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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 THE AMERICAN ANTITRUST INSTITUTE AND CONSUMER FEDERATION OF AMERICA AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

The American Antitrust Institute (AAI) is an independent non-profit education, research, and advocacy organization devoted to advancing the role of competition in the economy, protecting consumers, and sustaining the vitality of the antitrust laws. *See* http://www.antitrustinstitute.org. These goals would be significantly compromised if the antitrust laws' application to joint ventures were sharply constricted by the radical expansion of the "single entity" doctrine adopted by the court below and advocated here by respondents.

AAI is managed by its Board of Directors, with the guidance of an Advisory Board that consists of more than 90 prominent antitrust lawyers, law professors, economists, and business leaders. AAI's Board of Directors alone has approved of this filing for AAI; the individual views of members of the Advisory Board may differ from AAI's positions.

The Consumer Federation of America (CFA) is composed of over 280 state and local affiliates representing consumer, senior-citizen, low-income, labor, farm, public power, and cooperative organizations, with more than 50 million individual members. CFA

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[1] The written consents of all parties to the filing of this brief have been lodged with the Clerk. No counsel for a party has authored this brief in whole or in part, and no person or entity other than *amici* or its counsel has made a monetary contribution intended to fund the preparation or submission of this brief.

represents consumer interests before federal and state regulatory and legislative agencies, participates in court proceedings as *amicus curiae*, and conducts research and public education. CFA has a deep commitment to and history of ensuring that the antitrust laws protect consumer interests and ensure a fair marketplace.

SUMMARY OF ARGUMENT

1. Single-entity treatment under *Copperweld* requires that an entity be controlled by those with legal and economic incentives to act for the interests of the entity as a whole. Sports leagues and joint ventures that are controlled by independent economic actors, like the NFL, are not single entities. The Seventh Circuit's holding that the NFL is a single entity because it produces a product for which cooperation is essential is inconsistent with *NCAA* and numerous other cases that treat the degree of integration of a joint venture as a rationale for applying the rule of reason, not exemption from § 1 of the Sherman Act. The Seventh Circuit's extension of immunity beyond the production of football games to unnecessary and anticompetitive restraints on related activities is also inconsistent with the well-settled framework for analyzing restraints related to an efficiency-enhancing integration. Even if the NFL were a single entity when collectively licensing the teams' logos, the agreement not to license outside the venture would be subject to scrutiny under § 1.

2. Extending *Copperweld* to sports leagues and other highly integrated joint ventures would open a huge gap in the enforcement of the antitrust laws. It would permit the leagues to engage in anti-competitive conduct, and undermine enforcement against unnecessary and anticompetitive restraints by otherwise legitimate joint ventures in many industries, including those targeted by ongoing initiatives of the Justice Department and FTC.

3. There is no basis for immunizing sports leagues or other joint ventures because of the expense and supposed chilling effect of the rule of reason. Congress has repeatedly rejected the type of broad immunity respondents seek here. Rather, it has enacted narrow immunities for sports leagues and joint ventures in other industries that would be superfluous under respondents' reading of *Copperweld*, and has otherwise rejected immunity even for extremely valuable joint ventures engaged in research and development and standard setting.

ARGUMENT

I. THE SEVENTH CIRCUIT'S RULING IS INCONSISTENT WITH *COPPERWELD* AND BEDROCK ANTITRUST PRINCIPLES FOR ANALYZING JOINT VENTURES

The court of appeals' holding that the NFL teams are a single entity, immune from scrutiny under § 1 of the Sherman Act when they collectively license their

separately owned trademarks, conflicts with the reasoning of *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984), and bedrock antitrust principles for analyzing joint ventures because the NFL is controlled by independent club owners with separate economic interests.

A. *Copperweld* Immunity Requires That an Entity Be Controlled by Those With Legal Obligations and Economic Incentives to Act for the Interests of the Entity as a Whole

In *Copperweld*, the Court abolished the "intra-enterprise conspiracy doctrine" under which a parent and its wholly owned subsidiary had the capacity to conspire because they were separate legal entities. *Copperweld* held that separate incorporation was insufficient to make a parent and its wholly owned subsidiary separate entities under § 1 because they

> 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*.

467 U.S. at 771 (emphasis added). The Court observed that a parent and wholly owned subsidiary are equivalent to a "division within a corporate structure [which] pursues the common interests of the whole rather than interests separate from those

of the corporation itself," *id.* at 770, or the "officers of a single firm [who] are not separate economic actors pursuing separate economic interests," *id.* at 769.

Copperweld suggests that an efficiency-enhancing joint venture of separately owned corporations or other independent economic actors should not be considered a single entity unless the entity is "under the control of a single driver," that is, the governance structure of the venture cedes decision-making authority to those with a legal and economic incentive to act for the interests of the entity as a whole. *See Chicago Prof. Sports LP v. NBA* (*Bulls II*), 95 F.3d 593, 606 (7th Cir. 1996) (Cudahy, J., concurring) (*Copperweld* does not apply to joint ventures where "separate economic interests are joined in decisionmaking") (emphasis omitted). And even then, the decision of separate firms to form a single entity will itself always be subject to § 1 of the Sherman Act. *See Copperweld*, 467 U.S. at 777. Under this standard, a business can remove itself from subsequent § 1 review where its form follows the substance of a "single economic unit": where decisions are made by directors and executives whose own profits and legal duties are to the business as a whole. In contrast, a sports league or other joint venture controlled by members that are independent economic actors is necessarily *not* a single entity. *See* Herbert Hovenkamp, *Exclusive Joint Ventures and Antitrust Policy*, 1995 Colum. Bus. L. Rev. 1, 53 (1995) ("Given the opportunities for collusion and the differing incentives that motivate joint venture systems and

individual members, it is simply not appropriate to treat joint ventures as single firms."); *see also In re N. Texas Specialty Physicians*, 140 F.T.C. 715, 737-38 (2005) ("When a single organization is controlled by a group of competitors, antitrust law treats the organization as the agent of the group."), *aff'd*, 528 F.3d 346 (5th Cir. 2008).

A test that focuses on whether the decision-makers' legal and economic incentives are to act for the putative entity as a whole is consistent with the rule that even individual officers, directors, or employees within a *single firm* have the capacity to conspire when they act on their own behalf instead of the firm's. *See Copperweld*, 467 U.S. at 770 n.15; *cf. United States v. Sealy, Inc.*, 388 U.S. 350, 356 (1966) (close corporation whose shareholders were comprised of competing manufacturers was not a "separate entity, but . . . an instrumentality of the individual manufacturers"). It is also consistent with the presumption in economics that a "firm" constitutes an independent profit maximizing entity. *See* Herbert Hovenkamp, *Federal Antitrust Policy* 190 (3d ed. 2005) ("Agreements within the firm are to be treated as the conduct of a single actor, on the presumption that such a firm is a single profit maximizer."). And, unlike respondents' vague focus on the degree of economic integration of a joint venture, *see infra*, such a test is simple for courts to apply and easy for businesses to understand in planning their activities.

The risk of anticompetitive conduct by otherwise-legitimate joint ventures frequently arises when

decisions are based on members' independent interests rather than what is in the best interests of the venture as a whole. *See, e.g., Associated Press v. United States*, 326 U.S. 1 (1945) (bylaw that allowed member to veto membership of competing newspaper held unlawful); *Allied Tube & Conduit Corp. v. Indian Head, Inc.,* 486 U.S. 492 (1988) (standard setting organization's refusal to certify product that competed with controlling members' interests held unlawful); *see generally* Hovenkamp, *Exclusive Joint Ventures* at 9 (where the profit maximization goals of a venture's individual members differ from those of the venture as a whole "the venture may be more likely to behave anticompetitively"); *cf. Fraser v. Major League Soccer, L.L.C.*, 284 F.3d 47, 57 (1st Cir. 2002) ("Whatever efficiencies may be thought likely where a single entrepreneur makes decisions for a corporate entity (or set of connected entities), the presumption is relaxed – and may in some contexts be reversed – where separate entrepreneurial interests can collaborate . . . .").

The risk is particularly acute in the major professional sports leagues. Although the court below said "NFL teams share a vital economic interest in collectively promoting NFL football," Pet. App. 17a, unfortunately for consumers, the history of sports leagues is replete with examples of business decisions that reflect club self-interest rather than the best interests of the league as a whole. It took over five years, with an additional season and a half of delays regarding television rights, to move a failing baseball

franchise from Montreal to Washington, D.C. because of the veto of the Baltimore Orioles owner, who was supported by his fellow owners fearful of facing localized competition themselves. *See* Stephen F. Ross & Stefan Szymanski, *Fans of the World, Unite!* 8-9 (2008). Efforts to resolve difficult labor-management questions are frustrated by the additional need to secure unity among fractious owners. *See, e.g.*, John Helyar, *Lords of the Realm: The* Real *History of Baseball* 121, 486, 521-25, 533, 542 (1994). Indeed, when sports leagues do act in a unified manner, it is widely attributed to an enormously successful league commissioner who has been able to overcome the obstacles of owner self-interest to achieve an efficient result. *See* David Harris, *The League: The Rise and Decline of the NFL* (1986); Andrew Zimbalist, *In the Best Interests of Baseball? The Revolutionary Reign of Bud Selig* (2006). In contrast, a wide variety of innovations have been successfully implemented by NASCAR despite adverse effects on individual stakeholders, *see* Ross & Szymanski at 70-107, because that sport is run by a company that clearly fits *Copperweld*'s definition of a single entity.[2]

[2] In changing times, almost all sports league policies – how to organize the competition, sell broadcast rights, license merchandise, expand or relocate franchises – involve gains to some clubs and losses to others. But where transaction and bargaining costs exist and the precise nature of these gains and losses is uncertain, *cf*. Ronald H. Coase, *The Problem of Social Cost*, 3 J. L. & Econ. 1, 15 (1960), individual club owners may block, or significantly delay, output that is responsive to

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The panel below noted that the Seventh Circuit had previously rejected the argument that *Copperweld* requires "a complete unity of interest," stating that this was a "silly" proposition of law because "[e]ven a single firm contains many competing interests." Pet. App. 15a (quoting *Bulls II*, 95 F.3d at 598) (internal quotes omitted). While single entities like General Motors or IBM surely face internal battles between their divisions, internal conflicts there – unlike in the NFL and most professional sports leagues – are resolved by "a single economic driver": senior executives or a board of directors with a fiduciary duty to the shareholders as a whole. As Judge Cudahy explained in *Bulls II*,

> when *Copperweld* talks about unity of interests in the single entity context, I think it must be taken to mean unity of *economic* interests of the *decisionmakers*. A single firm does not evidence diverse *economic* interests to the outside world because final decisions are made by the owners or stockholders, who care only about the overall performance of the firm. Only because this is the case can single firms be assumed to behave in the canonical profit-maximizing fashion.

95 F.3d at 606 (Cudahy, J., concurring).

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consumer demand – the hallmark of an unreasonable restraint of trade. *See NCAA v. Board of Regents,* 468 U.S. 85, 107 (1984).

B. The Rule of Reason, Rather than Immunity Under an Expanded "Single Entity" Doctrine, Is Appropriate Even for a Joint Venture Requiring Cooperation to Produce its Product

The Seventh Circuit suggested that a sports league of separately owned teams should be considered a single entity because the league produces a single product for which cooperation is essential. *See* Pet. App. 16a ("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?").[3] But this Court's precedents demonstrate that the degree of integration of a joint venture – including whether cooperation is essential for the product to exist – indicates its potential efficiency, and hence treatment under the rule of reason, not exemption from § 1 scrutiny. *Cf.* J.A. 260 (district court recognized "that supposed efficiencies in economic arrangements are more the stuff of the rule of reason than of distinguishing between single entities and joint ventures").

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[3] In fact, cooperation among separately owned teams is not essential to operate a professional sports league. An independent business entity, such as a publicly traded "NFL, Inc.," could follow the NASCAR approach and establish all the rules necessary for the competition. *See* Ross & Szymanski at 70-107; *see also* Hovenkamp, *Exclusive Joint Ventures* at 10 ("saying that 'NCAA football' or 'NFL football' could not exist without a joint venture is . . . no different from saying that 'GM-Toyota' would not exist without the General Motors-Toyota joint venture").

In *NCAA,* this Court answered the "Zen riddle" posed by the court below by holding that while NCAA football involves "an industry in which horizontal restraints on competition are essential if the product is to be available at all," 468 U.S. at 101, the NCAA's decisions were not immune from § 1 scrutiny. Rather, the need to cooperate meant that agreements defining the conditions of the contest and preserving the integrity of the product were likely to be lawful under the rule of reason, *see id.* at 101-02, 117, and that even otherwise facially anticompetitive restraints on price or output were not *per se* illegal, *see id.* at 103. But in the face of evidence that league rules concerning the marketing of television broadcasts of the venture's jointly created product (what respondents would characterize as a "core venture function") had restricted output, such rules "require[d] some competitive justification even in the absence of a detailed market analysis." *Id.* at 110. Notably, the Court left no doubt that the NCAA's television plan, which was "controlled by the vote of member institutions," was "a horizontal restraint – an agreement among competitors on the way in which they will compete with one another," *id.* at 99,[4] even

[4] In a supporting footnote, *see NCAA,* 468 U.S. at 99 n.18, the Court cited (with a "see generally" signal) Maxwell M. Blecher & Howard F. Daniels, *Professional Sports and the "Single Entity" Defense Under Section One of the Sherman Act*, 4 Whittier L. Rev. 217 (1982), an article that contends that professional sports leagues should not be considered single entities.

though "cooperation is necessary if the type of competition that petitioner and its member institutions seek to market is to be preserved," *id.* at 117.

In *Bulls II,* Judge Easterbrook attempted to distinguish *NCAA* by arguing that, "[u]nlike the colleges and universities that belong to the National Collegiate Athletic Association, which the Supreme Court treated as a joint venture in *NCAA*, the NBA has no existence independent of sports." *Bulls II*, 95 F.3d at 599. However, the owners of NFL clubs and other professional sports teams typically have a myriad of commercial interests outside of their teams, including interests related to the sport as well as unrelated businesses. *See, e.g.,* Andrew Ross Sorkin, *Footballs, Funhouses and Fries*, N.Y. Times, Feb. 9, 2007, at C1 (reporting that Washington Redskins owner Daniel Snyder added Johnny Rockets restaurant chain to his stable of businesses). Moreover, it is hard to see why outside interests, such as the NCAA member schools' academic programs, should make any difference to the single-entity analysis when those interests have no relevance to the antitrust claim. Nor is there any logic to treating non-profit intercollegiate athletics more harshly under the antitrust laws than professional sports. *See NCAA*, 468 U.S. at 121 (White, J., dissenting).[5]

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[5] Nor does the fact that league membership adds value to a club make it a single entity. Clubs unhappy with league practices can break away to form their own league, as was recently threatened in Formula One auto racing. *See* Sebastian

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The Court has consistently treated the degree of economic integration as a rationale for applying the rule of reason, not for treating a joint venture as a single entity. For example, in *Broadcast Music, Inc. v. CBS*, *Inc.*, which involved "concerted action" among "potential competitors" to create a new product – a blanket license – for which collaboration was essential, the Court held the agreement was not *per se* illegal, but rather had to be considered under the rule of reason. 441 U.S. 1, 9, 10 (1979). And in *Nw. Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, a post-*Copperweld* case, the Court held that the efficiencies inherent in a wholesale purchasing cooperative dictated that an expulsion of a member was not *per se* illegal but should be analyzed under the rule of reason in most cases. 472 U.S. 284, 295 (1985). Likewise, the Justice Department and Federal Trade Commission treat the degree of economic integration of a "competitor collaboration" as an important factor in determining whether the rule of reason or *per se* rule will apply, not whether the collaboration is a single entity exempt from § 1. *See* Fed. Trade Comm'n & U.S. Dept. of Justice Antitrust Division, Antitrust Guidelines for

Moffett, *Renault Strains Formula One Integrity*, Wall St. J., Sep. 22, 2009, at B1; *see also* John Helyar, *Lords of the Realm* at 54 (baseball owners threatened to form new league in dispute with fellow owners over sharing television revenue). Entrepreneurs starting rival leagues can lure clubs into their new leagues, as Rupert Murdoch did with rugby league in Australia. *See* Mike Colman, *Super League: The Inside Story* (1996).

Collaborations Among Competitors § 3.2 (April 2000); U.S. Dept. of Justice & Fed. Trade Comm'n Statements About Enforcement Policy in Healthcare 71 (Aug. 1996).

Dagher and *Maricopa* are not to the contrary. *Dagher* held that a pricing agreement by an almost-fully-integrated marketing and production joint venture, the formation of which had been approved by the Federal Trade Commission and numerous States, was not *per se* illegal, but rather had to be analyzed under the rule of reason. *See Texaco Inc. v. Dagher*, 547 U.S. 1 (2006). The petitioners had argued that the joint venture should be immune from § 1 review, but the Court held that the creation of the venture was clearly actionable under *Copperweld*, *see id.* at 6 n.1, and declined to reach the *Copperweld* issue with respect to its operation because the plaintiffs had asserted no rule-of-reason claim, *see id*. at 7 n.2. To be sure, the Court referred to the joint venture as a "single entity," but this was a functional description, and not a statement about the applicability of § 1. *See id.* at 7 ("If Equilon's price unification policy is anticompetitive, then respondents should have challenged it pursuant to the rule of reason."). Indeed, a joint venture typically "constitutes a business entity separate from its parents, [which] distinguishes it from both mergers and contractual arrangements." Joseph F. Brodley, *Joint Ventures And Antitrust Policy*, 95 Harv. L. Rev. 1521, 1525 (1982). But that hardly makes a joint venture a single entity for § 1 purposes because control of the business entity

is ordinarily vested in parents who are independent economic actors with interests that may diverge from that of the business itself. *See id.* at 1525-26 ("common ownership of the joint venture *partially* unites the economic interests of the parent firms") (emphasis added); *see also* Hovenkamp, *Exclusive Joint Ventures* at 52 (a joint venture often resembles a single firm on its output side, but it is a combination of economic actors on its input side).[6]

In *Maricopa*, the Court in *dicta* distinguished the medical foundations at issue from "partnerships or other joint arrangements in which persons who would otherwise be competitors pool their capital and share the risks of loss as well as the opportunities for profit. In such joint ventures, the partnership is regarded as a single firm competing with other sellers in the market." *Arizona v. Maricopa County Med. Soc'y*, 457 U.S. 332, 356 (1982). However, there is nothing to suggest that the Court was opining on the applicability of § 1.[7] Indeed, only two years later,

[6] The fact that a joint venture is not a single entity does make every, or even most, operational business decisions by the venture suspect under § 1. When an agreement does not affect the members' competitive interests, it cannot be illegal. *See N. Texas Specialty Physicians*, 140 F.T.C. at 738 ("Associations can . . . negotiate prices for office facilities or wages for employees; agents can establish prices for services that the association provides for members or non-members. These are matters of no antitrust significance, because there is no conceivable anticompetitive impact.").

[7] In its *amicus* brief, the government made clear that even if an integration involved a "true partnership," it would not be

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Justice Stevens, who wrote *Maricopa*, declared that "joint ventures have no immunity from the antitrust laws." *NCAA*, 468 U.S. at 113 & n.51 (citing § 1 cases). Joint ventures among businesses are often organized as a partnership whose partners share the profits and losses of the venture, but unlike a single entity, the partnership will not necessarily maximize the venture's profits because of the partners' independent economic interests. *See* Brodley at 1544-45. In any event, the *Maricopa dicta* are not applicable here because each NFL club has its own independent risks of loss and opportunities to profit.

C. The Seventh Circuit's Test Is Inconsistent with Well-Settled Antitrust Analysis Proscribing Unnecessary and Anticompetitive Restraints Related to Efficiency-Enhancing Integration

The court of appeals improperly jumped from the premise that the NFL teams were a single entity when "producing NFL football" to the conclusion that the NFL teams were also a single entity in

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exempt from § 1. *See* Brief for the United States as Amicus Curiae 32-33, *Arizona v. Maricopa County Med. Soc'y*, 457 U.S. 332 (1982) (No. 80-419) ("[I]f an agreement on price were necessary to cooperative activity, as in a true partnership . . . the elimination of price rivalry would be a facet of an integration of productive resources capable of yielding efficiencies beneficial to competition, and would require further analysis [under the rule of reason].").

collectively licensing the teams' intellectual property. Even if inter-club cooperation is the most efficient way to produce NFL football, collective action in related endeavors is not necessarily justified. As Judge Posner has observed, 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." *General Leaseways, Inc. v. Nat'l Truck Leasing Ass'n*, 744 F.2d 588, 594 (7th Cir. 1984). Moreover, the court's reliance on the fact that the NFL teams supposedly "have acted" like a single entity for a long period of time makes no sense at all. *See* Pet. Br. 55-56.

The analytical framework for assessing otherwise anticompetitive restraints that are related to an efficiency-enhancing integration is well-settled: where the restraint is *necessary* to achieve the pro-competitive benefits of the integration, the restraint is analyzed under the rule of reason. In contrast, when a facially anticompetitive restraint by a joint venture is not necessary to achieve the pro-competitive benefits of the integration, it is treated more harshly. *Compare BMI*, 441 U.S. at 21 (rule of reason applied to setting price of blanket license because such a license "is a necessary consequence of the integration necessary to achieve [substantial] efficiencies, and a necessary consequence of an aggregate license is that its price must be established") *with NCAA*, 468 U.S. at 117-20 (television plan that restricted output was unlawful where it

was not necessary to achieve purported pro-competitive benefits of enhancing public interest in NCAA football); *see also Maricopa*, 457 U.S. at 352 (condemning fee schedule as *per se* illegal because "[e]ven if a fee schedule is . . . desirable [for offering insurance product], it is not necessary that the doctors do the price fixing"); *Nw. Wholesale Stationers*, 472 U.S. at 296 n.7 ("If Northwest's action were not substantially related to the efficiency-enhancing or procompetitive purposes that otherwise justify the cooperative's practices, an inference of anticompetitive animus might be appropriate.").

This framework follows from the venerable ancillary restraints doctrine. *See United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898) (Taft, J.), *aff'd*, 175 U.S. 211 (1899); Robert H. Bork, *The Antitrust Paradox* 266 (1978) (Judge Taft's definition of ancillary restraints "requires that the agreement eliminating competition be no broader than the need it serves.").[8] And it is the framework

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[8] In *Dagher*, the Court in *dicta* suggested that the ancillary restraints doctrine only applies to restraints on "nonventure activities," and not the "core activity of the joint venture itself." *Dagher*, 547 U.S. at 7. This is "a peculiar and unprecedented definition," Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 2132, at 328 (3d ed. Supp. 2009), particularly since the Court cited *NCAA* in support, *see id.* ("What mattered [in *NCAA*] was not whether the activity lay at the core, but whether the restraint was necessary to the proper functioning of the venture."); *see also In re Polygram Holding, Inc.*, 136 F.T.C. 310, 367 (2003) ("Cases in which defendants successfully invoked the doctrine of ancillary restraints consistently have involved

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the government follows. *See* Competitor Collaboration Guidelines § 3.2 (restraints "reasonably necessary to achieve . . . procompetitive benefits" of efficiency-enhancing integration analyzed under the rule of reason).

The decision below overturns this well-accepted analytical framework in holding that when a joint venture is sufficiently integrated to be deemed a single entity for one purpose, a restriction on competition in a separate but related activity is immune from review, regardless of whether the restriction is actually necessary for the proper functioning of the venture and even if it reduces output or quality, raises prices, and restricts innovation or consumer choice. In addition, the court offered no coherent guide for determining how far afield from the underlying single-entity activity immunity should extend.[9] The court implied that it extends to any

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restraints that affect the joint venture at issue, but not products outside its scope."), *aff'd*, 416 F.3d 29 (D.C. Cir. 2005). In any event, the definition was immaterial to the result because the Court concluded that the conduct at issue was indeed necessary for the joint venture to function. *See Dagher*, 547 U.S. at 8 ("'What could be more integral to the running of a business than setting a price for its goods and services?'") (quoting Judge Fernandez's dissenting opinion in the appeals court). The ancillary restraints doctrine could have been deemed inapplicable because the price unification policy at issue was not facially anticompetitive where the plaintiffs conceded that the elimination of price competition between the joint venture partners in the first place was proper.

[9] Respondents and their *amici* would limit immunity to "core venture functions," but it is not evident how or why one

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conduct that "foster[s] competition between [the] organization and its competitors," Pet. App. 18a, but this amounts to a rule-of-reason analysis without a real factual inquiry and without considering the anticompetitive effects half of the equation. As Judge Mansfield aptly observed, the approach now taken by the court below "would permit league members to escape antitrust responsibility for any restraint entered into by them" even when "the benefit would be outweighed by its anticompetitive effects," or when "the restraint might be one adopted more for the protection of individual league members from competition than to help the league." *N. Am. Soccer League v. NFL*, 670 F.2d 1249, 1257 (2d Cir. 1982).

While collective licensing of the teams' trademarks may promote NFL football, or reduce transaction costs, it is hardly essential for the NFL to function. Other sports leagues, most notably the English Premier (Soccer) League, operate entirely with individual club marketing of their own trademarked merchandise. *See* Stefan Szymanski, *The Economic Design of Sporting Contests*, 41 J. Econ. Lit. 1137, 1151-52 (2003). And the collateral restraint on

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would define a "core venture function" other than in reference to what is necessary for the joint venture to achieve its procompetitive objectives. As the certiorari brief of the United States aptly pointed out, "the broad range of disputes which the NFL respondents suggest . . . that a single-entity defense might be viable . . . indicates that the NFL respondents consider virtually all aspects of league operations to be 'core venture functions' subject to single-entity treatment." U.S. Cert. Br. 19 n.7.

separate team licensing may reduce output without any legitimate justification, or so a full rule-of-reason analysis may show. *See NCAA*, 468 U.S. at 114 n.54 ("Ensuring that individual members of a joint venture are free to increase output has been viewed as central in evaluating the competitive character of joint ventures.").[10]

D. The Agreement of the Teams Not to License Their Logos Outside of the Venture Is Subject to Scrutiny Under § 1 Regardless of Whether the NFL Is a Single Entity in its Collective Licensing

Even assuming, *arguendo*, that the NFL is a single entity for purposes of jointly licensing the teams' intellectual property, petitioner's challenge to

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[10] The fact that the rule against separate licensing is made by team owners who may act in their own parochial interests, rather than for the league as a whole, raises the distinct potential for anticompetitive conduct. While the restraint may be justified under the rule of reason by the need to prevent free riding or to preserve competitive balance, *see Major League Baseball Props., Inc. v. Salvino, Inc.*, 542 F.3d 290, 332, 340 (2d Cir. 2008), it may instead reflect the majority owners' fear of more aggressive or efficient owners in this ancillary line of business, *see New York Yankees P'ship v. Major League Baseball Enters., Inc.*, 97-1153-CIV-T-2513 (M.D. Fla. filed May 19, 1997) (New York Yankees' complaint alleged that other less successful owners prevented the Yankees from adopting an innovative trademark licensing and supply arrangement with an athletic shoe company, and that "cartel" on trademark licensing led to suboptimal marketing of team marks).

the agreement of the teams to *exclusively* license their individual logos through NFL Properties (NFLP) is plainly subject to review under § 1 for two reasons. *First*, insofar as it dates back to the creation of NFLP, such an agreement is properly characterized as part of the formation of the venture, which is always actionable under § 1. *See Copperweld*, 467 U.S. at 777. Indeed, any restraint that is claimed to be exempt as part of the "core" activity of the venture ought to be considered a matter of formation, regardless of when it is adopted; otherwise, review of formation would be meaningless.[11] *Second*, like a covenant within a single firm by an employee not to compete with his or her employer, *see* 7 Areeda & Hovenkamp ¶ 1470, at 248, a covenant by a member not to compete outside the venture is always subject

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[11] As noted *supra*, *Dagher* endorsed the view that the formation of a joint venture is always actionable. Indeed, *Dagher* was premised on the fact that federal and state authorities had determined that the joint venture – and the elimination of the competition at issue – was lawful. Here, by contrast, there is no comparable approval of the NFL's activities. It is one thing to say that "a well-considered decision legalizing the creation of a joint venture necessarily expresses approval of all that is inherent and reasonably ancillary to it" because "it would be senseless for antitrust law to take away with one hand what it gives with the other," recognizing that "the original formation *may* later be judged illegal" given changed circumstances. 7 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 1478b, at 320 (2d ed. 2003). It is quite another thing to say that a generally procompetitive joint venture such as a sports league may adopt any type of restraint related to the production, promotion and sale of products derived from the venture without any scrutiny under § 1, ever.

to review for reasonableness under § 1. *See Dagher*, 547 U.S. at 7 (restraint on "nonventure" activity actionable under ancillary restraints doctrine); *NFL v. N. Am. Soccer League*, 459 U.S. 1074, 1077-78 (1982) (Rehnquist, J., dissenting from denial of certiorari) (ancillary restraints rule applies to covenant not to compete even though NFL produces a "single product"); 7 Areeda & Hovenkamp ¶ 1478d, at 329 (restraint on individual team output "affects individual members' nonventure conduct" and is therefore not unilateral).

II. UPHOLDING THE SEVENTH CIRCUIT'S RULING WOULD UNDERMINE ANTITRUST ENFORCEMENT AGAINST SPORTS LEAGUES AND OTHER LEGITIMATE JOINT VENTURES

A. Anticompetitive Conduct by Sports Leagues Would Go Unchecked

Although the Seventh Circuit said that "the question of whether a professional sports league is a single entity should be addressed not only 'one league at a time,' but also 'one facet of a league at a time,'" Pet. App. 13a (quoting *Bulls II*, 95 F.3d at 600), the logic of the decision would immunize virtually all the activities of major sports leagues. All of these leagues currently share the feature that cooperation by the teams is essential for the production of the product. And teams arguably share a "vital economic interest" in all facets of the business. Indeed, respondents and their *amici* are not shy about the extent to which the

logic below shields their activities. *See supra* note 9; NHL *Amicus* Cert. Br. 15 ("§1 scrutiny should never apply to the production, promotional and marketing decisions of professional sports leagues").[12]

Upholding the decision below would allow the clubs to restrain trade in a host of areas where competition benefits consumers, players, and others, and often the league as a whole. Courts have repeatedly recognized that NFL teams compete in markets for individual gate receipts, parking, and concession sales; corporate proceeds from stadium naming rights and luxury suites; local television and radio broadcasts; players, coaches, and management personnel; and ownership interests. *See, e.g., L.A. Mem'l Coliseum Comm'n v. NFL,* 726 F.2d 1381, 1390 (9th Cir. 1984); *Mid-South Grizzlies v. NFL*, 720 F.2d 772, 787 (3d Cir. 1983); *see generally* 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

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[12] In *Bulls II,* Judge Easterbrook suggested that the NBA might not necessarily be a single entity with respect to labor matters, in contrast to the sale of television rights, but it is not obvious why league cooperation in the purchase of inputs should be treated any differently from the sale of outputs. Indeed, in *Brown v. Pro Football, Inc.*, 518 U.S. 231 (1996), this Court noted the economic interdependence of professional sports teams, and suggested that with respect to labor matters the NFL looked "more like a single bargaining employer." *Id.* at 248-49. Of course, had the NFL been a single entity on labor matters, the non-statutory labor exemption as applied to sports leagues – and the *Brown* decision itself – would be superfluous.

& Ent. L.J. 891, 911-24 (2008) (discussing the property rights sports clubs share at the league level versus those they retain at the club level). Indeed, upholding the lower court would overrule numerous precedents that have found NFL rules or practices to violate § 1 and which enabled competition in many of these areas. *See, e.g., L.A. Coliseum,* 726 F.2d at 1401 (franchise relocation); *N. Am. Soccer League*, 670 F.2d at 1262 (cross ownership rule); *Smith v. Pro Football, Inc.*, 593 F.2d 1173, 1187 (D.C. Cir. 1978) (college draft); *Mackey v. NFL*, 543 F.2d 606, 623 (8th Cir. 1976) (free agent compensation rule).

To be sure, § 2 of the Sherman Act would continue to apply to leagues with monopoly or near-monopoly power that engage in exclusionary conduct. But the scope of liability would be narrow indeed. *See, e.g., Chicago Prof. Sports LP v. NBA*, 961 F.2d 667, 672 (7th Cir. 1992) (if a sports league is a single entity then "its decisions about telecasting are effectively unreviewable"). Section 2 simply does not capture the collusive nature of the harm from restraints on intra-league competition, as it permits a monopolist freely to reduce output and raise prices. *See Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004). Indeed, none of the cases cited above in which the NFL has been found liable for violating § 1 would support liability under § 2.

B. Antitrust Enforcement Against Unreasonable Restraints of Legitimate Non-Sports Joint Ventures Would Be Thwarted

The adverse consequences of upholding the Seventh Circuit decision go well beyond immunizing anticompetitive conduct of sports leagues. Respondents contend that "other joint ventures that involve a similarly high degree of economic integration" should be immune, NFL Cert. Br. 4, but offer no administrable standards for distinguishing between degrees of integration. Indeed, insofar as the Seventh Circuit's logic is based on the efficiencies of integration, its holding would extend not only to all joint ventures where cooperation is necessary for the product to exist, but arguably to any legitimate joint venture. *See* NHL *Amicus* Cert. Br. 7 (immunity should extend to "all legitimate joint ventures"). After all, legitimate joint ventures generally produce efficiencies that could not be obtained by the firms operating separately; that is why joint ventures are treated leniently. *See* Brodley at 1525; *Copperweld*, 467 U.S. at 768 (joint ventures are judged under the rule of reason because they "hold the promise of increasing a firm's efficiency and enabling it to compete more effectively"). And the ruling would apply to any activity in which the members of the joint venture have a shared interest, which respondents' *amici* contend should include any activity that the members decide is within "the scope

of the venture's business." NHL *Amicus* Cert. Br. 1 n.2.

In abolishing the intra-enterprise conspiracy doctrine, the Court found it significant that the doctrine was not necessary to "control dangerous anticompetitive conduct," as reflected in the facts that "not a single holding of antitrust liability by this Court would be different in the absence of [the] doctrine," it had "played a relatively minor role in government enforcement actions," and the federal government no longer accepted the doctrine. *Copperweld*, 467 U.S. at 777 & n.25 (internal quotes omitted). In contrast, extending *Copperweld* to integrated joint ventures would open a huge gap in the enforcement of the antitrust laws. It is precisely because joint ventures are such "an important and increasingly popular form of business organization," *Dagher*, 547 U.S. at 5, that immunizing them from liability under § 1 would be so harmful.

Respondents' approach calls into question numerous decisions by the Court that have struck down anticompetitive restraints by joint ventures. For example, the Court has proscribed membership restrictions and similar exclusions by highly integrated, interdependent joint ventures such as a newspaper wire service, *see Associated Press*, 326 U.S. 1, an association that owned and operated railroad terminal facilities, *see United States v. Terminal R.R. Ass'n*, 224 U.S. 383 (1912), and a stock exchange, *see Silver v. New York Stock Exch.*, 373 U.S. 341 (1963). It has struck down territorial

restrictions on the distribution of the products created by legitimate marketing and purchasing joint ventures. *See Sealy*, 388 U.S. 350 (dissent would have considered under rule of reason); *United States v. Topco Associates, Inc.*, 405 U.S. 596 (1972) (same). The Court has sustained challenges to the decision making of private standard-setting organizations, which create standards that are often necessary for products to function. *See, e.g., Allied Tube*, 486 U.S. at 505-06; *see also Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, 364 U.S. 656 (1961) (reversing motion to dismiss). It has invalidated portions of an otherwise procompetitive joint operating agreement that integrated the operations of two newspapers. *See Citizen Publ'g Co. v. United States*, 394 U.S. 131 (1969). And of course, it has found a restraint in the marketing of the television rights of a sports league's product to be unlawful. *See NCAA*, 468 U.S. 85; *see also Radovich v. NFL*, 352 U.S. 445 (1957) (complaint against NFL's player boycott stated a claim for relief).

Furthermore, a host of other cases involving challenges to arguably "core" business decisions of integrated joint ventures are also premised on the assumption that the integrated joint venture was not a single entity for purposes of § 1. *See, e.g., Chicago Bd. of Trade v. United States*, 246 U.S. 231 (1918); *BMI*, 441 U.S. 1; *Nw. Wholesale Stationers*, 472 U.S. 284; *Dagher*, 547 U.S. 1; *Brown*, 518 U.S. 231.

Extending *Copperweld* to integrated joint ventures would also undermine the Justice Department and FTC's current enforcement efforts. The agencies'

Competitor Collaboration Guidelines and Health Care Policy Statements would be vitiated insofar as the venture-related activities of "highly integrated" joint ventures would be immune from § 1 review rather than analyzed to see whether restraints are reasonably necessary for the success for the venture or otherwise violate the rule of reason. And the agencies' § 1 initiatives against multiple listing services,[13] healthcare network joint ventures,[14] and credit card networks,[15] among others,[16] would be jeopardized because such challenges frequently involve network joint ventures that enable the

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[13] *See, e.g., United States v. Consolidated Multiple Listing Service, Inc.*, No. 3:08-cv-01786-SB (D. S.C. filed May 2, 2008) (challenge to multiple listing service rules that increased prices and deterred emergence of new brokerage business models); *see generally* Competition in the Real Estate Brokerage Industry: A Report by the Fed. Trade Comm'n and the U.S. Dept. of Justice 63-70 (April 2007).

[14] *See, e.g., In re New Century Health Quality Alliance, Inc.*, FTC Dkt. No. C-4169 (filed Aug. 24, 2006) (challenge to agreement among members of independent practice association not to offer services other than integrated capitation arrangements); *United States v. Greater Bridgeport Individual Practice Ass'n, Inc.*, C.A. No. 592CV00575 EBB (D. Conn. filed Sep. 30, 1992) (similar).

[15] *See United States v. Visa U.S.A., Inc*., 344 F.3d 229, 242 (2d Cir. 2003) (upholding challenge to Visa and Mastercard rules that prevented member banks from issuing American Express or Discover cards; rejecting "single entity" characterization of card networks).

[16] *See, e.g., United States v. ASCAP*, Civ. No. 13-95 (S.D.N.Y. 1941) (complaint challenging ASCAP's exclusive licensing practices, described in *BMI*, 441 U.S. at 10-12).

production of services that cannot be produced without cooperation.

III. THE NFL'S POLICY ARGUMENTS FOR § 1 IMMUNITY LACK MERIT AND HAVE BEEN REJECTED BY CONGRESS

A. The Costs of Antitrust Compliance and Litigation Risk Do Not Justify Immunity

Claiming that they have been subject to a "cascade of antitrust suits" resulting in "years of litigation and enormous burden and expense," respondents and their *amici* maintain that they need antitrust immunity for their business decisions in order to "permit early resolution of antitrust challenges without the need for full rule-of-reason litigation." NFL Cert. Br. 11, 13, 15. Moreover, they claim that "the uncertainty of a full rule-of-reason analysis . . . chills collaboration and decisionmaking, and it inevitably decreases interbrand competition." *Id.* at 9.

It should be beyond dispute that integrated joint ventures in any industry, while generally pro-competitive, can *sometimes* unnecessarily restrain competition with respect to the production and marketing of their product or related products. *See, e.g., NCAA*, 468 U.S. 84. When conduct can sometimes be anticompetitive, and sometimes pro-competitive, then the "rule of reason is the accepted standard for testing whether the practice restrains

trade in violation of § 1." *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 885 (2007); *see id.* at 886 ("In its design and function the rule distinguishes between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest.").

There is no evidence that courts are erroneously holding sports leagues liable under the rule of reason. On the contrary, "[t]he courts have largely understood that sports leagues lie in between ordinary business firms, whose collaboration is suspect, and totally integrated enterprises subject only to § 2. They have also understood that these situations need 'in-between' substantive antitrust rules. They certainly, and correctly, have not woodenly applied the per se prohibitions developed for ordinary business situations." 7 Areeda & Hovenkamp ¶ 1478d, at 329; *see also* 13 Phillip E. Areeda & Hebert Hovenkamp, *Antitrust Law* ¶ 2101, at 22 (2d ed. 2005) (enforcement "against anticompetitive joint venture rules represent[s] a . . . modest intrusion into an economy that we presume to be efficient overall"). And if there were a problem with the application of the rule of reason to sports leagues or other legitimate joint ventures, then the proper solution would not be immunity, but a refinement of the rule.

It is true that defending an antitrust suit (as well as bringing one) under the rule of reason can be costly. But courts are well equipped to dismiss implausible claims before discovery, *see Bell Atl. Corp.*

v. Twombly, 550 U.S. 544 (2007), and weak claims on summary judgment, *see Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); standing and antitrust injury doctrine also pose threshold hurdles, *see, e.g., St. Louis Convention & Visitors Comm'n v. NFL*, 154 F.3d 851 (8th Cir. 1998) (finding no antitrust injury where plaintiff failed to show that it was harmed by league's relocation rules). Moreover, insofar as the Seventh Circuit's single-entity test is merely a surrogate for rule-of-reason analysis, then it is not obvious that it would (or should) reduce discovery burdens. *See Fraser*, 284 F.3d at 59 ("To the extent the [single-entity] criteria reflect judgments that a particular practice in context is defensible, assessment under section 1 is more straightforward and draws on developed law."); *Bulls II*, 95 F.3d at 605 (Cudahy, J., concurring) ("inquiry into whether separate economic interests are maintained by the participants in a joint enterprise is likely to be no easier than a full Rule of Reason analysis"). Finally, there is simply no evidence that sports leagues or other legitimate joint ventures have been deterred from taking procompetitive actions because of the fear of litigation costs.

The bipartisan Antitrust Modernization Commission, created by statute, urged Congress to be chary about statutory immunities from the antitrust laws. *See* Antitrust Modernization Commission Report and Recommendation 334-37 (2007). The Commission endorsed the view that "[s]tatutory immunities from the antitrust laws should be disfavored" and that

"[c]laimed justifications for antitrust exemptions require careful scrutiny and testing against legal and marketplace realities." *Id.* at 350, 353. Notably, the Commission recommended:

> [N]o immunity should be granted to create increased certainty in the form of freedom from antitrust compliance and litigation risk. Antitrust compliance and litigation risks are costs of doing business that hundreds of thousands of American businesses manage every day. No particular companies or industries should be specially entitled to avoid those costs; if these costs are unreasonable, broader reform applicable to all businesses is the proper remedy.

Id. at 350-51.

If it is bad policy for Congress to enact immunities to shield particular industries or forms of businesses from purportedly burdensome antitrust compliance costs, then surely it is inappropriate for this Court to do so by extending *Copperweld* to joint venture conduct that has long been subject to § 1. And it is particularly inappropriate when Congress itself has evinced an intent *not* to shield sports leagues and other valuable joint ventures from § 1 scrutiny.

B. Congress Has Rejected Immunity for Sports Leagues and Other Valuable Joint Ventures Except in Narrow Circumstances

As petitioner's brief documents, over the last 60 years the NFL and other sports leagues have vigorously lobbied Congress for various antitrust exemptions and immunities, including the kind of broad immunity that respondents seek from this Court. However, with the limited exception of the Sports Broadcasting Act of 1961 (SBA), 15 U.S.C. § 1291, Congress has rejected those efforts. *See* Pet. Br. 34-37; *see also* Professional Sports Community Protection Act of 1985, S. 259, 99th Cong., 1st Sess. (1985); H. Rep. No. 104-656(I) (1996) (detailing leagues' efforts to obtain antitrust immunity with respect to franchise relocation decisions). "The legislative history of [the SBA] exemption demonstrates Congress' recognition that agreements among league members to sell television rights in a cooperative fashion could run afoul of the Sherman Act . . . ." *NCAA*, 468 U.S. at 104-05 n.28. As petitioner's brief demonstrates, the Seventh Circuit's interpretation of the single-entity doctrine would render the SBA, the Curt Flood Act, and all of Congress's efforts in this area superfluous. *See* Pet. Br. 32-38; *TRW Inc. v. Andrews*, 534 U.S. 19, 29 (2001) (rejecting interpretation of statute that "would in practical effect render . . . exception entirely superfluous in all but the most unusual circumstances").

Beyond the SBA, Congress has enacted immunities for highly integrated joint ventures in certain other industries. For example, § 6 of the Clayton Act, 15 U.S.C. § 17, exempts non-profit agricultural cooperatives from § 1 of the Sherman Act, and the Capper-Volstead Act of 1922, 7 U.S.C. §§ 291, 292, extended the exemption to capital stock agricultural cooperatives. Similar legislation authorizes fishermen's cooperatives. *See* 15 U.S.C. § 521. Those statutes were passed to ensure that "a group of farmers acting together as a *single entity* in an association cannot be restrained from lawfully carrying out the legitimate objects thereof," namely "collectively processing, preparing for market, handling, and marketing" their products. *Maryland and Virginia Milk Producers Ass'n v. United States*, 362 U.S. 458, 465-66 (1960) (internal quotes omitted) (emphasis altered). Similarly, Congress exempted almost-fully-integrated newspaper joint ventures from § 1 under certain narrow conditions, but such ventures remain liable for conduct that would otherwise be unlawful "if engaged in by a single entity." 15 U.S.C. § 1803. Congress plainly believed that, absent immunity, highly integrated joint ventures that act like single entities, such as agricultural cooperatives, would be subject to § 1. And, unless otherwise directed by Congress, similar joint ventures in other industries should not be exempt. *See Associated Press*, 326 U.S. at 14 (rejecting argument that "because AP's activities are cooperative" they were exempt from the Sherman Act; finding it "significant that when Congress has desired

to permit cooperatives to interfere with the competitive system of business, it has done so expressly by legislation"); *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616-17 (1980) ("Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent."); *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 126 (1982) ("[O]ur precedents consistently hold that exemptions from the antitrust laws must be construed narrowly.").

The legislative history of the National Cooperative Research Act of 1984 (NCRA) and its amendments, 15 U.S.C. § 4301 *et seq.*, also demonstrates that Congress did not intend to give joint ventures blanket immunity from § 1 even when they perform critical procompetitive activities that might otherwise be chilled. The NCRA was enacted because promoting research and development joint ventures was a significant national priority, key to American businesses' ability to compete with international rivals and stem the decline of U.S. productivity. *See* S. Rep. No. 98-427, at 1-4 (1984); H. Rep. No. 98-571(I), at 8-10 (1983). Congress thought the "chilling effect" of unclear antitrust standards and possible treble damages deterred the formation of such joint ventures, despite the relatively benign attitude towards R&D joint ventures by antitrust agencies and the courts. *See* H. Rep. No. 98-571(I), at 12-13; S. Rep. No. 98-427, at 3. Yet, Congress did not exempt R&D joint ventures from § 1. Rather, it mandated the

application of the rule of reason to certain of their activities, *see* 15 U.S.C. § 4302, and eliminated treble damages in certain circumstances, *see* 15 U.S.C. § 4303. Congress extended the protections of the Act to production joint ventures because of their potential contribution to a resurgence of U.S. leadership in high technology. *See* H. Rep. No. 103-94 (1993). And it further extended the protections of the Act to private standards development organizations because Congress believed that the threat of antitrust liability, although "remote in most cases," Pub. L. 108-237, 118 Stat. 661, § 102(8) (2004), may lead such bodies "to cut back on standards development activity at great financial cost both to the Government and to the national economy," *id.*, § 102(10). Notably, Congress expressly excluded from the Act joint marketing and distribution, *see* 15 U.S.C. § 4301(b)(2), the type of activity in which sports leagues engage.

Congress clearly knows how to provide relief from the antitrust laws to ensure that important procompetitive collaborative activity is not chilled. And, unlike the Court, Congress can act in a discriminating fashion, rather than providing blanket immunity under § 1. It would be ironic for this Court to exempt sports leagues from § 1 when Congress has not seen fit to exempt R&D and other joint ventures it believed to be critical to the nation's economic development.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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