

No. 08-661

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IN THE

*Supreme Court of the United States*

AMERICAN NEEDLE, INC.,  
*Petitioner,*

v.

NATIONAL FOOTBALL LEAGUE, ET AL.,  
*Respondents.*

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**On Writ of Certiorari to the United States  
Court of Appeals for the Seventh Circuit**

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**BRIEF OF MASTERCARD WORLDWIDE AND  
VISA INC. AS *AMICI CURIAE* IN SUPPORT OF  
RESPONDENTS**

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## INTEREST OF *AMICI CURIAE*

Critical elements of our modern financial system have been built through collaborations among formally separate entities—sometimes called “joint ventures.”<sup>1</sup> The predecessor entities of *Amici* MasterCard Worldwide (“MasterCard”) and Visa Inc. (“Visa”) each were developed decades ago when banks came together to create four-party payment card systems that have revolutionized the way the world exchanges and uses money. MasterCard shifted from the joint venture model to a publicly held corporation in 2006, and Visa did the same in 2008. But the joint venture model played an important role in enabling the development of the four-party networks, fueled *Amici*’s global expansion, and laid the groundwork for many of the network benefits that consumers enjoy today.

*Amici* file this brief respectfully to urge the Court to reject Petitioner’s extreme and formalistic rule, which would trigger application of Section 1 of the Sherman Act—and the heavy burdens that go with it—based on the mere fact that a joint venture is made up of formally separate entities. Instead, this Court should follow the path of its prior cases and provide a rule that balances the need for antitrust enforcement with the need to provide joint

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<sup>1</sup> Counsel of record for Petitioner and Respondents have filed blanket consents to the participation of *amici curiae* with the Court. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* made a monetary contribution to its preparation or submission.

ventures space to promote vigorous interbrand competition.

## INTRODUCTION

Petitioner asks this Court to hold that collaborations among formally separate entities are “walking conspiracies” whose *every action* is subject to litigation and liability under Section 1 of the Sherman Act, 15 U.S.C. § 1. But this rule would significantly burden procompetitive joint ventures, even when they do not implicate the competitive concerns underlying Section 1.

In *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), this Court recognized that “sprawling, costly, and hugely time consuming” Section 1 litigation is *itself* a threat to rational business conduct. *Id.* at 560 n.6. Thus, when designing pleading rules, *Twombly* balanced this reality with the need for antitrust enforcement. Yet here, Petitioner’s proposed solution—to throw all joint venture conduct into the morass of full-blown Section 1 litigation and “let discovery work it out”—does not even attempt to achieve the balance demanded by *Twombly*, and as a result poses a great risk to efficient joint venture conduct.

Worse, contrary to *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984), Petitioner’s rule hinges application of Section 1 on corporate *form* and thus refuses to ask whether the collaboration presents the danger Section 1 was “designed to police.” *Id.* at 769. That danger, as *Copperweld* explained, is the joining of independent

economic decisionmakers that otherwise would compete. *Id.*

In the joint venture context, that danger is absent—and therefore Section 1 should not apply—with respect to (a) conduct of a joint venture in which the individual venturers have effectively merged the relevant aspect of their operations; or (b) collaborative conduct commercializing a joint venture product that the individual venturers could not produce alone. Indeed, the main effect of applying Section 1 in these contexts would be to distort the very interbrand competition the antitrust laws were designed to protect, because these joint ventures would be subject to the burdens of Section 1, while their competitors with formal “single entity” status would not.

## BACKGROUND

This Court has recognized that the financial services industry is “essential to the health of [the nation’s] economy and to the well-being of its people.” *Lewis v. BT Inv. Managers*, 447 U.S. 27, 38 (1980). The joint venture business model, which has given us payment cards, ATMs, and numerous other efficiencies in financial services, should be vigorously protected.

### **A. Joint Ventures in the Financial Services Industry**

Joint ventures are fundamental to the financial services industry. They have ranged from some of the largest and most successful joint ventures in the world (like payment cards) to a plethora of smaller

joint ventures. These joint ventures serve the purposes underlying the antitrust laws—promoting consumer welfare by enabling innovation, increasing output, and providing efficiencies in production, distribution, and service. *See, e.g., Verizon Commc’ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004) (explaining that antitrust standards should promote innovation); *Schachar v. Am. Acad. of Ophthalmology*, 870 F.2d 397, 399 (7th Cir. 1989) (“Antitrust law is about consumers’ welfare and the efficient organization of production.”); 1 PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION* ¶ 100a (3d ed. 2006) (“[T]he principal objective of antitrust policy is to maximize consumer welfare by encouraging firms to behave competitively while yet permitting them to take advantage of every available economy that comes from internal or jointly created production efficiencies, or from innovation producing new processes or new or improved products.”).

***Combining Complementary Strengths.***

Joint ventures allow the market to capture the benefit of different firms’ complementary skills and assets, without requiring the firms to resort to an infeasible or inefficient merger or acquisition. *See, e.g.,* FED. TRADE COMM’N & U.S. DEP’T OF JUSTICE, *ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS* 6 (Apr. 2000) (hereinafter “COMPETITOR COLLABORATION GUIDELINES”) (“Efficiency gains from competitor collaborations often stem from combinations of different capabilities or resources.”); AIMIN YAN & YADONG LUO, *INTERNATIONAL JOINT VENTURES: THEORY AND*

PRACTICE 32–33 (2001) (hereinafter “INTERNATIONAL JOINT VENTURES”) (citing examples).

Financial services firms frequently come together to provide consumers the benefit of their complementary strengths. *See, e.g., Morgan Stanley and Citi Launch Joint Venture to Create New Global Leader in Wealth Management*, BUSINESS WIRE, June 1, 2009 (Westlaw, Business & News Directory, BWIRE Database) (“Leveraging the combined strengths of two leading global brands in wealth management, the new Morgan Stanley Smith Barney features . . . [o]ver 18,500 world-class financial advisors[,] . . . 6.8 million client households globally [and a range of other features.]”); Austin Kilgore, *Wells Fargo Enters Joint Venture to Fund NYC Broker’s Mortgages*, HOUSINGWIRE.COM, Sept. 23, 2009 (“The partnership will provide Prudential Douglas Elliman home buying customers with Wells Fargo Home Mortgage’s underwriting, processing and servicing services.”).

***Increasing Breadth of Coverage.*** Joint ventures often allow venture partners to access markets and achieve scale economies that otherwise would not be possible. *See, e.g., FAROK J. CONTRACTOR & PETER LORANGE, COOPERATIVE STRATEGIES IN INTERNATIONAL BUSINESS: JOINT VENTURES AND TECHNOLOGY PARTNERSHIPS BETWEEN FIRMS* 190–91 (1988) (hereinafter “COOPERATIVE STRATEGIES”) (“Another advantage of joint venture R&D over independent R&D efforts is the access that a joint venture can provide to large domestic and international markets.”); INTERNATIONAL JOINT VENTURES 8 (“[G]aining access to overseas markets has been a classic reason for firms to form joint

ventures.”). This is particularly evident in the financial services industry. *See, e.g., Raintree Capital Partners, LLC, Announces Joint Venture*, BUSINESS WIRE, July 22, 2009 (Westlaw, Business & News Directory, BWIRE Database) (“The focus of the joint venture is to expand the investment banking services currently offered by Cohen Capital to a broader, national market.”); *3 Indian Banks Plan Joint Venture in [Malaysia]*, BUSINESS TIMES (SINGAPORE), Sept. 17, 2009 (“T[hree] Indian banks have set up a consortium to undertake Malaysian commercial banking operations in Kuala Lumpur later this year.”).

***Creating New Products.*** The joint venture model is a powerful tool for innovation. As Congress has recognized: “[T]echnological innovations and the profitable commercialization of those innovations are critical to the ability of the United States to raise Americans’ living standards and to compete in the world marketplace,” and “cooperative arrangements among private-sector firms are often essential to meet th[e]se goals.” S. REP. 103-51, at 8 (1993) (National Cooperative Research and Production Act). Indeed, the joint venture model is perhaps most valuable when it enables through collective action the creation of a product that could not be produced by an individual entity. *See* Gregory J. Werden, *Antitrust Analysis of Joint Ventures: An Overview*, 66 ANTITRUST L.J. 701, 702 (1998) (“Joint ventures can combine complementary assets in a way that permits the development of a product that venture participants could not have produced individually[.]”); *see also* COMPETITOR COLLABORATION GUIDELINES 6 (“A collaboration . . . may provide incentives for [the collaborators] to

make output-enhancing investments that would not occur absent the collaboration.”).<sup>2</sup>

This type of innovation through joint ventures is particularly evident in the financial services sector. For example, as discussed more fully below, modern-day debit and credit card systems were built through joint ventures among banks. Similarly, working together, banks have created ATM networks to ensure that consumers throughout the world can withdraw money from any ATM, regardless of whether the ATM is owned by the consumer’s bank. These platforms, as courts have recognized, could not have been created by individual banks acting alone, but instead required an element of cooperation among them. *See Nat’l Bancard Corp. v. VISA U.S.A., Inc.*, 779 F.2d 592, 601–02 (11th Cir. 1986) (“*NaBanco*”) (recognizing that “none of [Visa’s]

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<sup>2</sup> An additional benefit of the joint venture model is that it allows firms to spread risk, often enabling them to invest in the creation of new products where the investment risk would be too great for any firm to bear alone. *See* INTERNATIONAL JOINT VENTURES 8 (observing attractiveness of joint venture model for projects “financially too large or too risky for single firms to handle alone” and projects in “a host country [that] is highly uncertain or unfriendly to foreign firms”); COOPERATIVE STRATEGIES 11 (explaining ways that joint ventures can reduce risk); IAN HEWITT, JOINT VENTURES 88 (4th ed. 2008) (explaining that risk-and-revenue-sharing joint ventures are “particularly useful where a product . . . requires substantial development expenditure”); *see also* Mitchell Berlin, *Dancing with Wolves: Syndicated Loans and the Economics of Multiple Lenders*, BUS. REV., 3rd Quarter 2007 (describing the economics of “syndicated loans” in which a loan is parceled among banks allowing a lower lending rate because the risk is spread among multiple lenders).

members could produce individually” the Visa payment card); *In re ATM Fee Antitrust Litig.*, 554 F. Supp. 2d 1003, 1015 (N.D. Cal. 2008) (“ATM networks are the type of venture that require a certain degree of cooperation among members in order to operate[.]”).

## **B. History of Payment Cards**

The development of payment cards—and particularly four-party payment card networks like *Amici*—demonstrates the critical role joint ventures can play in enabling valuable products to thrive.

The ancestor to today’s payment card systems began in the 1930s. During this time, merchants formed cooperative “charge card” joint ventures designed to do what no single merchant could accomplish alone: offer *consumers* credit and centralized billing services for transactions at a number of different participating merchants, and offer *merchants* a card-carrying consumer base, as well as centralized, efficient collection services. The Retail Service Bureau of Seattle, for example, linked more than 1,000 retailers in such a system by 1936.

The next evolution came in the 1940s and 1950s when companies like Diners Club, American Express, and Carte Blanche began offering “travel and entertainment” (“T&E”) cards. These cards were marketed to and accepted by a larger number of merchants (albeit limited to the T&E sector) and consumers (albeit primarily high-end consumers). The introduction of the T&E systems marked the advent of the modern general purpose payment card system—a system set up to authorize, clear, and

settle transactions between cardholders and each merchant that has entered into an agreement to accept payment by means of that system.

Systems like American Express (and later entrant Discover) traditionally operated through a “three-party” model. In this model, the same entity (*e.g.*, American Express) performs the necessary “network” functions, including the card “issuing” function (issuing cards to cardholders and providing customer service) and the “acquiring” function (acquiring card transactions from merchants and providing service to merchants). Thus, this system became known as a “three-party” system because there are three parties to a transaction: the company operating the network, a merchant, and a consumer.<sup>3</sup>

Over the next two decades, however, *Amici* emerged with a new payment card model—the “four-party” model.<sup>4</sup> In the four-party model, banks performed the two distinct roles—the “issuing” role and the “acquiring” role—previously performed by one company. Accordingly, they became known as

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<sup>3</sup> American Express and Discover now operate through a different model as well, in which third parties issue cards with their brands.

<sup>4</sup> Bank of America began offering the BankAmericard in 1958 through a three-party system. In 1966, Bank of America began to bring other banks into the system as franchisees, thus expanding its geographic reach. In 1970, the BankAmericard system was converted to a joint venture among banks, which became known as Visa. In 1966, the Interbank Card Association—now MasterCard—was set up in competition with BankAmericard as a joint venture among banks. *See generally* DAVID S. EVANS & RICHARD SCHMALENSSEE, PAYING WITH PLASTIC: THE DIGITAL REVOLUTION IN BUYING AND BORROWING 53–85 (2d ed. 2005) (hereinafter “PAYING WITH PLASTIC”).

“four-party” systems because payments commonly involved four parties (in addition to the network): a cardholder, the cardholder’s bank (the “issuing” bank), a merchant, and the merchant’s bank (the “acquiring” bank).

The four-party model revolutionized the payment card sector. Specifically, thousands of banks of all sizes and from all localities became card issuers and acquirers, offering their customers a national (and eventually global) payment product.<sup>5</sup> Of course, in order for “open” payment card systems like *Amici* to operate as integrated entities and compete with “closed” payment card systems (such as American Express and Discover) and other forms of payment (such as cash and checks), the ground rules of the network had to be established. Thus, *Amici* separately created rules to govern their networks, including rules protecting the value of their brands, establishing procedures, and defining how transactions are authorized and settled.

For example, to be a global payment system, the networks required interactions among thousands of different issuing and acquiring banks, many of which had no prior relationship. A clothing

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<sup>5</sup> Without a four-party network, each bank is limited to issuing cards accepted only by that bank’s *own* merchant customers, or acquiring transactions on cards issued to that bank’s *own* cardholders. Participation in the Visa or MasterCard systems, however, allows each member bank to offer its cardholding customers a card that is accepted at the merchant customers of every acquiring bank in the venture—millions of merchants worldwide. Likewise, each member bank is able to offer its merchant customers the ability to accept transactions made with cards held by customers of every issuing bank in the venture—hundreds of millions of cardholders worldwide.

merchant in Cairo may have a small, local acquiring bank, while the tourist who visits that merchant may have a card issued by his own local bank in Kyoto or a small Oklahoma town. Accordingly, the networks established terms of dealing—including default interchange rates—to facilitate transactions between banks with no prior relationship.<sup>6</sup> In this and many other ways, Visa and MasterCard developed a product that “none of [their] members could produce individually.” *NaBanco*, 779 F.2d at 601–02.

Since their inception as joint ventures, Visa and MasterCard have delivered enormous value to consumers and merchants alike. For consumers, the benefits include: the ability to pay for goods anywhere in the world without having to carry bulky cash or find an ATM; safety that comes from not having to carry cash or checks; availability of credit; a grace period for purchases made on credit; better record keeping; and the ability to participate in the global economy through instantaneous internet purchases.

Merchants, likewise, derive enormous benefits from payment cards. Card transactions are faster and more efficient than cash payments, increasing the volume of consumers that a merchant can serve and improving consumer satisfaction. A card payment also offers a merchant the critical guarantee of payment that is absent when a

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<sup>6</sup> Interchange is a small fee paid by the merchant’s bank (the acquiring bank) to the cardholder’s bank (the issuing bank). Interchange balances demand on both sides of the market—*i.e.*, maximizes both merchant acceptance and card issuance. See *NaBanco*, 779 F.2d at 594–95; see also PAYING WITH PLASTIC 152–56.

consumer pays with a check. Payment cards dramatically reduce the risk of employee theft or fraud, as well as the costs associated with counting and transporting cash. Merchants also benefit from consumers who have access to credit and the incremental consumer spend that results from the use of payment cards.<sup>7</sup>

### **C. Joint Ventures Subjected to Costly Litigation**

Despite the enormous value brought by payment card networks, ATM networks, and other joint ventures in the financial services area, they repeatedly have been subjected to costly litigation under Section 1 of the Sherman Act. With respect to payment cards especially, these lawsuits have escalated from a trickle to a flood. Courts in the last ten years have issued decisions in over a dozen different federal cases involving the various payment card networks raising antitrust claims—all of them concerning alleged violations of Section 1, and many including class action claims and/or multidistrict litigation. Notably, elements of the four-party payment card networks currently subject to ongoing Section 1 litigation—like the need for a rule providing for default interchange fees—have been in

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<sup>7</sup> For a sampling of the studies and literature reflecting the benefits of payment cards, *see, e.g.*, U.S. GOVERNMENT ACCOUNTABILITY OFFICE, CREDIT AND DEBIT CARDS: FEDERAL ENTITIES ARE TAKING ACTIONS TO LIMIT THEIR INTERCHANGE FEES, BUT ADDITIONAL REVENUE COLLECTION COST SAVINGS MAY EXIST, GAO-08-558 16–18, 41–44 (May 2008); Daniel D. Garcia-Swartz et al., *The Move Toward A Cashless Society: A Closer Look at Payment Instrument Economics*, 5 REV. OF NETWORK ECON. 175, 188 (June 2006); PAYING WITH PLASTIC 91-94.

effect for decades and have been upheld under the antitrust laws in previous suits.

This increase in the number of Section 1 cases has coincided with a massive increase in the cost of litigating these cases. The Section 1 rule of reason litigation in which joint ventures are frequently engaged has long been recognized as among the most costly and burdensome litigation in a civil justice system widely criticized for its overwhelming cost and burden. As Judge Easterbrook noted 25 years ago: “Litigation costs are the product of vague rules combined with high stakes, and nowhere is that combination more deadly than in antitrust litigation under the Rule of Reason.” Frank Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 12-13 (1984).

In the 25 years since Judge Easterbrook wrote those words, the “deadly combination” that he described has become only more pronounced. This is largely a result of the explosion of electronic documents and the costly and burdensome obligations of “e-discovery.” By way of example, *Amici* and others are currently defending the *In re Interchange Fee and Merchant Discount Antitrust Litigation*, MDL-1720 (E.D.N.Y). Collectively, *Amici* and their co-defendants in this case have produced more than 3 million documents, almost 45 million pages, and more than 3,100 gigabytes of data. *Amici* alone have produced millions of pages of documents from hundreds of custodians.

## ARGUMENT

Courts, Congress, and the antitrust enforcement agencies all recognize that joint

ventures are an important and procompetitive vehicle for doing business. *See, e.g., NaBanco*, 779 F.2d at 602, 605; S. REP. 103-51, at 8 (1993) (National Cooperative Research and Production Act); COMPETITOR COLLABORATION GUIDELINES 1, 6. In order to protect this valuable business model, this Court should adopt a rule that allows space for joint ventures to thrive while retaining space for appropriate antitrust enforcement.

**A. Petitioner’s Extreme Rule Ignores the Teaching of *Twombly***

Antitrust law is largely judge-made law. *See Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 899 (2007) (explaining that “the Court has treated the Sherman Act as a common-law statute” that must “evolve to meet the dynamics of present economic conditions”); *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 439 n.14 (1978) (“Senator Sherman adverted to the open texture of the statutory language in 1890 and accurately forecast its consequence—a central role for the courts in giving shape and content to the Act’s proscriptions.”). Accordingly, the Court, in defining the reach of antitrust law, has stayed carefully attuned to modern conditions, including changes in economic theory and the enforcement environment. *See Leegin Creative Leather Prods., Inc.*, 551 U.S. at 899–900.

In *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), the Court expressly recognized that, in the modern litigation environment, the mere fact (or even threat) of Section 1 litigation can force businesses to make inefficient decisions—like settling meritless litigation. *See id.* at 559–60

(explaining that the “threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching [summary judgment or trial] proceedings”). Against this backdrop, the Court rejected the long-standing pleading standard in *Conley v. Gibson*, 355 U.S. 41 (1957), which allowed cases to get “worked out” in discovery if any imaginable set of facts supported relief. Instead, the Court implemented a “plausibility” pleading standard to eliminate speculative antitrust lawsuits at the outset of a case. *Twombly*, 550 U.S. at 559–61.

*Twombly* focused on the “potentially enormous cost of discovery,” including the enormous volume of electronic documents in discovery, and quoted extensively from courts and commentators emphasizing the problems with our civil justice system. *Id.* Since *Twombly*, the courts, bar, and commentators continue to recognize the gravity of the situation.

***The Courts.*** Judicial lamentations of the massive burdens of litigation—especially antitrust litigation—continue unabated. As the Ninth Circuit said in a recent Section 1 case involving *Amici*: “[D]iscovery in antitrust cases frequently causes substantial expenditures and gives the plaintiff the opportunity to extort large settlements even where he does not have much of a case.” *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1047 (9th Cir. 2008).<sup>8</sup>

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<sup>8</sup> See also *In re Travel Agent Comm’n Antitrust Litig.*, 583 F.3d 896, 904 (6th Cir. 2009) (referring to “the dilemma of the extensive litigation costs associated with prosecuting and defending antitrust lawsuits”); *West Penn Allegheny Health*

Another court—after noting that “[f]or nearly six months, the parties and the Court have been grappling with an electronic discovery monstrosity”—specifically addressed the new era of “e-discovery.” *PSEG Power N.Y., Inc. v. Alberici Constructors, Inc.*, No. 1:05-CV-657, 2007 WL 2687670, at \*1 (N.D.N.Y. Sept. 7, 2007). As the court explained: “With the rapid and sweeping advent of electronic discovery, the litigation landscape has been radically altered in terms of scope, mechanism, cost, and perplexity. This landscape may be littered with more casualties than successes and the discovery imbroglio in this case is a prime example of this observation.” *Id.*

***The Bar.*** A recent survey of the Fellows of the American College of Trial Lawyers (including both plaintiffs’ and defense lawyers) “revealed widely-held opinions that there are serious problems in the civil justice system generally” and specifically major burdens associated with “[e]lectronic discovery.” *Final Report of the Joint Project of the American College of Trial Lawyers Task Force on Discovery and the Institute for the Advancement of the American Legal System 2* (Mar. 11, 2009) (“Final Report”). The Final Report developed from the survey recognized that lawyers using the “full range of discovery options offered by the rules,” as they always do in Section 1 litigation, are “crippling our civil justice system.” *Id.* at 7.

Similarly, the Sedona Conference—a research and educational institute in which lawyers, judges,

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*Sys., Inc. v. UPMC*, No. 09-cv-0480, 2009 WL 3601600, at \*18-19 (W.D. Pa. Oct. 29, 2009) (noting the “extraordinary costs associated with antitrust discovery”).

academics, and experts analyze issues related to complex litigation—recently stated that the costs associated with discovery are “a serious burden to the American judicial system. This burden rises significantly in discovery of electronically stored information (ESI). In addition to rising monetary costs, courts have seen escalating motion practice, overreaching, obstruction, and extensive but unproductive discovery disputes—in some cases precluding adjudication on the merits altogether.” The Sedona Conference, *The Sedona Conference Cooperation Proclamation 1* (2008), available at [http://www.thesedonaconference.org/content/tsc\\_cooperation\\_proclamation/proclamation.pdf](http://www.thesedonaconference.org/content/tsc_cooperation_proclamation/proclamation.pdf).

***The Commentators.*** Commentators routinely decry the burdens of litigation, particularly antitrust litigation, and the enormous pressure these burdens place on businesses. The following is a typical example:

As anyone involved in private antitrust litigation knows, discovery in such cases is usually quite expensive, very burdensome, and terribly distracting for management. Antitrust discovery is often vastly broader, deeper, and correspondingly more expensive than in other types of cases. Discovery costs in antitrust cases run into the millions of dollars for document collection alone. Those costs are so high that nuisance settlement amounts for antitrust cases run into the millions of dollars, amounts which are often still less than discovery costs.

Antitrust cases are also particularly hard for judges to manage or control. Because the heart of any antitrust case is evidence about relevant markets, antitrust discovery easily turns into production of all business planning, marketing, and pricing documents, followed by depositions of the entire management of a company. The burdens are immense.

John Bogart, *The Supreme Court Decision in Twombly: A New Federal Pleading Standard?*, 20 UTAH BAR J. 20, 22 (Sept./Oct. 2007).<sup>9</sup> In short, *Twombly*'s lesson—that the burdens of antitrust litigation, especially when combined with the threat of treble damages, require limiting principles—is more salient today than ever.

By proposing a rule that opens the door to Section 1 litigation with respect to every single decision of a joint venture, Petitioner has completely ignored *Twombly*'s lesson. The consequences of Petitioner's rule, if adopted, will be an unchecked rise in litigation costs, less incentive to collaborate, and an overall reduction in efficiency in many industries—especially financial services. See

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<sup>9</sup> See also Kal Hüscherlath, *Is It Worth All the Trouble?—The Costs and Benefits of Antitrust Enforcement*, Discussion Paper No. 08-107, Center for European Economic Research, at 25 (2008), <ftp://ftp.zew.de/pub/zew-docs/dp/dp08107.pdf> (estimating the “direct” and “indirect” costs related to public and private antitrust enforcement to be over \$2 billion per year); Gregory P. Joseph, *Trial Balloon: Federal Litigation—Where Did It Go Off Track?*, 34 LITIG. 5, 62 (2007-2008) (observing that discovery costs, particularly related to electronically stored information, are partly responsible for making federal litigation “procedurally more complex, risky to prosecute, and very expensive,” causing litigants to avoid litigating in federal court).

Kimberly Gleason et al., *Evidence of Value Creation in the Financial Services Industry Through the Use of Joint Ventures and Strategic Alliances*, 38 THE FIN. REV. 213, 214 (2003) (explaining that “[j]oint ventures and strategic alliances are an increasingly important mechanism for growth in the financial services industries”).

As *Texaco, Inc. v. Dagher*, 547 U.S. 1 (2006) explained, a “joint venture, like any other firm, must have the discretion” to make its core business decisions on the merits—not under the shadow of Section 1. *Id.* at 7. Under Petitioner’s proposed rule, *no* joint venture would have that discretion.

## **B. Petitioner’s Rule Rests on Empty Formalism**

Not only would Petitioner’s rule broadly impose the threat of Section 1 liability onto every decision of a joint venture, but it would do so solely because the members of joint ventures are formally separate corporate entities. This empty formalism is inconsistent with this Court’s precedent, as well as sound antitrust policy.

In *Copperweld*, the Court faced the question of whether a collaboration between a parent and its subsidiary constituted single-firm conduct or was an “agreement” under Section 1. The Court held that the *initial* joining of two separate entities into a parent and subsidiary relationship is reviewable under Section 1. 467 U.S. at 777. But after that time, the parent and subsidiary should not be subject to Section 1 scrutiny under an “intra-enterprise conspiracy” theory.

The Court’s analysis was functional, focusing on the fact that a collaboration between parent and subsidiary does not “raise the antitrust dangers that [Section] 1 was designed to police” because it does not “deprive[] the marketplace of the independent centers of decisionmaking that competition assumes and demands.” 467 U.S. at 769. In other words, “[i]f a parent and a wholly owned subsidiary do ‘agree’ to a course of action, there is no sudden joining of economic resources that had previously served different interests, and there is no justification for [Section] 1 scrutiny.” *Id.* at 771.<sup>10</sup>

After *Copperweld*, courts correctly recognized that the case’s rationale—and particularly its holding that single-entity status depends on *substance* and not *form*—extends beyond the parent/subsidiary context. As the Eighth Circuit explained: “[T]he logic of *Copperweld* reaches beyond its bare result,” and “[t]he thrust of the holding is that economic reality, not corporate form, should control the decision of whether related entities can conspire.” *City of Mount Pleasant v. Associated Elec. Co-op., Inc.*, 838 F.2d 268, 274–75 (8th Cir. 1988).

In *Dagher*, the Court applied the same *substantive* analysis to joint ventures, recognizing that they too can operate just like single entities.

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<sup>10</sup> While *Copperweld* also noted that “[a] parent and its wholly owned subsidiary have a complete unity of interest,” the Court’s rationale was not *confined* to situations in which perfect unity of economic interest exists between the cooperating parties. 467 U.S. at 771. As the NFL Respondents observe, this would subject to Section 1 scrutiny every decision of even highly integrated entities, such as law firm partnerships. See NFL Resp. Br. 37–39.

Specifically, the Court recognized that, although the two oil companies forming the joint venture at issue were formally separate entities, their joint venture to refine and sell gasoline functionally operated no differently than other single entities performing the same market functions. Thus, the Court held that the “pricing policy” of the joint venture “challenged here amounts to little more than price setting by a single entity—albeit within the context of a joint venture—and not a pricing agreement between competing entities with respect to their competing products.” 547 U.S. at 6. In short, this type of “core” joint venture conduct *is*, so far as competition is concerned, single-firm conduct. *Id.* at 7–8.

Of course, the Court in *Dagher* addressed only the narrow question of whether the “core” joint venture conduct was *per se* illegal and explicitly reserved the question of whether that conduct should be treated as single-entity conduct not subject to Section 1. 547 U.S. at 7 & n.2. But as the government explains: “*Dagher*’s reasoning and result generally reflect a natural extension of *Copperweld*.” U.S. Br. 10 n.4. Commentators also have recognized that *Dagher* supports that some joint venture conduct should not be subject to Section 1 under the *Copperweld* doctrine.<sup>11</sup>

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<sup>11</sup> See, e.g., Thomas A. Piraino, Jr., *The Antitrust Analysis of Joint Ventures After the Supreme Court’s Dagher Decision*, 57 EMORY L.J. 735, 751 (2008) (explaining the language in *Dagher* suggests the “conclusion that all internal rules of joint ventures should be exempt from scrutiny under Section 1 of the Sherman Act”); William Kopit & Patricia Wagner, *Dagher Redux: Searching For The Missing Pieces*, 39 J. HEALTH L. 349, 366 (Summer 2006).

The implications of *Copperweld* and *Dagher* are clear. *First*, single-entity status—contrary to the approach urged by Petitioner—does *not* depend on common ownership and control among venturers. Hinging single-entity status on corporate formalities was specifically rejected in *Copperweld*; indeed, even before *Copperweld* this Court recognized that single-entity status does not depend on corporate form. *See Sunkist Growers, Inc. v. Winckler & Smith Citrus Prods. Co.*, 370 U.S. 19, 29 (1962) (recognizing separate associations were in effect a single entity “even though they have formally organized themselves into three separate legal entities”); *see also United States v. Citizens & S. Nat’l Bank*, 422 U.S. 86, 121 (1975) (accord).

*Second*, when the lens is focused on substance—as *Copperweld* commands—there is no functional difference between certain joint-venture conduct and single-firm conduct. *Dagher*, 547 U.S. at 5–6, 7. Accordingly, that conduct should be accorded single-firm status under the antitrust laws.

This result flows not only from the Court’s cases, but also from the prime purpose of the antitrust laws: to protect *interbrand* competition—*i.e.*, the competition among sellers of the same type of product. *See Leegin Creative Leather Products, Inc.*, 551 U.S. at 895. Joint ventures typically engage in interbrand competition with single entities. For example, when they were joint ventures (and now after their IPOs), MasterCard and Visa vigorously competed against each other, American Express, Discover, and all other forms of payment, while ATM networks like the CO-OP Network and Shazam

compete with formally single rivals like STAR.<sup>12</sup> And “[a]s a single entity, a joint venture, *like any other firm*, must have the discretion to determine” its core conduct without the sword of Section 1 litigation and liability dangling over its head. *Dagher*, 547 U.S. at 7 (emphasis added).

Petitioner’s rule, nevertheless, would “impose grave legal consequences upon organizational distinctions that are of de minimis meaning and effect.” *Copperweld*, 467 U.S. at 773 (internal quotation marks, alteration, and citation omitted). The result would be a distortion—against joint ventures and in favor of single entities—of the very interbrand competition the antitrust laws are intended to protect. Indeed, the threat of Section 1 litigation and liability could cause firms not to enter into procompetitive joint ventures in the first place. *See id.* at 771 (“Indeed, a rule that punished coordinated conduct simply because a corporation delegated certain responsibilities to autonomous units might well discourage corporations from creating divisions with their presumed benefits.”). Because Petitioner’s rule is inconsistent with this Court’s cases and *defeats* the purposes of the antitrust laws, it should be rejected.

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<sup>12</sup> The CO-OP Network is a nationwide ATM network for credit unions. *See* [www.co-opfs.org/public/products/network/index.cfm](http://www.co-opfs.org/public/products/network/index.cfm). The Shazam ATM and debit card network is comprised of nearly 1,600 member banks in 30 states. *See* [https://public.shazam.net/about\\_shazam.html](https://public.shazam.net/about_shazam.html). STAR is owned by First Data Corporation. *See* <http://www.firstdata.com/star/>.

**C. The Single-Firm Inquiry Should Focus on the Substance of the Joint Venture**

Instead of Petitioner’s extreme, formalistic rule, this Court should ask the same question the *Copperweld* Court asked: Does the collaboration “raise the antitrust dangers that [Section] 1 was designed to police” because it “deprives the marketplace of the independent centers of decisionmaking that competition assumes and demands”? 467 U.S. at 769.

In the joint venture context, these “dangers” are absent—and thus single-entity treatment is appropriate—with respect to (a) conduct of a joint venture in which the individual venturers have effectively merged the relevant aspect of their operations (the “complete integration” scenario); or (b) collaborative conduct commercializing a joint venture product that the individual venturers could not produce alone (the “new product” scenario).

Both *Dagher* and the government here support that complete integration should trigger single-entity status. In *Dagher*, the Court recognized that the oil companies’ integration of their operations had “end[ed] competition between [them] in the domestic refining and marketing of gasoline” and thereafter they functioned like a single entity. 547 U.S. at 4. The government also generally agrees that “complete integration” should result in single-entity treatment, although the government adds an extra step (beyond

integration) to the analysis that is vague and unhelpful. *See* U.S. Br. 17.<sup>13</sup>

But complete integration is not the *only* situation in which single-entity status should apply to a joint venture. Where, as with the NFL, formally separate entities collaborate to produce a product that otherwise could not exist, then in this scenario too the market has not been deprived of entities that would otherwise be competing. To the contrary, the collaboration itself creates a wholly new product and thus a wholly new competitor.

Accordingly, this new competitor’s commercialization decisions—including the decisions on how to produce, promote, and price its product—should not be subject to Section 1 scrutiny, just as the decisions of a formally single competitor would not. This rule will promote interbrand competition and ensure that the threat of Section 1 will not be a disincentive to the creation of new products by a joint venture—perhaps the most procompetitive of all joint venture conduct. *See Trinko*, 540 U.S. at 407

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<sup>13</sup> If there is complete integration, the government would *further* require that “the challenged restraint must not significantly affect actual or potential competition among the [individual venturers] or between the [individual venturers] and the [joint venture] outside their merged operations.” U.S. Br. 17. But this second part of the government’s test is so vague that it practically would thwart the protection from burdensome Section 1 litigation after firms have integrated an aspect of their operations. Moreover, it is inconsistent with *Copperweld*, which asked whether the collaboration “deprive[d] the marketplace of the independent centers of decisionmaking that competition assumes and demands,” and did not *further* engage in the type of competitive effects analysis proposed by the government. 467 U.S. at 769.

(explaining antitrust standards should “safeguard the incentive to innovate” and promote the “risk taking that produces innovation”).

“Simply put,” as the Seventh Circuit explained here, “nothing in § 1 prohibits the NFL teams from cooperating so the league can compete against other entertainment providers. Indeed, antitrust law encourages cooperation inside a business organization—such as, in this case, a professional sports league, to foster competition between that organization and its competitors.” Pet. App. 18a.

*Amici*’s proposed rule appropriately balances the interest in encouraging procompetitive joint venture behavior with the interest in effective antitrust enforcement. Under *Amici*’s proposed rule, cases involving conduct that does not implicate the dangers underlying Section 1 could be eliminated at an early stage in the case—not after expensive and lengthy litigation aimed at a full-blown rule of reason analysis. In every Section 1 challenge, a plaintiff must plead facts demonstrating multi-firm conduct—and not single-firm conduct under the *Copperweld* doctrine—in order to survive a threshold motion to dismiss.<sup>14</sup> See *Jack Russell Terrier Network of N. Cal. v. Am. Kennel Club, Inc.*, 407 F.3d 1027, 1034 n.14 (9th Cir. 2005) (rejecting argument that “the ‘single entity’ determination is an

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<sup>14</sup> Specifically, under *Amici*’s proposed rule, the challenger would have to plead facts demonstrating a “plausible” case that (a) the challenge is to an aspect of operations that has not been effectively integrated in the joint venture and (b) the challenge does not involve a commercialization decision by a joint venture that produced a product no individual entity could produce alone. See *Twombly*, 550 U.S. at 559–61.

affirmative defense” that cannot be “resolved on a motion to dismiss” because “the existence of more than one entity sufficient to conspire is part of the first element required to allege a § 1 violation”).

Moreover, even if there was a factual ambiguity that did not allow the single entity question to be resolved on the pleadings, that question could be resolved (as it was in this case) after limited discovery aimed at the nature of the joint venture and conduct in question. Thus, at least in the “complete integration” and “new product” scenarios, joint ventures could make their business decisions on the merits, and not based on the fear of overwhelming Section 1 litigation and liability.

At the same time, Section 1 would continue to apply to the formation of the joint venture and to conduct outside the contexts identified by *Amici*. Accordingly, where joint venture conduct “deprives the marketplace of . . . independent centers of decisionmaking,” Section 1 scrutiny would remain. *Copperweld*, 467 U.S. at 769. Just as the Court reasoned in *Copperweld* in rejecting the intra-enterprise conspiracy doctrine, the antitrust laws’ continued reach will allow for adequate policing and “will therefore not cripple antitrust enforcement.” *Id.* at 777.

**D. *Amicus* Merchant Trade Association’s  
Attack is Misguided**

The Merchant Trade Association’s (“MTA”) attempt to use its *amicus* brief to collaterally litigate its lawsuit on interchange fees is not credible. The MTA has one purpose—to lower interchange fees

regardless of the effect on consumers. Indeed, the MTA reveals its mission when it applauds decisions of foreign jurisdictions imposing government-mandated interchange rates. *See* MTA Br. 13–14.<sup>15</sup>

What the MTA fails to tell the Court is that, under the U.S. antitrust laws, interchange fees have been recognized as procompetitive network functions necessary to make networks work. *See NaBanco*, 779 F.2d at 602, 605 (upholding centrally-set default interchange fees and explaining they are (1) a “necessary term without which the system would not function” and (2) an efficient mechanism to distribute costs and maximize demand for the card product); *see also In re ATM Fee Antitrust Litig.*, 554 F. Supp. 2d at 1015 (explaining that, “[b]y promoting additional ATMs,” a centrally-set interchange fee “actually promotes, rather than diminishes competition”). The MTA wants merchants to pay less for a valuable product, thereby shifting the costs of the network onto others, including consumers. But under U.S. law, “such an argument is not an antitrust argument at all, for it amounts to a dispute

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<sup>15</sup> The MTA’s suggestion that regulations by the Reserve Bank of Australia (“RBA”)—including a government-imposed interchange rate reduction—have benefited consumers is incorrect. For example, a 2008 study by economists at CRA International concluded that, “while the RBA’s regulations have clearly harmed consumers by causing higher cardholder fees and less valuable reward programmes, there is no evidence that these undeniable losses to consumers have been offset by reductions in retail prices or improvement in the quality of retailer service. The RBA’s intervention has redistributed wealth in favour of merchants.” Robert Stillman et al., *Regulatory Intervention in the Payment Card Industry by the Reserve Bank of Australia* 4 (Apr. 28, 2008), available at [http://www.crai.com/ecp/assets/Regulatory\\_Intervention.pdf](http://www.crai.com/ecp/assets/Regulatory_Intervention.pdf).

over prices and competition law is not concerned with setting a proper price.” *Brennan v. Concord EFS, Inc.*, 369 F. Supp. 2d 1127, 1132 (N.D. Cal. 2005).

Moreover, although the MTA primarily complains about Visa’s and MasterCard’s alleged market power, MTA Br. 8, the rule proposed by *Amici* would continue to allow for challenges to anticompetitive exercises of market power under the antitrust laws. What the rule would not allow—and what should not be allowed—is the use of Section 1 as a tool for reengineering the unilateral decisions of a joint venture to any complainant’s liking. See *Trinko*, 540 U.S. at 408 (explaining in the single-firm context that federal courts “are ill suited” to “act as central planners, identifying the proper price, quantity and other terms of dealing”).

**CONCLUSION**

The judgment of the court of appeals should be affirmed.

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