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 FOR THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION AS *AMICUS CURIAE* SUPPORTING RESPONDENT

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INTEREST OF *AMICUS CURIAE*[1]

The National Collegiate Athletic Association ("NCAA") is a voluntary unincorporated association that serves as the organizing, regulating and standard-setting body for 23 intercollegiate sports. The NCAA's active membership includes over 1,000 institutions of higher education that jointly create seasons of amateur intercollegiate competition across three Divisions. The NCAA serves an essential function in the creation of these league competitions by promulgating and enforcing rules of play, equipment standards, season-length and scheduling requirements, and rules regarding championship eligibility, athletic eligibility and permissible recruiting activities. More than 400,000 student-athletes participate in NCAA athletics. As one notable example of its league organizing activities, the NCAA stages dozens of national championship tournaments or competitions each year, involving tens of thousands of student-athletes (88 were held in 2008, involving more than 40,000 student-athletes).[2]

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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 *amicus curiae* or its counsel has made a monetary contribution intended to fund the preparation or submission of this brief.

[2] NCAA, *NCAA Sports and Championships*, http://www.ncaa.org/wps/ncaa?key=/ncaa/ncaa/sports+and+championship (last visited November 22, 2009). Many of the NCAA's members are state universities and colleges having significant indicia of state sovereignty.

The NCAA has been the frequent target of antitrust litigation challenging NCAA rules that set the conditions under which NCAA athletics are conducted. The NCAA has been forced to defend antitrust challenges to NCAA rules governing (1) the equipment that may be used in NCAA football, baseball and lacrosse games;[3] (2) the number of games that NCAA basketball teams may play in a season;[4] and (3) the criteria governing post-season basketball competition.[5] These and other NCAA rules[6] have been challenged as

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[3] *Warrior Sports, Inc. v. NCAA*, No. 08-14812, 2009 WL 646633 (E.D. Mich. Mar. 11, 2009) (NCAA rules for lacrosse stick heads); *Aculeus 5, LLC v. NFL Properties, LLC*, No. CV 04-4252 GAF (C.D. Cal. Jan. 3, 2005) (NCAA standard for football gloves); *Baum Research and Development Co., Inc. v. Hillerich & Bradsby Co., Inc.*, 31 F. Supp. 2d 1016, 1018 (E.D. Mich. 1998) (NCAA standard for baseball bats); *Easton Sports, Inc. v. NCAA*, No. 98-2341-KHV (D. Kan. Filed Aug. 27, 1998) (same).

[4] *Worldwide Basketball and Sports Tours, Inc. v. NCAA*, 388 F.3d 955, 957 (6th Cir. 2004) (NCAA rule limiting member schools to two certified tournament appearances over four years); *Metropolitan Intercollegiate Basketball Association v. NCAA*, 337 F. Supp. 2d 563, 568 (S.D.N.Y. 2004) (NCAA rules setting an end to the men's basketball season).

[5] *Metropolitan Intercollegiate Basketball Association*, 337 F. Supp. 2d at 567 (NCAA rules requiring selected members to participant in the NCAA's men's basketball championship).

[6] *White v. NCAA*, No. 06-0999 (C.D. Cal. Filed Feb. 17, 2006) (NCAA rules standardizing the "grant in aid" component of financial aid packages); *In re NCAA I-A Walk-On Football Players Litigation*, No. C04-1254C, 2007 WL 951504, at *1 (W.D. Wash. Mar. 26, 2007) (NCAA rules limiting the number of football scholarships for each member institution); *Adidas America, Inc. v. NCAA*, 64 F. Supp. 2d 1097, 1100 (D. Kan. 1999) (NCAA rules

"restraints of trade" under Section 1 of the Sherman Act. While the NCAA has prevailed in nearly all of these cases, it has been required to engage in expensive and often lengthy treble-damages antitrust litigation over rules that do nothing more than define the conditions of athletic contests between NCAA member schools – rules of the sort that even Petitioner's *amici* recognize pose no threat to the interests protected by Section 1 of the Sherman Act.

The NCAA therefore has an abiding interest in this Court clarifying the law regarding application of the *Copperweld* doctrine to sports leagues and similar joint ventures. Petitioner and most of its *amici* argue, incorrectly, that the Seventh Circuit's decision must be reversed because a sports league may never be regarded as a single entity for purposes of Section 1 analysis. By affirming the Seventh Circuit's ruling, and holding that sports leagues act as single entities when they promulgate or enforce league rules or engage in other league activities that do not eliminate actual or potential economic competition between league members, this Court will enable all sports leagues, including the NCAA, to go about their welfare-enhancing daily operations without self-imposed timidity over baseless antitrust litigation, will enhance the efficiency of the litigation that is filed, and will allow for early determinations that will minimize waste of both party and judicial resources.

The NCAA also has a critical interest in ensuring that the appropriate test is used to determine when

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limiting the amount of advertising on student-athletes' uniforms and equipment used in intercollegiate competition).

sports league activities, operations and regulation are properly considered the actions of a single entity. The Seventh Circuit properly held 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.'" *Am. Needle, Inc. v. Nat'l Football League, et al.*, 538 F.3d 736, 741 (7th Cir. 2008) (quoting *Chicago Professional Sports Ltd. Partnership v. NBA*, 95 F.3d 593, 600 (7th Cir. 1996) ("*Bulls II*")). The United States, while conceding that the appropriate focus should be on the existence, or lack thereof, of independent economic competition between members as to a particular facet of league regulation, proposes a test that places undue emphasis on form over function, and could deny single entity status based solely on aspects of league structure that are irrelevant to the concerns embodied in Section 1. Petitioner and several *amici* likewise propose interpretations of *Copperweld* that place inappropriate emphasis on the operational structures employed by the league or its members. The test for determining whether a league rule or action may properly be regarded as the product of a single entity should focus on the character of the alleged restraint, not on the governance structure adopted by the league or its members.

SUMMARY OF ARGUMENT

This Court has recognized that "league sports" are a "leading example" of "activities [that] can only be carried out jointly." *NCAA v. Board of Regents of the University of Oklahoma et al.*, 468 U.S. 85, 101 (1984). Although the Court did not have occasion to consider in *NCAA* whether, and in what situations, a sports league may be considered a single entity for purposes

of Section 1 of the Sherman Act,[7] *NCAA*'s insight that league sports require substantial cooperation among league members – and that such cooperation "can be viewed as procompetitive," *id.* at 102 – is, nonetheless, directly relevant to the questions presented in this case.

Because cooperation among league members is a necessary element of league sports, many league agreements – such as rules regarding season length, championship eligibility, equipment specifications and the playing rules of the games themselves – are reached in areas in which economic competition among league members either never existed, or has been subsumed into the joint operation of the league as a necessary prerequisite to the league's functioning. Labeling such agreements as "restraints" on "competition" among league members, and subjecting such agreements to scrutiny under Section 1, is a misguided triumph of form over substance. These agreements do not implicate the concerns addressed in Section 1 because they do not "represent a sudden joining of two independent sources of economic power previously pursuing separate interests." *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 771 (1984).

This Court in *Copperweld* instructed that in determining whether an alleged restraint should be treated as an "agreement" between multiple actors,

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[7] *Copperweld*, which reversed the mistaken intra-enterprise conspiracy theory of Section 1 liability, was decided just 8 days before *NCAA*. The lower courts in *NCAA* obviously could not have considered the impact of that decision and the record in this Court did not present that issue.

"the appropriate inquiry requires us to explain the logic underlying Congress' decision to exempt unilateral conduct from § 1 scrutiny, and to assess whether the logic similarly excludes the conduct" in question, *id.* at 776. This admonition has clear application to the operation of sports leagues. There are certain "core" areas of league operations that are so fundamental to the operation of the league that formation of the league itself can, indeed must, be seen as having eliminated whatever actual or potential competition might have existed between the league members. In such cases, *Copperweld*, *NCAA* and *Texaco, Inc. v. Dagher*, 574 U.S. 1 (2006) compel treating the sports league in question as a single entity that is incapable of violating Section 1 through promulgation or enforcement of the "core" rule in question. Having concluded on the record before it that the Petitioner had failed to establish that the alleged "restraint" in question actually did deprive a market of independent sources of economic power, the Seventh Circuit was correct to hold that the Petitioner had failed to set forth a Section 1 claim.

The test for determining whether a league rule or action may properly be regarded as the product of a single entity should focus on the character of the alleged restraint itself, and on the fundamental question of whether promulgation or enforcement of the rule can be said to have eliminated any preexisting economic competition among league members that had survived formation and operation of the league. The analysis should not focus on such irrelevant factors as the business form under which the league or its members are organized, as Petitioner and several of its *amici* suggest. Nor should the analysis hinge on whether the league exhibits some generic level of

"integration," or whether the league members engage in independent activities outside the league, or whether it is possible to imagine ways in which the league members could stage their sport under a different league structure. All of these inquiries are irrelevant to the question posed by *Copperweld*, which is not whether a sports league satisfies some arbitrary status-based conception of "leagueness," but rather whether an alleged "restraint" actually results in a lessening of preexisting or potential economic competition among independent entities.

The Seventh Circuit was therefore correct to hold in this case that "when making a single-entity determination, courts must examine whether the conduct in question deprives the marketplace of the independent sources of economic control that competition assumes." 538 F.3d at 742. Moreover, in the case of "core" league agreements of the sort identified in *NCAA*, there is no danger of the marketplace being deprived of such "independent sources of economic control." Such agreements should presumptively be treated as the decision of a single entity, and therefore not subject to scrutiny under Section 1.

ARGUMENT

I. Sports Leagues, Like Other Joint Ventures, May Properly Be Treated As Single Entities

Petitioner and many of its *amici* urge this Court to hold that the *Copperweld* single-entity doctrine is limited to "intra-enterprise" agreements between "the component entities of a single, commonly owned and

controlled firm." Pet. Br. 25; AAI Br. 4-6.[8] This assertion – which was properly rejected by the Seventh Circuit – is inconsistent with the analysis set forth in *Copperweld* itself, as well as with Section 1 jurisprudence since *Copperweld*. Contrary to Petitioner's assertions, neither *NCAA* nor any of this Court's other decisions preclude application of the *Copperweld* doctrine to sports league activities that do not regulate or eliminate existing independent economic competitive activities of the league's members.

A. Application of The Single Entity Doctrine to Sports Leagues and Other Joint Ventures Is Appropriate Under *Copperweld* and *Dagher*

Petitioner argues that the *Copperweld* single-entity doctrine can never be applied to joint ventures such as sports leagues where there is not a complete structural unity of interest. As Respondent NFL and, indeed, the United States as *amicus* for the Petitioner both persuasively demonstrate, however, and as the Seventh Circuit held below, the approach in *Copperweld* privileged function over form, and the existence of independent economic competition over corporate structure and ownership. NFL Br. at 16-20; U.S. Br. at 13-22. The Court did not base its decision on the "form of an enterprise's structure" but rather stated that the economic and competitive "[r]ealities

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[8] Notably, the United States does not agree with Petitioner on this point. *See* U.S. Br. 6 ("The functional analysis of the enterprises in *Copperweld* and *Dagher* can be extended to the NFL, which is a legitimate joint venture among competitors.").

must dominate the judgment" as to whether the agreement in question constitutes the decision of a single entity. *Copperweld*, 467 U.S. at 772, 774 (citing *Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 360 (1933)).

The facts presented in *Dagher* are analogous to the case at hand. Texaco and Shell Oil were not wholly merged entities, and did not have a complete unity of interest. *See Dagher v. Saudi Refining, Inc.*, 369 F.3d 1108, 1112 (9th Cir. 2004). Their agreement on the price to charge for their joint venture product, however, did not restrain existing competition between them. *Texaco v. Dagher*, 547 U.S. at 5-6. Although *Dagher* did not rely on the single-entity question expressly, its analysis is consistent with application of the *Copperweld* doctrine to joint ventures such as league sports. While individual member teams in a sports league may compete in some markets, decisions on core league functions simply do not implicate economic competition. A functional, facet by facet analysis of sports league rules or activities is entirely consistent with *Copperweld*. The Petitioner's argument misses the mark by focusing on the structure of the NFL, rather than on the realities of the economic competition – or lack thereof.

B. Nothing In *NCAA* Precludes Application of *Copperweld* to Sports Leagues and Other Joint Ventures

Petitioner and some of its *amici* further argue that *NCAA* is "flatly inconsistent" with the decision below. Pet. Br. at 12. That is not accurate. Nothing in *NCAA* precludes application of the single entity doctrine to sports league "agreements" that involve operations and

regulations in areas in which there is no actual or potential economic competition among their members.[9] The contrary, if anything, is true: *NCAA* expressly recognized that sports leagues necessarily cooperate in a wide range of areas, that such cooperation allows for the creation of the unique product of that league's sports, and that such cooperation poses no threat to the interests protected by Section 1.

Petitioner argues that *NCAA*, along with the Court's earlier decision in *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979), preclude application of the single entity doctrine to sports leagues because the joint activities at issue in those cases were analyzed under Section 1 and the Rule of Reason. Pet. Br. at 19, 29. The test the Seventh Circuit applied below, however, is entirely consistent with this Court's application of Section 1 in *NCAA* and *BMI*. The *NCAA* Court affirmed the lower courts' decisions striking down the NCAA's television

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[9] *NCAA* does not, as the NFL suggests, contain or depend on the conclusion that the NCAA's structure is distinct from the structure of the NFL or other professional sports leagues, or hold that NCAA rules, regulations and joint operations supposedly constitute inter-league, rather than intra-league, agreements. Nor did the Court base its decision on the fact that NCAA members, in addition to sponsoring teams that participate in NCAA league sports, are institutes of higher education. NFL Br. at 42-43. The Supreme Court in *NCAA* did not, in fact, distinguish the structure of the NCAA as being more suspect under Section 1 than that of the NFL – indeed, the Court compared the two. *NCAA*, 468 U.S. at 106, n. 28 and 112, n. 47. Although the *NCAA* Court did not have the single entity question before it, its analysis of the joint venture question focuses, not on the form or structure of the sports league, but on the particular function being analyzed. *Id.* at 113-14.

plan because the Court expressly found – on the unique facts of that case – that the football television plan regulated existing economic competition among NCAA member institutions.

The NCAA football television plan considered in *NCAA* did not attempt to merge the operations of NCAA members related to the sale of televised football rights. Under the plan, individual member schools continued to engage in and negotiate the individual deals with networks to televise their football games. While schools still competed against each other for rights deals with the networks, the plan expressly limited which networks schools could negotiate with, what the prices for the television appearances would be, and the number of television appearances a given school could make in a two-year period. 468 U.S. at 94.

Based on those unique facts, the Court found that the plan, rather than merging operations, merely regulated the manner in which NCAA schools engaged in extant economic competition:

> The essential contribution made by the NCAA's arrangement is to define the number of games that may be televised, to establish the price for each exposure, and to define the basic terms of each contract between the network and a home team. The NCAA does not, however, act as a selling agent for any school or for any conference of schools. The selection of individual games, and the negotiation of particular agreements, are matters left to the networks and the individual schools. Thus, the effect of the network plan is not to eliminate

> individual sales of broadcasts, since these still occur, albeit subject to fixed prices and output limitations. Unlike *Broadcast Music's* blanket license covering broadcast rights to a large number of individual compositions, here the same rights are still sold on an individual basis, only in a noncompetitive market.

NCAA, 468 U.S. at 113-14.

Nor is *BMI* inconsistent with either the decision below or the application of *Copperweld*'s single entity analysis to joint ventures and sports leagues. In *BMI*, the blanket music licenses at issue were clearly the product of an agreement between competitors and clearly implicated existing economic competition. Indeed, as the *BMI* Court recognized, the existing independent economic competition between the joint venture members on the very facet of the venture being challenged continued, and individual rights holders continued to compete outside of the venture. 441 U.S. at 23-24. The Seventh Circuit's facet by facet analysis of *Copperweld*, applied to the facts presented in *BMI*, would not change the result.

There is thus no inconsistency between this Court's decisions in *NCAA* and *BMI*, on the one hand, and the Seventh Circuit's decision below, on the other. This Court's decision in *NCAA* was based on the factual conclusion that the NCAA television plan regulated ongoing economic competition among NCAA members.[10] The Court's application of the rule of

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[10] Similarly, the court in *Rothery Storage & Van Co. v. Atlas Van Lines*, 792 F.2d 210 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1033

reason to the blanket licenses at issue in *BMI* was also based on the factual conclusion that the blanket licenses influenced existing independent economic competition between the licensors. The Seventh Circuit's decision below was based on the factual conclusion that the NFL licensing activities did not do so. The differing approaches in these cases are explained by their factual differences, and do not reflect inconsistent applications of Section 1. Indeed, the Seventh Circuit's decision is entirely consistent with, and expressly anticipates, differing "single entity" treatment for different activities by the same sports league. 538 F.3d at 741-43. The Seventh Circuit's decision is not contrary to, or even in tension with, *NCAA, BMI* or any other prior decisions of this Court, and it should be affirmed.

(1986), upon which Petitioner relies, did not treat a joint venture of moving companies as a single entity under *Copperweld* precisely because the court found that the companies were "actual or potential competitors" of each other and the venture, and that the challenged policy restricted that competition. *Id.* at 214. The court did not hold that a joint venture could never be treated as a single entity. And the Ninth Circuit's joint venture/single entity analysis in *Freeman v. San Diego Ass'n of Realtors*, 322 F.3d 1133 (9th Cir. 2003) expressly recognized that a joint venture could, under some circumstances, act as a single entity, but analyzed the challenged activities and expressly found that the venture was regulating and eliminating potential economic competition among the members. *Id.* at 1148-51.

II. Application Of The *Copperweld* Doctrine To The Activities Of Sports Leagues Or Joint Ventures Should Focus On The Conduct In Question, Not The Governance Form Adopted

Both *Copperweld* and *Dagher* support treating a sports league as a single entity in at least two distinct situations. The first situation arises when a league is regulating or acting in an area where economic competition among its members is impossible, because the league action accomplishes a result that can only be achieved via agreement of league members. The second situation arises when the league has integrated its operations to such an extent that, even if economic competition among league members is possible, that potential competition has been eliminated by formation of the league itself.

In neither case should the *Copperweld* analysis depend on whether the league in question has taken a particular form, or structured its operations in a particular way. There is not, nor should there be, an antitrust definition of a "sports league" that should be used as a threshold test that must be passed before application of the *Copperweld* doctrine is deemed potentially appropriate. NFL Br. 30-33. Instead, the analysis should focus on the question set forth in *Copperweld*: whether the league activity being challenged restrains preexisting actual or potential economic competition between league members.

There is no need to restate or refine the *Copperweld* test, as the United States suggests. U.S. Br. 17. Nor is there any need to limit *Copperweld*'s application to just those sports leagues that have organized

themselves in a particular way, Pet. Br. 25-27, or whose members have taken a particular business form, NFL Br. 20-24, or whose members have agreed to pool financial resources in a certain manner, Pet. Br. 43, AAI Br. 5, NFL Players Association Br. 7-12. While these questions might all be relevant to challenges to specific league rules – depending on the league and rule in question – nothing in *Copperweld* supports the development of a one-size-fits-all structural test that must be applied to all sports leagues, or even all sports league rules. Instead, as the Seventh Circuit has quite correctly held, "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.'" 538 F.3d 741, *quoting Bulls II*, 95 F.3d at 600.

The fact that *Copperweld* is best applied on a league by league and facet by facet basis does not preclude all generalizations regarding proper application of the doctrine to sports league activities. As demonstrated below, there are at least two broad areas in which it will almost always be appropriate to treat league activities as the work of a single economic actor.

A. Sports League Regulation of Core League Athletic Activities Does Not Implicate Member Teams' Independent Interests In Economic Competition

First, sports leagues should presumptively be treated as single entities when they promulgate or enforce rules that create or govern the athletic competition between league members. This should apply, at a minimum, to league rules that create or

regulate league competition at either (1) the level of individual games or matches (such as playing or equipment rules) or (2) the level of a season, championship, or other "unit" of league competition (such as rules regarding season length, game scheduling, championship eligibility, etc.).

These "core" league activities should be seen as the action of a single league entity because it is literally impossible for rules governing the condition of the athletic competition (at either the game or season level) to exist outside of agreement among league members. And because it is impossible for league members to create league competition rules through independent action, it is equally impossible to say that an agreement among league members on league competition rules results in the elimination of economic competition among league members. League members cannot meaningfully compete to accomplish individually what can only be achieved through agreement.

If two companies form a joint venture to manufacture a car, and agree that the joint venture's car will be red, they are not eliminating economic competition. Neither joint venture member has an independent economic interest in the color of the joint venture's product. Similarly, members of sports leagues do not have independent economic interests in the rules of the contest. It is possible, for example, for the University of Michigan and Ohio State University football teams to have differing opinions regarding what on-field actions should properly be penalized as illegal holding. It is not possible for those two teams, or any two football teams, to engage in economic competition (or, indeed, competition of any sort) over

the illegal holding rule that will be enforced during their football game, however, because the rule cannot exist except by agreement among the two teams. It is logically incoherent to suggest that by agreeing on the terms of the illegal holding rule, Michigan and Ohio State have eliminated actual or potential economic competition among themselves over what that rule will be, because the rule itself can only be created via agreement between Michigan and Ohio State – and their game can only be played after the rule is agreed. Since neither team can create the rule through individual action, they obviously cannot engage in economic competition to create the rule through individual action, and no economic competition is eliminated by their agreement on a holding rule.

It would be equally incoherent to suggest that NCAA rules regulating the conduct of NCAA football games eliminate preexisting competition (economic or otherwise) among NCAA members to promulgate NCAA football rules, because NCAA football rules can exist only via the agreement of NCAA member schools to abide by them. If the NCAA members did not agree to follow the NCAA's football rules, those rules would not be rules; they would only be words on a page. As the Seventh Circuit has aptly noted, considering whether the adoption or enforcement of a league playing rule has eliminated preexisting economic competition among league members is thus akin to considering the sound of one hand clapping: it is a pointless, and ultimately impossible, exercise. *Bulls II*, 95 F.3d at 598-99

This Court recognized all of this in *NCAA*, when it noted that many sports league rules and regulations should be viewed as presumptively precompetitive

because they are necessary to the creation of the unique product of league sports. 468 U.S. at 117 ("It is reasonable to assume that most of the regulatory controls of the NCAA are justifiable means of fostering competition among amateur athletic teams and therefore procompetitive because they enhance public interest in intercollegiate athletics."). Nor was the reasoning of the *NCAA* Court limited to college sports; the Court recognized that league sports, whether professional or intercollegiate, require league cooperation, and that most aspects of that type of cooperation simply do not pose an antitrust problem:

> As Judge Bork has noted: "[Some] activities can only be carried out jointly. Perhaps the leading example is league sports. When a league of professional lacrosse teams is formed, it would be pointless to declare their cooperation illegal on the ground that there are no other professional lacrosse teams." R. Bork, The Antitrust Paradox 278 (1978). What the NCAA and its member institutions market in this case is competition itself – contests between competing institutions. Of course, this would be completely ineffective if there were no rules on which the competitors agreed to create and define the competition to be marketed. A myriad of rules affecting such matters as the size of the field, the number of players on a team, and the extent to which physical violence is to be encouraged or proscribed, all must be agreed upon, and all restrain the manner in which institutions compete.

Id. at 102.

The *NCAA* Court's intuition that rules defining the conditions of athletic contests raise no antitrust concerns has been borne out by litigation in the lower courts. Both before and after this Court decided *NCAA* and noted the presumptively legal nature of most sports league regulation, the lower courts have consistently held that "core" league rules that create or regulate a league's athletic competition – such as rules that (1) establish the length of the season, (2) define permissible equipment and equipment specifications, (3) establish which games "count" against schedule limits, (4) create criteria for participating in a league championship game or tournament, or (5) govern the operation of the championship itself – do not violate Section 1. *See, e.g., Bassett v. NCAA*, 528 F.3d 426 (6th Cir. 2008) (NCAA recruiting regulations); *National Hockey League Players Ass'n v. Plymouth Whalers Hockey Club*, ("*NHLPA II*"), 419 F.3d 462, 473-74 (6th Cir. 2005) (player eligibility rules); *National Hockey League Players Ass'n v. Plymouth Whalers Hockey Club*, ("*NHLPA I*"), 325 F.3d 712,720 (6th Cir. 2003) (same); *Brookins v. International Motor Contest Ass'n*, 219 F.3d 849 (8th Cir. 2000) (equipment rules); *Smith v. NCAA*, 139 F.3d 180, 185-86 (3d Cir. 1998), *vacated on other grounds*, 525 U.S. 459 (1999) (NCAA player eligibility rules); *M&H Tire Co., Inc. v. Hoosier Racing Tire Corp*., 733 F.2d 973, 985 n. 8 (1st Cir. 1984) ("[I]f football teams and owners 'combine' to change the rule of the game to eliminate expensive equipment and generally to simplify the sport, we cannot conceive an antitrust violation simply because of the economic impact on suppliers."); *Brentwood Acad. v. Tennessee Secondary Schs*., No. 3:97-1249, 2008 U.S. Dist. LEXIS 55312 (M.D. Tenn. July 18, 2008) (high school athletic association recruiting rules); *Windage LLC v. United States Golf Ass'n*, No.

07-4897, 2008 WL 2622965, at *4 (D. Minn. July 2, 2008) ("So long as [the USGA] made game-defining rules decisions based upon its purpose as a sports organization, an antitrust court need not be concerned with the rationality or fairness of those decisions."); *Aculeus 5, LLC v. NFL Properties, LLC*, No. CV 04-4252 (GAF) (C.D. Cal. 2005) (order granting motion to dismiss antitrust challenge to NFL, NCAA and high school football league equipment rule) ("[W]here a sports-oriented rule-making body adopts a rule that governs the conditions under which a game is played, including rules governing the equipment that may be used in the contest, such rule-making is considered *procompetitive*") (emphasis in original); *Pocono Invitational Sports Camp, Inc. v. NCAA*, 317 F. Supp. 2d 569, 584 (E.D. Pa. 2004) (recruiting calendar rules and sports camp regulations); *Toscano v. PGA Tour, Inc.*, 201 F. Supp. 2d 1106, 1120 (E.D. Cal. 2002) (eligibility rules); *Adidas America, Inc. v. NCAA*, 40 F. Supp. 2d 1275, 1284-86 (D. Kan. 1999) (NCAA rule limiting size of logos on uniforms); *Weight-Rite Golf Corp. v. U.S. Golf Ass'n*, 766 F. Supp. 1104, 1111 (M.D. Fla. 1991) (equipment rules); *Gaines v. NCAA*, 746 F. Supp. 738, 744 (M.D. Tenn. 1990) (NCAA player eligibility rules); *STP Corp. v. U.S. Auto Club*, 286 F. Supp. 146, 151 (S.D. Ind. 1968) (equipment rules).[11]

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[11] Indeed, the *NCAA* Court cited a litany of sports league cases in which core league regulations were upheld with approval. *NCAA*, 468 U.S. at 102 n. 24 (citing, *inter alia*, *Brenner v. World Boxing Council*, 675 F.2d 445, 454-455 (2d Cir. 1982); *Neeld v. National Hockey League*, 594 F.2d 1297, 1299 n. 4 (9th Cir. 1979); *Hatley v. American Quarter Horse Assn.*, 552 F.2d 646, 652-654 (5th Cir. 1977); *Hennessey v. NCAA*, 564 F.2d 1136, 1151-1154 (5th Cir. 1977); *Bridge Corp. of America v. The American Contract Bridge League, Inc.*, 428 F.2d 1365, 1370 (9th Cir. 1970), *cert. denied*, 401

The overarching reason for these decisions is clear: "core" sports league rules do not eliminate actual or potential competition between league members in any way relevant to Section 1.

There is a similarly well-established academic literature in support of the notion such core sports league functions do not create an antitrust problem. *See* Daniel E. Lazaroff, *Sports Equipment Standardization: An Antitrust Analysis*, 34 Ga. Law Rev. 137, 151-52 (1999) ("rules of play" have "no perceptible impact on the competitive process"); Gary R. Roberts, *The NCAA, Antitrust, and Consumer Welfare*, 70 Tul. L. Rev. 2631, 2633 (1995-1996) (it is "self-evident" that "all of the participating teams must agree to the basic rules of the game on the field or court itself" and "unlikely that anyone would seriously allege that 'agreements' by members of an athletic organization defining the shape and size of playing venues, the required equipment, or the rules for the conduct of the game itself would pose antitrust questions"); Joseph P. Bauer, *Antitrust and Sports: Must Competition on the Field Displace Competition in the Marketplace?*, 60 Tenn. L. Rev. 263, 275-76 (1993)

U.S. 940 (1971); *Justice v. NCAA*, 577 F. Supp. 356, 379-383 (D. Ariz. 1983); *Gunter Harz Sports Inc. v. United States Tennis Assn.*, 511 F. Supp. 1103, 1116 (D. Neb.), *aff'd*, 665 F.2d 222 (8th Cir. 1981); *Cooney v. American Horse Shows Assn., Inc.*, 495 F. Supp. 424, 430 (S.D.N.Y. 1980); *Jones v. NCAA*, 392 F. Supp. 295, 304 (D. Mass. 1975); *Kupec v. Atlantic Coast Conference*, 399 F. Supp. 1377, 1380 (M.D.N.C. 1975); *College Athletic Placement Service, Inc. v. NCAA*, 1975-1 Trade Cases ¶ 60,117 (D.N.J.), *aff'd mem.*, 506 F.2d 1050 (3d Cir. 1974); *Association for Intercollegiate Athletics for Women v. NCAA*, 558 F. Supp. 487, 494-495 (D.D.C. 1983)).

(stating that cooperation on "the rules of the game, uniforms and equipment, the dates and locations of each contest, and so on" is obviously necessary to enhance competition and success of the overall enterprise). Indeed, some of Petitioner's own *amici* agree that core sports league standard setting does not inhibit economic competition and cannot violate Section 1. As the United States explains in its brief:

> Under [the government's proposed] test, single-entity treatment will be appropriate in the sports-league context in some but not all situations. For example, teams do not compete in establishing the rules of on-field play, but rather have effectively merged their operation with respect to such decisions. So long as decisions in this sphere do not affect actual or potential competition among the teams in other areas, then conduct establishing the "rules defining the condition of the contest," *NCAA*, 468 U.S. at 117, is reasonably viewed as that of a single entity. Similarly, the league may act as a single entity when hiring referees or establishing the structure of the central administrative staff.

U.S. Br. 19-20; *see also* Economists Br. 12, 17-22 ("Economics research concludes that league activities that are standards, such as schedules, playing rules [and] other behavioral rules for participants increase consumer welfare").

In light of the substantial experience that the lower courts have accumulated in dismissing antitrust challenges to "core" league activities that are necessary to create or govern the league's athletic

competition, and the consensus that such activities do not pose any threat to economic competition, this Court should hold that sports league rulemaking in those areas should presumptively be treated as the action of a single league entity.

B. Focus On "Merged Operations" and League Structure or Integration Is Unduly Narrow and Formalist

There are likely to also be situations in which a sports league is properly regarded as a single entity because the league members are acting in an area in which all actual or potential economic competition between league members was extinguished upon formation of the league. While the test offered by the United States recognizes this possibility, that test is inappropriately narrow. In suggesting that sports leagues should be seen as single entities only when their joint operations can be analogized to the joint operations present in *Dagher* and similar cases, the government test ignores the "standard setting" functions in which all sports leagues engage regardless of the level of integration in their operations and corporate structure. And while the government's proposed test might be useful in analyzing league activities that are innovative or unfamiliar to a court, or in circumstances where a league has merged what might historically be preexisting economically competitive functions, in many instances such an analysis would be superfluous and unnecessary. In some cases, the "merged operations" test might needlessly subject to Section 1 scrutiny sports league standard-setting that, while not the product of actually "merged" operations, still fails to eliminate preexisting economic competition.

For example, the fact that a hypothetical football league might not collectively purchase equipment does not indicate that its members are regulating independent, economically competitive interests when they agree on mandatory equipment specifications, such as the height of goal posts or the impermissibility of utilizing webbed gloves. Nor does that fact that NCAA Division I men's basketball does not have "merged" scheduling operations indicate that NCAA rules creating the season – i.e., setting the start and end dates for league play, scheduling postseason championships, and setting the number of games to be played against which of teams or categories of teams – eliminate economic competition. The government's proposed test, unfortunately, could require Section 1 scrutiny of these sorts of rules, and other "core league functions," unless the league in question had sufficiently merged its members' actual operations on the aspects of athletic competition the league is regulating.

As Petitioner and its *amici* concede, sports leagues are created with many different forms and structures, with varying levels of centralization. Pet. Br. at 43-44; Economists Br. at 21-28. The structure of the major sports leagues currently operating in the United States is too diverse – and the distinctions between their governance forms and operations too far removed from the concerns of antitrust – for league structure to be given any significant weight in the *Copperweld* analysis.

Consequently, nothing useful to the proper application of *Copperweld* can be gleaned from the fact that current league members may, at a point in the past, have been members of different leagues that

engaged in economic competition against one another. Many current major American sports leagues are composed of members who at one time were members of different, competing leagues. The current NFL has teams who were, at one time, members of the competing American Football League; the current NBA has teams who were, at one time, members of the competing American Basketball Association; the current NHL has teams who were, at one time, members of the competing World Hockey Association; and the NCAA regularly admits member institutions who previously had been members of other sporting associations, such as the National Association of Intercollegiate Athletics. Nathan Scott, *Take Us Back to the Ball Game: The Laws and Policy of Professional Sports Ticket Prices*, 39 U. Mich. J.L. Reform 37, 53-55 (2005) (recounting histories of the NBA and American Basketball Association, NHL and World Hockey Association, and the NFL and the American Football League); Peter C. Carstensen and Paul Olszowka, *Antitrust Law, Student-Athletes, and the NCAA: Limiting the Scope and Conduct of Private Economic Regulation*, 1995 Wis. L. Rev. 545, 555 n. 26 (1995) (noting that National Association of Intercollegiate Athletics members have joined the NCAA). The fact that these league members had been engaged in extra-league competition in the past says nothing useful – and certainly should not be determinative, as Petitioner would have it – on the question whether their current joint activities as league members are properly seen as the actions of a single entity.

Similarly, proper application of the *Copperweld* doctrine should not focus or hinge on the question whether the sports league in question has achieved some generic, threshold "integration" of its operations,

apart from the integration represented by the league action that is being challenged. Put another way, a sports league should not have to show that it has achieved an arbitrary, general level of "integration" before it is eligible to have specific rules or actions considered for application of the *Copperweld* doctrine. There is a wide diversity of approaches to league integration. The NCAA, NFL, NBA, NHL and MLB are all structured as "leagues of leagues" in which league-wide competition, and eligibility for championships, are channeled to a greater or lesser degree through divisional or conference structures that focus competition between certain subsets of the league's teams. The precise role that these divisional or conference entities play in the league's overall competition varies quite a bit from league to league. While regular season cross-conference play is common in the NHL and NBA, it is rare (and until recently was nonexistent) in Major League Baseball. Similarly, while the NFL mandates that its championship game feature a team from the National Football Conference playing a team from the American Football Conference, the NCAA structures its Men's Basketball Championship in a way that permits any two teams – including teams from the same conference – to play each other in the championship game.[12] There is no one-size-fits-all conception of a "league" that can be used to determine whether application of *Copperweld* is potentially appropriate to a sports league rule or action. Instead, the specific rule or action in question

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[12] NFL, *Rookie FAQs*, http://www.nfluk.com/about-the-game/rookies_faqs.html (last accessed November 22, 2009); NCAA, *Principles and Procedures for Establishing the Bracket*, available at http://www.ncaa.com/sports/m-baskbl/champpage/m-baskbl-div1-index.html (last accessed November 22, 2009).

must be analyzed to determine whether it results in the reduction of potential or actual competition among league members.

There is no support, in *Copperweld* or any of this Court's other precedents, for holding that *Copperweld* may never be applied to a specific sports league rule or joint venture action merely because the league or venture in question had not achieved some threshold level or form of integration outside of the rule or action in question.

CONCLUSION

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

Respectfully Submitted,

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