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No. 15-\_\_\_\_\_

Supreme Court, U.S.  
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IN THE  
**Supreme Court of the United States**

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VISA INC., ET AL.,  
*Petitioners,*

v.

MARY STOUMBOS, ET AL.,  
*Respondents.*

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**On Petition for a Writ of Certiorari  
to the United States Court of Appeals  
for the District of Columbia Circuit**

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**PETITION FOR A WRIT OF CERTIORARI**

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## QUESTION PRESENTED

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

## PARTIES TO THE PROCEEDINGS

Pursuant to Rule 14.1(b), the following list identifies all of the parties appearing here and before the United States Court of Appeals for the D.C. Circuit.

The petitioners here and appellees below in both *Stoumbos v. Visa Inc., et al.*, No. 1:11-cv-01882 (D.D.C.) ("*Stoumbos*") and *National ATM Council, et al. v. Visa Inc., et al.*, No. 1:11-cv-01803 (D.D.C.) ("*National ATM Council*" or "*NAC*") are Visa Inc., Visa U.S.A. Inc., Visa International Service Association, Plus System, Inc., MasterCard Incorporated, and MasterCard International Incorporated d/b/a MasterCard Worldwide.

The respondent here and appellant below in *Stoumbos* is Mary Stoumbos. The respondents here and appellants below in *National ATM Council* are The National ATM Council, Inc.; ATMs of the South, Inc.; Business Resource Group, Inc.; Cabe & Cato, Inc.; Just ATMs, Inc.; Wash Water Solutions, Inc.; ATM Bankcard Services, Inc.; Meiners Development Company of Lee's Summit, Missouri, LLC; Mills-Tel, Corp. d/b/a First American ATM; Scot Garner d/b/a SJI; Selman Telecommunications Investment Group, LLC; Turnkey ATM Solutions, LLC; Trinity Holdings Ltd, Inc.; and T&T Communications, Inc. and Randal N. Bro d/b/a T & B Investments.

## CORPORATION DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Petitioners state as follows:

Visa Inc. is a publicly-held corporation. Visa Inc. has no parent company, and no publicly-held company owns 10% or more of the stock of Visa Inc.

Visa U.S.A. Inc. is a non-stock corporation. Visa Inc., a publicly-held company, is a parent company of Visa U.S.A. Inc. and has a 10% or greater ownership interest in Visa U.S.A. Inc.

Visa International Service Association is a non-stock corporation. Visa Inc., a publicly-held company, is a parent company of Visa International Service Association and has a 10% or greater ownership interest in Visa International Service Association.

Plus System, Inc. is a non-stock corporation. Visa U.S.A. Inc., discussed above, is a parent company of Plus System, Inc. and has a 10% or greater ownership interest in Plus System, Inc.

MasterCard Incorporated is a publicly-held corporation. MasterCard Incorporated has no parent company, and no publicly-held company owns 10% or more of the stock of MasterCard Incorporated.

MasterCard International Incorporated is a Delaware membership corporation that does not issue capital stock, and is a wholly owned subsidiary of MasterCard Incorporated.

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## **PETITION FOR A WRIT OF CERTIORARI**

Petitioners Visa Inc., Visa U.S.A. Inc., Visa International Service Association, and Plus System, Inc. (collectively, “Visa”) and MasterCard Incorporated and MasterCard International Incorporated (collectively, “MasterCard”) respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

### **OPINIONS BELOW**

The opinion of the Court of Appeals (Pet. App. 3a–25a) is reported at 797 F.3d 1057. The opinion of the district court denying Plaintiffs’ motions for leave to amend their complaint and to alter or amend the court’s original judgment (Pet. App. 26a–51a) is reported at 7 F. Supp. 3d 51. The original opinion of the district court (Pet. App. 165a–214a) is reported at 922 F. Supp. 2d 73.

### **STATEMENT OF JURISDICTION**

The Court of Appeals entered its judgment on August 4, 2015. A timely petition for rehearing was denied on September 28, 2015 (Pet. App. 1a–2a). Petitioners’ request to extend the time to file a petition for a writ of certiorari to January 27, 2016 was granted by the Honorable John G. Roberts, Jr. on December 22, 2015. This Court’s jurisdiction is invoked under 28 U.S.C. § 1254(1).



## STATUTES INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1 provides, in relevant part:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.

## STATEMENT OF THE CASE

This petition addresses *Stoumbos v. Visa Inc., et al.*, No. 1:11-cv-01882 (D.D.C.) (“*Stoumbos*”) and *National ATM Council, et al. v. Visa Inc., et al.*, No. 1:11-cv-01803 (D.D.C.) (“*National ATM Council*” or “*NAC*”), two of three related cases that the Court of Appeals decided together. Petitioners Visa and MasterCard, along with other defendants named only in the third related case, *Mackmin, et al. v. Visa Inc., et al.*, No. 1:11-cv-01831 (D.D.C.) (“*Mackmin*”), have filed a separate petition seeking certiorari in that case, captioned *Visa Inc., et al v. Osborn, et al.* Because the Statement of the Case in *Mackmin* comprehensively sets out the relevant background for the Court, this petition provides a short summary.

All three cases—*Stoumbos*, *National ATM Council*, and *Mackmin*—challenge the same Visa and MasterCard rules prohibiting an ATM owner’s imposition of a higher access fee for transactions processed on Visa’s or MasterCard’s respective ATM network than for transactions processed on another ATM network. And all three cases make identical allegations to support a claim that each rule was the product of a purported conspiracy in violation of Section 1 of the Sherman Act. Visa and MasterCard are

defendants in all three cases. The plaintiff in *Stoumbos* is a consumer who purports to represent a putative class of consumers who paid access fees at ATMs not owned or operated by a bank. Pet. App. 57a ¶ 18, 71a–72a ¶ 56. The plaintiffs in *National ATM Council* are a trade association of non-bank ATM operators and several non-bank ATM operators who purport to represent a putative class of all non-bank operators of ATMs that access Visa- and MasterCard-owned networks. *Id.* at 113a–117a ¶¶ 10–25.

As in *Mackmin*, Plaintiffs in *Stoumbos* and *National ATM Council* allege that Visa, MasterCard, and certain of their member banks reached agreements to “fix” the access fee that a cardholder pays to an ATM operator to use an ATM that is not owned by the cardholder’s bank. *Id.* at 83a ¶ 80, 147a ¶ 95. Specifically, Plaintiffs challenge a Visa rule that allegedly bars ATM operators that participate in Visa’s network from charging a cardholder a higher access fee for an ATM transaction processed over Visa’s network than it charges for a transaction processed over a different ATM network. Plaintiffs challenge an allegedly similar MasterCard rule applicable to ATM operators that participate in the MasterCard network. *Id.* at 83a ¶ 80, 135a ¶ 63. Plaintiffs allege that these rules are the product of anticompetitive agreements among Visa and its bank members and among MasterCard and its bank members. *Id.* at 63a ¶ 40, 148a–149a ¶ 101.

Plaintiffs’ claims of actionable antitrust agreements under Section 1 rely solely on allegations that Visa and MasterCard each were formerly organized as associations owned by their bank members, that bank executives sat on the respective Visa and MasterCard boards that approved each association’s rules,

and that the bank members agreed to adhere to those rules. *Id.* at 59a–60a ¶¶ 28–29, 63a ¶ 40, 145a ¶¶ 89–90, 148a–149a ¶ 101.<sup>1</sup> In their complaints, Plaintiffs do not allege any facts showing that the bank members orchestrated a conspiracy through Visa and/or MasterCard board members or otherwise communicated with one another about the challenged rules.

On February 13, 2013, the district court dismissed the cases for failure to adequately plead conspiracy and injury-in-fact. *Id.* at 165a–214a. On December 19, 2013, the district court denied Plaintiffs’ motions for leave to amend their complaints, holding that Plaintiffs’ proposed amendments “provide no additional facts that constitute direct evidence of agreements that would support a claim of a current horizontal conspiracy among the member banks.” *Id.* at 48a. The Court of Appeals vacated the district court’s judgment on August 4, 2015, concluding that the complaints adequately pleaded injury and conspiracy by alleging that the banks “*used* the bankcard associations to adopt and enforce a supracompetitive pricing regime for ATM access fees.” *Id.* at 20a (emphasis in original). The Court of Appeals denied the defendants’ petition for panel rehearing or rehearing *en banc* on September 28, 2015. *Id.* at 1a–2a.

Both the district court and the Court of Appeals addressed all three related cases—*Stoumbos*, *National ATM Council*, and *Mackmin*—together.

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<sup>1</sup> Plaintiffs acknowledge that MasterCard and Visa became publicly held corporations by holding initial public offerings on May 24, 2006, and March 18, 2008, respectively. Pet. App. 59a ¶ 28, 145a ¶ 89.

Petitioners accordingly incorporate here by reference the petition filed today in the *Mackmin* case.

## REASONS FOR GRANTING THE PETITION

Certiorari should be granted to resolve the split between the decision of the Court of Appeals below and decisions of multiple other Courts of Appeals. In the opinion below encompassing *Mackmin*, *Stoumbos*, and *National ATM Council*, the D.C. Circuit held that a plaintiff can plead an actionable conspiracy solely through allegations that banks' employees sat on Visa and MasterCard boards, the boards adopted rules, and banks agreed to adhere to those rules. This decision squarely conflicts with the Ninth Circuit's holding in *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042 (9th Cir. 2008), which affirmed dismissal of a complaint that alleged, as here, that banks participated in the board governance of Visa and MasterCard and adhered to Visa and MasterCard rules. The Ninth Circuit held that these allegations were insufficient to establish an unlawful antitrust agreement.

The D.C. Circuit's decision below also conflicts with the Fourth Circuit's holding in *SD3, LLC v. Black & Decker (U.S.) Inc.*, 801 F.3d 412 (4th Cir. 2015), that allegations of membership and governance in a trade association do not sufficiently plead an antitrust conspiracy unless they are accompanied by factual allegations as to the "who, what, when and where" of the alleged agreement. *Id.* at 430, 436–38. It likewise conflicts with the Third Circuit's decision in *In re Insurance Brokerage Antitrust Litigation*, 618 F.3d 300 (3d Cir. 2010), which held that allegations

of membership in and adoption of a trade group's rules do not plausibly allege an antitrust conspiracy.

As the petition filed in the *Mackmin* case explains, this split of authority concerns an important, recurring question that affects numerous trade and business organizations across the United States. The question presented in these cases is thus deserving of this Court's review.

## CONCLUSION

For the foregoing reasons, and the reasons set forth in the separately filed petition seeking certiorari in the *Mackmin* case, if the Court grants certiorari in the *Mackmin* case, the Court should hold this petition pending a decision on the merits in *Mackmin*.

Respectfully submitted,

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January 27, 2016