No. 08-661

IN THE
Supreme Court of the United States

AMERICAN NEEDLE, INC.,
Petitioner,

v.

NATIONAL FOOTBALL LEAGUE, ET AL.,
Respondents.

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

BRIEF OF PETITIONER

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QUESTION PRESENTED

Whether an agreement of the 32 teams of the National Football League not to compete with each other or with a jointly selected monopoly licensee in the licensing of their individually owned intellectual property is immune from scrutiny under Section 1 of the Sherman Act, notwithstanding that the teams are independently owned and controlled for-profit businesses that do compete, and are capable of competing, with each other in numerous ways, including in the licensing and marketing of their respective intellectual property?

PARTIES TO THE PROCEEDING

The parties to the proceeding in the United States Court of Appeals for the Seventh Circuit were American Needle, Inc.; the National Football League; NFL Properties LLC; Arizona Cardinals Football Club, Inc.; Atlanta Falcons Football Club, LLC; Buffalo Bills, Inc.; Panthers Football, LLC; Cincinnati Bengals, Inc.; Cleveland Browns Football Company LLC; Dallas Cowboys Football Club, Ltd.; PDB Sports, Ltd. (d/b/a The Denver Broncos Football Club, Ltd.); The Detroit Lions, Inc.; Green Bay Packers, Inc.; Houston NFL Holdings, L.P.; Indianapolis Colts, Inc.; Jacksonville Jaguars, Ltd.; Kansas City Chiefs Football Club, Inc.; Miami Dolphins, Ltd.; Minnesota Vikings Football, LLC; New England Patriots L.P.; New Orleans Louisiana Saints, L.L.C.; New York Football Giants, Inc.; New York Jets LLC; The Oakland Raiders, L.P.; Philadelphia Eagles, LLC; Pittsburgh Steelers Sports, Inc.; The St. Louis Rams Partnership; Chargers Football Company, LLC; San Francisco Forty Niners, Limited Football Northwest LLC; Buccaneers Limited Partnership; Tennessee Football, Inc.; Pro-Football, Inc.; and Reebok International Ltd.

CORPORATE DISCLOSURE STATEMENT

Petitioner American Needle, Inc., has no parent company and no publicly held company owns 10% or more of its stock.

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JURISDICTION

The court of appeals' judgment was entered on August 18, 2008. The petition for writ of certiorari was filed on November 17, 2008, and was granted on June 29, 2009. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

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

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce ... is declared to be illegal.

STATEMENT OF THE CASE

In this case, American Needle challenges the 2000-2001 agreement of the 32 separately owned and controlled teams of the National Football League ("NFL") that each team will license its trademarks and logos exclusively to a jointly selected monopoly licensee, and that no team will compete by licensing its intellectual property separately. American Needle claims that this agreement of the 32 teams to eliminate competition in licensing the teams' trademarks and logos—which, according to the teams' licensee, produced a dramatic price increase for consumers of team branded merchandise by removing competitive "price pressures"—is an unlawful "contract, combination … or conspiracy" under Section 1 of the Sherman Act, 15

U.S.C. § 1. The Seventh Circuit, however, held that the challenged agreement is completely immune from Section 1 scrutiny on the theory that, at least with regard to their licensing activities, the 32 teams should be deemed a "single entity" incapable of entering into a "contract, combination … or conspiracy" with each other.

A. The 32 Teams Of The NFL

The NFL is an unincorporated, non-profit association of 32 football teams, each of which is a separate, independently owned and controlled for-profit entity. JA89. No team or owner has an ownership interest in any of the other teams. JA304. The NFL was formed in 1920 as a joint venture of already-existing professional football teams, and it exists, according to its constitution, "[t]o promote and foster the primary business of League members, each member being an owner of a professional football club located in the United States." JA269. No contract involving a "substantial commitment by the League or its members" can take effect without the specific approval of the member teams (JA290), and the NFL and its Commissioner are ultimately responsible to, and controlled by, the owners of the teams. JA168. Each team, moreover, retains the right to withdraw from the league. JA279.

Each of the 32 teams is a separate business. Each selects its own players, managers, administrators, and marketers. JA197-98. Moreover, although the teams by agreement share significant revenues, most notably proceeds from television contracts, there are numerous revenues and costs that they do not share: For example, NFL home teams set their own ticket prices and keep 60 percent of gate receipts from individual games, and revenues from sales of luxury suites, parking, concessions, and local sponsorship arrangements are not shared at all. *See* Marc Edelman, *Why the "Single Entity" Defense Can Never Apply to NFL Clubs: A Primer on Property-Rights Theory in Professional Sports*, 18 Fordham Intell. Prop. Media & Ent. L.J. 891, 911-16 (2008). Nor is revenue from logo merchandise sold at the teams' own stores subject to sharing. JA542. That is why, for example, the Green Bay Packers have promoted their pro shop with the slogan, "Where your purchases help the Packers win." As the Packers explained on their website:

> The Packers Pro Shop and PackersProShop.com are the only shopping locations where the Packers organization inherits all sales revenue. Revenue from Packers merchandise sold elsewhere—your local mall, for example—is shared by the entire league. Buy from the Pro Shop, help the Packers win. Buy anywhere else, help the Chicago Bears win, too.

Id.

Indeed, the respective teams' "total incomes vary wildly based on attendance at the local ballpark, premium seating, and corporate sponsorship, among other things." Johnnie L. Roberts & Andrew Murr, *If You Build It Will They Pay?*, Newsweek, Oct. 20, 2008, at E6. As a result, the highest-value team, the Dallas Cowboys, is worth an estimated $1.65 billion, more than twice as much as the lowest-value team, the Oakland Raiders, worth under $800 million, and the teams' operating results in 2008 ranged from a

$90.3 million profit to a $5.7 million loss. *Special Report: NFL Team Valuations*, Forbes, Sept. 2, 2009, http://www.forbes.com/nfl.

B. The Teams' Intellectual Property Licensing

1. Each NFL team owns its own intellectual property, including team logos and marks. JA195. Those logos and marks are highly valuable, as sales of team branded merchandise amount to several billion dollars annually. JA540. Indeed, many of the teams' marks are popular throughout the country, with the result that the market for such merchandise is national. JA264. For example, 30% of the reported $2.9 billion in NFL merchandise sales in 2001 was attributable to products bearing the logos of just three of the 32 teams. JA532. The relative popularity of the teams' marks, moreover, is fluid, permitting successful competitors to rapidly increase their share of the market. In 2006, when the Pittsburgh Steelers won the Super Bowl, sales of Steelers merchandise in the first two months of the year reportedly quintupled, from $30 million in 2005 to over $150 million in 2006. JA538.

For the first four decades of the NFL's existence, the league had no licensing arm and the teams decided individually whether and how to license their intellectual property. In 1963, however, the teams formed a joint licensing entity called NFL Properties ("NFLP"), which made possible the sale of a blanket license covering the marks and logos of all teams. JA195-96; 310-17. But the teams retained ownership of their respective intellectual property, and it does not appear from the record that NFLP became the teams' *exclusive* licensing agent at that time.

In 1982, a number of teams by agreement created the so-called NFL Trust as a new joint mechanism for licensing their marks. The participating teams again retained ownership of their respective marks, but assigned the Trust near-exclusive licensing rights for the term of the Trust, retaining only the rights to use their marks to advertise locally and in the teams' own publications. JA383. The Trust was to terminate on March 31, 2004, and was also terminable at the direction of 3/4 of the teams that joined it. JA359-60.

The Trust licensed the marks to NFLP, which, in turn, licensed them to various third parties. JA351, 387. Apparently, NFLP typically licensed the marks as a group—*i.e.*, as blanket licenses that bundled the marks of all of the teams—and its practice was to sell multiple such licenses to competing manufacturers. JA263. The income from the licensing agreements was distributed to the teams in equal shares. JA369-70.

Two teams—the Miami Dolphins and the Oakland Raiders—declined to participate in the Trust and contracted directly with NFLP. JA343-49, 464. A third team, the Dallas Cowboys, participated in the Trust but resisted the exclusivity of the arrangement.

In 1995, for example, the Cowboys' owner "entered into a number of highly-publicized contractual arrangements—with Dr. Pepper, Pepsi, and NIKE," triggering a lawsuit by NFLP alleging that the agreements "'impermissibly exploit[ed] the Club Marks and the NFL Marks.'" *NFL Props., Inc. v. Dallas Cowboys Football Club, Ltd.*, 922 F. Supp. 849, 851 (S.D.N.Y. 1996). The Cowboys, in turn, filed an antitrust suit against the teams, alleging that the "aptly-named" Trust "is a classic price-fixing cartel that has eliminated free competition among NFL clubs." JA407. Specifically, the Cowboys alleged that "[m]any licensees would prefer to buy the right to use the marks of only a few member clubs," JA422; and that output in the professional football merchandise and sponsorship markets "is lower than it would otherwise be" absent "the unlawful restrictions imposed by the cartel," JA431. The respective lawsuits were settled in 1996 on terms that allowed the Cowboys not only to retain the disputed sponsorship arrangements but to enter into new ones. *See, e.g.*, *N.F.L. Settles with Cowboys*, N.Y. Times, Dec. 14, 1996, at 32.

2. In the late 1990s, retail sales revenue from sports-related merchandise declined significantly. JA474-76. Within the licensing community, a view emerged that royalties could be increased by granting fewer licenses to manufacturers, thereby allowing prices to rise due to reduced competition. JA265; 465-68.

In the spring of 2000, the NFL teams discussed such an approach to licensing and began exploring a long-term exclusive merchandising arrangement involving Reebok. JA208-11, 465-68. Such an arrangement could not be reached by NFLP without agreement of the teams because, among other things, the NFL Trust did not possess licensing rights past the March 2004 termination date of the Trust. JA359.

Ultimately, in December 2000, the teams collectively agreed to grant Reebok a "[t]en year exclusive license agreement, including the NFL and all club marks and logos, for uniforms, sideline apparel, headwear and fitness equipment," resolving that "the member clubs hereby approve the necessary grant of rights and marks, logos, other intellectual property and marketing assets." JA204-05, 465-67. In further negotiations, Reebok agreed to "provid[e] Clubs greater flexibility in the distribution of the products covered by" the agreement (JA469), by permitting teams to elect to control (and profit from) the merchandising of their own apparel in exchange for an annual minimum contribution to the teams' shared revenue pool. *See* 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* 40-41 (forthcoming 2009, http://ssrn.com/abstract=1473995). This provision was included at the insistence of the Cowboys, who subsequently exercised the option and as a result compete independently in the sale and marketing of Cowboys' apparel. *Id.*; JA207-08.

In March 2001, the teams voted to approve a final agreement with Reebok. JA205-07, 469-70. In light of that agreement, NFLP did not renew its licenses with competing manufacturers. JA265.

After the creation of the new licensing arrangement—and the accompanying elimination of competing licensees in the market for NFL team apparel—the price of NFL team headwear increased. A Reebok vice-president hailed the elimination of price competition as "a godsend from a profitability standpoint," explaining that "[b]asic fitted caps that were selling for $19.99 a few years ago because of the price pressures are now selling for $30." JA471.

C. Procedural History Of The Case

1. American Needle, a manufacturer and distributor of headwear based in Illinois, had manufactured headwear bearing NFL team logos since the late 1950s. JA62-66. Following the teams' agreement with Reebok and consequent non-renewal of American Needle's license, American Needle filed this lawsuit, asserting that the NFL teams, NFLP, the NFL, and Reebok had conspired to restrain trade in violation of Section 1 of the Sherman Act and had attempted to monopolize in violation of Section 2. JA62-65. As American Needle explained early on, its suit challenged 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." JA68-69.

On the defendants' Rule 12(b)(6) motion, the district court dismissed American Needle's claim for a *per se* violation of Section 1. JA75. But it upheld the viability of Rule of Reason and monopolization claims, based on the teams' alleged "agree[ment] to restrict the use of their intellectual property" and the collective "grant [to] Reebok [of] an exclusive license." JA73.

Nonetheless, the district court next limited discovery to the subject of whether, in licensing and marketing their intellectual property, the NFL teams were a so-called "single entity" under *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984). Then, while conceding that "others might well disagree," the court held that the teams "have, through the various forms of NFL Properties, acted as an economic unit," and granted summary judgment on the Section 1 claim. JA259-60. It further decided that the teams' single-entity status also effectively defeated the monopolization claim. JA46-47.

2. The Seventh Circuit affirmed. While recognizing that the separately owned and controlled NFL teams could potentially compete in licensing and marketing their intellectual property, the court asserted that this did "not necessarily" preclude single-entity status under *Copperweld*; and therefore "[w]e … cannot fault the district court for not considering whether the NFL teams could compete against one another." Pet. App. 16a. More significant than this potential competition, the Seventh Circuit held, was that producing football games inherently requires a degree of cooperation. *Id.* From this premise, the court concluded that "the NFL teams can function only as one source of economic power when collectively producing NFL football," and likewise that "only one source of economic power controls the promotion of NFL football." *Id.* at 16a-17a. "[M]ost importantly," the Seventh Circuit added, "since 1963, the NFL teams have acted as one source of economic power—under the auspices of NFLP—to license their intellectual property collectively and to promote NFL football." *Id.* at 17a. The court further held that its single-entity holding under Section 1 "necessarily dooms" the Section 2 claim as well. *Id.* at 18a.

SUMMARY OF ARGUMENT

I. Section 1 of the Sherman Act applies to "[e]very contract, combination, in the form of trust or otherwise, or conspiracy, in restraint of trade...." 15 U.S.C. § 1. For over a century, this Court has uniformly held that all agreements between separately owned and controlled entities operating in interstate commerce are subject to scrutiny under this broadly phrased provision. That uniform history embraces numerous cases applying Section 1 scrutiny to agreements of members of joint ventures, including ventures in which substantial cooperation was inherent in the nature of the enterprise.

This Court's decision in *Copperweld* reaffirmed this long-standing antitrust principle. *Copperweld* held that a parent and wholly owned subsidiary are incapable of conspiring with each other under Section 1, because no meaningful "contract, combination … or conspiracy" is possible between entities that are inherently subject to a single source of control. Since the parent controls the subsidiary "[w]ith or without a formal 'agreement,'" no agreement between them can have any effect on competition that would otherwise exist. 467 U.S. at 771-72. In contrast, the Court emphasized, competition between *separately* owned and controlled entities is at the core of Section 1; agreements among such entities are "inherently … fraught with anticompetitive risk," and fall squarely within Section 1's coverage. *See id.* at 768-769, 775-777.

II. Under *Copperweld* and this Court's uniform case law applying Section 1 to all agreements between separately owned and controlled entities, the challenged agreement of the NFL's 32 teams is plainly subject to Section 1 scrutiny. The teams are separately owned and controlled profit-making enterprises. They are actual and potential competitors in numerous areas, including the licensing of intellectual property. And the challenged 2000-2001 agreement is the very definition of concerted conduct by multiple entities, as it required the specific approval of the 32 participating teams.

Indeed, for over 50 years, this Court and the courts of appeals have repeatedly held that such agreements of teams in the NFL and similar sports leagues are subject to scrutiny under Section 1. Most notably, in *Radovich v. NFL*, 352 U.S. 445 (1957), this Court upheld the viability of a Section 1 claim against the NFL; and in *NCAA v. Board of Regents*, 468 U.S. 85 (1984)—decided less than two weeks after *Copperweld*—the Court applied Section 1 to an agreement of separately owned and controlled teams in a college-football league. The decision below is at odds with this substantively indistinguishable precedent.

III. The decision below is also at odds with a long history of congressional action ratifying this settled judicial consensus. Congress has enacted at least two statutes—the Sports Broadcasting Act and Curt Flood Act—that are premised on the understanding that teams in the NFL and similar sports leagues are competitors and are fully capable of "conspiring" to restrain trade. And Congress has repeatedly rejected arguments by the NFL and other leagues that their teams should be exempted from all or part of the antitrust laws because they purportedly function as single entities.

IV. The Seventh Circuit's contrary reasoning cannot withstand scrutiny. First, the notion that *Copperweld* leaves room for separately owned and controlled entities with conflicting interests—indeed, even actual or potential competitors—to be treated as a single entity is untenable. *Copperweld* treats a parent and wholly owned subsidiary as a single entity solely because of their unitary ownership and control. Its reasoning defies extension to separately owned and controlled actual and potential competitors like the 32 NFL teams.

Second, the Seventh Circuit's reliance on the inability of a single team to produce football games without cooperating with other teams is misconceived. Many joint ventures require some degree of cooperation, yet are subject to Section 1 scrutiny. Indeed, *NCAA* is flatly inconsistent with the decision below, as it made clear that the antitrust consequence of the need for football teams to cooperate is Rule of Reason (rather than *per se*) scrutiny, not complete immunity from Section 1 scrutiny.

Third, the court below erred in speculating about the putative benefits of strengthening the NFL as a whole in purportedly competing with unspecified other forms of entertainment. The assessment of any such competitive effects is the essence of the Rule of Reason inquiry; it is entirely irrelevant to the single-entity issue under *Copperweld*. Moreover, there was in any event no record basis for the Seventh Circuit to look beyond the specific sports market alleged or to draw any conclusions about the pro- and anti-competitive effects of the challenged agreement.

Finally, the Seventh Circuit's assertion that "since 1963" the NFL teams have "acted" in an integrated fashion in licensing their intellectual property is misconceived. As a factual matter, it is inconsistent with the record. As a legal matter, the long persistence of anticompetitive conduct does not make such conduct permissible under the antitrust laws. In addition, the court's focus on whether the NFL teams here "acted" in a manner resembling a single entity is thoroughly flawed. Such a focus ensures a subjective inquiry that provides no principled basis for distinguishing between ventures that qualify as single entities and those that do not. Moreover, "acting" like a single entity has no bearing on the object of the *Copperweld* inquiry, which is whether the entities at issue are capable of reaching competitively meaningful agreements. Indeed, when potential competitors agree to function in an "integrated" manner rather than competing with each other, that is precisely the type of agreement with which the Sherman Act is *most* concerned.

V. The immunity granted by the Seventh Circuit is also contrary to the consumer welfare and efficiency goals of the antitrust laws. The consumer harm from sports leagues' anticompetitive conduct has been well documented, and the ruling below would give such leagues free rein to eliminate competition wherever such an approach promises greater profits in "promoting" a sport. Sports teams are well positioned to disadvantage consumers in this context, because they often have substantial market power due to consumers' lack of equivalent substitutes.

ARGUMENT

This case concerns an agreement of the NFL's 32 separately owned and controlled teams not to allow competition in the licensing of their respective trademarks and logos. American Needle does not challenge the 32 teams' agreement to establish a league for playing football—with its attendant schedule of games, rules of play, and end-of-season playoffs and Super Bowl—or any decision or action of the Commissioner of the NFL concerning how league football games should be played. Nor does it claim that the teams' agreement to make available, through NFLP, a blanket license covering the trademarks and logos of all of the teams is by itself unlawful. Rather, the complaint challenges the specific agreement made by the 32 teams in 2000-2001 that they will neither individually compete with NFLP or each other in the licensing of their respective intellectual property nor allow competition with their collective and exclusive licensee, Reebok.

This horizontal agreement of the 32 teams is plainly subject to Section 1 scrutiny. Section 1 broadly applies to every "contract, combination ... or conspiracy" in restraint of trade. This Court has therefore uniformly held, for over a century, that any agreement between separately owned and controlled entities about how competition will be conducted is subject to Section 1. Because the teams in the NFL and similar sports leagues are such separately owned and controlled competitors—capable of competing in a wide variety of economic activities, including in merchandising and other marketing activities involving their respective trademarks and logos—the courts, including this Court, have consistently held that agreements among such teams are subject to Section 1. Further, against the background of this long-standing judicial consensus, Congress has repeatedly rejected requests by the teams of the NFL and other sports leagues for antitrust immunity and has instead enacted laws that necessarily presume that the teams are competitors and that Section 1 applies to their agreements. Accordingly, while the horizontal agreement challenged here is unlawful only if it "unreasonably" restrains trade (*i.e.*, if its anti-competitive effects outweigh any pro-competitive benefits), it is unquestionably a "contract, combination … or conspiracy" within the meaning of Section 1.

The contrary judgment of the Seventh Circuit is at odds with both the cases otherwise uniformly holding that agreements among teams in the NFL and similar sports leagues are subject to Section 1 scrutiny and the repeated congressional ratification of that judicial consensus. It is also irreconcilable with *Copperweld*. That case held that no meaningful "contract, combination ... or conspiracy" is possible between a parent and its wholly owned subsidiary because such entities are subject to unitary control "[w]ith or without a formal 'agreement,'" 467 U.S. at 771-72; and it expressly emphasized that competition between *separately* owned and controlled entities is the core concern of Section 1, such that agreements among such entities fall squarely within Section 1's coverage. *See id.* at 768-69, 775-77. *Copperweld* thus directly refutes the Seventh Circuit's notion that the NFL teams—notwithstanding their separate ownership and control, and without even considering their capacity to compete with each other—can be deemed in their licensing activities incapable of a covered "contract, combination ... or conspiracy."

Furthermore, the Seventh Circuit's notion that the need for some level of cooperation among NFL teams to "produce" and "promote" NFL football immunizes the challenged horizontal licensing agreement from Section 1 scrutiny is contrary to this

Court's decision in *NCAA*. The *NCAA* Court expressly considered the need for cooperation to produce football games, and held that agreements among separately owned and controlled teams in a league about how they will compete are horizontal agreements subject to Rule of Reason scrutiny. 468 U.S. at 99-104, 120. The Seventh Circuit's notion that the need for a degree of cooperation makes the NFL's 32 teams a "single entity" also misses the point of the inquiry: any cooperation cannot change the fact that these 32 teams are acting jointly by consent, and not unilaterally (*i.e.*, without the need for consent).

In short, the Seventh Circuit's judgment is both anomalous and erroneous. It should be reversed.

I. SECTION 1 APPLIES TO ALL AGREEMENTS BETWEEN SEPARATELY OWNED AND CONTROLLED COMPETITORS

The Sherman Act draws a "basic distinction between concerted and independent action." *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 761 (1984). Purely unilateral conduct is governed by Section 2 of the Act, which applies only when actual monopolization is attempted or achieved. In contrast, because it "inherently is fraught with anticompetitive risk" and "deprives the marketplace of the independent centers of decisionmaking that competition assumes and demands," *Copperweld*, 467 U.S. at 768-69, concerted conduct "warrant[s] scrutiny even in the absence of incipient monopoly." *Id.* at 769. Accordingly, Section 1 broadly prohibits "[e]very contract, combination, in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce...." 15 U.S.C. § 1. While this Court has necessarily long read Section 1 to prohibit only "unreasonable" restraints, as measured by the flexible contours of the Rule of Reason, *see, e.g.*, *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997), the Court has not otherwise restricted the sweep of Section 1: Every "contract, combination … or conspiracy" is subject to Section 1 scrutiny.

A. This Court Has Uniformly Interpreted Section 1 As Reaching All Agreements Between Separately Owned And Controlled Entities

1. As this Court has long recognized, the primary goal of the Sherman Act is the protection of consumer welfare through the preservation of competition. "The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade." *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 4 (1958). The Act is therefore "interpret[ed] ... based upon the assumption that the public interest is best protected from the evils of monopoly and price control by the maintenance of competition." *United States v. Trenton Potteries Co.*, 273 U.S. 392, 397 (1927).

This statutory concern with preserving competition arose from the harmful effects of a wide variety of contracts, combinations, and conspiracies established in the 19th Century. Specifically, the Act was a response to:

> the vast accumulation of wealth in the hands of corporations and individuals, the enormous development of corporate organization, the facility for combination which such organizations afforded, the fact that the facility was being used, and that combinations

> known as trusts were being multiplied, and the widespread impression that their power had been and would be exerted to oppress individuals and injure the public generally.

Standard Oil Co. v. United States, 221 U.S. 1, 50 (1911). "[T]he 'trust problem' in contemporary debate" over the Sherman Act arose "from the existence of all kinds of combinations, from the simple agreements and pools to the holding companies (as far as they had come into existence) and mergers." Hans Thorelli, *The Federal Antitrust Policy* 85 (1955); *see also* Earl Kintner, *Federal Antitrust Law* § 3.2 (1980).

Based on this diversity of threats to competition, Congress designed Section 1 to embrace *all* agreements in interstate commerce. *Standard Oil* explained that:

> the contracts or acts embraced in [Section 1] were not expressly defined, since the enumeration addressed itself simply to classes of acts, those classes being broad enough to embrace *every conceivable contract or combination which could be made* concerning trade or commerce or the subjects of such commerce.

221 U.S. at 60 (emphasis added); *see also Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 438 (1911) (The Sherman Act "covered any illegal means by which interstate commerce is restrained.").

2. For over a century, therefore, this Court has applied Section 1 to *all* agreements—both horizontal and vertical—between separately owned and controlled entities operating in interstate commerce.

That uniform history embraces numerous cases applying Section 1 not only to simple contracts and merger agreements, but also to agreements of entities creating or involved in joint ventures, including ventures in which substantial cooperation was necessary to the enterprise.

For example, in *Chicago Board of Trade v. United States*, 246 U.S. 231 (1918), this Court applied Section 1 scrutiny to an agreement among the members of a commodities exchange to require that sales when the exchange was closed be made at the final pre-closing price. Finding that this rule was, on balance, procompetitive, this Court upheld it under the Rule of Reason. *Id.* at 239. Likewise, in *Associated Press v. United States*, 326 U.S. 1 (1945), the Court applied Section 1 to invalidate bylaws of a cooperative association of newspapers that granted each member the power to block non-member competitors from membership, *id.* at 11-13, expressly rejecting a defense based on an analogy to the actions of a single owner. *Id.* at 14-15 (emphasizing the "collective" nature of actions by the AP).

More recently, in *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979), this Court confronted an antitrust challenge to a blanket copyright licensing arrangement. The American Society of Composers, Authors, and Publishers (ASCAP) and Broadcast Music, Inc. (BMI), associations of owners of copyrighted musical works, sold blanket licenses to perform all of the works in their catalogs. This Court assessed the associations' activities as "plainly involv[ing] concerted action in a large and active line of commerce." *Id.* at 10. Although finding *per se* condemnation inappropriate, the Court held that the arrangement "should be subjected to a more discriminating examination under the rule of reason." *Id.* at 24.

Numerous other examples are to the same effect: this Court has vigilantly applied Section 1 scrutiny to agreements of potential competitors in all sorts of cooperative ventures. *See, e.g.*, *Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 781 (1999) (agreement among members of association of dentists); *Nw. Wholesale Stationers v. Pac. Stationery & Printing Co.*, 472 U.S. 284, 293-96 (1985) (by-laws of office-supply retailers' purchasing cooperative); *Arizona v. Maricopa County Med. Soc'y*, 457 U.S. 332, 356-57 (1982) (agreements among competing physicians); *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 694-97 (1978). (professional association's ethical canon); *Silver v. N.Y. Stock Exch.*, 373 U.S. 341, 347-48 (1963) (agreement by stock exchange members).

Indeed, this Court has even treated the actions of a single corporation as concerted conduct subject to Section 1 when the corporation has, in effect, been a joint venture controlled by competitors. For example, in *United States v. Sealy, Inc.*, 388 U.S. 350 (1967), the government brought a Section 1 action against Sealy, a corporation that owned, promoted and licensed the Sealy trademark. The Court treated Sealy's actions as equivalent to ongoing concerted action by its stockholder-licensees, as the licensees held substantially all of the corporation's stock and appointed the company's directors. *Id.* at 352-53. Similarly, in *United States v. Topco Associates, Inc.*, 405 U.S. 596 (1972), the Court treated a separately-incorporated cooperative of grocery stores that promoted a common Topco brand name as an ongoing combination and conspiracy among the members subject to Section 1 on the ground that Topco's stock was owned by member stores and Topco's members controlled its operations. *Id.* at 609.

3. In short, this Court has not merely consistently but *uniformly* held Section 1 broadly applicable to all agreements between separately owned and controlled entities operating in interstate commerce. There is no case to the contrary.

B. *Copperweld* Reaffirmed Section 1's Applicability To All Agreements Between Separately Owned And Controlled Entities

For a time, Section 1 was even applied to certain "agreements" between two corporations under common ownership and control, such as a parent corporation and its wholly owned subsidiary. *See generally Copperweld*, 467 U.S. at 759-66. But commentators severely criticized this so-called "intra-enterprise conspiracy doctrine," objecting that its focus on whether a parent and subsidiary had functioned in an "integrat[ed]" fashion was "unconnected to antitrust policy, [and] hopelessly vague"; and further observing that "[t]he concept of 'agreement' implies a notion of choice, which is absent when a subsidiary obeys its owner's will." Phillip Areeda, *Intraenterprise Conspiracy in Decline*, 97 Harv. L. Rev. 451, 470 (1983). Accordingly, at the urging of the Solicitor General as *amicus curiae*, in *Copperweld* the Court repudiated the notion that "a parent and its wholly owned subsidiary are capable of conspiring in violation of § 1 of the Sherman Act." 467 U.S. at 767. At the same time, the Court reaffirmed that Section 1 applies to all agreements between separately owned and controlled entities. 467 U.S. at 768-69, 775-77.

1. In presenting the issue, the Solicitor General argued that "agreements" between commonly owned and controlled corporations do not implicate Section 1 concerns about concerted action, because "a controlling parent always has the power to achieve the ends it desires by directing the actions of subordinate units, so that, unlike the situation of two separate firms, agreement does not eliminate a potential for independent decision making." Brief for the United States as *Amicus Curiae* at 10-11, *Copperweld*, No. 82-1260 (U.S. Aug. 25, 1983). The Solicitor General noted that, for a parent and wholly owned subsidiary, "the different entities remain part of a single economic enterprise, with the controlling entity determining the extent of any 'competition' among the subordinate units." *Id.* at 10. Indeed, the Solicitor General emphasized that, given this ultimate control, "[t]he concept of 'agreement' has little meaning in the context of commonly owned and controlled corporations." *Id.*

In this regard, the Solicitor General pointed out that a firm's actions through a separately incorporated subsidiary are no different in substance from actions—concededly exempt from Section 1 scrutiny—through an unincorporated division. In either case, "subdivisions that are under common ownership and control cannot properly be viewed as 'independent' enterprises or 'competitors' in an economic or antitrust sense .... The controlling entity will determine the extent of any 'competition' or operational 'independence' of the subordinate units ...." *Id.* at 25.

Importantly, the Solicitor General advised that, in both law and economics, a "single firm consists of the total of assets and operations which is by virtue of common ownership under a single control group or management." *Id.* at 16 n.7 (internal quotation marks omitted). In contrast, "[s]eparate enterprises [or firms] are recognized as complexes of assets and operations which are under separate ownerships and separate and independent control groups or managements, so that one management does not have the legal right or power to direct the activities of the other." *Id.* (internal quotation marks omitted). The Solicitor General urged that "[c]ontrol of one corporation by agreement with another corporation in the absence of common ownership should remain subject to Section 1." *Id.* at 33 n.31.

2. This Court, in an opinion that closely tracked the Solicitor General's arguments, agreed that entities subject to common ownership and control are not capable of "conspiring" within the meaning of Section 1:

> A parent and its wholly owned subsidiary have a complete unity of interest. Their objectives are common, not disparate; their general corporate actions are guided or determined not by two separate corporate consciousnesses, but one. They are not unlike a multiple team of horses drawing a vehicle under the control of a single driver. *With or without a formal "agreement," the subsidiary acts for the benefit of the parent, its sole shareholder.* If 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 § 1 scrutiny.
>
> Indeed, *the very notion of an "agreement" in Sherman Act terms between a parent and a wholly owned subsidiary lacks meaning* …. [I]n reality a parent and a wholly owned subsidiary always have a "unity of purpose or a common design." They share a common purpose whether or not the parent keeps a tight rein over the subsidiary; the parent may assert full control at any moment if the subsidiary fails to act in the parent's best interests.

467 U.S. at 771-72 (emphasis added).

In reaching this conclusion, the Court found persuasive that Section 1 does not apply to "the internally coordinated conduct of a corporation and one of its unincorporated divisions," because a "division within a corporate structure pursues the common interests of the whole rather than interests separate from those of the corporation itself." *Id.* at 770. It similarly found persuasive that, for the same reason, a company and its employees cannot conspire within the meaning of Section 1. *Id.* at 769. It thus accepted the Solicitor General's conclusion that no meaningful Section 1 agreement can be reached between a parent and its wholly owned subsidiary. *Id.* at 771-72.

Moreover, the Court further agreed with the Solicitor General that, when dealing with "separate entities" not commonly owned and controlled, all concerted activity is subject to Section 1. *Id.* at 768.

The Court reiterated that such activity is "inherently … fraught with anticompetitive risk," because "two or more entities that previously pursued their own interests separately are combining to act as one for their common benefit." *Id.* at 768-69. Indeed, while recognizing that some "combinations, such as ... joint ventures, ... hold the promise of increasing a firm's efficiency," *id.* at 768, the Court reaffirmed that they must still be "judged under a rule of reason." *Id.*

3. In sum, the *Copperweld* "single entity" doctrine's sole office is to shield from Section 1 scrutiny "intra-enterprise" agreements between the component entities of a single, commonly owned and controlled firm. Both by its terms and its rationale, the doctrine does not shield from such scrutiny any agreement between separately owned and controlled entities.

C. Following *Copperweld*, Courts Have Consistently Understood Section 1 To Apply To All Agreements Between Separately Owned And Controlled Competitors

This Court has never extended the "single entity" immunity recognized in *Copperweld* beyond the context of a parent and wholly owned subsidiary. The courts of appeals, moreover, have repeatedly held that, under *Copperweld*, Section 1 continues to apply to all agreements between separately owned and controlled competitors.

The seminal post-*Copperweld* appellate decision is *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210 (D.C. Cir. 1986), written by former antitrust scholar Judge Robert Bork. *Rothery* involved defendant Atlas Van Lines, a nationwide moving company that contracted with smaller moving companies throughout the nation to act as its agents—a structure that made Atlas and its agents "an enterprise or firm integrated by contracts, one which is indistinguishable in economic analysis from a complex partnership." *Id.* at 212. The antitrust claim in the case challenged an Atlas policy prohibiting its agents from engaging in any interstate moving on their own account—*i.e.*, in competition with Atlas. *Id.* at 211-12. The court held that the fact that Atlas and the agents were "actual or potential competitors" precluded single-entity treatment under *Copperweld*. *Id.* at 214-15. The court further held that, because the majority of the Atlas "board represented separate legal entities that competed in interstate commerce," Section 1 scrutiny was applicable for the additional reason that it "brings the case within the rule of *Sealy* and *Topco* and shows the existence of a horizontal restraint." *Id.* at 215. The court held that the challenged policy had to be analyzed under the Rule of Reason and the so-called "ancillary restraints" doctrine. *Id.* at 229.

In another widely cited post-*Copperweld* appellate opinion, *Freeman v. San Diego Ass'n of Realtors*, 322 F.3d 1133 (9th Cir. 2003), local real-estate associations created a corporation to maintain and support a unified listing database. When the agreed-upon fee structure was challenged as a Section 1 conspiracy, the corporation and associations argued that they were interdependent enough to be a single entity under *Copperweld*. Judge Kozinski, writing for a Ninth Circuit panel, disagreed: He noted that, "in the absence of economic unity, the fact that joint venturers pursue the common interests of the whole is generally not enough, by itself, to render them a single entity," and that this "Court routinely scrutinizes joint ventures that involve aspects of common interest." *Id.* at 1148. Because the associations were independently owned, did not share profits, and could and often did compete with one another for subscribers, the defendants had created a "joint venture [that] is not immune from scrutiny under section 1." *Id.* at 1150.

Indeed, almost every federal circuit has issued a post-*Copperweld* decision to the same effect—to wit, holding that agreements between separately owned and controlled entities, particularly those which are actual or potential competitors, are subject to Section 1 scrutiny. *See, e.g.*, *NHL Players Ass'n v. Plymouth Whalers Hockey Club*, 419 F.3d 462, 470 (6th Cir. 2005); *Sullivan v. NFL*, 34 F.3d 1091 (1st Cir. 1994); *Capital Imaging Assocs., P.C. v. Mohawk Valley Med. Assocs., Inc.*, 996 F.2d 537, 544-45 (2d Cir. 1993); *Advanced Health-Care Servs., Inc. v. Radford Cmty. Hosp.*, 910 F.2d 139, 146 (4th Cir. 1990); *Bolt v. Halifax Hosp. Med. Ctr.*, 891 F.2d 810, 819 (11th Cir. 1990); *Volvo N. Am. Corp. v. Men's Int'l Prof'l Tennis Council*, 857 F.2d 55, 71 (2d Cir. 1988); *Plueckhahn v. Farmers Ins. Exch.*, 749 F.2d 241, 245 n.7 (5th Cir. 1985).

II. THE CHALLENGED HORIZONTAL AGREEMENT OF THE NFL TEAMS IS SUBJECT TO SECTION 1 SCRUTINY

Under these Section 1 principles and cases, there is no doubt that the NFL's teams are fully capable of conspiring with each other and that their specific agreement challenged here is subject to Section 1 scrutiny. The teams are separately owned and controlled. Although they share certain revenues, each team is a separate profit-making enterprise that owns its own assets—including the intellectual property at issue here—and takes its own investment risks. The teams, moreover, are actual and potential competitors both on and off the field—including in their licensing and merchandising activities. And the exclusive licensing arrangement challenged here is a result of their explicit, horizontal agreement. In stark contrast to the situation of a parent and its wholly owned subsidiary, it plainly cannot be said that "the very notion of an 'agreement' in Sherman Act terms" among these teams "lacks meaning." *Copperweld*, 467 U.S. at 771. On the contrary, in scrutinizing all manner of agreements under Section 1, this Court and the courts of appeals, emphasizing that the teams are competitors, have repeatedly rejected arguments that the teams in the NFL and similar sports leagues are not capable of conspiring in restraint of trade. This case should be no different.

Most notably, in *Radovich v. NFL*, 352 U.S. 445 (1957), this Court held that an antitrust lawsuit against the NFL stated a proper claim under Section 1. In *Radovich*, the plaintiff alleged that the NFL teams had collectively boycotted a player who accepted employment with a competing league. The NFL, in addition to (fruitlessly) seeking an extension of the interstate-commerce holding of *Federal Baseball Club v. National League*, 259 U.S. 200 (1922), argued, among other things, that the complaint failed to state a claim, because "[t]o refer to a conspiracy among the member teams of the National Football League is to disregard the nature of the enterprise. The members are not business competitors in the accepted sense. They are engaged in a joint venture in which the success of any is dependent upon the success of all." Brief for Respondents National Football League et al., *Radovich*, No. 94 (U.S. Dec. 2, 1956), 1956 WL 89185, at *53. This Court rejected the NFL's various arguments for antitrust exemption, holding that the NFL's "activities as alleged are within the coverage of the antitrust laws," 352 U.S. at 448, and that the plaintiff's allegations stated a proper antitrust claim. *Id.* at 453.

This Court likewise applied Section 1 to an agreement of separately owned and controlled teams in a sports league in *NCAA*, which was itself rendered less than two weeks after *Copperweld* was decided. In that case, an NCAA policy prevented its member institutions from competing against each other with respect to the sale of television rights to broadcasters. This Court found that the member schools were competitors, and that the NCAA policy was "a horizontal restraint—an agreement among competitors on the way in which they will compete with one another." 468 U.S. at 99. In addition, while finding that the need for cooperation among teams in a sports league made *per se* antitrust analysis inappropriate, the Court held that the agreement among such teams was subject to Rule of Reason scrutiny. *Id.* at 103. A sports league, the Court noted, like other joint ventures, has "no immunity from the antitrust laws." *Id.* at 113.

Numerous federal appellate courts have likewise applied Section 1 to agreements of separately owned and controlled teams in sports leagues. For example, in *L.A. Memorial Coliseum Commission v. NFL*, 726 F.2d 1381 (9th Cir. 1984) ("*Raiders*"), the Ninth Circuit rejected the NFL's argument for single-entity treatment, explaining that "[w]hile the NFL clubs have certain common purposes, ... NFL policies are not set by one individual or parent corporation, but by the separate teams acting jointly." *Id.* at 1388-89. The teams, moreover, "are all independently owned"; and they "do compete with one another off the field as well as on." *Id.* at 1389-90.

Other courts of appeals have consistently echoed this same view. *See, e.g.*, *NHL Players' Ass'n*, 419 F.3d at 469-70; *Fraser v. Major League Soccer, L.L.C.*, 284 F.3d 47, 55-56 & n.3 (1st Cir. 2002); *St. Louis Convention & Visitors Comm'n v. NFL*, 154 F.3d 851, 861 (8th Cir. 1998); *Sullivan*, 34 F.3d at 1099; *Volvo*, 857 F.2d at 71; *Mid-South Grizzlies v. NFL*, 720 F.2d 772, 783 (3d Cir. 1983); *N. Am. Soccer League v. NFL*, 670 F.2d 1249, 1257 (2d Cir. 1982) ("*NASL*"); *Smith v. Pro Football, Inc.*, 593 F.2d 1173, 1177 (D.C. Cir. 1978); *Mackey v. NFL*, 543 F.2d 606 (8th Cir. 1976).

In short, prior to the decision below, this Court and the federal courts of appeals had uniformly held, in numerous cases over the course of more than five decades, that agreements of the teams of the NFL and comparable sports leagues are subject to Section 1 scrutiny, precisely because such teams are competitors and are capable of conspiring in restraint of trade. The agreement challenged here is similarly one among competitors and should also be subject to Section 1. Both in its holding and in otherwise stating that the teams' capacity to compete need not even be considered, the decision below is an anomaly that cannot be reconciled with either this settled law or the legal principles that animate it.

III. THE SETTLED UNDERSTANDING THAT AGREEMENTS OF SEPARATELY OWNED AND CONTROLLED SPORTS TEAMS ARE SUBJECT TO SECTION 1 SCRUTINY HAS REPEATEDLY BEEN RATIFIED BY CONGRESS

Indeed, the decision below is at odds not only with the judicial consensus that separately owned and controlled teams can conspire in restraint of trade, but also with judgments of Congress endorsing and ratifying that consensus. Congress has repeatedly rejected requests from the NFL teams and other leagues for immunity from antitrust scrutiny, and it has enacted legislation—such as the Sports Broadcasting Act—that would be wholly superfluous if agreements restraining competition among the teams of the NFL and similar sports leagues were not subject to Section 1 scrutiny.

A. The "classic judicial task of reconciling many laws enacted over time, and getting them to 'make sense' in combination, necessarily assumes that the implications of a statute may be altered by the implications of a later statute." *United States v. Fausto*, 484 U.S. 439, 453 (1988). Thus, subsequent legislation that is premised on a particular construction of an earlier statute "is entitled to great weight in statutory construction." *Loving v. United States*, 517 U.S. 748, 770 (1996) (internal quotation marks omitted); *see also NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 275 (1974). Further, in appropriate contexts, the Court has given weight to subsequent congressional judgments *not* to revise earlier construed legislation. *See, e.g.*, *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 144, 147

(2000) (relying on congressional rejection of proposed legislation); *Baldrige v. Shapiro*, 455 U.S. 345, 358, 361 n.17 (1982) (same).

For example, in *Babbitt v. Sweet Home Chapter*, 515 U.S. 687 (1995), this Court found a subsequent amendment to the Endangered Species Act persuasive in interpreting the meaning of the Act as originally passed. Noting that under one of the two proffered interpretations of the Act the amendment would have had no substantial purpose, the Court observed that this "strongly suggests" the opposing interpretation. *Id.* at 700. "'When Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect.'" *Id.* at 701 (quoting *Stone v. INS*, 514 U.S. 386, 397 (1995)); *see also id.* at 729 (Scalia, J., dissenting) (interpreting statute to avoid rendering subsequent amendment meaningless is "a valid inference").

Similarly, in *Brown & Williamson*, the Food and Drug Administration asserted jurisdiction to regulate tobacco products. Despite language in the Food, Drug, and Cosmetic Act that could have been read as authorizing such regulation, this Court held that such regulation was not authorized by the Act. In so holding, the Court relied heavily on Congress's enactment of subsequent legislation that appeared difficult to square with a view that tobacco was subject to FDA regulation, and on Congress's repeated subsequent rejection of proposals to give the FDA jurisdiction over tobacco. 529 U.S. at 143-56.

B. These interpretive principles provide an additional ground compelling reversal here. Congress has repeatedly rejected requests of the teams of the NFL and other sports leagues for antitrust immunity and has instead enacted laws that presume that such teams are competitors and that Section 1 applies to all agreements between them.

1. As early as 1951, four identical bills were introduced in Congress to forbid application of the antitrust laws "to organized professional sports enterprises or to acts in the conduct of such enterprises." H.R. 4229, 4230, 4231, and S. 1526, 82d Cong. (1951). After extensive hearings, the authoritative subcommittee report made clear that, far from viewing actions of sports leagues as unitary conduct of little concern, the members saw such actions as concerted conduct going to the very heart of the antitrust laws:

> The requested exemption would extend to all professional sports enterprises and to all acts in the conduct of such enterprises. The law would no longer require competition in any facet of business activity of any sport enterprise.... *Such a broad exemption could not be granted without substantially repealing the antitrust laws.*

H.R. Rep. No. 82-2002 (1951), at 230 (emphasis added). None of the bills passed.

2. In 1961, against the backdrop of *Radovich* and an ongoing injunction entered in *United States v. NFL*, 116 F. Supp. 319 (E.D. Pa. 1953) (holding that certain NFL territorial restraints on the radio and television broadcasting of football games violated Section 1), Congress passed the Sports Broadcasting Act, 15 U.S.C. § 1291. That statute amended the antitrust laws to exempt any agreement by which a professional football, baseball, basketball, or hockey

league transfers rights "in the sponsored telecasting of the [teams'] games." This limited exemption was necessarily premised on the understanding that the antitrust laws are otherwise applicable to agreements of professional sports teams.

3. In 1964, NFL Commissioner Pete Rozelle testified in favor of a bill that would have amended the Sherman Act to broadly exempt agreements of professional sports teams with respect to "the equalization of competitive playing strengths," selection, assignment and employment of players, "the right to operate within specific geographic areas," and "the preservation of public confidence in honesty in sports contests." S. 2391, 88th Cong. (1964). Rozelle argued that antitrust restrictions should not apply because "the member clubs of a professional football league are in a unique relationship." *Professional Sports Antitrust Bill: Hearings on S. 2391 Before S. Subcomm. on Antitrust and Monopoly*, 88th Cong. 112 (1964). This bill also failed.

4. In 1982, concurrent with the battle over whether the Oakland Raiders could move to Los Angeles, bills proposing antitrust exemptions of varying scope were introduced in both Houses of Congress—including an exemption for leagues like the NFL to resist the relocation of teams. *See Antitrust Policy and Professional Sports: Hearings on H.R. 823, H.R. 3287, and H.R. 6467 Before H. Subcomm. on Monopolies and Commercial Law*, 97th Cong. 7-20, 502-05 (1981) ("*House Hearing*"). Commissioner Rozelle again argued that "the law should recognize [a sports league] as a single business enterprise." *Id.* at 189.

Oakland Raiders owner Al Davis opposed Rozelle's position, arguing that "the National Football League is 28 individual owners" who "do not share profits and losses. We do not share them at all. And to make us a single entity is totally unfair because that is what we are not." *Professional Sports Antitrust Immunity: Hearings on S. 2784 and S. 2821 Before S. Judiciary Comm.*, 97th Cong. 311 (1982).

The Department of Justice likewise opposed the proposed legislation. Deputy Assistant Attorney General Abbott B. Lipsky, Jr., testified:

> [W]e have held consistently throughout the years to the view that sports are business and, as such, ought to be held fully accountable under the antitrust laws, as are other industries. In our view, the flexible principles embodied in the antitrust laws should apply to sports as they do to unregulated sectors of the economy.

House Hearing, at 21.

Congress again declined to enact any exemption.

5. In 1995 hearings, NFL Commissioner Paul Tagliabue once again argued that the NFL is a single entity, and advocated passage of an antitrust exemption for the teams. He acknowledged, however, that the federal courts had "failed to recognize" his single-entity argument:

> Since the *Raiders* decision, federal courts, seeing the *Raiders* precedent, have failed to recognize ... the economic reality of a sports league—that league members are co-producers of a joint product, and thus

> together constitute a single league enterprise in competition with other entertainment providers. Instead, courts and others have tended to raise form over substance, viewing *each team franchise* as an independent competitive entity.

Antitrust Issues In Relocation of Professional Sports Franchises: Hearing Before S. Subcomm. on Antitrust, Business Rights, and Competition, 104th Cong. 70 (1995). Again, no legislation resulted.

6. In 1998, against this background, Congress did enact the Curt Flood Act, which partially reversed the court-created antitrust exemption for professional baseball. That Act provides that, with respect to the employment of major league players, baseball teams "are subject to the antitrust laws to the same extent such conduct ... would be subject to the antitrust laws if engaged in by persons in any other professional sports business affecting interstate commerce." 15 U.S.C. § 26b(a). Here, again, if agreements of teams in other sports leagues were not within Section 1, this provision would be largely meaningless.

C. In short, Section 1 cannot properly be construed, at this late date, as treating the NFL teams as a single entity whose agreement about licensing is exempt from scrutiny. In particular, the Sports Broadcasting Act and Curt Flood Act were necessarily premised on the understanding that the NFL and its teams *are* competitors capable of conspiring to restrain trade within the meaning of Section 1, and that understanding "is entitled to great weight." *Loving*, 517 U.S. at 770; *see also Sweet Home*, 515 U.S. at 700-01; *Brown & Williamson*, 529 U.S. at 156. More generally, construing Section 1 as inapplicable here—on the notion that the teams are a single entity that cannot conspire in restraint of trade—would fail appropriately to make sense of the antitrust law as it has evolved as a whole, as this Court has in fact held on prior occasions.

For example, in *United States v. International Boxing Club*, 348 U.S. 236 (1955), this Court relied heavily on the 1951 congressional rejection of an antitrust exemption for professional sports in holding that boxing is subject to the antitrust laws. The Court stated, in reasoning equally applicable here, that the defendants were asking "for precisely the same exemption which enactment of those bills would have afforded. Their remedy, if they are entitled to one, lies in further resort to Congress .... For we agree that '[s]uch a broad exemption could not be granted without substantially repealing the antitrust laws.'" *Id.* at 244.

Likewise, in *Radovich*, the Court—in rejecting the NFL's argument that it was exempt from the antitrust laws—emphasized that Congress had thoroughly considered and chosen not to enact such an exemption for the teams of the NFL and other sports leagues: "Congress did consider the extension of the baseball rule to other sports" in "four separate bills," and "[n]one of them were enacted." 352 U.S. at 450 n.7.

The NFL teams here again seek to have the courts treat the teams as if they are not competitors and craft an antitrust exemption that Congress has repeatedly withheld—an exemption that would potentially render the Sports Broadcasting Act and the Curt Flood Act meaningless. This Court should decline. As in *International Boxing*, the teams' "remedy, if they are entitled to one, lies in further resort to Congress." 348 U.S. at 244; *see also, e.g., Brown & Williamson*, 529 U.S. at 144, 147.

IV. THE SEVENTH CIRCUIT'S REASONING CANNOT WITHSTAND ANALYSIS

In arriving at its holding, the Seventh Circuit did not discuss *Radovich* or the repeated congressional ratification of the judicial consensus that agreements between NFL teams are subject to Section 1 scrutiny. Aside from these omissions, moreover, the court's reasoning suffers from numerous critical flaws: (1) The Seventh Circuit's notion that *Copperweld* permits separately owned and controlled competitors to be deemed a single entity rests on a patent misreading of *Copperweld*. (2) The court's suggestion that the need for cooperation to produce football games justifies single-entity treatment is flatly contrary to *NCAA*; and it is unsound in light of the numerous ways in which the NFL teams' interests demonstrably diverge and make them capable of meaningful competition. (3) The court further erred in speculating about the putative benefits of the teams' collective competition with "other forms of entertainment." Those speculative benefits are both irrelevant under *Copperweld* and improperly premised on assuming away the market definition alleged in the complaint and generally accepted in the case law. (4) Finally, the Seventh Circuit's reliance on the proposition that the teams have "acted" as an integrated licensing enterprise "since 1963" is unsustainable: As a factual matter, the record defies any such conclusion. As a legal matter, a focus on "acting" like a single entity fundamentally misunderstands *Copperweld*; provides no principled or coherent basis for making a single-entity determination; erroneously suggests that the persistence of anticompetitive conduct can confer antitrust immunity; and ignores that, even if a single entity had been created, the agreements creating that entity are necessarily subject to challenge.

A. Under *Copperweld*, Agreements Between Separately Owned And Controlled Competitors Are Necessarily Subject To Section 1 Scrutiny

The opinion below acknowledges that the NFL teams are independently owned and controlled and that there could be "potential intra-league competition" in the teams' use of their respective intellectual property. Pet. App. 16a. Critically, however, the opinion asserts that the teams' resultant "competing interests" "do not necessarily keep the teams from functioning as a single entity" under *Copperweld*. *Id.* According to the Seventh Circuit, reading *Copperweld* as requiring unitary interests would be "'silly,'" since "'even a single firm contains many competing interests.'" *Id.* (quoting *Chicago Prof'l Sports, LP v. NBA*, 95 F.3d 593, 598 (7th Cir. 1996)) ("*Bulls II*"). This treatment of *Copperweld* is untenable.

1. As detailed above, under *Copperweld* a parent and wholly owned subsidiary are incapable of conspiring with each other precisely because their interests are *inherently united*: "With or without a formal 'agreement,' the subsidiary acts for the benefit of the parent …." 467 U.S. at 771. This inherent "complete unity of interest," *id.*, derives from the parent's complete ownership and control: "the parent may assert full control at any moment." *Id.* at 771-72.

It was on this basis that *Copperweld* held that "the very notion of an 'agreement' in Sherman Act terms between a parent and a wholly owned subsidiary lacks meaning." *Id.* at 771.

This reasoning cannot be extended to separately owned and controlled sports teams, whose interests and decisionmaking are *not* inherently unitary. Because the interests of such teams are capable of diverging, agreements among them *do* have competitive meaning and thus are "contracts" and "conspiracies" under Section 1.

The Seventh Circuit's sole justification for taking a contrary position—that "'even a single firm contains many competing interests'" (Pet. App. 15a (internal quotation omitted))—misses the point. Consistent with sound economic theory, *see, e.g.*, Herbert Hovenkamp, *Exclusive Joint Ventures and Antitrust Policy*, 1995 Colum. Bus. L. Rev. 1, 54 ("[N]eoclassical price theory regards the firm as a profit-maximizing entity and does not give any special consideration to the conflicting preferences of its managers or other employees."), *Copperweld* holds that potentially competing interests at lower levels of a firm are irrelevant; the relevant interests under the Sherman Act are those of the decisionmakers with ultimate ownership and control: As the Court explained, "the parent may assert full control at any moment if the subsidiary fails to act in the parent's best interests," and it is that unitary control of decisionmaking that makes the parent and subsidiary a single entity. 467 U.S. at 771-72. That reasoning simply cannot apply to competing sports teams that are separately owned and controlled by separate decisionmakers.

2. In reaching the opposite conclusion, the Seventh Circuit also suggested—erroneously—that there has been a "gradual extension of *Copperweld*" by the federal courts to embrace immunity for some agreements between potential competitors. Pet. App. 5a, 14a-15a. But the circuit's own prior decision in *Bulls II* only speculated about that single-entity issue; it expressly did not resolve it. *Bulls II*, 95 F.3d at 600. Moreover, the three cases cited from other courts also offer no support for that proposition: (1) *Jack Russell Terrier Network v. Am. Kennel Club*, 407 F.3d 1027 (9th Cir. 2005), involved a national dog-registry organization and regional affiliates that "share[d] a unity of all relevant interests and policies," and the national organization "controlled entirely" the affiliates. *Id.* at 1035. Indeed, the court emphasized that "'where firms are not an economic unit and are at least potential competitors, they are usually not a single entity,'" *id.* at 1034, and contrasted the NFL teams as "wholly independent business entities" that "compete[] against one another for profit." *Id.* at 1036. (2) *Eleven Line, Inc. v. North Texas State Soccer Ass'n*, 213 F.3d 198 (5th Cir. 2000), also involved local affiliates functioning under the auspices of a national non-profit organization, and, in any event, declined to rule on the single-entity issue. *Id.* at 205-06. And (3) *City of Mt. Pleasant v. Associated Electric Cooperative, Inc.*, 838 F.2d 268 (8th Cir. 1988), found that a rural electrical cooperative and its members were a single entity, but emphasized that defendants could not be a single entity if "any two of the defendants are, or have been, actual or potential competitors." *Id.* at 276 (citing *Rothery*, 792 F.2d at 214-15). Far from supporting the Seventh Circuit, these cases highlight

how far the court below went beyond anything that *Copperweld* even arguably authorized or any other court has accepted.

B. The Need For Cooperation To Produce Football Games Cannot Justify Single Entity Treatment

The court below further erred by relying on the need for cooperation by the NFL teams to produce football games. Indeed, notwithstanding its stated intention to address only the "facet" of the NFL pertaining to the licensing of intellectual property, the Seventh Circuit's reasoning swept much more broadly:

> Certainly the NFL teams can function only as one source of economic power when collectively producing NFL football. Asserting that a single football team could produce a football game is less of a legal argument than it is a Zen riddle: Who wins when a football team plays itself? *See* [*NCAA*, 468 U.S. at 101] ("[Some] activities can only be carried out jointly. Perhaps the leading example is league sports....") .... It thus follows that only one source of economic power controls the promotion of NFL football ....

Pet. App. 16a-17a (internal quotation marks omitted). In other words, the Seventh Circuit reasoned that treating the NFL teams as a single entity in "producing" and "promot[ing]" NFL football follows ineluctably from the assumption that some level of cooperation among teams is necessary to produce football games. This reasoning is strewn with errors.

1. First, while it takes two teams to play a football game (other than scrimmages), it does not inherently require a league—much less a league governed by cooperation among economic competitors, and even less a league that by agreement forbids competition in off-field enterprises like the licensing of intellectual property.

Barnstorming by professional football teams, often not affiliated with any league, existed for decades before (and after) the NFL's 1920 founding—by teams that pre-existed the league. *E.g.,* Marc S. Maltby, *The Origins and Early Development of Professional Football* 108-10, 132-41, 184 (1997); Michael MacCambridge, *America's Game* 46-47 (2004). Even today, several popular college football teams are independent of any conference framework, including the University of Notre Dame Fighting Irish, the nation's most valuable college-football program, worth an estimated $101 million. Peter J. Schwartz, *The Most Valuable College Football Teams*, Forbes.com, Nov. 20, 2007, http://www.forbes.com/2007/11/20/notre-dame-fooball-biz-sports-cx_ps_1120collegeball.html.

Moreover, even where there is a league, it need not be structured as a joint venture governed by competing team owners. Leagues can be—and have been—organized by a single company that owns and controls all of the teams, *see Fraser*, 284 F.3d at 53-54, or structured—as the popular and economically successful NASCAR is structured—with the competition sponsored by an entity that has separate ownership and control from the teams that enter the competition. Stephen F. Ross & Stefan Szymanski*, Fans of the World Unite!* 70-71 (2008).

That is not to suggest that the antitrust laws *require* that professional sports leagues, or the NFL in particular, be organized in one of these alternative structures. But the Seventh Circuit's implicit assumption that a league like the NFL is inherently necessary if professional football is to be produced is both ahistoric and incorrect.

2. Second, even accepting that some level of cooperation is needed to produce league football games, that need cannot justify treating agreements between separately owned and controlled teams as immune from Section 1 scrutiny. The Seventh Circuit erred in holding otherwise.

There are in fact *many* types of joint ventures that make possible the creation of products that could not be created by individual firms alone. *See* Hovenkamp, *supra*, at 10 (football is just one of a number of products as to which "joint production or distribution is said to be necessary before the product can even exist"). The blanket license at issue in *BMI* is a prominent example, as are the national reporting networks at issue in *Associated Press* and the collegiate football produced by the NCAA. Yet this Court has routinely applied Section 1 to the agreements of joint ventures that create such products—as it did in *BMI*, *AP*, and *NCAA*. *See also Copperweld*, 467 U.S. at 768 (joint ventures "are judged under a rule of reason"). And rightly so, because such joint ventures are fully capable of anticompetitive conduct. *See Gen. Leaseways, Inc. v. Nat'l Truck Leasing Ass'n*, 744 F.2d 588, 594 (7th Cir. 1984) (Posner, J.) ("It 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.").

Indeed, the Seventh Circuit's conclusion that the need for cooperation to produce football games justifies antitrust immunity is flatly contrary to this Court's decision in *NCAA*. That case made clear that the antitrust consequence of the need for cooperation in a sports league is Rule of Reason (rather than *per se*) analysis, *not* immunity from Section 1 scrutiny, 468 U.S. at 100-01; the Court in fact expressly stated that, notwithstanding any need for cooperation, "joint ventures have no immunity from the antitrust laws." *Id.* at 113. In light of *NCAA*'s clarity on this point, the Seventh Circuit's decision to quote from *NCAA* concerning the need for cooperation in producing football games (Pet. App. 16a)—while utterly ignoring *NCAA*'s determination that the antitrust consequence of that need is Rule of Reason scrutiny—is incomprehensible.

The Seventh Circuit's prior opinion in *Bulls II* suggested that *NCAA* might be distinguished on the ground that, "[u]nlike the colleges and universities that belong to the [NCAA], which the Supreme Court treated as a joint venture in *NCAA*, the NBA has no existence independent of sports." 95 F.3d at 599. The purported distinction is a false one, because while colleges and universities have functions other than sports (just as many NBA teams are parts of businesses that have functions other than sports), the NCAA—which stands for National Collegiate Athletic Association—exists as an athletic coordinating body in the same fashion as does the NBA. In any event, the proffered distinction is without legal significance: the applicability of Section 1 to joint ventures has never turned on how many functions a joint venture or its members have; the dispositive issue is whether the venture aggregates separately owned and controlled entities that are actual or potential competitors of each other. In this regard, the NCAA, the NBA, and, most importantly here, the NFL, are identically situated.

Moreover, *NCAA* itself makes clear that its antitrust analysis does not turn on any difference between collegiate and professional sports. This Court's opinion—without suggesting the existence of any such distinction—cited legislation that applies only to *professional* leagues (the Sports Broadcasting Act) as "demonstrat[ing] Congress' recognition that agreements among league members to sell television rights in a cooperative fashion could run afoul of the Sherman Act." 468 U.S. at 104 n.28. In short, *NCAA* cannot be meaningfully distinguished, and the Seventh Circuit erred in failing to follow it. *See also id.* at 99 n.18 (citing, in support of characterizing the NCAA's policy as a horizontal agreement, a law review article arguing that the NFL teams cannot be deemed a single entity).

3. Likewise, the Seventh Circuit erred in asserting that the need for cooperation to produce football games makes the NFL and its teams "one source of economic power" in "producing" and "promoting" NFL football and, in particular, in licensing NFL team trademarks and logos. Pet. App. 16a.

First, the fact that separately owned and controlled teams must (or choose to) cooperate in some respects does not make them a single source of economic power: Such cooperation is fully consistent with the teams having both divergent economic interests and the ability to make anti-competitive agreements.

Second, it is indisputable that the NFL teams are 32 very separate sources of economic power. The teams have different assets—including different intellectual property. They take different investment risks. While they share some revenues, they have different incomes and widely different values. They are anything but a single economic actor.

Moreover, because the teams have separate profits and losses, each team has an overriding interest in maximizing its own individual profits, *i.e.*, a fundamental interest that differs from the interests of the other teams and the league as a whole. The teams' interests are not merely separate but often conflicting, because the teams compete in numerous ways on both local and national levels. *See, e.g., Raiders*, 726 F.2d at 1390; JA264. Indeed, the teams' divergent interests, and ability to compete with each other, is well illustrated both by their separate promotional activity, *see* JA542, and the lawsuits they have filed against each other. *See, e.g.*, *NFL Props.*, 922 F. Supp. 849 (NFLP suit against Cowboys); *Sullivan*, 34 F.3d 1091 (suit by owner of the New England Patriots); *NASL*, 670 F.2d 1249 (suit over rules creating a conflict between League and owners of the Miami Dolphins and Kansas City Chiefs). The resort to lawsuits to resolve differences underscores that, in contrast to a parent dealing with a wholly owned subsidiary, the NFL is not a single entity with the inherent power simply to direct all of the actions of its constituent teams.

Equal in importance to the teams' actual competition is that they are also *potential* competitors. Potential competition is no less important than actual competition, because, as here, "[a]bsence of actual competition may simply be a manifestation of the anticompetitive agreement." *Freeman*, 322 F.3d at 1149. In this case, the court of appeals conceded that "the several NFL teams could have competing interests regarding the use of their intellectual property that could conceivably rise to the level of potential intra-league competition," (Pet. App. 16a), and the NFL's own expert did not dispute that, but for the teams' exclusive licensing agreement, the teams would be competitors in the sale of licenses for branded products. JA189. The Dallas Cowboys' lawsuit made this point explicitly: "In the absence of the cartel … the NFL member clubs would compete with one another, and with the NFL in … the professional football merchandise market, leading to competitive pricing and increased output." JA420.

Finally, it is simply wrong to suggest that, because the teams have *agreed* not to compete with each other in certain aspects of licensing their trademarks and logos, they are a "single source" of economic power. On the contrary, the trademarks and logos remain the property of each respective team; each team has reserved certain licensing rights with respect to its own trademarks and logos; and the teams have had to consent to each successive joint licensing arrangement. Even with regard to their joint actions, the teams operate by consent and/or vote, not by unilateral direction. In other words, in licensing as elsewhere, the NFL teams are 32 separate sources of economic power; that they sometimes act jointly by consent does not mean that they act unilaterally, *i.e.*, without need of consent.

4. In sum, the NFL teams are separately owned and controlled competitors with some interests that overlap and others that diverge. They therefore do not approach a "complete unity of interest," *Copperweld*, 467 U.S. at 771, nor does "the very notion of an 'agreement' in Sherman Act terms" between or among them "lack[] meaning," *id.* They are 32 separate economic entities sometimes acting jointly, not a single economic entity acting unilaterally. The Seventh Circuit erred in thinking otherwise.

C. The Purported Benefits Of Fostering Competition Between The NFL And "Other Forms Of Entertainment" Also Cannot Justify Antitrust Immunity

The court below further erred in basing Section 1 immunity for the NFL teams' licensing agreement on what it described as the teams' shared interest in "compet[ing] with other forms of entertainment for an audience of finite (if extremely large) size" and, relatedly, antitrust law's encouragement of "cooperation inside a business organization … to foster competition between that organization and its competitors." Pet. App. 17a-18a. Those putative benefits of the teams' agreement are not germane to the immunity issue.

First, the fact that the separately owned and controlled members of a joint venture may share certain interests does nothing to transform them into a single entity. The members of *every* joint venture share an interest in the success of the venture, yet *Copperweld* makes clear (as do numerous other cases) that joint ventures are subject to Rule of Reason scrutiny. 467 U.S. at 768. So long as the members of the venture are separately owned and controlled competitors, their agreements have competitive significance and are subject to Section 1.

In addition, the *Copperweld* single-entity inquiry focuses solely on whether entities are capable of conspiring, not on whether their particular agreement is pro- or anti-competitive. The asserted benefits of "foster[ing] competition" with (unnamed) competitors of the NFL have no relevance to this inquiry. Indeed, the argument that the competitive harm resulting from particular restraints is outweighed by their asserted procompetitive benefits is a paradigmatic Rule of Reason argument; it is not an argument for rendering Rule of Reason scrutiny entirely inapplicable.

Moreover, the court below improperly assumed the result of the very Rule of Reason inquiry that it pretermitted; indeed, with respect to market definition, it simply ignored both the market alleged in the complaint and what numerous prior cases in the sports context have (on a full record) found, which is a relevant antitrust market that is limited to the particular sport and does not extend to any "other forms of entertainment." *E.g., Int'l Boxing*, 348 U.S. at 251 (world championship bouts in separate market from other major professional boxing); *NCAA*, 468 U.S. at 111-12 (relevant market is college football telecasts); *Fishman v. Wirtz*, 807 F.2d 520, 531 (7th Cir. 1986) (relevant product market is live professional basketball); *Raiders*, 726 F.2d at 1393 (relevant product market is NFL football); *Mid-South Grizzlies v. NFL*, 550 F. Supp. 558, 571 (E.D. Pa. 1982) (relevant product market is professional football), *aff'd*, 720 F.2d 772 (3d Cir. 1983); *Phila.*

World Hockey Club v. Phila. Hockey Club, 351 F. Supp. 462, 501 (1972) (relevant product market is major league hockey).

In light of this authority, even the district court in this case recognized that "we do not see how, as a matter of law, a unique market cannot exist for the manufacture and distribution of merchandise carrying NFL trademarks." JA85. The NFL did not appeal this decision. The Seventh Circuit had no basis in law or record evidence for speculating about competitive benefits in some undefined broader market—and particularly not in the context of an immunity inquiry to which such speculation is plainly not relevant.

D. Section 1 Immunity Cannot Properly Be Based On The Notion That The Teams Have "Acted" As An Integrated Licensing Enterprise "Since 1963"

Nor does the law allow the challenged agreement of the NFL teams to be treated as immune from Section 1 scrutiny on the ground that the teams have purportedly "acted" as a single integrated licensing entity "since 1963." The Seventh Circuit's contrary suggestion (Pet. App. 16a) is untenable.

1. First, the Seventh Circuit's assertion that the NFL teams have functioned in a unitary fashion since 1963 in licensing their intellectual property is simply not supported by the record—let alone supported sufficiently to justify such a judicial finding on a motion for summary judgment.

As to 1963, the record indicates only that NFLP initiated "collective" issuance of blanket licenses at that time. JA137. It does not establish that NFLP became the *exclusive* licensing agent for all NFL teams at that time, or that all teams thereafter ceased granting licenses for their own intellectual property.

Moreover, even after the advent of the NFL Trust in 1982, the record does not suggest that the teams fully integrated their licensing activities. Two teams, the Oakland Raiders and Miami Dolphins, did not even participate in the Trust. JA464. In addition, the Trust Agreement itself specifically carved out areas in which the teams retained rights to independently use or license their own intellectual property, including in local advertising and in team publications. JA383. Indeed, unlike fully integrated joint ventures where the participants have ceased competing in the relevant market, *see, e.g.*, *Texaco Inc. v. Dagher*, 547 U.S. 1, 6-7 (2006), the teams here have formed only a limited joint venture, have retained ownership and use of their respective intellectual property, and have continued vigorously to compete—as allowed—in the relevant market. *See, e.g.*, JA542 (urging Green Bay Packers fans to buy from Packers Pro Shop).

Furthermore, evidence about the high-profile 1995 suit and counter-suit between NFLP and the Dallas Cowboys—whose merchandise consistently provides a disproportionate percentage of the league's overall sales (JA530-34)—and the conduct that gave rise to it also shows that the teams did not function as a unitary licensing enterprise during this time period. Specifically, in 1995, the Cowboys' owner and related entities negotiated high-profile sponsorships with Dr. Pepper, Pepsi, and NIKE that, according to NFLP, "impermissibly exploit[ed] the Club Marks and the

NFL Marks." *NFL Props.*, 922 F. Supp. at 851. The Cowboys' counter-suit sought the complete invalidation of the NFL Trust and the right to license marks in competition with the other teams and NFLP. JA458-60. The settlement of the suits allowed the Cowboys' ownership to continue the challenged conduct. Feldman, *supra*, at 40-41. None of this is consistent with the conduct of a unitary licensing enterprise.

Finally, even in entering into the horizontal agreement that approved making Reebok their exclusive licensee, the teams cannot be said to have acted in a unitary fashion. That agreement required two votes of the 32 teams to approve the agreement and its pooling of the licensing rights for the teams' individually-owned intellectual property. JA465-70. Moreover, even under that agreement, individual teams have the ability to use their marks on a local level and, if desired, to control their own merchandising of the licensed apparel—rights that have subsequently been exercised. JA207-08, 469, 533-34; Feldman, *supra*, at 40-41. All of this evidence bespeaks of concerted, not unilateral, action.

2. In any event, issues of record support aside, the Seventh Circuit erred legally in focusing on whether the teams have "acted" as an integrated entity since 1963 in conducting their licensing activities.

First, the Seventh Circuit's approach is flawed in that it fails to provide—indeed, cannot provide—any principled basis for distinguishing between ventures that "act" as single entities and those that do not. Other than its wrong-headed reference to the need for cooperation to produce and promote NFL football, the court did not provide any criteria for resolving the single-entity question. To the contrary, the court hedged even on the factors it did address, saying only that the teams' status as potential competitors is "not necessarily" inconsistent with single-entity treatment; that the question does not "turn[] entirely" on such potential for competition; and that the teams "are best described" as a single source of economic power. Pet. App. 15a-18a.

Second, the court's focus on whether the teams have "acted" as a single entity is directly analogous to pre-*Copperweld* tests applied in deciding whether a parent and subsidiary had functioned like a single "integrated" entity—an approach that was rightly criticized as "unconnected to antitrust policy, [and] hopelessly vague," Areeda, *supra*, at 469, and was expressly repudiated by *Copperweld*, 467 U.S. at 772 n.18. Indeed, as Judge Boudin has observed, "[o]nce one goes beyond the classic single enterprise, including *Copperweld* situations, it is difficult to find an easy stopping point or even decide on the proper functional criteria for hybrid cases." *Fraser*, 284 F.3d at 59. And, to the extent that courts seek to define criteria by reference to the pro- or anti-competitive effects of the practice at issue, "assessment under section 1 is more straightforward and draws on developed law." *Id.* The inevitable result of the Seventh Circuit's contrary approach would be fact-intensive and undisciplined inquiries that will needlessly increase the burden, length, cost, and unpredictability of antitrust litigation, contrary to this Court's consistent emphasis on "the importance of clear rules in antitrust laws." *Pac. Bell Tel. Co. v. linkLine Commc'ns, Inc.*, 129 S. Ct. 1109, 1120-21 (2009).

Third, the Seventh Circuit's approach is contrary to *Copperweld*. Under *Copperweld*, whether multiple entities constitute a "single entity" immune from Section 1 scrutiny is determined by the presence (or absence) of unitary ownership and the accompanying power to control. 467 U.S. at 771. Entities subject to unitary control have no potential for truly concerted conduct; and "the very notion of an 'agreement' . . . [between them] lacks meaning." *Id.* The issue does *not* turn on whether the entities "act[]" or "function" in a more integrated or less integrated manner. So long as entities are separately owned and controlled—and hence are not inherently unitary—they *are* capable of reaching meaningful agreements to restrain trade. Indeed, when potential competitors agree to function in an "integrated" manner rather than competing with each other, that is precisely the type of agreement with which Section 1 is *most* concerned.

Fourth, the court's focus on whether the teams have "acted" in an integrated fashion "since 1963" is particularly problematic, in that it incorrectly suggests that the long persistence of the very conduct that is challenged as anticompetitive—here, the teams' agreement not to allow competition in the licensing of their intellectual property—can confer immunity from Section 1 scrutiny. As *Freeman* notes, the "[a]bsence of actual competition may simply be a manifestation of the anticompetitive agreement itself," and it therefore cannot be a basis for conferring single-entity immunity. 322 F.3d at 1149. How long the allegedly anticompetitive conduct has continued, moreover, is immaterial, because the persistence of anticompetitive conduct does not make such conduct permissible under the antitrust laws, *see, e.g.*, *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481, 502 n.15 (1968); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338 (1971)—let alone transform it into unilateral conduct.

Finally, the Seventh Circuit's focus on whether the teams have "acted" as a single entity in their licensing activities simply misses the fundamental antitrust claim in this lawsuit: The challenge to the teams' arrangement that so substantially restricts competition in the licensing of their respective trademarks and logos. Even if "acting" or "functioning" in an integrated fashion can somehow be treated as merging the separate teams into a single entity—*i.e.*, as the functional equivalent of a true merger—the law is clear that the creation of the single entity is (indeed must be) always subject to Section 1 scrutiny. As *Copperweld* emphasized, one of the important safeguards offsetting any concerns about single-entity immunity is that "[a] corporation's initial acquisition of control will always be subject to scrutiny." 467 U.S. at 777; *see also Dagher*, 547 U.S. at 6 n.1. Under this principle, the NFL teams' horizontal agreement in 2000-2001 to establish a ten-year collective and exclusive licensing arrangement is clearly subject to Section 1 attack.

Notably, the teams' 2000-2001 agreement was not merely an application of the teams' existing collective licensing arrangement. It created a new collective licensing arrangement that went well beyond the terms to which the teams were previously bound, and it required approval by vote of all of the teams. It was necessary, among other things, because the Trust was going to expire in 2004. At a minimum, if not viewed as creating an entirely new venture, the agreement was a material modification of the scope of the existing venture. The establishment of such an arrangement—where the prior arrangement was about to lapse—is necessarily subject to Section 1 challenge.

In all events, whatever agreement to restrict competition among the teams and their possible distributors is viewed as having created the integrated entity perceived by the Seventh Circuit, *that* agreement—and through it the legality of the creation of the integrated entity in the first place—is necessarily subject to Section 1 scrutiny. Put differently, the NFL teams' agreement not to allow competition in licensing their intellectual property cannot create a single-entity immunity that immunizes *that very agreement* from scrutiny. In apparently concluding that the agreement not to allow competition *did* effectively immunize itself, the court below seriously erred.

V. EXEMPTING THE NFL TEAMS FROM SECTION 1 SCRUTINY WOULD UNDERCUT THE CONSUMER WELFARE AND EFFICIENCY GOALS OF THE ANTITRUST LAWS

The antitrust immunity granted by the Seventh Circuit is also contrary to the consumer welfare and efficiency goals of the antitrust laws. It should be rejected for this reason as well.

The Seventh Circuit's holding, while nominally limited to the "facet" of licensing, appears broadly to encompass cooperative efforts by NFL teams in "producing" and "promoting" NFL football—seemingly up to and including fixing the price of tickets to the games the teams "produce." As the Second Circuit has noted, such a single-entity "loophole" would "permit league members to escape antitrust responsibility for any restraint ... that would benefit their league ... even though the benefit would be outweighed by its anticompetitive effects." *NASL*, 670 F.2d at 1257. Such a loophole, no matter how broad, would significantly undermine the consumer-welfare purposes of the Sherman Act.

There are already "well documented" consumer "welfare losses stemming from the potentially anticompetitive agreements among professional sports clubs." *Major League Baseball v. Crist*, 331 F.3d 1177, 1188 (11th Cir. 2003). In the present case, for example, there is record evidence—even in the absence of relevant discovery—that the challenged agreement, by eliminating "price pressures," quickly resulted in a 50% increase in the price of NFL team-branded hats. JA471.

The potential harms arising from immunizing this licensing agreement—and other collective but restrictive efforts by the teams to "promote" NFL football—from antitrust scrutiny are exponentially large. As scholars have demonstrated, professional sports teams are particularly well situated to engage in anticompetitive activity "because of the lack of product market rivals to whom consumers can turn." Stephen F. Ross, *Antitrust Options to Redress Anticompetitive Restraints and Monopolistic Practices by Professional Sports Leagues*, 52 Case W. Res. L. Rev. 133, 139-40 (2001). In addition to trademark licensing, professional sports teams have instituted restrictions on competition and output in areas such as the satellite and internet broadcasting of games in ways that appear to have raised prices above (and reduced output below) what they would be absent such restraints. *See, e.g.*, *id.* at 141-44. Indeed, these restraints have recently been a subject of congressional concern. *See Time Change—Competition in Sports Programming and Broadcasting: Are Consumers Winning?: Hearing Before S. Judiciary Comm.*, 109th Cong. (2006), http://judiciary.senate.gov/hearings/hearing.cfm?id=2440.

That is not to suggest that the NFL teams' collective conduct necessarily would be found to violate Section 1. Under the Rule of Reason, the defendants would be able to argue that the procompetitive benefits of the challenged restraints outweigh their anticompetitive effects—either under an ancillary restraints analysis or under a more general Rule of Reason inquiry. *See, e.g.*, *Major League Baseball Props., Inc. v. Salvino, Inc.*, 542 F.3d 290, 337-41 (2d Cir. 2008) (Sotomayor, J., concurring in the judgment). The defendants would also have the benefit of the standing, pleading, case management, and summary judgment rules that this Court has created to screen out implausible claims, limit litigation burdens, and prevent unsupported claims from going to trial. *See, e.g.*, *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556-57 (2007); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986). But the teams could not simply defend agreements to eliminate competition on the false ground that they are mere unilateral acts. "[A] joint venture is not a firm and it would be foolish for antitrust to treat them as if they were." Hovenkamp, *supra*, at 53.

CONCLUSION

This Court should reverse the judgment of the Seventh Circuit.

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