficient to prove the existence of a conspiracy" (*United States* v. *Apple, Inc.*, 791 F.3d 290, 315 (2d Cir. 2015)). A plaintiff who hopes to plead a secret agreement from parallel conduct "must show the existence of additional circumstances, often referred to as 'plus' factors, which, when viewed in conjunction with the parallel acts, can serve to allow a fact-finder to infer a conspiracy." *Ibid.* (quoting *Apex Oil Co.* v. *DiMauro*, 822 F.2d 246, 253 (2d Cir. 1987)); *accord N. Am. Soccer League, LLC*, 883 F.3d at 39 ("[C]ourts often must evaluate circumstantial evidence of a conspiracy by weighing plus factors, which, when viewed in conjunction with the parallel acts, can serve to allow a fact-finder to infer a conspiracy.") (quotation omitted). In a direct-evidence case, though, plus factors are not required.

3. The decisions U.S. Soccer and its amici cite for the purported circuit split illustrate this critical distinction. *See* Pet. 13–19; Brief of the American Society of Association Executives as Amicus Curiae in Supp.

of Pet'r at 7–9. The courts in those cases demanded more under *Twombly* because the plaintiffs were attempting to use circumstantial evidence to plead an agreement reached in secret. None of those cases involved a challenge to a written association rule—that is, concerted action that could be established through direct evidence.

In *Kendall*, for example, the plaintiffs were merchants who alleged a conspiracy among their banks to set "merchant discount fees" that merchants had to pay on credit card transactions. 518 F.3d at 1048. But those fees were not dictated by any written association rule; they were set by the banks individually. *Id.* at 1045, 1049–50 (Visa and MasterCard consortiums "do not directly set the merchant discount fee; the acquiring bank sets that fee"). Although the consortiums did prescribe a *different* fee that the banks paid to one another—called an "interchange fee"—the merchants could not challenge that fee directly. *Id.* at 1049–50 (citing *Ill. Brick* v. *Illinois*, 431 U.S. 720, 736 (1977)).

The Ninth Circuit held that the plaintiffs had not done enough to plead a conspiracy among the banks to set the merchant discount fees. The complaint consisted only of conclusory statements, with no facts to make an inference of conspiracy plausible. *Id.* at 1048. The court observed that "merely charging, adopting or following" the inter-bank fee set by the consortium was not enough to plead a conspiracy to fix the merchant discount fees that each bank chose to charge. *Ibid.* For the latter, there was no written rule to serve as direct evidence of a conspiracy, and the plaintiffs had alleged no circumstantial evidence beyond parallel conduct.

Nor did the Third Circuit's decision in *Insurance Brokerage* involve a challenge to a written association rule. *See In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 349 (3d Cir. 2010). The plaintiffs there alleged a

global conspiracy in which brokers agreed among themselves not to disclose one another's commissions. *Id.* at 313. As evidence of this alleged conspiracy, the plaintiffs pointed to the brokers' parallel conduct in using similar confidentiality agreements. *Ibid.* They also alleged that membership in a trade association "afforded [the brokers] many opportunities to exchange information and allowed [them] to adopt collective policies towards nondisclosure." *Ibid.* But the plaintiffs did not identify any explicit policy that bound the association's members. *Id.* at 349 (noting that the association merely made "suggestions" that the individual brokers could decide whether to adopt). That meant that the plaintiffs had to rely on "circumstantial evidence" of an agreement (*id.* at 323–24)—and they did not have enough. The court openly acknowledged that the analysis would be different in a case (like this one) involving "direct evidence" of an agreement. *Id.* at 323–24 ("Allegations of direct evidence of an agreement, if sufficiently detailed," would be "adequate" by themselves.).

The Fourth Circuit's decision is even further afield. *See SD3, LLC* v. *Black & Decker (U.S.), Inc.*, 801 F.3d 412 (4th Cir. 2015), *cert. denied*, 579 U.S. 917 (2016). There, the plaintiff alleged that industry participants conspired to "use[] their influence" over the private standard-setting organization Underwriters Laboratories to promote safety standards that disadvantaged the plaintiff's technology. 801 F.3d at 435. But the plaintiff did not challenge the Underwriters Laboratories standards themselves. Instead, it asked the court "to *infer* malfeasance because some of the defendants' representative[s] served on the relevant standard-setting panel." *Id.* at 436 (emphasis added). The court rejected the claim, holding that the plaintiff "fail[ed] to

allege the 'more' necessary to raise an inference of agreement." *Id.* at 435.

In short, none of these cases involved the kind of challenge at issue here—a challenge to a written association rule that explicitly restrains competition. Had Relevent alleged that U.S. Soccer and its counterparts simply acted in parallel in refusing to allow official-season games outside a league's home territory, it might have been proper to require additional circumstantial evidence. Instead, Relevent alleged that U.S. Soccer and other FIFA members came together and adopted a written, binding market division policy. The 2018 Policy is direct evidence of concerted action. Nothing else was required.

B. Even the D.C. Circuit—the court Petitioner claims created the split—agrees that mere membership in an association is not enough to plead a conspiracy.

The analysis described above also applies to the very case U.S. Soccer says created the circuit split—the D.C. Circuit's decision in *Osborn*. As here, *Osborn* was a written-rule case, not a secret-agreement case for which circumstantial evidence would be required. It too came out differently than the Ninth Circuit's *Kendall* case because the cases were different in a dispositive way.

In *Osborn*, users and operators of independent ATMs mounted a challenge to "Access Fee Rules" promulgated by the Visa and MasterCard networks. 797 F.3d at 1061. They alleged that these written rules "illegally restrain[ed] the efficient pricing of ATM services." *Ibid.* The district court dismissed the complaint, holding (among other things) that the plaintiffs had not adequately alleged concerted action.

On appeal, the D.C. Circuit *agreed* with the Ninth Circuit that "[m]ere membership in associations is not enough to establish participation in a conspiracy with other members of those associations." *Id.* at 1067 (internal quotations omitted). Indeed, the court cited *Kendall* itself for this proposition. *Ibid.* But the court also explained that the plaintiffs had "done much more than allege 'mere membership.' They have alleged that the member banks used the bankcard associations to adopt and enforce a supracompetitive pricing regime for ATM access fees." *Ibid.* (citing complaint). By pointing to the written Access Fee Rules as the target of their challenge, the plaintiffs did more than enough to plead the element of concerted action. *Ibid.*

The defendants sought certiorari on the ground that the D.C. Circuit had found concerted action based solely on membership in an association and agreement to follow its rules. Petition for Writ of Certiorari at i, *Osborn*, No. 15-961. But as the Solicitor General later explained, this was not what happened. The plaintiffs had adequately pled concerted action because they "alleged the relevant agreements *directly*: They challenge[d] written rules adopted by Visa and MasterCard," to which "all member banks [were] required to adhere." Brief for United States as Amicus Curiae Supporting Respondents at 13, *Osborn*, No. 15-961 (emphasis in original). Because the plaintiffs "'d[id] not rest on evidence of parallel business conduct' but rather on allegations that association members 'conspired in the form of the association's rules,' circumstantial facts of the sort required in *Twombly* are 'superfluous.'" *Id.* at 13–14 (quoting *Robertson*, 679 F.3d at 289).

As discussed above, after the grant of certiorari, the *Osborn* petitioners apparently recognized this problem themselves, abandoned their claim of a circuit split,

and challenged the D.C. Circuit's judgment on different grounds. This led the Court to dismiss the writ. Here, too, no circuit split is implicated.

II. Even if there were a split, this case would be a poor vehicle for resolving it.

1. To the extent there is any disagreement among the circuits, this is not the right case to address it. The answer to the question presented in the petition will not affect the outcome of this case.

Again, the petition asks this Court to decide "[w]hether allegations that members of an association agreed to adhere to the association's rules, *without more*, are sufficient to plead the element of conspiracy." Pet. i (emphasis added). But Relevent has pled much "more" than mere membership in FIFA and a commitment to adhere to FIFA's rules. *See* Pet. 83a–97a, 104–105a (Am. Compl.).

Relevent alleged that U.S. Soccer directly solicited the promulgation of the 2018 Policy to protect its member MLS—with which it is intertwined—from competition in the United States. When Relevent asked U.S. Soccer to permit a Spanish La Liga official-season game in the United States, U.S. Soccer "referred the issue to the FIFA Council." Pet. 86a–87a. U.S. Soccer's then-President directly "participated in the FIFA Council's consideration and adoption of the geographic market division agreement in October 2018." Pet. 61a. Further, officials of U.S. Soccer and MLS served on the Football Stakeholders Committee, which took "a number of actions to support the adoption, implementation, enforcement—and, most recently, the strengthening"—of the 2018 Policy. Pet. 64a. This is much more than enough to plausibly allege U.S. Soccer's "assent[]" to the policy. Pet. 3.

Relevent also alleged that U.S. Soccer and other national associations, leagues, and teams have adhered to FIFA's 2018 Policy and that U.S. Soccer has specifically invoked the policy to prevent official-season games from being played in the United States. Pet. 60a, 105a–106a. U.S. Soccer invoked the 2018 Policy to stop Relevent from promoting a 2019 official-season match between two Ecuadorian teams and approached FIFA to confirm that the game was prohibited under the 2018 Policy. Pet. 90a–92a. Around the same time, U.S. Soccer enforced the 2018 Policy against at least one other U.S. promoter. Pet. 92a.

Accordingly, it is not as if a purportedly "innocent bystander"—like the national association of Montenegro (Pet. 25)—is facing liability here based on a policy it had no hand in making or enforcing. Here, the entity that solicited the policy, spearheaded it, and invoked it at Relevent's expense—U.S. Soccer—is the very party that faces liability, along with FIFA itself. The "risk of becoming a Sherman Act violator" (*id.* at 26) has fallen on the appropriate shoulders.

Further, Relevent also alleged what some courts call "plus factors." *See Gelboim* v. *Bank of Am. Corp.*, 823 F.3d 759, 781 (2d Cir. 2016), *cert denied*, 580 U.S. 1091 (2017). *First*, Relevent alleged "a common motive to conspire" (*ibid.*): each league and its national association has the incentive to protect itself from competition with other leagues for fans within its territory. Pet. 53a, 66a, 94a–95a, 104a–106a. U.S. Soccer Board Member and MLS Commissioner Don Garber publicly admitted this, stating that "the [majority of the] respective leagues"—including MLS—"don't believe it's in their best interest" to compete with one another for official games outside their home markets. Pet. 66a, 94a–95a. Indeed, this is the classic common economic motive for a market division agreement. *See, e.g.*,

United States v. *Sealy, Inc.*, 388 U.S. 350, 356 (1967) (geographic market division agreement "gave * * * each licensee an enclave * * * free from the danger of outside incursions").

Second, Relevent alleged facts "show[ing] that the parallel acts were against the apparent individual economic self-interest of the alleged conspirators." *Gelboim*, 823 F.3d at 781 (quotation omitted). It alleged that adherence to the 2018 Policy conflicted with the individual interests of the FIFA-affiliated leagues and teams that wanted to play games in the United States but had instead been forced to comply with the 2018 Policy. Pet. 57a, 85a, 88a–93a, 106a. Relevent provided two examples in which non-U.S. entities wished to have official-season games in the United States but were barred from doing so by the 2018 Policy: first, the cancelled La Liga game between Barcelona and Girona, and second, the frustrated effort by two Ecuadorian LigaPro teams to play an official game here in 2019 (with approval from their league, national association, and confederation). Pet. 89a–92a. Even MLS President Garber admitted that "[t]here might be one or two" leagues that felt it was in their best interests to hold games outside their home markets. *See* Pet. 66a.

Third, Relevent alleged "a high level of interfirm communications" (*Gelboim*, 823 F.3d at 781) (quotations omitted) between FIFA, U.S. Soccer, the confederations, the national associations, and the leagues to adopt, implement, and enforce the market division policy. *See, e.g.*, Pet. 86a (FIFA's announcement of 2018 Policy solicited by U.S. Soccer in response to Relevent's proposed La Liga game), 87a (October 26, 2018 Council meeting adopting 2018 Policy), 88a–89a (communications between Cordeiro and South American Confederation about 2018 Policy), 89a (communication from FC

Barcelona blaming withdrawal from Miami game on "lack of consensus" due to 2018 Policy), 91a (U.S. Soccer letter expressing intent to inform Ecuador's national association and confederation that Relevent's proposed official-season game violated 2018 Policy), 94a–95a (meetings and vote, including dates and attendees, to propose incorporating 2018 Policy into FIFA Statutes), 64a–66a (attendance by U.S. Soccer, MLS, and other national association and top-tier league representatives at meetings of Football Stakeholders Committee where action was taken to recommend that Council adopt (and later, elevate) 2018 Policy), 66a (Garber telling media that most top-tier professional leagues discussed and supported 2018 Policy).

Finally, the Department of Justice warned FIFA and U.S. Soccer that the 2018 Policy "could violate U.S. antitrust law by restricting the territory in which teams can play league games." Pet. 95a. This too is a "plus factor" that bolsters the plausibility of the conspiracy allegations. *See, e.g.*, *Hinds County* v. *Wachovia Bank N.A.*, 700 F. Supp. 2d 378, 396 (S.D.N.Y. 2010) (government actions "may be used to bolster the plausibility of § 1 claims" at the pleading stage) (collecting cases).

In short, even though Relevent was not *required* to supplement its direct evidence with circumstantial evidence, it has done so. It has alleged far "more" than just an abstract agreement by U.S. Soccer to adhere to FIFA rules. Its allegations are more than enough to raise a plausible inference of the "conscious commitment" that U.S. Soccer's amici say should be required. *See* Brief of Chamber of Commerce of the United States of America as Amicus Curiae in Supp. of Pet'r at 6; Brief of the American Society of Association Executives as Amicus Curiae in Supp. of Pet'r at 9. Thus,

even if there were a circuit split on the petition's question presented, resolving that question would not make a difference to the outcome here.

2. This case is also a poor vehicle because of a factual dispute U.S. Soccer has raised, notwithstanding Relevent's well-pled allegations. U.S. Soccer contends that FIFA's members—the national associations—do not compete with one another, so a rule adopted by FIFA cannot represent concerted action restricting horizontal competition. Pet. 28–29.

As the Second Circuit held, the operative complaint alleges otherwise, and those allegations must be taken as true at this stage. Pet. 17a. That court appropriately credited Relevent's allegations that FIFA Council decisions "bind the various national associations, which in turn bind their respective leagues and teams," and that "those leagues and teams would otherwise compete with each other for fans and sponsors but dodge competition because FIFA and the national associations enforce the 2018 Policy." *Ibid.* Further, Relevent alleged that "[e]ach FIFA National Association" is *itself* "a membership-based association," made up of teams and/or leagues in the association's territory. Pet. 59a (Am. Compl.). "Each National Association is authorized by its members, including professional leagues and teams, to act as its members' representative in FIFA decision-making," including "to elect or appoint members to FIFA decision-making bodies and committees in order to establish, agree to[,] and enforce FIFA's rules and policies." *Ibid.* With the active involvement of the Commissioner of MLS, U.S. Soccer used FIFA decision-making bodies and committees to adopt a written association rule that protects its member MLS from competition from leagues belonging to other national associations. Pet. 64a, 66a. These allegations are more than enough to show

concerted action restricting horizontal competition, and they must be accepted as true. Indeed, concerted action would exist even if the parties were not in a horizontal relationship. *See, e.g.*, *Monsanto Co.* v. *Spray-Rite Serv. Corp.*, 465 U.S. 752, 765–66 (1984) (finding sufficient evidence that Monsanto and distributors agreed "to maintain resale prices and terminate price cutters"); *United States* v. *Parke, Davis & Co.*, 362 U.S. 29, 45–47 (1960) ("In thus involving the wholesalers to stop the flow of [the drug manufacturer's] products to the retailers, thereby inducing retailers' adherence to its suggested retail prices, [the drug manufacturer] created a combination with the retailers and the wholesalers to maintain retail prices and violated the Sherman Act.").

More broadly, though, the factual dispute makes this case even less appropriate as a vehicle to resolve the question presented. If U.S. Soccer plans to challenge the facts alleged, then it must do so in the district court, not on certiorari. And the very existence of this factual dispute could impair the Court's ability to resolve the question presented in a meaningful way. For this reason too, the petition should be denied.

CONCLUSION

The Second Circuit's decision follows a long line of cases from this Court recognizing that written association rules restricting the competitive activities of members are subject to scrutiny under Section 1. A plaintiff need not plead the existence of such a rule through circumstantial evidence; the rule itself is direct evidence of concerted action. There is no circuit split on this issue, and even if there were, this case would be a poor vehicle in which to resolve it. This Court should deny the petition.

Respectfully submitted.

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