No. 23-120

# In the Supreme Court of the United States

UNITED STATES SOCCER FEDERATION, INC.,
PETITIONER

*v.*

RELEVENT SPORTS, LLC, ET AL.

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

**BRIEF FOR THE UNITED STATES AS AMICUS CURIAE**


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## QUESTION PRESENTED

Whether allegations that an association adopted a binding anticompetitive rule governing its members' separate businesses are sufficient to plead concerted action under Section 1 of the Sherman Act, 15 U.S.C. 1, in a suit brought against an association member that enforced the rule against the plaintiff.

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This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

## STATEMENT

1. a. The Fédération Internationale de Football Association (FIFA) is an international membership organization that governs soccer. Pet. App. 58a.[1] FIFA's voting members include more than 200 national associations, which FIFA authorizes to act on its behalf in their respective territories. *Ibid.* Each national association is itself a membership organization, consisting of (among others) soccer leagues and teams located in the

[1] Because this case arises from a motion to dismiss, the facts alleged in the complaint are taken as true.

association's territory. *Id.* at 59a. Each national association is also part of a regional confederation under the FIFA umbrella. *Id.* at 58a.

Acting through FIFA, the national associations adopt and enforce rules governing the conduct of soccer games and other matters. Pet. App. 58a. Many FIFA rules appear in the FIFA Statutes, which are enacted by the FIFA Congress. *Id.* at 60a. Each national association is entitled to vote in the FIFA Congress. *Id.* at 59a. Another body, the FIFA Council (Council), interprets the statutes and issues additional rules and policies. *Id.* at 60a. The regional confederations choose the Council's members from candidates nominated by the national associations. *Id.* at 60a-61a. A third body, the FIFA Football Stakeholders Committee (Committee), advises the Council. *Id.* at 63a.

The FIFA Statutes require member national associations "to comply fully with the Statutes, regulations, directives and decisions of FIFA bodies at any time," and "to cause their own members to comply with the Statutes, regulations, directives and decisions of FIFA bodies." FIFA Statutes Art. II.14.1(a) and (d) (June 2019 ed.)[2]; see *id.* Art. II.11.4(a) (requiring members to agree to comply with FIFA rules as a condition of membership).

b. As the FIFA national association for the United States, petitioner acts on FIFA's behalf in this country, including by authorizing soccer matches. Pet. App. 58a, 70a-71a. During the relevant period, petitioner had one representative on the Council and two representatives on the Committee. *Id.* at 71a-73a. Petitioner's bylaws

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[2] https://digitalhub.fifa.com/m/784c701b2b848d2b/original/ggyamhxxv8jrdfbekrrm-pdf.pdf. All citations to the FIFA Statutes are to the June 2019 version. See Pet. App. 58a n.3.

state that it is "obliged to respect the statutes, regulations, directives and decisions of FIFA," and "to ensure that these are likewise respected by [petitioner's] members." *Id.* at 60a n.12 (citation omitted).

Major League Soccer (MLS), the United States' top-tier men's professional soccer league, is one of petitioner's members. Pet. App. 53a, 70a. The two entities are financially intertwined: "[T]he single largest source of [petitioner's] annual revenues" is payments from MLS's marketing arm for promotional and marketing rights. *Id.* at 78a; see *id.* at 73a.

Respondent Relevent Sports, LLC (respondent), is a soccer promoter that competes with MLS to promote top-tier men's professional soccer games in the United States. Pet. App. 56a, 73a. Respondent has frequently hosted exhibition matches (which do not count towards teams' official season records) between foreign teams in the United States. *Id.* at 82a-83a; see *id.* at 79a. It seeks to promote official matches in the United States as well. *Id.* at 83a.

In mid-2018, respondent met with petitioner to propose hosting in the United States an official season game between two Spanish teams. Pet. App. 85a. In October 2018, after petitioner and others notified the Council about the match, the Council adopted a policy and issued an accompanying press release stating that, "[c]onsistent with the opinion expressed by the Football Stakeholders Committee, the [FIFA] Council emphasised the sporting principle that official league matches must be played within the territory of the respective member association." *Id.* at 87a (citation omitted; second set of brackets in original). One of the Spanish teams subsequently withdrew from the match. *Id.* at 89a.

In November 2018, respondent sought petitioner's permission to host in the United States an official season match between two Argentinian teams. Pet. App. 88a. Petitioner refused to discuss the match, and petitioner's president conveyed his opposition to South America's regional confederation. *Id.* at 88a-89a. The game did not take place because, as an official of that confederation explained, petitioner's president "did not want [it] to." *Id.* at 89a (citation omitted).

In 2019, respondent again sought petitioner's permission to host in the United States an official season match, this time between two Ecuadorian teams. Pet. App. 90a. Petitioner denied the application. *Id.* at 92a. "[I]n its denial letter to [respondent]," petitioner explained "that the game was prohibited by the market division policy, which [petitioner] had agreed to follow." *Ibid.* Separately, petitioner "explicitly identified its agreement to comply with the policy adopted by the FIFA Council as the reason why it would not sanction any official season soccer games that [respondent] sought to promote in the U.S." *Ibid.*

Petitioner also relied on the 2018 policy to prevent at least one other promoter from hosting in the United States an official season match between foreign teams. Pet. App. 92a-93a. In denying that application, petitioner expressed its "understanding that official league matches cannot be approved to be played outside of the home country." *Id.* at 93a.

2. Respondent brought suit against petitioner and FIFA under Section 1 of the Sherman Act, 15 U.S.C. 1 *et seq.*, which prohibits "[e]very contract, combination * * * , or conspiracy, in restraint of trade or commerce." 15 U.S.C. 1; see Pet. App. 25a, 104a-111a. Respondent alleged that the 2018 policy constituted "direct[]

evidence[]" of an "anticompetitive market division agreement" in violation of Section 1. Pet. App. 109a. Respondent alleged that the existence of this illicit combination was further evidenced by "the admission of [petitioner] that it denied a sanction to the official season games that [respondent] sought to promote because of [petitioner's] agreement to adhere to the FIFA market division policy." *Ibid.*

The district court dismissed respondent's Section 1 claim on the ground that respondent had failed to allege concerted action. Pet. App. 20a-47a. The court concluded that, "for an organizational decision or policy to constitute concerted action," a plaintiff "must plausibly allege an antecedent 'agreement among horizontal competitors to agree to vote a particular way' to adopt such a policy"—which respondent had failed to do. *Id.* at 37a (brackets and citation omitted); see *id.* at 41a.

3. The court of appeals vacated and remanded. Pet. App. 1a-19a.

The court of appeals explained that, when a plaintiff challenges "a binding association rule" governing "members' separate businesses," the rule itself "is *direct evidence* of concerted action." Pet. App. 11a, 15a. The court observed that "[t]he promulgation of the rule, in conjunction with the members' 'surrender[] . . . to the control of the association,' sufficiently demonstrates concerted action." *Id.* at 15a (quoting *Associated Press* v. *United States*, 326 U.S. 1, 19 (1945)). The court accordingly held that respondent was not required to "allege a prior 'agreement to agree' or conspiracy to adopt the policy." *Id.* at 12a.

The court of appeals made clear, however, that "not every decision by an association violates federal antitrust laws." Pet. App. 12a. The court "focus[ed] on those

improprieties reducing competition among the members," without casting doubt on decisions relating to the "day-to-day operations of the organization," such as "buying, selling, hiring, renting, or investing." *Ibid.* (citation omitted).

The court of appeals denied a petition for rehearing en banc without noted dissent. Pet. App. 48a-49a.

## DISCUSSION

To state a claim under Section 1 of the Sherman Act, a plaintiff must plausibly allege concerted action among independent economic actors. 15 U.S.C. 1. This Court has recognized for more than a century that, when a plaintiff directly challenges an association rule that its members have agreed to follow and that governs their separate businesses, Section 1's requirement of concerted action is satisfied. See, *e.g.*, *Associated Press* v. *United States*, 326 U.S. 1, 8 (1945).

The decision below correctly reaffirmed that understanding and does not warrant further review. Contrary to petitioner's contention, there is no circuit conflict on the question presented. This Court's dismissal of the writs of certiorari in *Visa Inc.* v. *Osborn*, 580 U.S. 993 (2016), as improvidently granted cautions *against*—not in favor of—again granting certiorari on the same question here. Petitioner also dramatically overstates the effect of the court of appeals' decision, ignoring the court's express limits on its holding. Properly understood, that decision leaves a wide berth for procompetitive conduct by membership associations and related ventures.

### A. The Decision Below Is Correct

Respondent adequately pleaded concerted action by challenging a FIFA policy that petitioner had agreed to

follow; that governs petitioner's separate business; and that petitioner itself has invoked as its stated rationale for refusing to allow official league matches between foreign teams to be played in the United States.

1. Section 1 prohibits every "contract, combination * * * , or conspiracy" that unreasonably restrains trade. 15 U.S.C. 1. "The question whether an arrangement is a contract, combination, or conspiracy"—that is, whether it constitutes concerted action—"is different from and antecedent to the question whether it unreasonably restrains trade." *American Needle, Inc.* v. *National Football League*, 560 U.S. 183, 186 (2010). The "key" to the concerted-action inquiry is whether the arrangement "joins together separate decisionmakers" and thus "'deprives the marketplace of independent centers of decisionmaking.'" *Id.* at 195 (citation omitted).

In many Section 1 cases, plaintiffs ask courts to infer the existence of an undisclosed agreement from the observed parallel behavior of two or more firms. A plaintiff might allege, for example, that gas stations on opposite corners of an intersection charge the same price or that competing firms refrain from selling in each other's territories. See, *e.g.*, *Bell Atlantic Corp.* v. *Twombly*, 550 U.S. 544, 550-551 (2007). The plaintiff might further allege that the most likely explanation for that behavior is an agreement between the competitors. In such cases, the "crucial question" is whether the competitors' parallel conduct "stem[s] from independent decision or from an agreement, tacit or express." *Id.* at 553 (citation omitted; brackets in original). "Without more," allegations of "parallel conduct do[ ] not suggest conspiracy," and therefore "must be placed in a context that raises a suggestion of a preceding agreement." *Id.* at 556-557.

*Twombly*'s pleading requirements would be implicated here if respondent had simply alleged that FIFA's member national associations had consistently refused to authorize teams to play official season games outside their home territories, and had argued that this observed conduct standing alone raised an inference of an undisclosed agreement among the national associations. But respondent does not rest on an inference from parallel conduct. Instead, respondent challenges an explicit policy adopted by FIFA, and its complaint includes a verbatim quotation of the FIFA press release that announced the policy. Pet. App. 87a. Respondent further alleges that petitioner, as a FIFA member, has agreed to comply with policies like this one. *Id.* at 60a; see Pet. 6-7 (conceding this point). Respondent alleges as well that petitioner has explicitly invoked the applicable FIFA policy in refusing to allow official league games between foreign teams to be played in the United States. Pet. App. 92a-93a, 109a.

When a Section 1 complaint rests not "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." *Robertson* v. *Sea Pines Real Estate Cos.*, 679 F.3d 278, 289 (4th Cir. 2012) (Wilkinson, J.). Like a contract, the rules themselves are "direct evidence" of the challenged agreement, and "the concerted conduct is not a matter of inference or dispute." *Id.* at 289-290. Thus, for over a century, this Court has treated association rules imposing "duties and restrictions in the conduct of [members'] separate businesses" as agreements subject to Section 1.

*Associated Press*, 326 U.S. at 8.[3] The court of appeals correctly held that the same treatment is appropriate here.

2. Petitioner rejects (Pet. 23-30) that unbroken line of authority. While it has apparently abandoned the agreement-to-agree requirement adopted by the district court, see Pet. App. 37a, petitioner nevertheless contends (Pet. 23-26) that something additional is required beyond the fact that the plaintiff is challenging a

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[3] See, *e.g.*, *NCAA* v. *Alston*, 594 U.S. 69, 77-79, 86 (2021) (NCAA rules restricting student-athlete compensation); *California Dental Ass'n* v. *FTC*, 526 U.S. 756, 759-760 (1999) (dental-association rule restricting members' advertising); *FTC* v. *Indiana Fed'n of Dentists*, 476 U.S. 447, 451 (1986) (dental-association rule forbidding members from submitting x-rays to insurers); *NCAA* v. *Board of Regents*, 468 U.S. 85, 99 (1984) (NCAA plan restricting members' licensing of television rights); *Arizona* v. *Maricopa Cnty. Med. Soc'y*, 457 U.S. 332, 357 (1982) (medical society's schedule of maximum prices); *National Soc'y of Prof'l Eng'rs* v. *United States*, 435 U.S. 679, 681 (1978) (engineering society's ethical canon barring competitive bidding); *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 781-783 (1975) (bar associations' fee schedules); *United States* v. *Topco Assocs., Inc.*, 405 U.S. 596, 602-603 (1972) (joint-venture bylaws setting members' exclusive territories); *United States* v. *Sealy, Inc.*, 388 U.S. 350, 352-354 (1967) (same); *Silver* v. *New York Stock Exch.*, 373 U.S. 341, 347-348 (1963) (exchange rules prohibiting wire connections with nonmembers); *United States* v. *National Ass'n of Real Estate Bds.*, 339 U.S. 485, 488 (1950) (real-estate board's code of ethics requiring adherence to rates); *Associated Press*, 326 U.S. at 4 (association bylaws prohibiting members from selling news to nonmembers); *Fashion Originators' Guild of Am., Inc.* v. *FTC*, 312 U.S. 457, 461-463 (1941) (guild rules prohibiting sales to certain retailers); *Sugar Inst., Inc.* v. *United States*, 297 U.S. 553, 579 (1936) (association's ethical rule governing price-setting); *FTC* v. *Pacific States Paper Trade Ass'n*, 273 U.S. 52, 58-59 (1927) (price lists set by associations of paper dealers); *Board of Trade* v. *United States*, 246 U.S. 231, 238 (1918) (commodities-exchange rule governing members' off-exchange transactions).

binding association rule that governs the defendant's separate business. Petitioner is mistaken.

At the outset, petitioner fails to specify exactly what additional showing it believes is required. Petitioner variously describes its preferred test as requiring that a defendant had a "conscious commitment" to the unlawful scheme, Pet. 23 (citation omitted); was an "architect[ ]" of or "participant[ ]" in the scheme, Pet. 24 (citation omitted); committed to the scheme "in an individual capacity," *ibid.* (citation and emphasis omitted); was connected to the scheme by the defendant's "own actions," *ibid.*; or had "knowing involvement" in the scheme, Pet. 25 (citation omitted).

Petitioner's litany of potential tests is puzzling, as petitioner would not prevail under any of them. Petitioner "explicitly identified its agreement to comply with the [2018 policy] as the reason why it would not sanction any official season soccer games that [respondent] sought to promote in the U.S." Pet. App. 92a. Petitioner also refused to sanction an official season game proposed by a different promoter based on petitioner's "agreement to follow the FIFA geographic market division policy." *Id.* at 93a. And at the time the 2018 policy was adopted, petitioner had one representative on the Council and two representatives on the Committee. *Id.* at 71a-73a. In short, petitioner indisputably contributed to the restraint by its "own actions." Pet. 24.

In any event, petitioner's proffered tests have no basis in this Court's precedents. Petitioner principally relies (Pet. 23) on *Monsanto Co.* v. *Spray-Rite Service Corp.*, 465 U.S. 752 (1984). There, in addressing allegations that a manufacturer and its distributors had conspired to terminate the plaintiff distributor, the Court held that the evidence must show "a conscious

commitment to a common scheme designed to achieve an unlawful objective." *Id.* at 768. Because the *Monsanto* plaintiff was not challenging an association rule, see *id.* at 765-766, the Court had no occasion to address the question presented here. But the Court observed that a "conscious commitment" could be shown by either "direct or circumstantial evidence." *Id.* at 768. When a defendant joins an association and agrees to follow its rules, that is direct evidence of a "conscious commitment" to those rules, *ibid.*—as the host of precedents discussed above confirm, see pp. 8-9 & n.3, *supra*.

Petitioner attempts to distinguish (Pet. 27) those precedents on the ground that the Court in each case undertook a "contextual inquiry" to determine whether the challenged rules represented concerted action. But this Court has long held that the members of an association engage in concerted action when, as here, they "surrender[ ] [their] freedom of action" in an aspect of their separate businesses and "agree[ ] to abide by the will of the association[ ]." *Anderson* v. *Shipowners Ass'n of the Pac. Coast*, 272 U.S. 359, 364-365 (1926); see, *e.g.*, *North Am. Soccer League, LLC* v. *United States Soccer Fed'n, Inc.*, 883 F.3d 32, 40 (2d Cir. 2018) (explaining that, when a plaintiff directly challenges "an association's express regulation of its members' market," the challenged association rules themselves are "§ 1 concerted action"). The Court has not demanded details about the manner in which such rules were adopted or which members supported them. To the contrary, an association member that agrees to conduct its business according to the association's rules engages in concerted action even if it *opposed* those rules, because "acquiescence in an illegal scheme is as much a violation of the Sherman Act as the creation and promotion of

one." *United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131, 161 (1948).

Petitioner's support for its proposed "contextual" approach is unconvincing. Petitioner argues that the association members in *Associated Press* agreed to the "challenged rule itself as a condition of joining the association," whereas the restraint here was adopted *after* petitioner joined FIFA. Pet. 27 (emphasis omitted). That is an inapt characterization of *Associated Press*. Although the Court noted that "all AP members had assented" to the challenged bylaws, *ibid.* (quoting *Associated Press*, 326 U.S. at 4), it did not suggest that they had done so as a condition of membership, see *Associated Press*, 326 U.S. at 10 (observing that the challenged rules were repeatedly amended in the leadup to litigation). And the Court has elsewhere made clear that "[a] blanket subscription to possible future restraints does not excuse the restraints when they occur." *Silver* v. *New York Stock Exch.*, 373 U.S. 341, 348 n.5 (1963) (citing *Associated Press*, *supra*); see *ibid.* ("The fact that the consensus underlying the collective action was arrived at when the members bound themselves to comply with Exchange directives upon being admitted to membership rather than when the specific issue of Silver's qualifications arose does not diminish the collective nature of the action."). A member that wishes to dissociate itself from an unlawful policy may limit its liability by withdrawing from the association. See pp. 21-22, *infra*. Otherwise, though, the timing of the restraint's adoption is irrelevant to the concerted-action inquiry.

Next, petitioner cites a case in which "the defendants colluded to subvert an association process to establish the anticompetitive policy." Pet. 28 (citing *Allied Tube*

*& Conduit Corp.* v. *Indian Head, Inc.*, 486 U.S. 492, 495-498 (1988)). But the plaintiff in that case challenged an agreement to manipulate association voting procedures, not an association rule itself. See *Allied Tube*, 486 U.S. at 496-497. An association rule serves as direct evidence of concerted action only when—as in this case—"the plaintiff adequately alleges that the policy or rule *is* the agreement." Pet. App. 13a.

Finally, petitioner suggests (Pet. 28) that an "infer[ence]" of concerted action is appropriate only "when association members horizontally compete."[4] Whatever the merits of that argument, the agreement in this case is not a matter of "inference." Whether conspirators stand in a vertical or horizontal relationship is clearly irrelevant when a plaintiff has adduced *direct* evidence of concerted action. Like horizontal agreements, vertical agreements are subject to Section 1. *E.g.*, *Ohio* v. *American Express Co.*, 585 U.S. 529, 541 (2018); *Leegin Creative Leather Prods., Inc.* v. *PSKS, Inc.*, 551 U.S. 877, 882 (2007). And when vertically and horizontally related entities collectively join a single conspiracy, those agreements are subject to Section 1 too. *E.g.*, *United States* v. *Masonite Corp.*, 316 U.S. 265, 267, 274-275 (1942); *United States* v. *General Motors Corp.*, 384 U.S. 127, 140 (1966).

**B. Further Review Is Not Warranted**

The question presented does not warrant further review. Contrary to petitioner's contentions, the decision

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[4] A horizontal agreement is "an agreement among" actual or potential "competitors on the way in which they will compete with one another." *Board of Regents*, 468 U.S. at 99. A vertical agreement is an "agreement between firms at different levels of distribution" on matters over which they do not compete. *Ohio* v. *American Express Co.*, 585 U.S. 529, 541 (2018) (citation omitted).

below neither conflicts with any decision of another circuit nor threatens harmful policy consequences.

1. a. Petitioner asserts that the decision below "deepens [an] acknowledged conflict" among the circuits on the question presented. Pet. 19; see Pet. 12-19. But petitioner recognizes that the D.C. Circuit has adopted an approach similar to the Second Circuit's in this case. See Pet. 17-18 (citing *Osborn* v. *Visa Inc.*, 797 F.3d 1057, 1060-1061 (D.C. Cir. 2015), cert. granted, 579 U.S. 940 (2016), cert. dismissed, 580 U.S. 993 (2016)). And the purportedly conflicting decisions that petitioner identifies are all distinguishable because none involved a direct challenge to a binding rule promulgated by an association to govern its members' conduct of their separate businesses.

Petitioner principally relies (Pet. 13-15) on the Ninth Circuit's decision in *Kendall* v. *Visa U.S.A., Inc.*, 518 F.3d 1042 (2008). In *Kendall*, merchants sued various banks as well as Visa and Mastercard, which were consortiums of banks, over fees charged when a consumer used a credit card. See *id.* at 1044-1045. The plaintiffs challenged two kinds of fees, the "merchant discount fee" and the "interchange fee." *Id.* at 1045-1046. The court held that the plaintiffs could not show concerted action as to the merchant discount fee, which was set by individual banks rather than by the consortiums. *Id.* at 1049. And it held that the plaintiffs could not challenge the interchange fee because they were not "charged [that] fee directly." *Ibid.* (applying *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977)).

Despite the latter holding, the *Kendall* court also concluded that the plaintiffs had not pled concerted action as to the interchange fee. It noted that "membership in an association does not render an association's

members automatically liable for antitrust violations committed by the association." *Kendall*, 518 F.3d at 1048. But that observation merely reflected the specific factual allegations in *Kendall*, which were that the banks had engaged in parallel conduct in "adopt[ing] the interchange fees set by the Consortiums"—not that the consortiums had adopted a policy *requiring* member banks to charge those fees. *Ibid.*; see *id.* at 1046; see also *Kline* v. *Coldwell, Banker & Co.*, 508 F.2d 226, 232 (9th Cir. 1974) (proof that an association "prepared a *suggested* commission schedule and distributed it to its members does not" alone establish concerted action) (emphasis added), cert. denied, 421 U.S. 963 (1975). Here, in contrast, it is undisputed that FIFA's members agreed to be bound by the 2018 policy. See, *e.g.*, Pet. App. 60a; pp. 2-3, 8, *supra*.

Petitioner next cites (Pet. 15-16) *SD3, LLC* v. *Black & Decker (U.S.) Inc.*, 801 F.3d 412 (4th Cir. 2015), cert. denied, 579 U.S. 917 (2016), which involved claims that defendants had conspired to prevent a standards-setting organization from adopting the plaintiff's safety technology and to prompt it to adopt alternative technology instead, *id.* at 420-421. But the plaintiff in that case claimed that the defendants had "'agreed to vote as a bloc' to 'thwart' the proposal," *id.* at 421 (citation omitted); the standards themselves were not "anticompetitive or exclusionary" because none of them "barred" the plaintiff's technology "from the market," *id.* at 438. Again, no such issues are presented here, where respondent alleges that an association rule is *itself* anticompetitive. Moreover, petitioner's interpretation of *SD3* is belied by another Fourth Circuit decision, *Robertson*, which held that "the very passage of" an association rule "establishes that the defendants convened

and came to an agreement," thus rendering "[c]ircumstantial evidence * * * superfluous." 679 F.3d at 289 (citation omitted).

Petitioner also invokes (Pet. 16-17) *In re Insurance Brokerage Antitrust Litigation*, 618 F.3d 300 (3d Cir. 2010), where the plaintiffs alleged a conspiracy to conceal from insurance consumers the contingent commission arrangements that brokers had entered with insurance companies. *Id.* at 313. As circumstantial support for their conspiracy claims, the plaintiffs alleged that the brokers were members of a trade association and had adopted policies at the association's "suggestion[]" to facilitate concealment of the commission arrangements. *Id.* at 349. While acknowledging that membership in the trade association had given the brokers "an opportunity to conspire," the court of appeals concluded that such membership did not "plausibly imply that each broker acted other than independently when it decided to incorporate the [association's] proposed approach" into its own disclosure policies. *Ibid.* Because the case did not involve a binding association rule, the court had no occasion to address the question presented here.

b. Contrary to petitioner's contention (Pet. 2, 11-12), this Court's grants of writs of certiorari in *Visa Inc.* v. *Osborn*, 579 U.S. 940 (2016), and *Visa Inc.* v. *Stoumbos*, 579 U.S. 940 (2016), provide no sound reason to grant review here.

The question presented in the *Visa* cases was "[w]hether 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 concerted action. 580 U.S. at 993 (citations omitted; brackets in original). To support

their claim of a circuit conflict, the *Visa* petitioners invoked the same cases—*Kendall*, *SD3*, and *In re Insurance Brokerage*—that petitioner relies on here. Pet. at 11-19, *Osborn*, *supra* (No. 15-961); Pet. at 5-6, *Stoumbos*, *supra* (No. 15-962).

"'[H]aving persuaded [the Court] to grant certiorari' on this issue, however," the *Visa* petitioners "'chose to rely on a different argument' in their merits briefing." 580 U.S. at 993 (citation omitted). They acknowledged that the D.C. Circuit in *Visa* had not held "that allegations of 'mere membership' in the networks could * * * suffice to plead a horizontal agreement," and they conceded that the D.C. Circuit's decision on that score was consistent with *Kendall*, *SD3*, and *In re Insurance Brokerage*. Pet. Br. at 23 & n.3, *Osborn*, *supra* (Nos. 15-961, 15-962) (citation omitted); see Consumer Resp. Br. at 21, *Osborn*, *supra* (Nos. 15-961, 15-962) (highlighting this concession as "[c]ontrary to [petitioners'] position at the certiorari stage"). The United States, participating as amicus curiae at the merits stage, agreed that no circuit conflict existed. Br. at 16 & n.4, *Osborn*, *supra* (Nos. 15-961, 15-962).

In light of the petitioners' changed position, the *Visa* Court dismissed the writs as improvidently granted. 580 U.S. at 993. Nothing has changed since that dismissal. There is still no circuit conflict on the question whether concerted action is present when a plaintiff directly challenges a binding association rule that governs members' separate businesses. And as the *Visa* petitioners apparently recognized when they pivoted to a different argument at the merits stage, this Court's precedent unambiguously answers that question in the affirmative.

2. Petitioner contends that the decision below seriously threatens membership associations, which "are integral to this Nation's economy." Pet. 19; see Pet. 19-23. Those concerns are misplaced.

a. Petitioner asserts (Pet. 23, 25) that the court of appeals' decision "vitiates" the "critical" "threshold limitation" that the concerted-action requirement imposes on antitrust suits. Congress in enacting Section 1 "treated concerted behavior more strictly than unilateral behavior." *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752, 768 (1984). "And because concerted action is discrete and distinct, a limit on such activity leaves untouched a vast amount of business conduct." *American Needle*, 560 U.S. at 190.

The court of appeals below respected that principle when it found that respondent had adequately pleaded concerted action by alleging that "FIFA and its member associations adopted an anticompetitive geographic market division." Pet. App. 18a. If petitioner had independently decided to deny approval for official league games played outside the participants' home territories, the critical element of concerted action would be absent. But petitioner did not act independently. Rather, it participated in a membership association that adopted a policy binding the association's members, and it invoked that policy as its stated rationale for denying approval of the proposed matches.

"'[C]oncerted activity'" like the conduct in this case "'inherently is fraught with anticompetitive risk' insofar as it 'deprives the marketplace of independent centers of decisionmaking that competition assumes and demands.'" *American Needle*, 560 U.S. at 190 (citation omitted). When an individual entity "has surrendered [its] freedom of action * * * and agreed to abide by the

will of [an] association[ ]" respecting the member's separate business, its conduct pursuant to that agreement presents precisely the anticompetitive risks that Congress intended Section 1 to address. *Anderson*, 272 U.S. at 364-365. While associations and joint ventures among actual or potential competitors "may well lead to efficiencies that benefit consumers," the "anticompetitive potential" of such arrangements is "sufficient to warrant scrutiny." *Copperweld*, 467 U.S. at 769.

Of course, the mere fact that an agreement is *subject to* Section 1 scrutiny does not mean that it *violates* Section 1. "The question whether an arrangement is a contract, combination, or conspiracy is different from and antecedent to the question whether it unreasonably restrains trade." *American Needle*, 560 U.S. at 186. Entities sued under Section 1 therefore can always "defen[d]" against antitrust claims by arguing that particular association policies, and particular actions taken pursuant to those policies, "do[ ] not violate the antitrust laws." Pet. 26.

In assessing lawfulness under the rule of reason, a court may properly consider the "procompetitive benefits" of particular joint action. Pet. 20. While "[t]he justification for cooperation is not relevant to whether that cooperation is concerted or independent," *American Needle*, 560 U.S. at 199, it bears directly on the substantive legality of a restraint under the rule of reason, which asks "whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition," *FTC* v. *Indiana Fed'n of Dentists*, 476 U.S. 447, 458 (1986) (citation omitted). "The fact that" FIFA's members "share an interest in making the entire [organization] successful," and "that they must

cooperate in the production and scheduling of games, provides a perfectly sensible justification for making a host of collective decisions." *American Needle*, 560 U.S. at 202. Nevertheless, "the conduct at issue in this case is still concerted activity under the Sherman Act that is subject to § 1 analysis." *Id.* at 202-203.

Beyond the doctrinal limits on Section 1 liability that apply in every case, Congress has enacted additional protections for certain forms of joint conduct. For example, it has codified the rule of reason for antitrust scrutiny of joint ventures and standards-development organizations that satisfy specified requirements. 15 U.S.C. 4302. In such cases, treble damages are unavailable and costs (including attorney's fees) may be awarded to prevailing defendants if certain criteria are met. 15 U.S.C. 4303(a), 4304. Measures like these demonstrate that Congress is already attuned to the special attributes of joint undertakings. Petitioner offers no basis for distorting bedrock antitrust doctrine in order to accord additional protections that Congress has declined to confer.

b. Petitioner exaggerates the practical significance of the decision below.

Petitioner describes (Pet. 22) the court of appeals' rule as allowing "plaintiffs [to] sail past the pleading stage simply by pointing to an association rule." But the court expressly limited its holding to (1) direct challenges to association rules that (2) govern members' "separate businesses." Pet. App. 11a, 13a (quoting *Associated Press*, 326 U.S. at 8). The court explained that, when "the plaintiff alleges that a policy or rule is in service of a plan to restrain competition," rather than alleging that the rule itself is the restraint, "then it must allege enough additional facts to show that agreement

to such a plan exists." *Id.* at 13a. And the court distinguished rules governing "the 'day-to-day operations of [an] organization' including 'buying, selling, hiring, renting, or investing.'" *Id.* at 12a (quoting *AD/SAT, a Div. of Skylight, Inc.* v. *Associated Press*, 181 F.3d 216, 234 (2d Cir. 1999) (per curiam)). Rules like that generally do not "deprive[ ] the marketplace of" any "independent centers of decisionmaking," *Copperweld*, 467 U.S. at 769, and thus do not qualify as direct evidence of concerted action.

In the same vein, the court of appeals' holding is limited to association policies that members have "agreed to follow"—*i.e.*, *binding* policies. Pet. App. 18a (citation omitted). Non-binding recommendations and standards would require a different analysis. See, *e.g.*, *In re Insurance Brokerage*, 618 F.3d at 349 (finding that "common adoption of [a] trade group's *suggestions*" did not "plausibly suggest conspiracy") (emphasis added); Pet. App. 18a (distinguishing "non-binding" policies). Petitioner and its amici focus on the importance of standards-setting organizations, see Pet. 20-21; Am. Soc'y of Ass'n Execs. Amicus Br. 11-13; Chamber of Commerce Amicus Br. 7-9, but many standards are voluntary and thus would not be covered by the decision below, see, *e.g.*, Inst. of Elec. & Elec. Eng'rs Standards Ass'n, *Antitrust and Competition Policy: What You Need to Know*, https://standards.ieee.org/wp-content/uploads/2022/02/antitrust.pdf (noting that "IEEE standards are voluntary," and that "[t]here should be no agreement to implement them or to adhere to them").

Even when an association adopts a binding rule that governs members' separate businesses, members may limit their liability by withdrawing from the association. Petitioner asserts (Pet. 21) without support that "the

Second Circuit's rule does not permit association members to opt out of an allegedly anticompetitive rule and limit their own exposure." But this Court has held that "[w]ithdrawal terminates [a conspirator's] liability for postwithdrawal acts of his co-conspirators." *Smith* v. *United States*, 568 U.S. 106, 111 (2013) (addressing criminal conspiracy); see *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 464 (1978) (discussing withdrawal in antitrust context).

Petitioner also argues that, under the court of appeals' decision, respondent could have sued any of the "210 other national associations that are members of FIFA today, including the national association for Montenegro" or other national associations that played no direct role in causing respondent's harm. Pet. 25; see *ibid.* (asserting that the decision below permits liability in the absence of "knowing involvement of each defendant") (citation omitted). But petitioner was not a randomly selected FIFA member, nor was it a passive or unknowing bystander to the adoption and enforcement of the 2018 policy. Rather, petitioner was the national association that disapproved specific official league matches that respondent wished to host; it was represented on the Council and the Committee when the 2018 policy was adopted; and it invoked the policy as its stated rationale for its disapproval decisions. See Pet. App. 71a-73a, 92a-93a, 109a.

The court of appeals therefore had no occasion to address the potential liability of remote or unknowing conspirators or the various defenses—such as Article III traceability, proximate cause, or personal jurisdiction—that they might raise. And petitioner's own knowledge and express invocation of the challenged FIFA rule in taking specific actions adverse to respondent's economic

interests would make this case an unsuitable vehicle for deciding how such defenses should be analyzed. Petitioner's concern appears to be that some of the court's articulations of the governing rule, read in isolation, might literally support liability for any of FIFA's member national associations. Pet. 25 (citing Pet. App. 2a, 15a, 18a-19a). For the most part, the court in the cited passages was explaining its rejection of the district court's agreement-to-agree requirement, see Pet. App. 2a, 15a—a theory that petitioner no longer defends. In any event, "[t]his Court 'reviews judgments, not statements in opinions,'" *California* v. *Rooney*, 483 U.S. 307, 311 (1987) (per curiam) (citation omitted), and the judgment below is clearly correct. Further review is not warranted.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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