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

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

Page

INTRODUCTION 1

ARGUMENT 3

I. Respondent's Attempt To Assume Away The *Osborn* Split Fails..3

II. The Question Presented Is More Important Than Ever..9

III. The Second Circuit's Decision Is Patently Wrong 11

CONCLUSION...12

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TABLE OF AUTHORITIES

Page(s)

CASES

Illinois Brick Co. v. Illinois,
431 U.S. 720 (1977)..7

In re Insurance Brokerage Antitrust Litigation,
618 F.3d 300 (3d Cir. 2010) 6, 8

Kendall v. Visa U.S.A., Inc.,
518 F.3d 1042 (9th Cir. 2008)............................6, 7

Monsanto Co. v. Spray-Rite Service Corp.,
465 U.S. 752 (1984)...11

SD3, LLC v. Black & Decker (U.S.), Inc.,
801 F.3d 412 (4th Cir. 2015), *cert. denied*, 579 U.S. 917 (2016)...........................6, 7, 8

Visa Inc. v. Osborn,
580 U.S. 993 (2016).......................................1, 2, 4

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INTRODUCTION

Respondent does not deny that the Second Circuit decision is as extreme as explained in the petition. Indeed, it acknowledges that, under the Second Circuit decision, a plaintiff satisfies the concerted-action requirement in any challenge to an association rule merely by alleging that members agreed in advance to abide by an association's rules—"[n]o further proof is necessary." BIO 16 (quoting Pet. App. 11a). And respondent admits that the decision even sweeps in non-members that are multiple steps removed from the rule's adoption as long as a plaintiff alleges that they, too, agreed to abide by the association's rules. *Id.* at 26. While respondent says it "is not seeking treble damages from entities that merely agreed to follow FIFA rules, like 'the English Premier League or FC Tokyo,'" it does not dispute that it *could* do so on exactly the same basis as it does for U.S. Soccer. *Id.* at 4 (citation omitted). The decision below eliminates the concerted-action element of pleading an antitrust claim against association members, "creat[ing] intolerable risks for associations and their members." American Society of Association Executives Amicus Br. ("ASAE Br.") 11.

As amici representing businesses and associations from across the spectrum confirm, that decision necessitates this Court's review. Indeed, respondent does not dispute that this case squarely presents the same question this Court *already* deemed cert-worthy in *Visa Inc. v. Osborn*, 580 U.S. 993, 993 (2016). BIO 2. Respondent concocts a revisionist narrative that this Court dismissed the *Osborn* writ of certiorari because the petitioners there "recognized that . . . a conflict did not exist." *Id.* But that is false. After obtaining new counsel at the merits stage, petitioners

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in *Osborn* abandoned their cert-stage position and pressed a "different" legal theory. *Osborn*, 580 U.S. at 993 (citation omitted). As the Court's order dismissing certiorari explains, it was that *change in position* that prompted the DIG, *id.*—not any change in the circuit conflict precipitating certiorari.

Respondent also tries to paper over the conflict with a distinction between "written association rules" and other forms of agreement. BIO 1. But that too is a red herring. Though respondent insists that alleging individual assent is only necessary when a plaintiff "plead[s] an agreement reached in secret," BIO 18, the Ninth, Fourth, and Third Circuit decisions that demanded such allegations all involved *open* agreements. And those alleged agreements were written too. Respondent's written/nonwritten distinction is thus illusory. The central question is whether, to establish concerted action, a plaintiff must plausibly plead that an association member actually assented, in their individual capacity, to the challenged rule—whether that rule is written or not. The Ninth, Fourth, and Third Circuits all say no, but the Second Circuit and D.C. Circuit say yes. That conflict was real when this Court granted certiorari in *Osborn*, and it is even more pronounced now.

Finally, the question presented is as important as ever. As amici attest, because "antitrust plaintiffs w[ill] surely have no trouble" finding associations that require members to abide by rules that can be painted as anticompetitive, the decision below is "breathtaking in its scope," inviting Section 1 claims against untold numbers of association members and their constituents. ASAE Br. 6-7, 13. It will "dissuade[] businesses from joining any association and expose[] any number of lawful collaborators

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across industries to crippling litigation risk, including the risk and overwhelming burden of antitrust discovery." Chamber of Commerce Amicus Br. ("Chamber Br.") 3. And because countless associations operate nationwide—with at least one member in the Nation's financial center—this rule is particularly susceptible to forum-shopping.

The Court should grant certiorari and finally resolve the question left open by *Osborn*.

ARGUMENT

I. Respondent's Attempt To Assume Away The *Osborn* Split Fails

Respondent's opposition hinges on the proposition that the circuit split precipitating certiorari in *Osborn* "never" existed. BIO 1-3, 12-22. That is false.

1. First, respondent claims that the DIG in *Osborn* proves "there is no circuit split here." *Id.* But that account is refuted by *Osborn*.

a. In seeking certiorari, the *Osborn* petitioners argued that the D.C. Circuit's decision split with the Ninth, Fourth, and Third Circuits by holding that a plaintiff could plead concerted action based on allegations "that banks participated in the governance of [an ATM] network and agreed to its rules." *Osborn* Pet. for Cert. ("*Osborn* Pet.") 3-4, 11, No. 15-961 (U.S. Jan. 27, 2016), 2016 WL 369962. Opposing certiorari, the *Osborn* respondents claimed there was no circuit split, because the other cases involved defendants who did not adopt open, written "rules and operating regulations," *Osborn* BIO 9-10, No. 15-961 (U.S. Mar. 30, 2016), 2016 WL 1254372, like respondent here. The Court, appropriately, was not swayed by this argument, and granted certiorari.

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b. At the merits stage, however, petitioners engaged new counsel, who then advanced a new argument: because the ATM network was a joint venture, its conduct "is concerted only where it flows from the members' 'pursuing separate economic interests' as 'separate economic actors.'" *Osborn* Pet'rs Br. ("*Osborn* Merits Br.") 22, No. 15-961 (U.S. Sept. 1, 2016), 2016 WL 4578848. Petitioners' merits argument no longer defended the petition's position that defendants did not "communicate[]" about or "agree[]" on the access fee rules. *Osborn* Pet. 19-20. Rather, petitioners apparently conceded that the "associations' Boards of Directors . . . established the anticompetitive access fee rules with the cooperation *and assent of the member banks*." *Osborn* Merits Br. 24 (emphasis added) (citation omitted). They then contended that *even if* they "exercised" governance rights to adopt the challenged rule, the complaint *still* should be dismissed based on their new theory that only actions advancing "'interests separate from'" the joint venture's collective interest qualify as concerted action. *Id.* at 29 (citation omitted).

Because the factual and legal predicates of that *new* argument were totally different than the ones pressed in the petition, the Court understandably dismissed the writ of certiorari. Respondent here claims that this DIG was the result of an epiphany that "there was never any conflict" on the question presented in the *Osborn* petition. BIO 2-3. But that is completely false. As the Court's own DIG order explained, the Court dismissed the writ because: "'[h]aving persuaded us to grant certiorari' on this issue, . . . petitioners 'chose to rely on a different argument' in their merits briefing." *Visa Inc. v. Osborn*, 580 U.S. 993, 993 (2016) (alteration in

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original) (citation omitted). The merits-stage flip flop in *Osborn* had no bearing on the underlying split.

Nor did the *Osborn* petitioners' merits brief "acknowledge[]" the absence of a circuit split, as respondent states. BIO 3. Petitioners acknowledged a circuit consensus that "'mere membership'" did "not suffice to plead a horizontal agreement." *Osborn* Merits Br. 23 & n.3. But they also explained that the D.C. Circuit accepted the sufficiency of other allegations that were "no more suggestive of concerted action than mere membership alone." *Id.* at 24-25. That put the D.C. Circuit at odds with the Ninth, Fourth, and Third Circuits—which hold that such allegations are insufficient to plead concerted action. Pet. 13-18. Here, the Second Circuit went even *further* than the D.C. Circuit's decision in *Osborn*—not only deepening but exacerbating the conflict in *Osborn*. *Id.* at 18-19; *see also* ASAE Br. 7.

2. When it comes to actually addressing the conflict, respondent puts all its eggs in one basket—the notion that cases on the other side of the split did not address "written association rules." BIO 3-4, 12-22. But that distinction is both inaccurate and irrelevant. The policies at issue in the Ninth, Fourth, and Third Circuits' cases were *at least* as "written" as the policy at issue here. Moreover, the reasoning in each of those decisions is irreconcilable with the decision below. None of those cases would come out the same way if they applied the Second Circuit's rule.

Respondent contends that the Ninth, Fourth, and Third Circuit cases involved "secret" agreements—and so required additional allegations beyond the rule itself. BIO 13. But the rules at issue in the Ninth, Fourth, and Third Circuits were not secret. In each case, the plaintiff alleged that an association had

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openly promulgated an allegedly anticompetitive rule, policy, or standard; and the question was whether the association's *members* should automatically be liable for that rule.[1] And, in each instance, the court of appeals said no, and that additional allegations of affirmative conduct in creating, or at least assenting, to the rule were required to establish concerted action on the part of the member. That is precisely the opposite of what the Second Circuit held in the decision below.

Kendall: Respondent claims *Kendall* involved an unwritten agreement among banks to charge "merchant discount fees." BIO 18 (citation omitted). But, in fact, the plaintiffs also alleged that the banks violated Section 1 by setting an "interchange fee." *Kendall*, 518 F.3d at 1046; *see* BIO 18 (recognizing that the "consortiums did prescribe" the interchange fee). And the record was clear that this fee was set openly through the consortiums' "by-laws and operating regulations." William Sheedy Decl. ¶¶ 5, 7, 12, *Kendall v. Visa U.S.A. Inc.*, No. 3:04-cv-4276 (N.D. Cal. June 3, 2005), Dkt. 81. The plaintiffs sought to hold the banks liable for the consortiums' interchange fee because the banks "manage[d]" the consortiums. *Kendall*, 518 F.3d at 1046, 1048. *Kendall*'s interchange-fee claim thus mirrors the theory here, namely, that the FIFA Council's adoption of the 2018

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[1] In all three cases, the plaintiffs also alleged that members had agreed to adhere to (or were following) the relevant rules. *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1048 (9th Cir. 2008); *SD3, LLC v. Black & Decker (U.S.), Inc.* ("*SawStop*"), 801 F.3d 412, 420-21 (4th Cir. 2015), *cert. denied*, 579 U.S. 917 (2016); *In re Insurance Brokerage Antitrust Litigation*, 618 F.3d 300, 348-49 (3d Cir. 2010).

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policy constitutes concerted action by every FIFA member. Pet. App. 12a, 60a-61a, 104a-05a, 109a.

But, unlike the Second Circuit, the Ninth Circuit held that "[r]egarding the allegation that the Banks conspired to fix the interchange fee, 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 of the Sherman Act." *Kendall*, 518 F.3d at 1048 (emphasis added).[2] That is because "membership in an association does not render an association's members automatically liable for antitrust violations committed by the association." *Id.* Nor does "participation on the association's board of directors." *Id.* In other words, even where there is a plausible allegation of anticompetitive conduct "by the association," there must be allegations of conscious commitment by the member to the unlawful scheme in order to state a claim against that member. Here, the Second Circuit held the exact opposite.

SawStop: There was also nothing "secret" or unwritten about the alleged standard-setting conspiracies in *SawStop*. Indeed, that case involved a challenge to the "adoption" of written and published "safety standards" for table saws issued by an industry organization. 801 F.3d at 420-21; *see also* First Am. Compl. ¶¶ 32, 35, 104, 113, 115, 125, *SD3, LLC v. Black & Decker (U.S.), Inc.*, No. 1:14-cv-191 (E.D. Va. Apr. 24, 2014), Dkt. 120 (challenging written amendments to "UL Safety Standard 987").

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[2] Respondent emphasizes *Kendall*'s rejection of an interchange-fee claim against the *consortiums* under *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). BIO 18. But that argument conflates claims against "two groups" of defendants. *See Kendall*, 518 F.3d at 1045, 1048-50.

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The Fourth Circuit held that the existence of these standards was *not* sufficient to establish concerted action by every member. 801 F.3d at 435-37. But the mere existence of these standards would establish concerted action on the part of all members under the Second Circuit's rule, under which the association's "adoption" of a policy and a defendant's membership alone establishes concerted action. Pet. App. 12a.

Insurance Brokerage: Respondent also cannot distinguish away *In re Insurance Brokerage Antitrust Litigation*. There, brokers drafted and followed their association's "position statement" instructing members to engage in allegedly anticompetitive conduct. 618 F.3d at 349; Second Consol. Am. Com. Class Action Compl. ¶¶ 444-58, *In re Ins. Brokerage Antitrust Litig.*, 2:04-cv-5184 (D.N.J. June 29, 2007), Dkt. 1240 (quoting written "position statement"). That rule is just as "written" as the 2018 "policy" here. *See* Pet. App. 5a; Second Circuit Appendix 598-601. Yet the Second and Third Circuits reached opposite pleading-stage outcomes based on their conflicting pleading standards for establishing concerted action.

The explanation for these conflicting results is not a distinction between written and unwritten rules, or secret and open agreements. It is the irreconcilable standards for pleading concerted action adopted by different circuits, with three circuits requiring allegations "that each defendant 'actively participated in an individual capacity in [a] scheme,'" ASAE Br. 8 & n.5 (alteration in original) (citation omitted); Pet. 12-19, and two finding such allegations unnecessary. Despite respondent's wishful thinking, this circuit conflict has not vanished since the Court granted certiorari in *Osborn*; it has *deepened*.

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II. The Question Presented Is More Important Than Ever

As the amicus briefs underscore, the question presented remains vitally important to countless businesses who belong to associations of all kinds and collaborate to provide procompetitive benefits. *See* Chamber Br. 2-7, 10-11; ASAE Br. 11-16. The extreme nature of the Second Circuit's decision only heightens the need for this Court's intervention.

Two radical consequences of the decision below—neither of which respondent denies—bear emphasis:

- *First*, under the Second Circuit's rule, an association's adoption of an allegedly anticompetitive policy turns every single association member into a Sherman Act co-conspirator—even if all the member did was join an association and agree to follow its rules *a century before* the challenged rule's promulgation. Pet. App. 12a. That decision eliminates the concerted-action requirement for members of associations, automatically subjects them to "burdensome discovery," and leaves the merits of the challenged rule as their only defense to "potentially ruinous liability"—simply for "agreeing to participate in an association." ASAE Br. 6, 9; *see* Pet. 26.
- *Second*, under the decision below, an alleged rule provides a basis for finding concerted action not just among association members but *non-members* as well. Pet. App. 17a. One association rule can thus serve as the linchpin for a conspiracy of thousands of diverse actors within and *beyond* the association. Here, the

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alleged conspiracy literally spans the globe, with *thousands* of discrete entities. Pet. 3-4.

Instead of defending the Second Circuit's extreme rule, respondent pivots and tries to defend the decision below on the alternative ground that respondent actually alleged *more*. BIO 4. For similar reasons, respondent claims this case is a poor vehicle. *Id.* at 22-26. This is another distraction. Petitioner challenges the *legal* pleading standard adopted by the Second Circuit, under which a plaintiff need only allege that a defendant joined an association and agreed to abide by its rules in order to establish concerted action in any challenge to any association rule. Pet. App. 11a-12a; Pet. 18-19. That legal argument does not depend in any way on any other allegations, because, as the Second Circuit made clear, it vacated the district court's dismissal of the amended complaint based *solely* on its extreme new pleading rule. Pet. App. 2a, 11a-12a.

In any event, this argument is wrong. The district court analyzed all the allegations on which respondent relies under the proper pleading standard and held that they were *insufficient* to state a claim. Pet. 9-10. That the district court and Second Circuit reached different results by applying the different pleading standards at issue to the same complaint makes this case an *ideal* candidate for review.[3]

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[3] Respondent also asserts that the petition raises a "factual dispute" about whether national associations compete horizontally. BIO 26-27. But there is no dispute. Respondent's own allegations only describe competition between leagues and teams—not national associations. Pet. App. 52a, 76a-77a, 106a; *see also id.* at 38a n.14, 17a. And, in any event, this "dispute" is irrelevant to the question presented—the Second Circuit's

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III. The Second Circuit's Decision Is Patently Wrong

To the extent it even attempts to defend the decision below, respondent just repeats the refrain that the Second Circuit's rule "follows a long line of cases from this Court." BIO 27; *id.* at 13, 15-16. But, as petitioner explained (and respondent ignores), those cases did not rest their holdings on "[n]o further allegation of an agreement" aside from association membership and a rule's promulgation. *See* Pet. App. 2a. They involved explicit assent or allegations that plausibly suggested individual, "conscious commitment" to the challenged rule. Pet. 27-30 (quoting *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984)). *None* of this Court's cases remotely embraces the radical result that any association member who previously "agreed to join the association" and follow its rules automatically engages in concerted action "as to any rule subsequently promulgated by the association." Pet. 29. Though an association rule can sometimes reflect concerted action, the Second Circuit went badly astray by holding that *any* rule is "enough" to plead concerted action by *any* member. Pet. App. 15a.

"Associations routinely develop codes of conduct and other business or professional conduct-regulating rules . . . ." ASAE Br. 13; *see also* Chamber Br. 5. Indeed, that is largely the point of an association. Under the Second Circuit's holding, every member of an association is a Section 1 target *whenever* the association promulgates a rule, policy, or standard—"merely because they join an association and agree to

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extreme rule is wrong, regardless of whether national associations compete with one another.

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be bound by the association's rules." ASAE Br. 2. Associations and their members understandably fear the "dire consequences" of that rule. *Id.* at 3, 9; *see* Chamber Br. 2. The amicus briefs filed in support of certiorari undercut respondent's self-serving assertion that this case is not worthy of the Court's time. Indeed, this Court previously recognized that the question presented warrants certiorari. The Second Circuit's extreme decision in this case only magnifies the need for this Court's review.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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