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 AMICI CURIAE FOR NATIONAL FOOTBALL LEAGUE PLAYERS ASSOCIATION, MAJOR LEAGUE BASEBALL PLAYERS ASSOCIATION, NATIONAL BASKETBALL PLAYERS ASSOCIATION, AND NATIONAL HOCKEY LEAGUE PLAYERS' ASSOCIATION IN SUPPORT OF PETITIONER

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## INTEREST OF AMICI

The National Football League Players Association ("NFLPA"), the Major League Baseball Players Association ("MLBPA"), the National Hockey League Players' Association ("NHLPA"), and the National Basketball Players Association ("NBPA") are the exclusive collective bargaining representatives of players in, respectively, the National Football League ("NFL"), Major League Baseball ("MLB"), the National Hockey League ("NHL"), and the National Basketball Association ("NBA") (collectively, the "Players Associations").[1]

The 32 separately-owned and separately-controlled teams in the NFL seek from this Court a broad "single entity" exemption from Section 1 of the Sherman Act, 15 U.S.C. § 1. This requested defense would apply to all of the NFL teams' "core venture functions," which the NFL owners define as virtually all aspects of their operations. The NFL owners have indicated that even the market for player services, in which the owners fiercely compete, should be immune from Section 1 scrutiny. *See* Certiorari Brief for NFL Respondents at 4, 10-11 [hereinafter NFL Cert. Br.].

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici curiae*, or their counsel, made a monetary contribution to its preparation or submission. Counsel of Record for all parties have consented to this brief's filing. The letters of consent have been filed with the Clerk.

In professional football, basketball and hockey, player-employees achieved their right to choose their employer in a competitive market at a meaningful point in their careers through antitrust suits that have protected the competitive markets for their services. Owners in these sports have repeatedly attempted to suppress competition in the player services market (as well as other markets), but those efforts have been consistently struck down by the courts. In professional baseball, this Court's decisions exempting baseball from the antitrust laws required the players to take a different route to competitive markets, but Congress enacted a statute in 1998 providing that the antitrust laws now apply to the market for MLB players to the same extent as other sports. *See Silverman v. Major League Baseball Player Relations Comm.*, 880 F. Supp. 246, 250-252 (S.D.N.Y 1995), *aff'd* 673 F.3d 1054 (2d Cir. 1995); Curt Flood Act of 1998, 15 U.S.C. § 26(b)(a).

The outcome of this case is of great interest to the Players' Associations. The antitrust settlement agreement in the NFL is about to expire in 2011. The labor agreements in MLB, the NBA, and the NHL are similarly set to expire in or around 2011. The NFL owners' appeal in this case is a Trojan horse designed to free sports team owners from Section 1 scrutiny so they can restrain competition with impunity in the market for player services. If the broad single entity defense advanced by the owners were adopted, decades of antitrust precedents that have protected competition for player services would be reversed, the benefits that both players and consumers have gained from competitive markets would be jeopardized, and labor disputes and work stoppages would likely ensue.

## SUMMARY OF ARGUMENT

The NFL owners' request that this Court hold that professional sports leagues are "single entities" for all core venture functions is inconsistent with numerous decisions of this Court and statutes enacted by Congress going back many decades, particularly in player services markets. That holding would also preclude Section 1 scrutiny of conduct that unreasonably restrains or even eliminates competition among the owners – giving the owners an immunity that they have sought unsuccessfully for decades from the courts and Congress. The application of Section 1 to these businesses has ensured that sports team owners invest, innovate, and compete for fans; that players' and coaches' salaries are not artificially suppressed; that team ownership interests can be bought and sold in competitive markets; that players have an effective alternative to disruptive work stoppages; that cities wishing to obtain or retain a team can compete to do so based on market forces; and that competition is preserved in local markets for broadcast rights, stadiums and arenas, and other products and services.

The claim that 32 separately-owned NFL teams – worth from $800 million to $1.65 billion – can be combined into a single entity under Section 1 for all core venture functions is wrong.[2] The factual record below does not address whether the single entity exemption could apply in any market other than the one for the

[2] *Special Report: The Business of Football*, FORBES, http://www.forbes.com/nfl (last visited Sept. 23, 2009) [hereinafter *Forbes NFL Valuations Report*].

challenged apparel licenses. Indeed, had a fuller record been developed, it would have shown that any such defense could not be so broadly applied. Each NFL team, like each MLB, NHL, and NBA team, is separately owned and controlled by a fiercely independent business person ,[3] and the teams do *not* share profits or losses. It cannot be disputed that NFL teams compete vigorously against each other in markets for player services, coaching and other managers, franchise locations, sponsorships, and other products and services. In fact, the NFL's structure is designed to preserve substantial operating and economic independence for owners, notwithstanding that they cooperate and share revenues to some extent, including the ability to pursue disparate economic strategies. Having chosen to be separate economic entities for their own business reasons, the NFL teams cannot ask to be treated as a single entity solely when it suits their purposes. Indeed, even in the business of apparel licensing, the NFL teams have not consistently acted jointly; individual teams can "opt-out" of these arrangements in many important respects, and the Dallas Cowboys have done so since 2002.

Treating the 32 NFL teams as a single entity would vitiate settled law. Broadly exempting sports teams from Section 1 would be flatly inconsistent with *NCAA v. Bd. of Regents*, 468 U.S. 85 (1984), which applied the Rule of Reason to restraints imposed by a joint venture of college sports teams. It also would be inconsistent with

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[3] The only differently owned team is the Green Bay Packers, which after obtaining special approval, became widely held through the issuance of stock to the public.

*Brown v. Pro Football, Inc.*, 518 U.S. 231 (1996), which rejected the contention that sports teams deserve special treatment when it comes to the application of antitrust law in the player services market. And it would be inconsistent with a raft of lower court decisions refusing to apply the single entity defense to restraints on competition imposed by NFL and other sports teams, most notably in the market for player services – as even the courts below acknowledged.

Moreover, the broad immunity sought by the NFL teams would be contrary to Congressional enactments, including the Sports Broadcasting Act, 15 U.S.C. §§ 1291-1295 ("SBA") (exempting, under specific circumstances, joint negotiation of national broadcast television contracts by teams in the NFL and other leagues), and the Curt Flood Act, 15 U.S.C. § 26(b)(a) (restoring antitrust protection to the Major League Baseball players' labor market to the same extent as in football and other sports). These statutes would be rendered nugatory if the Court were to hold that the single entity defense absolves sports teams from accountability under Section 1 for unreasonably restraining competition in labor or broadcast markets. Indeed, the specific policy trade-off that Congress set forth in the SBA – protecting both college football and high school football from NFL broadcasts, in exchange for the limited antitrust exemption granted the NFL – would be eviscerated. *See* H. Rep. No. 89-2308 (1966) (Conf. Rep.), *as reprinted in* U.S.C.C.A.N 4372, 4378.

Even if this Court were to determine that the NFL teams should be treated as a single entity for the one facet of their operations addressed by the courts below

– the joint licensing of certain intellectual property – there would be no basis to apply that holding to other markets in which NFL teams actively compete. This is especially so in the markets for player services, which this Court, Congress, and the lower courts have uniformly held are subject to Section 1 of the Sherman Act. Such competition for players has greatly benefitted not only player-employees, but also consumers and fans.

Finally, adopting the broad formulation of the single entity defense the NFL teams propose would significantly increase the burden, cost, and complexity of antitrust litigation. The NFL teams seek to replace a bright line "single entity" rule that applies only when entities are commonly owned and controlled with a fuzzy standard that will lead to unpredictable outcomes. To the extent the Court is concerned about overly burdensome antitrust practice, the Rule of Reason can be effectively calibrated to generate an inquiry only as broad or as narrow as needed to reach an appropriate judgment about those restraints imposed by sports team owners in markets in which they compete.

## ARGUMENT

This Court, Congress, and the lower federal courts have recognized for many decades that unreasonable restraints of trade agreed to by sports team owners are subject to scrutiny under Section 1 of the Sherman Act. That is because the teams, as demonstrated below, are separately owned and controlled business entities that compete with one another, not a commonly owned or controlled single entity.

## I. Professional Sports Teams Are Separately Owned and Controlled Business Entities That Compete in a Wide Range of Economic Activities.

In assessing American Needle's challenge to NFL Properties' ("NFLP") licensing agreement with Reebok, the courts below narrowly focused on the market for apparel licensing, given the Seventh Circuit's prior determination that the single entity defense should be considered "one facet of a league at a time." *See* Pet. App. 12a-13a. The district court confined the record to this question, denying American Needle discovery on the structure of the NFL and its teams, as well as on the anti-competitive effects of a broader single entity ruling. *See* Pet. App. 7a-8a. Had the lower courts considered these issues, they would have been compelled to conclude that the NFL teams, like those in MLB, the NHL, and the NBA, are separately owned and controlled, and compete fiercely in a variety of economically relevant markets. Because each of the 32 NFL teams is under the control of its own individual owner, and not "under the control of a single driver," *Copperweld v. Independence Tube*, 467 U.S. 752, 771 (1984), there is no basis to treat the NFL teams as a "single entity" exempt from Section 1 scrutiny.

### A. Professional Sports Teams Are Separately Owned Business Entities That Do Not Share Profits, Losses, or Risks.

Each of the NFL's 32 teams has a separate and independent owner, many of whom are billionaires.[4]

[4] Jack Gage, *Business of Football: Richest NFL Owners*, FORBES, Sept. 2, 2005, http://www.forbes.com/2005/09/01/sports-football owners _05nfl_cz_jg _0901riche stowners.html.

Indeed, cross-ownership of franchises is expressly prohibited in the NFL.[5] MLB, the NHL, and the NBA have similar structures. Nat'l Basketball Ass'n, Constitution and Bylaws of the National Basketball Association § 3(a) (2005); Major League Baseball, Major League Rules, R. 20(a) (1998). Nat'l Hockey League, Constitution of the National Hockey League §8.1(a) (2001).

NFL team ownership interests are bought and sold in the marketplace. NFL Const. and Bylaws at Art. III § 3.5. The courts have long recognized that current and potential NFL owners compete with one another in the market for team ownership interests and, accordingly, have applied the antitrust laws in that market. *See, e.g.*, *Sullivan v. NFL*, 34 F.3d 1091, 1097-98, 1100 (1st Cir. 1994); *N. Am. Soccer League v. NFL*, 670 F.2d 1249, 1256 (2d Cir. 1982).

The NFL owners consciously rejected centralized ownership over the teams; instead, they organized to preserve economic independence and competition among teams.[6] Separate ownership, combined with a marketplace for team ownership interests, provides an incentive for each owner to compete to increase his or

[5] Nat'l Football League, Constitution and Bylaws of the National Football League Art. IX § 9.1(B)(1) (2006) [hereinafter NFL Const. and Bylaws].

[6] *Cf. Fraser v. Major League Soccer*, 284 F.3d 47, 53 (1st Cir. 2002) (declining to apply single entity defense despite "unique structure" of the league because of different economic interests of club operators who competed with each other in important respects).

her team's value through different strategies of lowering costs, increasing revenues, or investing to promote the team. While the NFL owners agree on the rules of the game and a schedule for the season, a substantial portion of their decisions are driven by competing economic interests. *See, e.g., Radovich v. NFL*, 352 U.S. 445, 45-52 (1957); *N. Am. Soccer League,* 670 F.2d at 1252; *McNeil v. NFL*, 790 F. Supp. 871, 880 (D. Minn. 1992).

Moreover, the NFL teams do not share profits and losses. Far from it: the teams separately earn and retain revenues that collectively amount to billions of dollars annually. *See Forbes NFL Valuations Report, supra* note 2. The NFL owners share some types of revenue, but revenue from numerous sources are *not* shared equally or at all.[7]

For example, each NFL team independently determines the prices it charges for tickets, concessions, parking, local advertising and promotion, signage, and sales of programs and novelties, among other items. *See Los Angeles Mem'l Coliseum Comm'n v. NFL*, 726 F.2d 1381, 1390 (9th Cir. 1984). The economic impact of these price-setting decisions is substantial: out of the approximately $7.5 billion generated in 2008 by NFL teams and the League, approximately $4.5 billion was generated from revenue sources whose prices were independently set by individual teams. Accordingly, the ability of teams to capture revenues varies significantly;

[7] To the extent the teams receive any "profits" from the licensing activities of NFLP, this would amount to a relatively small portion of the overall revenues of the NFL owners.

some teams make roughly twice as much in gate receipts as other teams, and some teams earn nine times more in local stadium revenues than other teams.

With respect to stadium revenues, the owner of the home team at an NFL football game keeps 60% of the "gross receipts" derived from the sale of regular season game tickets, and generally shares the remaining 40% with visiting teams. NFL CONST. AND BYLAWS at Art. XIX § 19.1(A). Numerous categories of revenue generated at NFL stadiums are wholly retained by the home team owner, including concessions, parking, local advertising and promotion, signage, sales of programs and novelties, and non-ticket revenues from the sale of luxury boxes. *Id.* at Art. IV § 4.4.

Congress enacted a specific antitrust exemption in the SBA regarding the major source of revenue that the NFL teams share equally. *See* 15 U.S.C. § 1291. That exemption allows the teams to jointly negotiate national television broadcasting contracts, and reflects Congress's intent to permit the NFL teams to share this revenue "on a basis of substantial equality."[8] The teams, however, do not share revenue from preseason local television broadcasts or from local radio broadcasts. NFL CONST. AND BYLAWS at Art. X § 10.3.

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[8] S. REP. NO. 87-1087 (1961), *as reprinted in* 1961 U.S.C.C.A.N. 3042, 3043. *See also Professional Sports Antitrust Immunity: Hearing on S. 2784 and S. 2821 Before the S. Comm. on the Judiciary*, 97th Cong. 40 (1982) (testimony of Paul Tagliabue, Counsel, National Football League). The SBA and its antitrust exemption similarly apply to baseball, basketball, and hockey.

As a result of the independent decision-making power exercised by each team, NFL teams have substantially different revenue streams and economic valuations. *See Los Angeles Mem'l Coliseum*, 726 F.2d at 1390 ("The disparity in profits can be attributed to independent management policies regarding coaches, players, management personnel, ticket prices, concessions, luxury box seats, as well as franchise location, all of which contribute to fan support and other income sources."). Individual team revenue in 2008 ranged from approximately $214 million to $345 million – a difference of over 60 percent – while the operating income reported by the highest and lowest teams varied by approximately $100 million.[9] Team valuations show similar disparities. For example, the Dallas Cowboys were recently valued at more than twice the Oakland Raiders (approximately $1.65 billion versus $800 million),[10] and the Cowboys chose to invest in a new stadium this season costing about $1.2 billion.[11]

Other leagues are like the NFL, and are formed on the basis that each team is separately owned and operated, and will act as a separate business enterprise that will invest in itself, take individual risks, and reap its own profits and losses. Each MLB, NBA and NHL team sets its own prices for tickets and other items, and teams in these leagues share even less revenue than the NFL owners. None of these teams shares profits

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[9] *Forbes NFL Valuations Report*, *supra* note 2.

[10] *Id.*

[11] Nicolai Ouroussoff, *A Supersize Stadium With a Helping of Sprawl,* N.Y. Times, Sept. 18, 2009, at B10.

with each other. Different MLB, NBA and NHL teams adopt widely differing economic strategies, with some investing heavily to increase revenues, and others attempting to increase profitability by lowering costs. *See, e.g.*, Michael Lewis, Moneyball: The Art of Winning an Unfair Game 119-125 (W.W. Norton & Co. 2004) (discussing Oakland's strategies for efficient hiring and management that allowed it to compete with wealthier teams, such as the New York Yankees).

Individual team values also vary widely in other sports. In the NBA, team values range from $278 million to $613 million, and the variance between the teams with the highest and lowest operating income is nearly $82 million.[12] In MLB, the New York Yankees have a value of $1.5 billion; by contrast, the Florida Marlins are worth $277 million.[13] And, in the NHL, team values go from a high of $448 million to a low of $153 million.[14]

### B. Professional Sports Teams Compete Vigorously Against One Another In Numerous Markets

NFL teams, like the teams in other professional sports leagues, act in their own economic interests and in competition with one another, in a wide range of activities. Given this extensive competition among the

[12] *Special Report: The Business of Basketball*, Forbes, http://www.forbes.com/nba (last visited Sept. 23, 2009).

[13] *Special Report: The Business of Baseball*, Forbes, http://www.forbes.com/mlb (last visited Sept. 23, 2009).

[14] *Special Report: The Business of Hockey*, Forbes, http://www.forbes.com/nhl (last visited Sept. 23, 2009).

teams, every Circuit – except for the Seventh Circuit below – that has considered the potential application of the single entity defense to a sports league business declined to apply it.[15]

### 1. Professional Sports Teams Compete Against Each Other for Player Services

The NFL owners, like owners in other sports leagues, have always individually hired players to play solely for that team in the economic market that may be most critical to a team's success: the market for player services. The teams compete directly with each other for the service of players, and most NFL-caliber players have no reasonable alternative other than to sell their services to an NFL team.[16]

Accordingly, the courts have consistently recognized the applicability of the antitrust laws to the market for

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[15] *See, e.g.*, *Metro. Intercollegiate Basketball Ass'n v. NCAA*, 339 F. Supp.2d 545, 549 (S.D.N.Y. 2004); *Sullivan*, 34 F.3d at 1099; *Fraser*, 284 F.3d at 53; *McNeil*, 790 F. Supp. at 879-80; *N. Am. Soccer League*, 670 F.2d at 1256-58; *Mackey v. NFL*, 543 F.2d 606, 616 n.19, 620 (8th Cir. 1976); *Los Angeles Mem'l Coliseum Comm'n*, 726 F.2d at 1388-1390; *Smith v. Pro Football, Inc.*, 593 F.2d 1173, 1179 (D.C. Cir. 1978).

[16] NFL teams also compete with one another for coaches and other non-player employees. *See, e.g., Los Angeles Mem'l Coliseum Comm'n*, 726 F.2d at 1390; *Sullivan*, 34 F.3d at 1097-98, 1100; *cf. Law v. NCAA*, 134 F.3d 1010, 1018 n.10 (10th Cir. 1998) ("[T]he NCAA does not hire coaches for the teams. Rather the teams hire coaches individually, 'albeit subject to fixed prices.' Thus, the NCAA does not operate as a joint venture for the purposes of hiring assistant basketball coaches.").

players in the NFL and other sports leagues. *Mackey*, 543 F.2d 606; *Smith,* 593 F.2d 1173; *Kapp v. NFL,* 390 F. Supp. 73 (N.D. Cal. 1974), *aff'd in part, dismissed in part as moot,* 586 F.2d 644 (9th Cir. 1978). For example, in *Radovich v NFL*, this Court considered a Section 1 claim brought by a player against the NFL teams for a boycott of certain players who had agreed to play in another league. 352 U.S. 445. The Court allowed the claim to proceed, holding that the alleged activities were "within the coverage of the antitrust laws." *Id.* at 447. Likewise, in *Brown* this Court reaffirmed that the antitrust laws apply to team owners in their competition for players. "We can understand," the Court noted, "how professional sports may be special in terms of, say, interest, excitement, or concern. But we do not understand how they are special in respect to labor law's antitrust exemption." 518 U.S. at 248. *See also Flood v. Kuhn*, 407 U.S. 258, 282 (1972) (other professional sports, unlike major league baseball, are not exempt from antitrust laws).

The Seventh Circuit below similarly acknowledged that the market for player services is subject to Section 1 scrutiny under the antitrust laws. Pet. App. 12a ("Individuals seeking employment with any of the league's teams would view the league as a collection of loosely affiliated companies that all have the independent authority to hire and fire employees."); *see also Chicago Prof'l Sports Ltd. P'ship v. Nat'l Basketball Ass'n,* 95 F.3d 593, 600 (7th Cir. 1996) ("*Bulls II*") ("Just as the ability of McDonald's franchises to coordinate the release of a new hamburger does not imply their ability to agree on wages for counter workers, so the ability of sports teams to agree on a TV

contract need not imply an ability to set wages for players.") (Easterbrook, J.). The district court also acknowledged that the single entity rule should not apply in the labor context. *See* Pet. App. 12a-13a.

The consistent application of Section 1 in sports labor markets has been critical in efficiently allocating player services according to market forces, to the great benefit of consumers. For many decades, NFL players did not have a union through which they could exercise labor law rights and lacked the resources and experience to assert antitrust rights. *See Kapp,* 390 F. Supp. at 83. Thus, the NFL owners were free to agree amongst themselves not to compete for player services, and to pay player salaries at low levels that were unrelated to the wealth generated by the players' work. While the players eventually formed a union and tried to remedy the situation in the 1970's by striking, *see id.*, this tool was ineffective given the extremely short average career length of NFL players (approximately three years).[17]

In the mid-1970's, NFL players began to assert their rights under Section 1 of the Sherman Act, and a series of antitrust suits gradually yielded improvements in restraints on competition for player services. In the late 1980's, the NFL players again filed an antitrust suit against the NFL owners, challenging restrictions on player free agency. *See Powell v. NFL*, 678 F. Supp. 777 (D. Minn. 1988), *rev'd*, 930 F.2d 1293 (8th Cir. 1989). The

[17] *See* NFLPlayers.com, NFL Hopeful FAQ, http://nflplayers.com/user/template. aspx?fmid =181&lmid =349&pid=0&type=1 (last visited Sept. 21, 2009).

Eighth Circuit, taking a position similar to that later adopted by this Court in *Brown*, required the players to elect rights under either the labor laws or the antitrust laws. The players ultimately disbanded their union, and individual players brought another antitrust challenge to the NFL's restrictions on competition for players. *See McNeil*, 790 F. Supp. at 880 (rejecting single entity claim based on *Copperweld*). After a lengthy trial, a jury found that the NFL's restraints were unreasonably restrictive and violated Section 1 of the Sherman Act. The players and the owners then settled a separate antitrust class action suit in 1993 – the *Reggie White* litigation – with the settlement resulting in NFL players, for the first time, having the ability to choose their employer in a competitive market. *See White v. NFL*, 836 F. Supp. 1458 (D. Minn. 1993).[18]

The *White* antitrust litigation resulted in substantial changes for NFL players. Average salary levels for new player contracts more than doubled in 1993. *Id*. at 1479. Salaries were also distributed more efficiently among players with the introduction of competition. It turned out, for example, that the wages of offensive linemen increased at a substantially higher rate than wages of players at many other positions – a recognition of the unique and underappreciated value of these players in the absence of a competitive market. *See* Peter King,

[18] The players union was reformed and a corresponding collective bargaining agreement was also entered into, at the insistence of the NFL owners. *See White v. NFL,* 836 F. Supp. 1508 (approving settlement agreement), *aff'd*, 41 F.3d 402 (8th Cir. 1994). The *Reggie White* settlement and CBA both expressly provide that the players can give up their union and assert their antitrust rights after these agreements expire.

*Money Men*, SPORTS ILLUSTRATED, April 12, 1993, at 44 ("It's been like a land rush to get the linemen. . . .").

The increases in player salaries did not impair the economic viability of NFL teams. To the contrary: players were allocated more efficiently, and teams that had endured decades of losses on the playing field were able to improve more quickly. For example, Reggie White, one of the first major free agent players, joined the Green Bay Packers in 1993, and three years later the team won the Super Bowl – their first in 30 years. The overall attractiveness of NFL football increased, and NFL franchise values skyrocketed, increasing from approximately $288 million in 1998, to an average value of approximately $1.04 billion in 2008.[19] Economists recognize that consumers and other market participants have benefitted greatly from interteam competition. *See e.g.*, E. Woodrow Eckard, *Free Agency, Competitive Balance, and Diminishing Returns to Pennant Contention*, 39 ECON. INQUIRY 430 (2001) (free agency improved interseason competitive balance in MLB). For these reasons, even if this Court were to conclude that the NFL owners act as a single entity in the licensing of certain intellectual property, there would be no basis to apply a single entity defense in the market for player services in which the teams compete against one another.

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[19] KEVIN M. MURPHY & ROBERT H. TOPEL, THE ECONOMICS OF NFL TEAM OWNERSHIP 8-9, *available at* http://chicagopartners.com/sites/default/files/FINAL%20-%20The%20Economics%20of%20NFL%20Team%20Ownership%20-%202.pdf.

### 2. Each NFL Team Still Competes In Licensing Activities

Originally, the NFL teams only individually licensed team-specific intellectual property, without any sharing of revenues from these licenses among NFL team owners. Beginning in 1963, however, the NFL teams formed a joint licensing entity known as NFL Properties. Pet. App. 137. Although the business model changed, that entity has served as a licensing agent for intellectual property commonly owned by all of the NFL teams, such as the "NFL shield," and, in some circumstances, for intellectual property owned by individual teams, such as team logos. *See* Pet. App. 3a; *Dallas Cowboys Football Club v. NFL Trust*, No. 1:95-cv-09426, 1996 U.S. Dist. LEXIS 15501, at *2-3 (S.D.N.Y. Oct. 18, 1996). Under this arrangement, at times the NFL sought to constrain what it viewed as excessive licensing competition from individual teams, and teams accused the League of unreasonably restraining competition in violation of Section 1 of the Sherman Act. *See, e.g., Dallas Cowboys Football Club*, 1996 U.S. Dist. LEXIS 15501, at *2-3; *NFL Properties v. Dallas Cowboys Football Club*, No. 1:95-cv-07951, 1996 U.S. Dist. LEXIS 1814, at *80-81 (S.D.N.Y. Feb. 20, 1996); *cf. Madison Square Garden, L.P. v. Nat'l Hockey League*, No. 07 Civ. 8455, 2008 U.S. Dist. LEXIS 80475 (S.D.N.Y. Oct. 10, 2008).

In 2004, the NFL owners agreed upon a set of rules that encouraged continued competition among the teams in licensing activities, while imposing limits in certain specified areas. Under this new regime, each NFL team retains the right, within its home geographic

area, to use and license its intellectual property for purposes of local advertising, sponsorship, naming rights, related promotional arrangements, retail stores and other team-identified ventures, promotional and public awareness campaigns, and team-sponsored events. NFL CONST. AND BYLAWS, app. at 2004 Resolution BV-4 § 4.4(B). Teams retain 100% of the revenue generated by such licensing, *id.*, which gives them an incentive to invest and compete to generate revenue and profits and build team strength and brand. The NFL retains the right to license collective league intellectual property, such as the NFL shield, and logos created for each Super Bowl and other League events. It also may license individual team intellectual property, but only in specified categories and circumstances. *See, e.g., id.* at § 8; *id.* at § 10(a). Thus, while the NFL may license its name and the NFL shield to a particular type of national sponsor – such as the Coors Brewing Company, which is the NFL's beer sponsor – individual NFL teams can and do have their own licensing arrangements in their local geographic areas (for example, Budweiser is the official beer sponsor of many NFL teams). *Id.* at Art. IV § 4.4(B)(1).

Significantly for this case, the teams retained the rights to license their logos within their home geographic area on products that compete with NFLP merchandise and from which they can keep all revenues. *Id.* They also compete directly with each other for such licensing in home territories that overlap, such as New York, Washington, D.C.-Baltimore, and San Francisco-Oakland. Further, individual NFL teams have recently been permitted to opt-out of certain league-wide licensing arrangements. For example, in exchange for a

payment to NFL Properties, the Dallas Cowboys directly license third parties to manufacture and sell certain apparel to the public, rather than through NFL Properties, and the team keeps the revenue.[20]

### 3. NFL Teams Compete Against Each Other For Fans and Franchise Territories

NFL teams, like teams in other leagues, compete with each other on a nationwide basis for fans, who may relocate throughout the nation but can still follow their favorite team. The Dallas Cowboys have branded themselves as "America's Team" and the Pittsburgh Steelers refer to their fans as "Steeler Nation." The same is true in other sports, with "Red Sox Nation" being one example, and the Atlanta Braves MLB team similarly marketing itself on nationwide cable television as "America's Team." Nationwide fan support may substantially boost a team's revenues, and specialized digital media has been specifically developed to connect these teams and fans.

Teams compete not only for fan support, but also for broadcast revenues and media spaces, ticket sales, and sales of concession items. *Los Angeles Mem'l Coliseum Comm'n*, 726 F.2d at 1390. This competition is particularly fierce when two teams operate in the same or adjacent geographic markets. *See Mid-South Grizzlies v. NFL*, 720 F.2d 772, 787 (3d Cir. 1983). Nearly 20% of the NFL teams fall in this category – the Oakland and San Francisco teams, the two New York teams, and the teams in Washington D.C. and Baltimore. Additional

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[20] *See* JA530.

teams compete for fans in regions that are located between several teams' geographic areas. For example, central Pennsylvania is situated near teams based in Philadelphia, Pittsburgh, Washington, and Baltimore; Youngstown is located between teams based in Cleveland and Pittsburgh; parts of New Jersey are readily accessible to the stadiums in which the Philadelphia and both New York teams play; and various parts of the Midwest are located between teams in Indianapolis, Chicago, Green Bay, and Minneapolis. Several other teams also compete for allegiance in the same state, such as St. Louis and Kansas City in Missouri; Cleveland and Cincinnati in Ohio; and Dallas and Houston in Texas. Many NFL teams are rivals for fans, and the economic benefits that they bring.

When NFL team owners have collectively attempted to set rules to restrain competition among themselves, the courts have uniformly recognized that the teams are competitors and accordingly are subject to Section 1 of the Sherman Act. *See*, *e.g.*, *supra* note 16. This check on anticompetitive restraints is essential in preventing leagues from enforcing what amounts to a group boycott on the terms they will accept for locating a franchise in a particular city. If the NFL owners were treated as a single entity, they could exercise their market power to command excessive compensation or other concessions from cities that wish to attract an NFL team. Indeed, the NFL has asked Congress for an exemption pertaining to relocation issues. *See Professional Sports Antitrust Immunity: Hearings on S. 2784 and S. 2821 Before the S. Comm. on the Judiciary*, 97th Cong. 33 (1982) (statement of NFL Commissioner Rozelle). Congress did not grant it.

## II. *Copperweld's* Narrow Single Entity Exemption Cannot Apply to Separately Owned And Operated Professional Sports Teams

The Sherman Act requires particular vigilance in examining "concerted activity," as distinguished from unilateral activity. Such conduct "is inherently fraught with anticompetitive risk" because it "deprives the marketplace of the independent centers of decision-making that competition assumes and demands." *Copperweld*, 467 U.S. at 768-69. Because each of the 32 NFL teams is an independent economic actor that competes with the other teams, the broad antitrust immunity sought by the NFL would violate fundamental antitrust policy. Further, this Court has already indicated in *Radovich* and *Brown* that agreements among NFL owners are subject to scrutiny under Section 1, and this principle has been applied by numerous lower courts to the great benefit of consumers.

### A. The NFL's Sweeping Formulation of the Single Entity Exemption Is Inconsistent With This Court's Precedents

In proposing that the 32 NFL teams should be treated as a single economic entity, the NFL teams rely primarily on *Copperweld*, and to a lesser extent, *Texaco, Inc. v. Dagher*, 547 U.S. 1 (2006). Neither of these cases, nor any other relevant Section 1 precedent, provides any support for the broad single entity defense that the NFL teams seek in this case.

*Copperweld* addresses the circumstances in which the "contract, combination . . . or conspiracy" prong of Section 1 has been met. While these words reach broadly, this Court concluded that a parent and its wholly-owned subsidiary cannot conspire for purposes of Section 1:

> The distinction between unilateral and concerted conduct is necessary for a proper understanding of the terms "contract, combination . . . or conspiracy" in § 1 . . . . [I]t is perfectly plain that an internal "agreement" to implement a single, unitary firm's policies does not raise the antitrust dangers that § 1 was designed to police. The officers of a single firm are not separate economic actors pursuing separate economic interests, so agreements among them do not suddenly bring together economic power that was previously pursuing divergent goals.

467 U.S. at 768.

This single entity exception is narrow. As the Court explained, a "parent and its wholly-owned subsidiary 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." *Id.* at 771. Thus, the subsidiary is always acting for the benefit of the parent, whether or not the two entities have entered into a formal agreement. *Id.* In applying *Copperweld*, the lower courts have generally adhered to the Court's focus on ownership and control. *See, e.g., Eichorn v. AT&T Corp.*, 248 F.3d 131, 138 (3d Cir. 2001); *Century*

*Oil Tool Co. v. Prod. Specialties*, 737 F.2d 1316, 1317 (5th Cir. 1984); *Novatel Comm'ns v. Cellular Tel. Supply*, No. C85-2674A, 1986 WL 15507, at * 6 (N.D. Ga. Dec. 23, 1986); *Aspen Title & Escrow Inc. v. Jeld-Wen, Inc.*, 677 F. Supp. 1477, 1486 (D. Or. 1978).[21]

In the sharpest contrast to the "offerings of a single firm," the NFL owners are "separate economic actors pursing separate economic interests." *Copperweld*, 467 U.S. at 769. They pursue a variety of revenue maximizing strategies in competition with each other and, accordingly, teams have substantially different revenue streams and a wide range of economic values. As one NFL team owner put it, the NFL teams are "vicious competitors." *McNeil*, 790 F. Supp. at 879 n.9.

The NFL teams nonetheless suggest that the need for cooperation regarding game rules, playing fields, and scheduling transforms them into a "single entity." *See* NFL Cert. Br. at 12. This Court's decision in *NCAA* defeats that argument. There, the Court acknowledged that at times, agreements among sports teams may be necessary for the creation of a product. 468 U.S. at 101-02 ("[W]hat is critical is that this case involves an industry in which horizontal restraints on competition are essential if the product is to be available at all."). Nevertheless, the Court applied Section 1 to strike down

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[21] The NFL's proposed antitrust exemption is so lacking in support that the teams cite as favorable authority two decisions in which the court finds that a single entity defense applies, but expressly distinguishes the entity before it from the NFL. *See Jack Russell Terrier Network of N. Cal.*, 407 F.3d 1027, 1035 (9th Cir. 2005*); Eleven Line Inc. v. N. Tex. State Soccer Ass'n,* 213 F.3d 198, 205-206 (5th Cir. 2000).

the NCAA's broadcast market restrictions in which the teams could compete. *Id.* at 120.

In focusing on whether the NFL teams "can function only as one source of economic power when collectively producing . . . or promoting NFL football," Pet. App. 16a, or whether the teams "collectively produce an entertainment product that no member could produce on its own," NFL Cert. Br. at *i*, both the Seventh Circuit and the NFL teams are asking the wrong question. *Copperweld* is concerned with whether two entities are separately owned and controlled, and whether they are potential or actual competitors – which the NFL teams and other sports teams indisputably are – not whether they can produce a new product or enhance marketing by acting together.

Indeed, if the single-entity rule were as broad as the NFL teams argue, the *Copperweld* exemption would swallow vast swaths of antitrust jurisprudence. The *sine qua non* of a joint venture is that it produces something new and coordination is necessary to create it. The NFL's broad formulation of the single entity exemption would thus have severe consequences not just for professional sports, but also in other major sectors of the economy. For example, coordination among competitors is common in the health care and housing industries, where the single entity argument has been rejected. *See, e.g.*, *Freeman v. San Diego Ass'n of Realtors*, 322 F.3d 1133, 1147-49 (9th Cir. 2003); *N. Texas Specialty Physicians v. FTC*, 528 F.3d. 346, 356 (5th Cir. 2008).

Likewise, separate companies join together in a range of other industries to set standards so that a joint product that would not otherwise exist may be created – such as computers assembled from components created by different manufacturers. But the fact that the companies join together in standard setting to enable the creation of the ultimate product does not mean that the component manufacturers act as a single entity in manufacturing their individual products, or that they are entitled to blanket Section 1 immunity as to their competition in obtaining the raw materials needed to create the components they manufacture. *See Bulls II*, 95 F.3d at 600, *quoted supra* Point I.B.1 (Easterbrook, J.).

The possibility that coordination among distinct economic actors may, in some circumstances, enhance competition or create a new product has nothing to do with Section 1's requirement of multiple actors. Rather, it provides a basis for assessing agreements among multiple competing entities under the Rule of Reason, rather than *per se* invalidation. *NCAA,* 468 U.S. at 103 (citing *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 18-23 (1979)) ("*BMI*"); *see also Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 228 (2d Cir. 1986) (stating that Supreme Court refused to apply *per se* treatment to a price restraint in *NCAA* "on the ground that horizontal restraints were necessary if the product was to be available").

The NFL teams also urge that they should be treated as a single entity under the reasoning in *Dagher*, 547 U.S. 1. *See* NFL Cert. Br. at 14. *Dagher* has no bearing on the "single entity" defense whatsoever, as it expressly

reserved that question. *See Dagher*, 547 U.S. at 7 n.2. To the extent *Dagher* is relevant, it supports holding the NFL teams subject to Section 1.

The *Dagher* joint venture was comprised of participants who pooled their capital, shared all profits and losses, and participated in the relevant market solely through the joint venture. 547 U.S. at 3-4. Because the formation of the venture (which was itself reviewed by the Federal Trade Commission and state enforcement agencies) ended all competition between its participants, the Court declined to invalidate the venture's pricing policy as *per se* unlawful. *Id.* at 6. The Court did not hold that the members of the venture constituted a single entity that was immune from Section 1 scrutiny; nor did it suggest that joint ventures should be granted single entity status. Rather, the holding in *Dagher* was limited to whether the restraints at issue should be condemned as *per se* illegal.[22]

The individual operations and economic competition of the 32 NFL teams are wholly different from the fully-integrated joint venture in *Dagher*. Amici are not arguing that the joint venture created by the NFL teams is *per se* unlawful, but rather that restraints teams impose on competition are subject to Section 1

[22] For example, *Dagher* did not disturb *NCAA*. In fact, *Dagher* cited it with approval, distinguishing the restrictions invalidated there as unreasonably restraining trade. *Id.* at 7; *cf. Major League Baseball Props., Inc. v. Salvino*, 542 F.3d 290, 337 (2d Cir. 2008) (centralization of intellectual property licensing by MLB teams should be reviewed under rule of reason, not *per se* framework, in light of "efficiency-enhancing benefits") (Sotomayor, J., concurring).

scrutiny. *See Rothery,* 792 F.2d 210 at 214-215 (applying the Rule of Reason after holding *Copperweld* does not apply to restraints agreed to by actual or potential competitors that belonged to a joint venture) (Bork, J.); c*f. BMI,* 441 U.S. at 23-24 (applying the Rule of Reason to a nonexclusive licensing agreement among horizontal competitors that were members of a joint venture).

The licensing agreement challenged here and the *Dagher* agreement also differ. Each NFL team owns its logo independently, and competes against the other teams and the NFLP in licensing activities. NFL CONST. AND BYLAWS at Art. IV § 4.4(B)(1). Each team retains all of the revenue that it generates from, among other things, sales of apparel carrying its logo in its stadium and in its team-owned stores. *Id.* Although the agreement among the teams and NFLP grants Reebok an exclusive license in some respects (*id.* at 2000 Resolution G-10), each team continues to compete, make its own investments, assume its own risks, and retain all of the rewards from individual licensing activities. Thus, the licensing arrangement between Reebok and the NFLP does not create a fully integrated licensing joint venture. *See, e.g.*, UNITED STATES DEP'T OF JUSTICE AND FED. TRADE COMM'N, ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS, § 1.3 (2000) (distinguishing joint ventures from mergers).

### B. Treating Professional Sports Teams As a Single Entity In Non-Licensing Markets Would Be Inconsistent With The Sports Broadcasting Act and The Curt Flood Act

To the extent the NFL and other professional sports leagues want a broad antitrust exemption, that is a matter for Congress. It is Congress that has the prerogative to shape exemptions from antitrust laws, and has crafted limited statutory antitrust exemptions or special antitrust rules in carefully defined circumstances. For example, Congress has enacted special antitrust rules or exemptions affecting the insurance industry, the soft drink industry, standards development organizations, agriculture, labor, fishing, defense, newspapers, local government, energy, airlines, shipping, and health care.[23]

Recognizing Congress's authority to limit application of the antitrust laws, the NFL has repeatedly

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[23] *See* McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015, 1013; Soft Drink Interbrand Competition Act of 1980, 15 U.S.C. §§ 3501-3503, 3501; Standards Development Organization Advancement Act of 2004, 15 U.S.C. §§ 4301-4305, 4301; Capper-Volstead Cooperative Marketing Act of 1926, 7 U.S.C. §§ 451-457, 455; Clayton Act, 15 U.S.C. §§ 12-27, 17; Norris-LaGuardia Act of 1932, 29 U.S.C. §§ 101-115, 105; Fishermen's Collective Marketing Act, 15 U.S.C. §§ 521-522, 521; Defense Production Act of 1950, 50 U.S.C. app. §§ 2061-2169, 2158; Newspaper Preservation Act of 1970, 15 U.S.C. §§ 1801-1804, 1803; Local Government Antitrust Act of 1984, 15 U.S.C. §§ 34-36, 35; Atomic Energy Act of 1954, 42 U.S.C. §§ 2011-2297g-4, 2135; Airline Deregulation Act of 1978, 49 U.S.C. §§ 40010-44310, 41713(b); Shipping Act of 1984, 46 U.S.C. app. §§ 1701-1719, 1706; Health Care Quality Improvement Act, 42 U.S.C. §§ 11101-11152, 11111.

sought antitrust exemptions from Congress. For example, the NFL has sought an antitrust exemption related to franchise relocation. Congress has held hearings[24] regarding the issue,[25] but has *never* adopted any of these measures.

Even in those rare circumstances where Congress has altered the application of the antitrust laws to professional sports leagues, it has carefully limited the scope of its action. For example, the SBA was enacted in direct response to *United States v. NFL*, which held that the NFL teams' grant to a single broadcaster of exclusive rights to televise all league games violated the antitrust laws. 196 F. Supp. 445, 446 (E.D. Pa. 1961) ("*NFL II*"). Shortly thereafter, Congress overruled *NFL II* and granted the NFL teams a narrow antitrust immunity applicable to jointly-negotiated agreements for television broadcasting rights. It specified that antitrust immunity would not apply to agreements for the broadcasting of games during certain months, days of the week, and hours, in part to prevent the broadcast

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[24] *See, e.g.*, *Antitrust Issues in Relocation of Professional Sports Franchises: Hearing before the Subcomm. on Antitrust, Business Rights, and Competition, S. Comm. on the Judiciary*, 104th Cong. (1995); *Professional Sports Franchise Relocation: Antitrust Implications: Hearing before the H. Comm. on the Judiciary*, 104th Cong. (1996).

[25] *See, e.g.*, Fan Rights Act of 1995, S. 1439, 104th Cong. (1st Sess. 1995); Fan Freedom and Community Protection Act of 1995, H.R. 2740, 104th Cong. (1st Sess. 1995); Professional Sports Franchise Relocation Act of 1998, H.R. 3817, 105th Cong. (2d Sess. 1998); Football Fairness Act of 2007, S. 249, 110th Cong. (1st Sess. 2007).

of NFL games from diminishing attendance at college or high school games. *See* SBA, 15 U.S.C. § 1293.

As this Court has expressly recognized, the enactment of the SBA reflects Congress's settled understanding that teams in the NFL and other sports are subject to Section 1 of the Sherman Act:

> [I]t is not without significance that Congress felt the need to grant professional sports an exemption from the antitrust laws for joint marketing of television rights. *See* 15 U.S.C. §§ 1291-1295. The legislative history of this exemption demonstrates Congress's recognition that agreements among league members to sell television rights in a cooperative fashion could run afoul of the Sherman Act, and in particular reflects its awareness of the decision in *United States v. National Football League*, 116 F. Supp. 319 (E.D. Pa. 1953), which held that an agreement among the teams of the National Football League that each team would not permit stations to telecast its games within 75 miles of the home city of another team on a day when that team was not playing at home and was televising its game by use of a station within 75 miles of its home city, violated § 1 of the Sherman Act.

*NCAA*, 468 U.S. at 104 n.28. The sweeping exemption proposed by the NFL owners would cast aside the carefully tailored legislative compromises reflected in the SBA. Under the owners' broad single entity theory,

for example, the teams would be free without Section 1 scrutiny to jointly negotiate national broadcast of games in the same time periods previously reserved for college and high school games – a result that Congress foreclosed.[26]

The broad single entity exemption sought by the NFL teams is likewise impossible to square with the Curt Flood Act. 15 U.S.C. § 26b. Almost 90 years ago, this Court interpreted the antitrust laws to exempt baseball on the basis that baseball did not involve interstate commerce. *Fed. Baseball Club of Baltimore v. Nat'l League of Prof'l Baseball Clubs,* 259 U.S. 200, 208 (1922). This Court later described the baseball exemption as an "anomaly" in *Flood,* 407 U.S. at 282, and repeatedly refused to extend it to other sports. *See Toolson v. New York Yankees*, 346 U.S. 356, 357 (1953)*; Radovich*, 352 U.S. 445; *United States v. Int'l Boxing Club*, 348 U.S. 236 (1955). The Court declined to reverse *Federal Baseball Club* itself, however, holding that this decision was reserved to Congress. *See Flood,* 407 U.S. at 282; *Toolson,* 346 U.S. at 357 ("If there are evils in this field which now warrant application to it of the antitrust laws it should be by legislation.").

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[26] The NFL owners also came to Congress seeking an antitrust exemption when they wanted to merge with the American Football League. Congress amended the SBA to allow the two leagues to merge, but affirmed that it was "not extend[ding] to the combined league any greater antitrust immunity than that now existing for the existing professional football leagues." H. Rep. No. 89-2308 (1966) (Conf. Rep.), *as reprinted in* 1966 U.S.C.C.A.N. 4327, 4378; *see also* 15 U.S.C. § 1291.

Congress eventually did act, subjecting MLB to the antitrust laws for "conduct, acts, practices or agreements" directly relating to or affecting employment of baseball players at the Major League level, "to the same extent such conduct . . . would be subject to the antitrust laws if engaged in . . . by any other professional sports business." Curt Flood Act, 15 U.S.C. § 26(b)(a). Of course, Congress would not have passed the Curt Flood Act if it believed that professional sports leagues were single entities exempt from Section 1 scrutiny in labor markets. Notably, when the Curt Flood Act passed, multiple courts had already rejected single entity treatment for sports leagues. *See supra* note 15.

Critically, Congress continues to exercise close oversight of the antitrust exemptions granted to sports leagues. *See, e.g., The Application of Federal Antitrust Laws to Major League Baseball: Hearing Before the S. Comm. on the Judiciary*, 107th Cong. (2002); Letter from Sen. Arlen Specter and Sen. Patrick Leahy, U.S. Senate Comm. on the Judiciary, to Roger Goodell, Commissioner, Nat'l Football League (Dec. 19, 2007), *available at* http://judiciary.senate.gov/ resources/ documents/upload/12-19-07-Specter-Leahy-to-Goodell.pdf (questioning SBA exemption). And, as recently as July 2009, at the urging of Senator Orrin Hatch, Congress held hearings considering potential antitrust violations by members of the Bowl Championship Series in college football related to the exclusion of potential competitors. *The Bowl Championship Series: Is it Fair and In Compliance with Antitrust Law?: Hearing Before the S. Comm. On the Judiciary*, 111th Cong. (2009). The blanket Section

1 immunity the NFL teams seek is inconsistent with this continuing Congressional understanding and oversight, as well as with each of the narrowly tailored statutes Congress has enacted regarding the applicability of antitrust laws to professional sports leagues.

## III. The Single Entity Rule Proposed by the NFL Teams Would Make Antitrust Litigation More Complex And Burdensome

Finally, the NFL owners assert they are concerned with the burden of antitrust litigation in relation to concerted conduct they view as necessary to operate the NFL. NFL Cert. Br. at 12-13. But the proper vehicle for addressing this concern is an appropriately-calibrated inquiry under the Rule of Reason, rather than a broad single entity defense that protects restraints on competition by multiple economic actors. In *Cal. Dental Ass'n v. FTC*, this Court explained that examination of a challenged restraint does not necessarily "call for the fullest market analysis" or require "plenary market examinations," even where the anticompetitive nature of the restraint is not obvious and thus not subject to "per se" or "quick look" condemnation. 526 U.S. 756, 779 (1999). Rather, the majority held, "[w]hat is required . . . is an enquiry meet for the case, looking to the circumstances, details, and logic of the restraint" – and the concurring Justices agreed. *Id.* at 758; *see also Leegin Creative Leather Prods. v. PSKS, Inc.*, 551 U.S. 877, 898 (2007) ("Courts can, for example, devise rules over time for offering proof, or even presumptions where justified, to make the Rule of Reason a fair and efficient way to prohibit anticompetitive restraints and to promote

procompetitive ones."). Indeed, "the Rule of Reason can sometimes be applied in the twinkling of an eye." *NCAA*, 468 U.S. at 109 n. 39.

As these decisions confirm, modern antitrust law applying the Rule of Reason provides great flexibility in reviewing concerted restraints that fulfill procompetitive objectives. *See Polygram Holding, Inc. v. FTC*, 416 F.3d 29, 34 (D.C. Cir. 2005) ("[T]he extent of the inquiry is tailored to the suspect conduct in each particular case.") (Ginsburg, J.). This point wholly undermines the NFL teams' request that a broad single entity defense is necessary to stave off the purported burden of allegedly meritless litigation. *Cf.* NFL Cert. Brief at 13.

Instead of reducing the burdens of antitrust litigation or promoting judicial economy, the single entity defense advanced by the NFL teams would have the opposite effect. A single entity defense under *Copperweld* is clear and provides a bright line. If this test is replaced with an expansive and fuzzy single entity exemption, it will encourage every joint venture and partially integrated operation to assert it. The boundary between a single entity defense and a rule of reason inquiry would disintegrate and the two conceptually distinct doctrines would become hopelessly muddled. The district court's analysis below is a perfect demonstration.[27] The interest in simplifying antitrust

[27] After reciting a series of efficiency considerations to support its single entity holding, the district court below admitted that the "supposed efficiencies in economic arrangements are more the stuff of the Rule of Reason than of distinguishing between single entities and joint ventures." JA260.

litigation, and easing the burdens it imposes, would be best served by rejecting the NFL's proposal for a radical expansion of the single entity exemption.

## CONCLUSION

For the foregoing reasons, amici respectfully request that the Court vacate the decision below. Alternatively, if the Court affirms, it should reject the broad "single entity" defense advanced by the NFL owners and confirm that such a defense would not apply to labor markets and other economic markets in which sports teams compete.

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