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

SUPPLEMENTAL BRIEF FOR PETITIONER

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INTRODUCTION

The government's focus on the merits is a clear signal that there is no real obstacle to certiorari. And while it is no surprise that the world's largest and most powerful antitrust plaintiff embraces the Second Circuit's decision after arguing for it as an amicus below, what *is* surprising is that the Solicitor General all but abandons the court's reasoning. Instead of defending the Second Circuit's extreme membership liability rule that a plaintiff need only allege the promulgation of a rule and a member's prior agreement to abide by associational rules—and nothing further, Pet. App. 2a, 11a-12a, the government now emphasizes petitioner's alleged adherence to the policy. In other words, the government acknowledges something more *is* needed. The government's retreat from the Second Circuit's extreme rule underscores that the decision below warrants review. And, in any event, as the District Court held, the government's alternative "enforcement" theory for pleading concerted action is equally meritless. *See id.* at 31a-34a.

The bigger problem is that the merits are usually reserved for plenary review. This Court has already granted certiorari on the question presented, and the government's efforts to avoid review here fall flat. On the split, the government abandons the written/unwritten rules theory it advanced below and in *Visa Inc. v. Osborn,* 580 U.S. 993 (2016). And the government's new theory that none of the rules at issue in the split was binding on members is also meritless. The split is real. As to importance, the government's brief confirms amici's fears. The government's main response is that association members can assert defenses *on the merits*. U.S. Br.

12, 21-22. But simply passing the pleading stage is the ballgame in most antitrust cases, given the crippling costs of discovery and threat of treble damages. As amici representing *thousands* of membership organizations have explained, the decision below thus presents an existential threat to membership organizations. The government's attempts to assure this Court otherwise ring hollow.

In short, the government's response only confirms that certiorari is warranted.

ARGUMENT

I. The Circuit Split Is Real

1. The inconvenient truth for the government is this Court previously granted certiorari on the question presented. Like respondent, the government tries (at 17) to explain away that grant by claiming that the Court dismissed the writ in *Visa Inc. v. Osborn* because it discovered there was "no circuit conflict." But this Court's DIG order refutes that theory. *See Osborn,* 580 U.S. at 993 (explaining that new counsel "'chose to rely on a different argument' in their merits briefing" (citation omitted)); Cert. Reply 4-5. Like respondent, the government claims (at 17) that, in *Osborn,* the petitioner and the government "agreed that no circuit conflict existed." But the cited briefs do not even mention the "circuit conflict," much less claim it does not exist. The government's argument, like respondent's, is entirely revisionist.

In any event, the government's claim (at 17) that no split existed in *Osborn* is premised on the notion that the D.C. Circuit's precedent was "consistent" with other circuits'—and that all the circuits *reject* a purely passive theory of membership liability. But that purely passive theory is precisely what the

Second Circuit adopted in the decision below. Pet. 10-11. Thus, regardless of whether the split existed when *Osborn* was granted, it certainly exists now, because the decision below cannot be squared with *Osborn*, let alone the other decisions. Pet. 12-19.

2. The government's latest attempt to paper over the circuit conflict is equally unpersuasive.

In its BIO (at 12-20), respondent argued that there was no conflict because the decision below and the D.C. Circuit addressed *written* rules, and the other courts addressed *unwritten* ones. Respondent lifted that distinction from the government's amicus brief in *Osborn*. *See* BIO 12-13; *Osborn* U.S. Br. I, 8-9, 11-17, Nos. 15-961 & -692 (U.S. Oct. 24, 2016). But the government abandons this written/unwritten distinction here—presumably because, as petitioner explained, the cases underlying the *Osborn* split *did* involve "written" or "open" agreements. Cert. Reply 2, 5-8. Now the government argues (at 14) that the conflicting decisions did not involve challenges to "binding rule[s]." This new argument fails too, which likely explains why it was not made earlier.

Kendall: According to the government, *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042 (9th Cir. 2008), held that banks did not engage in concerted action to set an "interchange fee" because that fee was set through "parallel conduct," not "a policy *requiring* member banks to charge [interchange] fees." U.S. Br. 14-15. That is incorrect. The record in *Kendall* establishes that the Visa Consortium's binding "rules[] includ[e] interchange." William Sheedy Decl. ¶ 5, *Kendall v. Visa U.S.A. Inc.*, No. 04-cv-4276 (N.D. Cal. June 3, 2005), Dkt. 81. The interchange fee has to be binding for Visa's system to work. *Id.* ¶¶ 10-12.

Yet, the Ninth Circuit held that plaintiffs failed to plead concerted action. *Kendall*, 518 F.3d at 1048. Under the Ninth Circuit's rule, "merely charging, adopting, or following the fees set by a Consortium is insufficient as a matter of law to constitute a violation of Section 1" by its members. *Id.* In other words, "membership in an association" does *not* make a member "automatically liable for [the association's] antitrust violations." *Id.* The Ninth Circuit's legal rule directly conflicts with the decision below, under which membership in an association *alone* establishes concerted action as to all of its members—and anyone else who agrees to follow the association's rules. Pet. App. 11a-12a. That conflict between the Nation's two largest antitrust forums itself warrants certiorari.

Insurance Brokerage: The government argues (at 16) that *In re Insurance Brokerage Antitrust Litigation*, 618 F.3d 300 (3d Cir. 2010), "did not involve a binding association rule." But the *Insurance Brokerage* plaintiffs alleged that a trade association "adopted collective policies" to "disguis[e] activity in which each [member] engaged," and that members adhered to those policies. 618 F.3d at 313, 349-50. The Third Circuit rejected this conspiracy claim even though members actually adhered to a policy because they had plausible independent reasons for doing so. *Id.* at 349-50. By contrast, the Second Circuit treats an association's adoption of a policy as concerted action by every member, even if they did not "vote[] in favor of" the policy. Pet. App. 12a. The Second and Third Circuits thus have irreconcilable approaches to evaluating a member's "conscious commitment to a common scheme designed to achieve an unlawful objective." *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984) (citation omitted).

SawStop: The government claims that *SD3, LLC v. Black & Decker (U.S.) Inc.* ("*SawStop*"), 801 F.3d 412 (4th Cir. 2015), *cert. denied*, 579 U.S. 917 (2016), is distinct because the *SawStop* plaintiff did not allege "that an association rule is *itself* anticompetitive" but instead complained that members "'vote[d] as a bloc' to 'thwart'" a proposed standard. U.S. Br. 15 (citation omitted). That is incorrect, too. The *SawStop* plaintiff alleged that the organization promulgated allegedly anticompetitive standards that would keep plaintiff's "technology off the market," "impose unnecessary costs," and "foreclose [the technology's] wide adoption." 801 F.3d at 418, 420-21. Respondent presents the exact same kind of claim here, asserting that FIFA members "adopted" a policy to "thwart" respondent's promotional efforts. Pet. App. 105a. *SawStop* held that the complaint failed to allege concerted action among members, 801 F.3d at 436-38, whereas the decision below deemed the mere allegation that FIFA adopted the policy at issue an "agreement on the part of all," Pet. App. 12a. The Second Circuit and the Fourth Circuit thus directly conflict.[1]

In short, the circuit conflict is (still) real, and the decision below only deepened it.

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[1] The government points (at 8, 15-16) to *Robertson v. Sea Pines Real Estate Cos.*, 679 F.3d 278 (4th Cir. 2012). But in *Robertson*, the court did not rely simply on the fact that members had agreed to abide by an association's rules, but rather stressed defendants themselves were allegedly integral to the formulation and passage of the rule at issue. 679 F.3d at 283.

II. The Question Presented Is Exceptionally Important

The government's attempts (at 18-23) to deny the importance of this case also falter.

1. The government says (at 6, 20-21) there are "express limits" on the Second Circuit's holding. But the Second Circuit was emphatic that when a plaintiff challenges an association rule, that rule itself is direct evidence of a conspiracy among all of an organization's members—and "[n]o further allegation of an agreement is necessary." Pet. App. 2a, 11a. This is true "whether [members] voted in favor of the policy or not." *Id.* at 12a. All that is required for an individual member to be liable is a "prior agreement" to abide by association rules generally (something typically inherent in joining an association). *Id.* at 12a, 15a. That is true even if the defendant joined *decades* before the challenged rule. Pet. 25. The Second Circuit's rule thus "punishes membership in" associations "alone." American Society of Association Executives *Amicus* Br. ("ASAE") Br. 7-9. And here, that rule produced a truly stunning result: the court held that respondent adequately pleaded an antitrust conspiracy among *hundreds* of national associations and *thousands* of leagues and teams *around the world*, just because they agreed at some point to follow FIFA's rules—before promulgation of the policy at issue. Pet. App. 17a-18a; *id.* at 85a (headings).

The government characterizes the Second Circuit's repeated statements emphasizing the scope of its extreme membership liability rule as mere "statements in opinions" in an effort to distance them from a "judgment[]" warranting review. U.S. Br. 23 (citation omitted). When a petition merely seeks "to

correct errors in dicta," that argument might have force. *Bunting v. Mellen*, 541 U.S. 1019, 1023 (2004) (Scalia, J., dissenting). But these statements are central to the *legal rule* that the court adopted. That rule will bind district courts in one of the Nation's largest antitrust forums—in direct conflict with the rule in other circuits. As amici underscore, that expansive membership liability rule is enormously threatening to "associations of all kinds." ASAE Br. 13; Chamber of Commerce *Amicus* Br. 2-3, 5.

The government claims (at 21) the decision below only applies to *binding* rules. But when it advanced the position that the Second Circuit adopted as an amicus below, Pet. App. 15a, the government argued that "[c]oncerted action is not limited to an association's formal, binding rules" and can include "[a]n advisory rule." U.S. CA2 Br. 13 n.8, ECF 44. In any event, although the government cites all of *one* organization with "voluntary" rules, U.S. Br. 21, amici representing *thousands* of organizations have explained that binding rules governing member conduct are "ubiquit[ous]," ASAE Br. 9; *id.* at 6-7, 13.

2. The government also states (at 19) that "the mere fact that an agreement is *subject to* Section 1 scrutiny does not mean that it *violates* Section 1." But the pleading threshold is typically the main event in antitrust cases. As *Bell Atlantic Corp. v. Twombly* stressed, antitrust discovery is enormously expensive, and the concerted-action requirement plays a critical role in weeding out meritless claims at the pleading stage. 550 U.S. 544, 558-59 (2007). The decision below eviscerates that check for suits against association members. Pet. 21-22. In the Second Circuit, simply belonging to a "trade guild" thus all but guarantees that one will need "to hire lawyers,

prepare for depositions, and otherwise fend off allegations of conspiracy" whenever a rule is challenged. *Twombly,* 550 U.S. at 567 n.12.

This threat will chill association membership—sending current members to the exits and scaring away potential new members. ASAE Br. 3, 14-16. Indeed, the government itself advises (at 12, 21-22) that members seeking to "limit [their] liability" should immediately "withdraw[] from the association." No wonder amici see the decision below as a death knell for institutions that have long played a beneficial role in the Nation's economy. Pet. 19-20.

3. Finally, while the government seeks to downplay the decision below to avoid review here, before other courts it—along with private plaintiffs—is already brandishing the Second Circuit's decision.[2] The antitrust defense bar is closely watching this case.[3] And amici, who are in the best position to gauge the threat, are waving a red flag. This Court's intervention is plainly needed.

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[2] *See, e.g.*, U.S. Statement of Interest at 5-6, 12, 14, *In re: Realpage, Rental Software Antitrust Litig.*, No. 23-md-3071 (M.D. Tenn. Nov. 15, 2023), Dkt. 628; *Alvarado v. Western Range Ass'n*, No. 22-cv-249, 2024 WL 915659, at *8 (D. Nev. Mar. 4, 2024); Mem. in Opp. Summ. J. 14 & n.13, *In re: NFL "Sunday Ticket" Antitrust Litig.*, No. 15-ml-2668 (C.D. Cal. Aug. 28, 2023), Dkt. 964.

[3] Mike Keeley, *Soccer Antitrust Case Looking Like a Vehicle for Supreme Court to Prune Section 1 Antitrust Cases*, Axinn (Nov. 15, 2023), https://viewpoints.axinn.com/post/102iskr/soccer-antitrust-case-looking-like-a-vehicle-for-supreme-court-to-prune-section-1; Jim Morsch & Jason McElroy, *FIFA Case Would Shift Trade Group Members' Liability if Affirmed*, Bloomberg Law (Jan. 30, 2024), https://news.bloomberglaw.com/us-law-week/fifa-case-would-shift-trade-group-members-liability-if-affirmed.

III. The Second Circuit's Decision Is Wrong

The government's merits arguments are for plenary review, but most telling here is the Solicitor General's failure to defend the Second Circuit's rule.

1. The government leans heavily on the assertion that this is "a suit brought against an association member that enforced the rule against the plaintiff." U.S. Br. I; *id.* at 6-7, 8, 18, 22. Yet, the Second Circuit emphatically held the *promulgation* of a rule is "direct evidence" of concerted action as to *anyone* who previously agreed to abide by the association's rules—and "[n]o further allegation . . . is necessary." Pet. App. 2a; *see id.* at 11a ("No further proof is necessary."). And the government as amicus and respondent argued for that very rule below. *See* U.S. CA2 Br. 5 (association "rule" "is direct evidence of concerted action"); Relevent CA2 Br. 5, ECF 39 ("*The policy itself* is the agreement."); Pet. App. 15a (citing government's amicus brief). The Solicitor General's pivot is a tacit admission that something "further" *is* needed beyond an association rule to establish concerted action by an individual member.

2. This Court's precedents have long required that. As petitioner has explained, a plaintiff seeking to plead that a defendant engaged in concerted action must show that the defendant "had a conscious commitment to a common scheme designed to achieve an unlawful objective." *Monsanto Co.*, 465 U.S. at 764 (citation omitted); *see American Tobacco Co. v. United States*, 328 U.S. 781, 809-10 (1946); Pet. 23-24. *Monsanto* and similar cases thus contemplate a commitment *to* the unlawful act—not a commitment to a lawful association that *later* promulgates an allegedly anticompetitive rule. And this precedent

requires not just an alleged agreement, but plausible allegations that show that *the particular defendant* was committed to the unlawful scheme.

The decision below converts a series of concededly *lawful* actions by a member (*e.g.*, joining an association or agreeing to abide by its rules) into an unlawful conspiracy based on the actions of third parties that the member cannot control. That rule revives a theory of "walking conspiracy" liability that courts have long rejected. *Consolidated Metal Prods., Inc. v. American Petroleum Inst.*, 846 F.2d 284, 293-94 (5th Cir. 1988); Pet. 26. None of this Court's cases permits this radical result. Indeed, many of the cases the government cites address claims against *associations,* not individual members. *See, e.g.*, *Silver v. New York Stock Exch.*, 373 U.S. 341, 345 (1963).[4]

The government's argument (at 10) that petitioner "would not prevail" under existing precedent is incorrect. Applying *Monsanto*, the District Court held respondent failed to state a claim. Pet. App. 30a-47a. Equally baseless is the government's suggestion (at 23) that petitioner is "no longer defend[ing]" that decision. *See* U.S. Br. 9. The District Court used the

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[4] The government argues (at 12) that in *Associated Press v. United States*, 326 U.S. 1 (1945), members did not assent to bylaws "as a condition of membership" because the bylaws were amended over time. But the AP's bylaws had restricted the admission of members' competitors s*ince its inception*. *Id*. at 10. Moreover, like *Associated Press,* most of the government's cases (at 9 n.3) predate *Monsanto* and *Twombly*. *See* ASAE Br. 9 n.6. And, in the post-*Monsanto* cases, concerted action was "uncontested." *NCAA v. Alston*, 594 U.S. 69, 86 (2021); *California Dental Ass'n v. FTC*, 526 U.S. 756, 764-65 (1999); *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 455-56 (1986); *NCAA v. Board of Regents of the Univ. of Okla.*, 468 U.S. 85, 99 (1984).

phrase "agreement to agree" interchangeably with a "unity of purpose," "meeting of the minds," and "conscious[] commit[ment]" to an unlawful objective. Pet. App. 27a, 33a, 38a-39a, 41a, 43a (citations omitted). This standard—*from this Court's cases*—requires an individualized showing as to defendant members that the District Court correctly found lacking here. Pet. App. 30a-45a; Pet. 9-10, 24.

3. Finally, the government's new argument (at 18) based on allegations that petitioner "invoked" the policy cannot salvage the decision below. Most fundamentally, those allegations are irrelevant under the rule that respondent and the government themselves urged the Second Circuit to adopt—that the promulgation of the challenged rule *alone* establishes concerted action among all of an association's members. Pet. App. 2a, 11a.

In any event, as the District Court held, respondent's "enforcement" allegations do not plausibly suggest a conscious commitment on petitioner's part to an unlawful scheme. Pet. App. 31a-34a.[5] For example, petitioner had "obvious[ly] rational reasons" to remain a member in good standing of FIFA. *Id.* at 33a. Indeed, under the Ted Stevens Act, petitioner is required to follow FIFA's rules. Pet. 7 n.1. It is therefore (at least) equally plausible that petitioner complied with the policy for a *lawful* reason. *See Twombly,* 550 U.S. at 556-57. Such independent reasons matter in other circuits' concerted-action inquiries in cases against association members, *supra* at 4-5, but the Second Circuit's rule deems them irrelevant.

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[5] *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948) is not to the contrary. *See* Pet'r CA2 Br. 47 n.10, ECF 70.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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