

No. 08-661

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IN THE  
**Supreme Court of the United States**

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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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**REPLY BRIEF OF PETITIONER**

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MEIR FEDER  
ANDREW D. BRADT  
DAVID M. COOPER  
JONES DAY  
222 East 41st St.  
New York, NY 10017  
(212) 326-3939

GLEN D. NAGER  
*Counsel of Record*  
JOE SIMS  
JONES DAY  
51 Louisiana Ave., NW  
Washington, DC 20001  
(202) 879-3939

JEFFREY M. CAREY  
790 Frontage Road  
Suite 306  
Northfield, IL 60093  
(847) 441-2480

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*Counsel for Petitioner*

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As explained in Petitioner’s supplemental brief at the certiorari stage (at 10-12) and its opening brief here (at 1, 8, 14, 56-57), this lawsuit challenges multiple agreements of the 32 teams of the NFL that severely limit competition in the licensing and use of their separately owned intellectual property.

As further shown (Pet. Br. 16-30), this Court has long held that any such agreement between separately owned and controlled entities—including teams in a sports league—is a “contract, combination ... or conspiracy” under Section 1 of the Sherman Act; and, as demonstrated (at 31-38), for at least 50 years, Congress has acted on that understanding. And Petitioner showed (at 38-59) that the decision below—holding the challenged agreements immune from scrutiny—is at odds with this long-standing consensus and is based on serious errors.

The arguments and alternative tests advanced in the responsive briefs are equally contrary to this settled understanding and equally wrong.

**I. THIS COURT’S PRECEDENTS REQUIRE SCRUTINY OF ANY AGREEMENT BETWEEN SEPARATELY OWNED AND CONTROLLED ENTITIES**

The NFL teams and the United States initially challenge the principle that, under the Court’s cases, any agreement between separately owned and controlled entities is a “contract, combination ... or conspiracy” under Section 1. *See* NFL Br. 20-22, 30-34, 37-43; U.S. Br. 21-22. This challenge fails.

### A. Section 1 Applies To Agreements Of Teams In Sports Leagues

The NFL teams boldly argue that collaboration among teams in a sports league is not conduct “of the kind that Section 1 was intended to address.” NFL Br. 2. This Court’s precedents say differently.

Most significantly, *NCAA v. Board of Regents*, 468 U.S. 85, 99 (1984), held that a sports-league rule was a horizontal restraint constituting concerted conduct under Section 1. Despite expressly recognizing that NCAA teams cannot produce their “product” (NCAA football) without collaboration, the Court held that this “critical” factor meant only that Rule of Reason rather than *per se* scrutiny should apply. *Id.* at 100-103.

The NFL teams seek to distinguish *NCAA* on the ground (NFL Br. 42) that “the NCAA is not a league,” because the NCAA includes multiple leagues and conferences that could separately generate a season of competition. But the same is true of the NFL’s multiple conferences and divisions. The NFL teams’ related protestation (*id.*) that the NCAA contains “no single league or tournament in which all college football teams compete” is equally specious: Not only does the NCAA have formal playoffs in almost all of its sports and a poll-determined champion in Division I-A football, but the NFL teams cannot explain how a *joint decision* to have a single league or season-ending playoff (or not) makes the difference between unilateral conduct of a single entity and concerted conduct of a joint venture. And, contrary to the teams’ suggestion (at 43), it is irrelevant that the NCAA members also sell educational products. *See* Pet. Br. 45-46.

More fundamentally, none of these evasions can obscure the critical point that *NCAA* itself treated the NCAA as presenting the same antitrust considerations as other sports leagues. 468 U.S. at 102. Indeed, the Court's reliance on the Sports Broadcasting Act ("SBA"), which applies only to professional leagues, makes sense only because of that identity of issues. *Id.* at 104 n.28. *NCAA* is as applicable to the NFL as it is to the NCAA.

The NFL teams also cannot distinguish *Radovich v. NFL*, 352 U.S. 445 (1957), which applied Section 1 to the NFL. The teams suggest (NFL Br. 41) that *Radovich* involved only an agreement between the NFL and another league and its commissioner. But the other league was an "affiliat[e]" of the NFL teams, "not a competitor," 352 U.S. at 448, and the core agreement in issue was an alleged conspiracy among the NFL teams to "monopolize and control organized professional football in the United States." *Id.* at 446-47. Recognizing this, the NFL teams in *Radovich* argued that they "are not business competitors in the accepted sense.... [T]he success of any is dependent upon the success of all." Brief for Respondents NFL, et al., *Radovich*, No. 94 (U.S. Dec. 2, 1956), 1956 WL 89185, at \*53. This Court found that argument "lacking in merit" (separate from its rejection of an immunity based on the *Federal Baseball* case). 352 U.S. at 454.

#### **B. All Agreements Of Separately Owned And Controlled Entities Are Subject To Section 1**

With the United States, the NFL teams alternatively argue that separate ownership and control of entities taking joint action is not dispositive

of the “concerted conduct” inquiry. NFL Br. 20-22; U.S. Br. 21-22. Precedent is again to the contrary.

1. Cases such as *Associated Press v. United States*, 326 U.S. 1, 14-15 (1945), and *United States v. Sealy, Inc.*, 388 U.S. 350, 352-53 (1967), long ago established that Section 1 applies to all agreements of separately owned and controlled entities. These cases and others like them were cited in Petitioner’s opening brief (at 18-21), are well accepted, and are controlling. Accord Robert H. Bork, *The Antitrust Paradox* 270 (1978) (*Sealy* was “without doubt correct[]” in treating the restraints at issue as “horizontal restraints between the ... manufacturer-licensees” that controlled the corporation rather than as restraints of a unitary corporation). The silence about these cases in the responsive briefs speaks volumes.

2. The NFL teams do discuss *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979) (“*BMI*”), but fail to distinguish it. NFL Br. 30-31. *BMI* recognized that a blanket-license arrangement among copyright owners was “quite different from anything any individual owner could issue,” *id.* at 23, and that “the whole is truly greater than the sum of its parts; it is, to some extent, a different product,” *id.* at 21-22. Nevertheless, the Court held that the blanket license was “concerted action” under Section 1, and that the necessity of cooperation to produce it merely justified Rule of Reason rather than *per se* scrutiny. *Id.* at 10, 23-24. In other words, even if the NFL teams cannot individually produce “NFL Football”—as opposed to mere “football,” which the teams can, and have, produced without an NFL—this does nothing to

distinguish them from the copyright owners in *BMI*, who also could not individually produce a blanket license.

3. Between them, the NFL teams and the United States cite four cases that are allegedly “inconsistent” with this understanding of the foregoing cases. But no inconsistency exists.

a. In *Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co.*, 370 U.S. 19 (1962), the two defendant associations had “common ownership”; moreover, there was “no indication” that the associations’ separate incorporation was of any “economic significance.” *Id.* at 25, 29. Further, the case turned on the Capper-Volstead Act’s immunity provision for agricultural cooperatives, 7 U.S.C. § 291, and not—contrary to the teams’ suggestion, *see* NFL Br. 19 n.5—on any immunity under Section 1 itself. *See* 370 U.S. at 27-29; *see also* *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 773 n.21 (1984) (*Sunkist*’s “holding derived from statutory immunities granted to agricultural organizations”).

b. *United States v. Citizens & Southern National Bank*, 422 U.S. 86 (1975), simply did not address “the capacity to conspire under Section 1.” NFL Br. 38. Rather, the Court addressed “whether restraints of trade integral to this particular, unusual function [of a parent bank operating *de facto* branches] are *unreasonable*.” 422 U.S. at 116 (emphasis added); *see also id.* at 119 (finding that the challenged conduct “has plainly been procompetitive”).

c. Even more remarkably wrong is the suggestion that a focus on separate ownership and control violates *Copperweld*’s instruction that the “reality” of

economic power, not the “form” of corporate structure, dictates whether an agreement is concerted conduct. *See* NFL Br. 18-21; U.S. Br. 21. This contention fundamentally misunderstands *Copperweld*—and equally misunderstands the significance of “ownership” in a free-market economy. The realities of unitary ownership and control *were* the “reality” and “substance” to which the Court was referring in *Copperweld*—as contrasted with the “form” of applying different rules to commonly owned entities based on whether they were separately incorporated. *See, e.g.*, 467 U.S. at 771-73. Unitary ownership and control was the critical “reality” because that unitariness, or its absence, is what determines whether independent decisionmaking and action are possible, i.e., whether the entities’ “actions are guided or determined not by two separate corporate consciousnesses, but one.” *Id.* at 771. As the United States contradictorily notes, separate ownership “is not just a matter of form, but creates ‘functional differences’ that are ‘significant for antitrust policy.’” U.S. Br. 23.

The NFL teams also misuse *Copperweld*’s phrase “independent sources of economic power.” NFL Br. 24-25. That phrase did not invite a metaphysical inquiry into the wellsprings of the venturers’ respective economic values. It asks whether the entities at issue are capable of any independence in making decisions—a question answered by looking to whether the entities are separately owned and controlled. *See* 467 U.S. at 770-71.

The NFL teams likewise err in insisting that they are not “completely independent.” *See, e.g.*, NFL Br. 24-25. Under *Copperweld*, the relevant question is

whether the entities are independent *at all*—i.e., whether, as the United States put it in *Copperweld*, there is any “*potential* for independent decision making.” Brief of U.S. as *Amicus Curiae* at 11, *Copperweld*, No. 82-1260 (U.S. Aug. 25, 1983) (emphasis added). To fall outside of Section 1, conduct must be “*wholly unilateral*.” *Copperweld*, 467 U.S. at 768 (emphasis added) (internal quotation marks omitted).

For its part, the United States errs in suggesting that, in determining whether “concerted action” exists, *Copperweld* invites a case-by-case inquiry into whether the challenged agreement affects the entities’ “actual or potential competition.” U.S. Br. 6-7. The point of the “concerted conduct” inquiry is to determine whether the requisite plurality of actors is involved; evaluation of competitive effects is the office of the Rule of Reason. *Copperweld*, 467 U.S. at 768-69, 775-77; *accord Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 885 (2007) (“The rule of reason is the accepted standard for testing whether a practice restrains trade in violation of [Section] 1.”). Indeed, the assertion that *Copperweld* asks whether the entities are “actual or potential competit[ors]” is baffling, since *Copperweld* involved a challenge to a *vertical* agreement between a parent and subsidiary who were not even conceivably competitors. *See* 467 U.S. at 771. In other words, the United States’ interpretation of *Copperweld* would not apply to *Copperweld itself*. That cannot be correct.

d. Finally, the United States errs in suggesting (at 21-22) that *Texaco Inc. v. Dagher*, 547 U.S. 1 (2006), is “inconsistent” with the principle that all agreements between separately owned and controlled

entities are subject to Section 1. *Dagher* addressed only the narrow question “whether it is *per se* illegal” for a fully integrated production and marketing joint venture to set the price for its product. 547 U.S. at 3. *Dagher* expressly *declined* to address an argument that the venture’s price-setting was the conduct of a “single entity” not subject to Section 1. *Id.* at 7 n.2. Indeed, far from questioning the applicability of Section 1, *Dagher* indicated that the antitrust plaintiffs there could have “challenged [the price-setting policy] pursuant to the rule of reason.” *Id.* at 7. In short, the Court’s holding and reasoning in *Dagher* expressly do *not* speak to the “concerted conduct” issue, much less create any “inconsistency” with a century of precedent.

## II. THE ARGUMENTS MADE FOR BROADLY EXEMPTING NFL TEAM AGREEMENTS ARE WITHOUT BASIS

Notwithstanding these precedents, the NFL teams ask the Court to create a new immunity for agreements of teams in sports leagues. However, just as the Court has previously refused to create exceptions based on “the special characteristics of a particular industry,” *Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 689 (1978), it should refuse here, too.

### A. The Commentaries Cited Are No Basis For An Exemption

The NFL teams initially argue (NFL Br. 21-24) that, over the past fifty years, some commentators have suggested that a sports league should be treated as a “single entity” for at least some purposes. This discussion is both misleading and irrelevant.

Contrary to the teams' suggestion (NFL Br. 22), then-Professor Bork did not in *The Antitrust Paradox* advocate treating sports leagues as immune from Section 1. Quite the opposite: He argued that restraints adopted by sports leagues should be subjected to an "ancillary restraints" analysis, so as to distinguish between agreements that "enhance efficiency [and] may be called ancillary" and those that "accompany a joint endeavor but are actually predatory." Bork, *supra*, at 332-34; *see also id.* at 279 (ancillary status limited to "restraints that make [the league] efficient"). He specifically cited a professional football league as an example of a "cooperative group" whose restraints "the law should investigate to determine [their] relationship to efficiency." *Id.* at 335-36.

The NFL teams misstate Professor Hovenkamp's views as well. Hovenkamp has written that the NFL is no different from numerous other joint ventures to which Section 1 has been applied. Herbert Hovenkamp, *Exclusive Joint Ventures and Antitrust Policy*, 1995 Colum. Bus. L. Rev. 1, 10, 12. And, he has noted:

Antitrust policy has always regarded joint ventures as combinations—that is, as associations of independent economic actors making joint decisions.... Given the opportunities for collusion, and the differing incentives that motivate joint venture systems and individual members, it is simply not appropriate to treat ventures as single firms.

*Id.* at 53.

In any event, the NFL teams' cherry-picking of citations adds nothing relevant, because there is no strong academic consensus to guide the Court. *Cf. Leegin*, 551 U.S. at 899-90. As Professor Feldman notes:

A debate has raged in the scholarly literature for more than 50 years over the proper classification of sports leagues. Yet, in nearly every judicial opinion, both before and after the Supreme Court's decision in *Copperweld*, the courts have rejected the single-entity argument and held that a professional sports league is capable—and often guilty—of conspiring in violation of Section 1 of the Sherman Act.

Gabriel Feldman, *The Puzzling Persistence of the Single-Entity Argument for Sports Leagues: American Needle and the Supreme Court's Opportunity to Reject a Flawed Defense*, 2009 Wis. L. Rev. 835, 846-47 (2009).

**B. That A Team Cannot Individually Produce "NFL Football" Provides No Basis For Section 1 Immunity**

Commentaries aside, the NFL teams' principal substantive argument is that, because "the member clubs of a professional sports league are inherently unable to compete *at all*" (NFL Br. 30) in the absence of collaboration, their agreements are unique and should not be subject to Section 1. NFL Br. 32-35. This argument has multiple flaws.

1. To begin with, contrary to the teams' pretensions, the NFL was not created in a Big Bang, or even in the 1970 merger of the AFL and NFL.

Rather, the NFL was formed in 1920, by already-extant teams that were existing competitors. *See* Pet. Br. 43. Moreover, as the United States notes, by maintaining separate ownership, the teams remained competitors across “an extensive web of operations.” U.S. Br. 23. Thus, the teams’ starting premise—that the NFL is unlike “traditional” joint ventures involving “entities that had been actual or potential economic competitors and often remain so after formation of the venture,” NFL Br. 33—is contrary to historical and present fact.

2. Nor is the NFL unique in needing cooperation to create its joint product. The same is true of numerous ventures long subject to Section 1, including the “Associated Press, NCAA football, long distance telecommunications since the AT&T divestiture, automated bank teller (“ATM”) networks, and MasterCard or VISA,” as well as “the St. Louis railroad terminal facility ... and ASCAP’s blanket licensing arrangements.” Hovenkamp, *supra*, at 10, 12. As *NCAA* and *BMI* held, the antitrust consequence of the need for cooperation is *not* immunity from Section 1, but rather Rule of Reason scrutiny.

3. In all events, the teams’ correlative contention (NFL Br. 25-27) that the need for cooperation in “production” of league football carries with it an immunity extending beyond that production to all joint “promotion” activities is itself contrary to precedent and reason. As Judge Posner has written, “[i]t does not follow that because two firms sometimes have a cooperative relationship there are no competitive gains from forbidding them to cooperate in ways that yield no economies but simply limit

competition.” *Gen. Leaseways, Inc. v. Nat’l Truck Leasing Ass’n*, 744 F.2d 588, 594 (7th Cir. 1984). Thus, exceptions to Section 1’s “otherwise inflexible prohibition of agreements eliminating rivalry” are “confined ... to the ... reason for [their] existence,” Bork, *supra*, at 267, and efficiencies that have justified the creation of a production joint venture have not sufficed to justify joint action in other areas. *See, e.g., In re Gen. Motors Corp.*, 103 F.T.C. 374 (1984) (G.M.-Toyota joint venture); *PolyGram Holding, Inc. v. FTC*, 416 F.3d 29, 38 (D.C. Cir. 2005) (“Three Tenors” album). Indeed, under the “ancillary restraints” doctrine, a restraint cannot be justified by reference to the benefits of a joint venture unless it is “reasonably necessary to achieve [the] joint venture’s efficiency-enhancing purposes.” *Major League Baseball Props., Inc. v. Salvino, Inc.*, 542 F.3d 290, 339 (2d Cir. 2008) (Sotomayor, J., concurring in the judgment).

Here, whatever the merits of the claim that the need for cooperation justifies Section 1 immunity for the production of football games, this justification clearly cannot extend to commercial conduct that the teams *can* undertake individually, such as the licensing of their trademarks and logos and the sale of hats and apparel bearing those marks and logos. While the teams contend that “without use of other member clubs’ names, marks, and logos, a member club could not sell a game program or display the opposing team’s identifying information on signage in its stadium,” NFL Br. 26, this argument at most justifies an agreement requiring teams to permit use of their marks for such purposes. It does not justify treating *all* “promotion” agreements as categorically lawful without analysis of their reasonable necessity

to the production of football or their anticompetitive effects.

The NFL teams' attempted end-run around the "ancillary restraints" doctrine and the Rule of Reason is ironically exposed by the teams' concession (NFL Br. 52) that an agreement to form a trucking company would be subject to Section 1. A true single entity could invest in such an unrelated line of business without triggering Section 1. But, since the NFL teams are not a true single entity, even they lack the temerity to claim an immunity for an obviously unrelated—i.e., non-ancillary—agreement to form a trucking company. That concession shows, however, that the teams have no basis for claiming immunity for other agreements—such as exclusive licensing agreements.

4. The NFL teams' argument that Section 1 does not reach "production or promotion" of NFL football also cannot be squared with the SBA. The SBA's grant of partial immunity for collective broadcasting agreements is plainly premised on the understanding that such "promotion" agreements *are* subject to Section 1. The suggestion (NFL Br. 45 n.18) that the SBA was a "reaffirmation" that the production and promotion of football are not subject to Section 1 is facially absurd, particularly in light of the intentionally "limited" nature of what was expressly understood as an "antitrust exemption." *See NCAA*, 468 U.S. at 108 n.35. Indeed, as this Court stated, the SBA manifests "Congress' recognition that agreements among league members to sell television rights in a cooperative fashion could run afoul of the Sherman Act." *Id.* at 104 n.28.

### C. The NFL Teams' Alternative Rationales For Single-Entity Treatment Are Also Unfounded

The NFL teams offer various additional rationales for single-entity treatment. But these additional arguments also ignore basic antitrust principles.

1. The teams first suggest (NFL Br. 4) that individual teams are “controlled by the League,” and their *amicus* National Basketball Association argues (at 13-24) that this “control” makes the “League” the equivalent of the corporate parent in *Copperweld*. The “League,” however, is nothing more than *the teams acting in concert*. As the teams concede, the “League” is controlled by vote of its Executive Committee, which is to say by a body comprising one representative from each team. NFL Br. 4. As this Court has made clear, the decisions of a body that is “ultimately controlled by the vote of [its] member[s]” are “horizontal restraint[s],” i.e., “agreement[s] among competitors on the way in which they will compete with one another.” *NCAA*, 468 U.S. at 99; *Sealy*, 388 U.S. at 352-54.

2. For this reason, the NFL teams’ further argument (NFL Br. 2) that they derive all value from “NFL Football” is as irrelevant as it is unfounded. It is irrelevant because the concerted conduct question turns on whether the teams have the potential to make independent decisions or are inherently unitary, *Copperweld*, 467 U.S. at 771-72, not on how the teams have attained their “value.” And the argument is unfounded because the NFL teams clearly do not derive all value collectively: As Petitioner’s opening brief shows (at 2-4, 43, 47-48), the teams that formed the NFL brought their pre-existing values into the league (as did those that

later joined from the AFL and other leagues), and teams continue to be the primary source of their own values through their respective investments in players, facilities, coaching staffs, promotional activities, intellectual property, and other operations. It is the teams that produce NFL football games on the field, not the league. Indeed, the amounts invested by individual teams—and the assets of those teams—far outstrip the relatively minuscule investments and assets of the league organization (which are owned in common by the teams). And this point applies equally to teams that have entered the league after its initial formation: Entities wishing to join the league are required to form an organization and apply for membership, and to commit very substantial capital both to their own operations and, in exchange for admission, to the existing teams. JA273-75. Any contention that a new team's value derives solely, or even primarily, from the league (and not from team investments) is unfounded.

3. The NFL teams similarly err in analogizing (NFL Br. 15, 35-36) to divisions of Macy's, law firm partnerships, and the Equilon venture at issue in *Dagher*. Macy's owns and controls its divisions; the NFL does not own and control the teams. Further, the teams point to no cases holding that either law firm partnerships or the *Dagher* entity are outside of Section 1. On the contrary, it has frequently been assumed that law firm partnerships *are* subject to Section 1. *See, e.g., Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 224 n.10 (D.C. Cir. 1986); Bork, *supra*, at 265-67 (same). And *Dagher*, of course, expressly held that the agreement forming Equilon was subject to Section 1 and declined to adopt an argument that the pricing

decision of Equilon was not subject to further Section 1 scrutiny. 547 U.S. at 6 n.1, 7 n.2. Moreover, to the extent that there is an argument for single-entity treatment of a law firm partnership or an entity like Equilon, a necessary condition would be that the venture be *fully integrated*—i.e., one in which the venturers have “pool[ed] their capital and share[d] the risks of loss as well as the opportunities for profit,” and no longer compete in the relevant market, such that their relation to the joint venture is solely “as investors, not competitors.” *See id.* at 6 (quoting *Arizona v. Maricopa County Med. Soc’y*, 457 U.S. 332, 356 (1982)). The NFL teams, however, have not pooled their capital, do not share profits and losses, and actually and potentially compete with each other for fans and revenues in many ways. The analogies that the teams seek to draw are thus completely without basis.

4. The NFL teams’ attempt (NFL Br. 21, 29, 53) to draw cover from Judge Easterbrook’s opinion in *Chicago Professional Sports, LP v. NBA*, 95 F.3d 593 (7th Cir. 1996) (“*Bulls II*”), fares no better. In a case about televising NBA games, Judge Easterbrook speculated (but did not hold) that in certain “facet[s]” a sports league might be viewed from certain “perspective[s]” as a single entity. *Id.* at 599. However, in contrast to the NFL teams, which ask for single-entity immunity as a matter of law, Judge Easterbrook found the proper “characterization” of NBA team television agreements sufficiently debatable to make it a question of fact not capable of appellate resolution. *Id.* Indeed, he concluded that, “given the difficulty of [the single-entity] issue, it may be superior to approach this as a straight Rule of Reason” question. *Id.* at 601. And, in further contrast

to the NFL teams (NFL Br. 34 n.11), he opined that NBA teams likely were *not* a single entity in the context of player relations. 95 F.3d at 599.

Moreover, with respect, Judge Easterbrook's reasoning is seriously suspect. Its attempt to distinguish *NCAA* completely fails. Pet. Br. 45-46. Nor is its treatment of *Copperweld's* "complete unity of interest" discussion sound. *Id.* at 39-40. It identifies no basis for an approach turning on "perspectives" rather than on unitary ownership and control—the standard actually applied in *Copperweld*. And it necessarily—and improperly—assumes the result of a market-power inquiry in asserting (95 F.3d at 600) that in televising games a league might be seen as one firm "in competition with a thousand other producers of entertainment." Pet. Br. 39-40, 50-51.

In any event, even under a "perspectives-based" approach, the agreements challenged here are those of separate entities: As the NFL teams themselves assert, it is essential to the "league's legitimacy—the perception among consumers that its games and championship races are genuine"—that the teams be perceived as separate entities in competition with each other. NFL Br. 39 & n.14 (internal quotation marks omitted). And those perceptions are if anything particularly critical in the context of licensing and merchandising, where the teams are commercially exploiting fan loyalties to individual teams. *Id.* at 7. In short, from the "perspective" of consumers, the teams are by their own account

decidedly separate entities—particularly in licensing and merchandising.<sup>1</sup>

**D. The Concern About Subjecting “Ordinary Business Decisions” Of Sports Leagues To Section 1 Scrutiny Is Unfounded**

The NFL teams (at 20-21, 37-40) protest that treating their joint actions as concerted conduct will result in scrutiny of their “every business decision” and “convert every league of separately owned clubs into a walking antitrust conspiracy.” This protest is also unsound.

*First*, agreements of joint venturers are *not* the equivalent of “ordinary business decisions” of single firms. As *Copperweld* explained, Congress chose to subject *all* concerted activity to scrutiny, because “[c]oncerted activity inherently is fraught with anticompetitive risk.” 467 U.S. at 768-69. From an economic standpoint, joint ventures always present heightened risks of anticompetitive conduct that do not exist for single firms. Hovenkamp, *supra*, at 58-59, 61-64; *see also Copperweld*, 467 U.S. at 768-69. Indeed, the NFL teams apparently accept this teaching with respect to the “ordinary business decisions” of *other* joint ventures—as they seek exemption only for sports leagues, not for “traditional” joint ventures.

*Second*, there is no evidence of a flood of frivolous challenges to “ordinary business decisions” of sports

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<sup>1</sup> Echoing Judge Easterbrook’s errors, Respondents’ *amici* economists, among other flaws, likewise base their conclusions on impermissible assumptions about market power. Resp. Econ. Br. 7 (discussing theory of the firm assuming “a venture without market power”), 27 (dismissing anticompetitive risk because “unreasonable to assume” that NFL teams have market power).

leagues—notwithstanding the long-standing judicial consensus that such leagues are subject to Section 1. Antitrust litigation involving NFL teams has typically involved overt restraints on competition, such as agreements not to compete in licensing intellectual property, as in this case and in the Dallas Cowboys’ 1995 lawsuit; territorial restraints, as in *L.A. Memorial Coliseum Commission v. NFL*, 726 F.2d 1381 (9th Cir. 1984); restraints on player free agency, *McNeil v. NFL*, 790 F. Supp. 871 (D. Minn. 1992); and a group boycott against participants in a competing league, *Radovich*. Furthermore, antitrust plaintiffs seeking to challenge “ordinary business decisions” would have to surmount a host of daunting obstacles, such as the need, under *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), to allege a “plausible” Rule of Reason claim, including anticompetitive effects in a cognizable market in which the teams plausibly have market power.

*Finally*, altering long-settled concerted conduct law would be a spectacularly ill-conceived way to address concerns about meritless litigation—the doctrinal equivalent of hunting a mosquito with an elephant gun. The NFL teams have made no showing that “ordinary business decision” antitrust litigation has been a problem *at all*; yet, the immunity they seek would instantly legalize a broad array of actions previously subject to antitrust constraint, including both concerted conduct previously held to violate the law, *see, e.g., L.A. Coliseum*, 726 F.2d 1381; *United States v. NFL*, 116 F. Supp. 319 (E.D. Pa. 1953); concerted conduct with regard to satellite and internet broadcasting that is under investigation by congressional committees; and conduct deterred until now but apparently lawful under the teams’ sweeping

proposed immunity—such as fixing of ticket prices to NFL games and restriction or elimination of competition for players.<sup>2</sup>

### III. THE UNITED STATES' PROPOSAL IS UNSUPPORTED AND UNWORKABLE, AND IN ANY EVENT REQUIRES REVERSAL

The United States also opposes the teams' position, but in place of this Court's traditional approach to Section 1's plurality requirement proposes a case-by-case "effective merger" inquiry. This approach asks whether entities have contractually eliminated actual and potential competition in an aspect of their operations such that the challenged restraints do not affect remaining competition between them. U.S. Br. 16-19. The United States' approach, too, is unsound.

#### A. The Proposed Approach Departs From Prior Positions Of The United States

Notably, the United States' new approach departs sharply from its positions in *Copperweld* and *NCAA*. In *Copperweld*, the United States argued that a single firm is defined by reference to unitary ownership and control of assets and that control by *agreement* "in the absence of common ownership should remain subject to Section 1." Brief of U.S. at 33 n.31. Here, however, the United States proposes that a mere contract integration *can* be deemed an immune enterprise. Equally troublesome, in *NCAA*,

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<sup>2</sup> The teams dismiss this latter concern based on their collective bargaining relationship with the NFL players. NFL Br. 34 n.11. But antitrust constraints have played a critical role in that relationship, *see* NFL Players Ass'n, et al. Br. at 2, 15-17, and the union has in the past decertified itself and looked to the antitrust laws to oppose restrictions on competition for players. *See Powell v. NFL*, 764 F. Supp. 1351, 1354 (D. Minn. 1991).

the United States advised that “courts and commentators generally deem it advisable to eschew *per se* condemnation and evaluate regulations of [sports] leagues under the rule of reason,” and suggested that rules like those “limit[ing] the sizes of squads ... [and] the number of practices that may be held” likely would be justified under such an approach. Brief of U.S. as *Amicus Curiae* at 24 n.16, 35, *NCAA* (U.S. Jan. 17, 1984). Here, in contrast, the United States suggests that, under its “effective merger” approach, “conduct establishing the ‘rules defining the conditions of the contest’ ... is reasonably viewed as that of a single entity.” U.S. Br. 20 (citation omitted). Such unacknowledged departures from long-held prior positions deserve serious skepticism. *See Motor Veh. Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 57 (1983).

**B. The Proposed Approach Is Contrary To NCAA And Finds No Basis In *Copperweld* Or *Dagher***

Here, skepticism should become rejection: The *NCAA* Court endorsed the government’s earlier view that sports league rules *are* subject to Section 1, and further agreed that for a subset of them—such as “rules defining the conditions of the contest”—it would be “reasonable to assume” that they are “procompetitive” under the Rule of Reason. 468 U.S. at 117; *see id.* at 101-03; *Leegin*, 551 U.S. at 898-99 (approving use of “presumptions where justified” under Rule of Reason). And the proposed “effective merger” exception in no way follows from “the reasoning of *Copperweld* and *Dagher*.” U.S. Br. 21.

1. As explained above (at 6-8), *Copperweld* does not authorize a case-by-case “functional” inquiry into

whether a restraint “pose[s] the risks that Section 1 is intended to address,” U.S. Br. 21—as the United States now proposes. *Copperweld* asks whether the alleged conspirators are separate entities or are controlled by a single owner, such that they would have an inherent “complete unity of interest” that exists “[w]ith or without a formal agreement.” 467 U.S. at 771. *Copperweld* focuses on whether the conduct at issue involves a plurality of actors and is thus concerted; competitive effects analysis is not the point of this inquiry and, under the cases, is more properly the office of the Rule of Reason.

2. Nor does the reasoning of *Dagher* “reflect a natural extension of *Copperweld*” to joint ventures. U.S. Br. 9-10 & n.4. This argument seriously misconstrues *Dagher*.

*First*, *Dagher* expressly *declined* to extend *Copperweld* to joint ventures. 547 U.S. at 7 n.2. The statements in *Dagher* upon which the United States relies—concerning the absence of competition and price-setting by a single firm—all relate to why a *per se* rule was inapplicable there. *E.g.*, *id.* at 5 (“Price-fixing agreements between two or more *competitors* ... are *per se* unlawful. These cases do not present such an agreement ....”) (emphasis added). The Court was merely equating the price-setting in *Dagher* with the price-setting in *BMI*, *id.* at 5-8—which “plainly involve[d] concerted action,” 441 U.S. at 10. *Dagher* demonstrably broke no new ground.

*Second*, the passages in *Dagher* on which the United States relies were, not surprisingly, predicated on *Dagher*’s particular facts—a key feature of which was that, in creating their integrated joint venture, the venturers had ceased to

be competitors in the market at issue, *and the plaintiffs were not challenging their agreement not to compete*. 547 U.S. at 6 n.1. Accordingly, once the venturers “pool[ed] their capital and share[d] the risks of loss as well as the opportunities for profit,” *id.* at 6 (quoting *Maricopa*, 457 U.S. at 356), they had entirely identical interests “as investors, not competitors,” *id.*, in the pricing of the venture’s product. Even if *Copperweld* could be applied in such a case, that would hardly justify applying it where, as here, the venturers have *not* pooled capital and shared profits and losses and the antitrust plaintiff *does* challenge the venturers’ agreements not to compete.

**C. An “Effective Merger” Exception Will Lengthen And Complicate, Rather Than Simplify, Antitrust Litigation**

The United States also errs in suggesting (at 26) that its proposed “effective merger” test could be a “useful tool for identifying conduct that raises no Section 1 concern.”

*First*, the United States itself refutes that suggestion, conceding that “[t]he inquiry into whether separate economic interests are maintained by the participants in a joint enterprise is likely to be no easier than a full Rule of Reason analysis.” U.S. Br. 25 n.14 (quoting *Bulls II*, 95 F.3d at 605 (Cudahy, J., concurring)). Whether the participants have maintained “separate economic interests” is an express component of the proposed “effective merger” inquiry. U.S. Br. 17-21.

*Second*, a new “effective merger” exception would undoubtedly *increase* the length, expense, and uncertainty of antitrust litigation. In proposing a new

defense potentially applicable in every joint venture case, the United States' approach would replace the easily administrable "ownership and control" test with a multi-prong test that is extraordinarily undefined. The United States criticizes the NFL teams on the ground that "there is no obvious principle for identifying a 'highly integrated joint venture,'" U.S. Br. 24, yet it likewise fails to specify precisely what constitutes an "effective merger": It states that venturers "have effectively merged an aspect of their operations" when they "have completely eliminated competition among themselves in that activity," U.S. Br. 16, but this presumably is an incomplete definition, as it would otherwise apply to a mere cartel. Likewise unspecified is how to define the relevant area of a joint venture's operations to be analyzed for a potential effective merger—which the United States variously terms an "operational sphere" (at 6), "facet" (at 8), "aspect" (at 16), or "relevant sphere" (at 21). Other areas left to conjecture include what constitutes a "proper case" in which "decisions about formation of a joint venture or the centralization of additional functions in it could—like the merger of previously independent firms—be challenged well after the fact," *id.* at 16 n.6; and the standard for vertical restraints, which the United States outright declines to address. *Id.* at 17 n.7.

*Third*, unlike the "ownership and control" determination, the determination whether a particular integration is sufficiently merger-like to be deemed an "effective merger" appears likely to require frequent jury determinations, much like the pre-*Copperweld* determination of whether a parent and subsidiary were sufficiently "integrated" to be deemed a single entity. Such a result is hardly

consistent with a tool for early resolution of unwarranted litigation.

*Finally*, there are no offsetting judicial benefits. The United States concedes that “[o]nly a limited range of conduct would qualify for single-entity treatment under this standard.” U.S. Br. 7. And, by design, the “effective merger” approach imports a complicated competitive-effects inquiry into the threshold “concerted conduct” determination—which heretofore inquired only whether a plurality of actors is involved.

In particular, the United States’ approach would require a court to:

- (1) Determine whether the teams are competitors in any fashion in the relevant aspect of their operations. *Id.* at 6.
- (2) If the teams previously integrated their operations in this aspect in a way that eliminated all competition among them, determine whether that prior integration was lawful under the Rule of Reason. *Id.* at 16 n.6, 28, 32.<sup>3</sup>
- (3) If the prior integration was lawful, determine whether the challenged restraint “significantly affect[s] actual or potential competition among the teams or between the teams and the league outside their merged operations.” *Id.* at 7.

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<sup>3</sup> The United States apparently concedes that a plaintiff may challenge the earlier formation of an effectively merged entity. U.S. Br. 16 n.6, 28, 32. Accordingly, the government’s purportedly “two-step” test is more accurately described as involving three steps.

The proposed “effective merger” test is obviously just a truncated Rule of Reason inquiry into competitive effects that lacks prior precedent to draw upon.

The United States offers no reason why applying the traditional Rule of Reason will not be a superior means to the same end. As it concedes, “applying the rule of reason need not be unduly burdensome,” and “reductions [in litigation burdens] are unlikely to materialize” in the absence of an undesirable “abdication of Section 1 scrutiny.” U.S. Br. 25 & n.14. Indeed, *Twombly* applies as much to claims against sports leagues as it does to other businesses; and, as the United States’ brief opposing certiorari observed (at 20 n.8), sports leagues have had little difficulty summarily defeating meritless claims—*e.g.*, when plaintiffs could not prove injury to competition. More generally, this Court has recognized that, “by applying the rule of reason over the course of decisions, [courts] can establish the litigation structure to ensure the rule operates to eliminate anticompetitive restraints from the market and to provide more guidance to businesses.” *Leegin*, 551 U.S. at 898. For these reasons, as Judge Boudin observed, applying the Rule of Reason, as opposed to incorporating competitive-effects analysis into the concerted conduct inquiry, “is more straightforward and draws on developed law.” *Fraser v. Major League Soccer, L.L.C.*, 284 F.3d 47, 59 (1st Cir. 2002).

#### **D. Even Under The United States’ Test, The Decision Below Should Be Reversed**

In any event, even under the proposed “effective merger” test, the decision below should be reversed.

Although the meaning of “effective merger” is unacceptably ambiguous, the NFL teams plainly do

not meet it. At a minimum, an effective merger requires that the teams “have *completely* eliminated competition among themselves in [the relevant] activity.” U.S. Br. 16 (emphasis added). Here, as detailed in Petitioner’s opening brief (at 51-53; *see also* NFL Players Br. 18-20), although severely restricted, the teams continue to compete some in licensing and merchandising. The United States does not explain how an effective merger could exist on these undisputed facts.

Moreover, as also shown by Petitioner (at 56-57), the 2000-2001 agreements unquestionably adopted “additional constraints” that go well beyond “subsequent conduct simply reflecting th[e existing] limitation” on competition, U.S. Br. 15-16—including a lengthy extension of the teams’ agreement to restrict competition among themselves in licensing their intellectual property, along with new use of a monopoly licensee and new merchandising provisions. This, too, subjects the 2000-2001 agreements to scrutiny under the United States’ own test. *Id.*

The restraints at issue also “significantly affect actual or potential competition ... outside [the teams’] merged operations.” *Id.* at 17. The NFL teams repeatedly insist that licensing of intellectual property plays a critical role in both the production and promotion of their football businesses, *e.g.*, NFL Br. 14, 25-29—and the teams plainly have not merged those businesses in competing for things such as “fan support, ... ticket sales, [and] local broadcast revenues.” U.S. Br. 14 (internal quotation marks omitted). On this basis, too, the agreements are

subject to scrutiny even under an effective merger analysis.

Finally, the United States concedes that, at a minimum, the NFL teams' agreement "to make NFLP their exclusive licensing agent" is concerted conduct properly subject to challenge. U.S. Br. 27-28. While the United States suggests a remand to "clarify" whether Petitioner's claim encompasses this concerted restraint, *id.* at 32, its suggestion is contrived.

Until this non-issue was raised in the United States' brief unsuccessfully opposing certiorari, no one had expressed any doubt that Petitioner *does* challenge the teams' agreement to license only through NFLP. For example, the NFL teams' brief below (at 5) unequivocally described Petitioner's claim as challenging "*the NFL's long-standing collective approach to licensing its trademarks and those of its member clubs*" (emphasis added). The district court likewise understood that a central issue was "whether or not the 32 teams can agree on *designating a common actor to exploit their various intellectual property rights, and on being bound by the decisions of that common actor.*" Pet. App. 24a (emphasis added).

Any suggestion that Petitioner was attacking the exclusive Reebok license but not the teams' underlying agreements not to license independently makes no sense. The teams' horizontal agreements not to increase output by selling their own individual licenses in competition with the blanket license were an essential aspect of making Reebok's license exclusive. *Compare NCAA*, 468 U.S. at 114 n.54 ("Ensuring that individual members of a joint

venture are free to increase output has been viewed as central in evaluating the competitive character of joint ventures.”).

Thus, from the beginning of this case, Petitioner stated that it was challenging the *entirety* of the restraints, to wit, the teams’:

enter[ing] into a horizontal agreement to restrict (actually eliminate) their own use of their respective intellectual property, to deal only through National Football League Properties (which they created), to grant a license only to Reebok, and, necessarily, to refuse to deal with any other licensee.

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The United States’ contrary suggestion (U.S. Br. 32) is based on statements that simply say that Petitioner is not challenging the teams’ collective licensing *standing alone*, but rather is challenging the anticompetitive *combination* of the exclusivity in that collective licensing with the teams’ additional agreements creating a monopoly licensee. *E.g.*, Pet’r S.J. Resp. 25-26. In 2000-2001, the teams not only extended their earlier agreement not to license their intellectual property individually, but also agreed to create a monopoly licensee (with whom the teams agreed largely to refrain from competing in the merchandising of NFL-logo products)—thereby eliminating the previously remaining competition among blanket licenses. Petitioner’s challenge to the anticompetitive effects of the entire set of agreements is entirely proper. *See* VII Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 1504d (2d ed. 2003) (the “restraint is the sum total of everything

the parties have ‘agreed’ about and that is alleged to injure competition”).<sup>4</sup>

In short, as confirmed in the Questions Presented in the petition and in the NFL’s response to that petition (at 2), Petitioner is and always has been challenging the teams’ multiple agreements to limit competition in their licensing and merchandising activities. That challenge is to concerted conduct subject to Section 1.

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<sup>4</sup> Reebok—arguing solely the underlying antitrust merits, which are not before this Court—defends (at 4) only “an integrated license on behalf of all NFL clubs,” while ignoring, among other things, its agreement with the teams that they not license individually, and the settled anticompetitive effect of such blanket-only licensing, *e.g.*, *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 139-40 (1969).

**CONCLUSION**

This Court should reverse the judgment of the Seventh Circuit.

Respectfully submitted,

MEIR FEDER  
ANDREW D. BRADT  
DAVID M. COOPER  
JONES DAY  
222 East 41st St.  
New York, NY 10017  
(212) 326-3939

GLEN D. NAGER  
*Counsel of Record*  
JOE SIMS  
JONES DAY  
51 Louisiana Ave., NW  
Washington, DC 20001  
(202) 879-3939

JEFFREY M. CAREY  
790 Frontage Road  
Suite 306  
Northfield, IL 60093  
(847) 441-2480

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*Counsel for Petitioner*