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

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BRIEF FOR THE NFL RESPONDENTS

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QUESTION PRESENTED

Section 1 of the Sherman Act applies only to a "'contract, combination . . . or conspiracy' between *separate* entities" to restrain trade. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768 (1984) (quoting 15 U.S.C. § 1). In *Copperweld*, this Court held that because their coordinated activities do not "deprive[] the marketplace of . . . independent centers of decisionmaking" or "represent a sudden joining of two independent sources of economic power previously pursuing separate interests," a parent company and its separately incorporated subsidiary constitute a single entity for Section 1 purposes. *Id.* at 769, 771. The question presented is:

Whether, consistent with the principles articulated in *Copperweld*, a professional sports league and its separately owned member clubs, which exist to produce collectively an entertainment product that no member club could produce on its own, function as a single entity for Section 1 purposes in promoting that product.

CORPORATE DISCLOSURE STATEMENT

The NFL Respondents have one amendment to update the Corporate Disclosure Statement included in their response to the petition for certiorari: "Pittsburgh Steelers Holdings Inc. (Pittsburgh Steelers LLC)" should be substituted for "Rooney Enterprises, Inc. (Pittsburgh Steelers Sports, Inc.)."

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INTRODUCTION

This case involves application of Section 1 of the Sherman Act, 15 U.S.C. § 1, which prohibits contracts, combinations, and conspiracies between separate entities—"independent sources of economic power," in the words of *Copperweld*—that unreasonably restrain trade.

The assertedly separate entities here are the 32 member clubs of the National Football League ("NFL"), the League itself, and the clubs' wholly owned licensing company. The NFL clubs are separate as a formal matter. But they are not and have never been independent sources of economic power.

Their function, material value, and reason for existence all are dependent on their membership in the NFL and their joint production of NFL Football.

A sports league creates a product that none of its member clubs could create by itself: a structured series of athletic contests, with win-loss records and playoffs, that leads to a championship. Through that product, the member clubs compete as a unit in the entertainment marketplace.

That type of collaboration—between clubs inherently unable to produce their joint product alone—is not a contract of the kind that Section 1 was intended to address. The antitrust laws encourage and protect such internal collaboration; they do so to promote interbrand competition, which in turn enhances consumer welfare.

For nearly fifty years, the NFL has promoted its entertainment product through collective, integrated licensing of the names, marks, colors, and logos of its member clubs, all of which derive their economic value from their association with NFL Football. Petitioner enjoyed the benefits of that integrated licensing for decades. But when the NFL decided to promote its product through an exclusive license granted to a different manufacturer, Petitioner brought a Section 1 challenge to that decision. The Seventh Circuit recognized that the League's decision reflected the action of a single economic entity, and on that basis it affirmed summary judgment rejecting Petitioner's claims.

STATEMENT OF THE CASE

A. The National Football League

The National Football League is an unincorporated association of 32 member clubs (collectively, "the NFL"). J.A. 89, 136. The modern NFL was created in 1970 by a merger of the American Football League ("AFL"), then consisting of ten member clubs, and the National Football League, then consisting of sixteen member clubs. *See* Pub. L. No. 89-800, 80 Stat. 1508, 1515 (Nov. 8, 1966), codified at 15 U.S.C. § 1291.

The NFL produces an entertainment product known as NFL Football, an annual, integrated series of more than 250 football games leading to playoffs and culminating in the Super Bowl championship game. J.A. 125, 137-38, 214.

Because the League's entertainment product consists of competition itself, in the form of a structured series of athletic contests between separate teams, each member club is inherently incapable of generating on its own a single unit of production (a single game). J.A. 125-27, 138, 191, 214. Although separately owned to ensure that their athletic contests are perceived as legitimate, every NFL member club is integrally and inherently dependent upon every other member club to create NFL Football. J.A. 125-27, 138-39, 177-81, 191.

The clubs compete on the field but they do not jockey among themselves for market share in the production of NFL Football. To the contrary, they engage in extensive revenue and cost sharing, and they invest in each others' stadiums, all in an effort to enhance the ability of their product to compete against other forms of entertainment. J.A. 125-27, 137-39; CB 1999 Res. G-3.[1]

Virtually every significant decision about the production and promotion of NFL Football is controlled by the League, either (a) by three-quarters vote of the NFL's Executive Committee (composed of one representative of each member club) or delegation to its Commissioner; or (b) by club-level decisions within a structure and subject to terms prescribed by the League. J.A. 138, 198-99, 287-303; CB Art. 6. No contract involving a "substantial commitment by the League or its members" can take effect without approval of the Executive Committee. J.A. 290.

These collective decisions define NFL Football. For example, the League controls *where* its entertainment product is produced. Each club is assigned a home territory in which it plays its home games and seeks to foster fan loyalty. This assignment also dictates where eight other clubs play away games during a season. J.A. 138, 199; CB Art. 4. Such assignments shape NFL Football by developing and sustaining allegiances to individual teams and fostering regional and national rivalries. J.A. 132-33, 137-38; CB Art. 4. For instance, the League's decision that the Washington Redskins and the Dallas Cowboys will play each other twice (and only twice) each regular season, and the ongoing rivalry associated with that scheduling choice, is an integral part of the creation and presentation of NFL Football.

NFL Football is further defined by the League's decisions about *when* its entertainment product will

[1] Excerpts from the NFL Constitution and Bylaws ("CB") are included in the Joint Appendix. The entire document is available at www.nfl.com/help/faq.

be produced. The League sets the schedule of regular season and playoff games and decides, based on the League's interests, which club match-ups will be featured in the prime-time broadcast windows. J.A. 138, 199; CB Arts. 13, 20-21; CB 1998 Res. BC-4.

The League similarly controls *who* will join in the production of NFL Football. Ownership of a club may not be assigned or sold without approval of the League's Executive Committee. J.A. 138, 199, 276-77. Moreover, the member clubs periodically create new member clubs to join with them in the production of NFL Football. J.A. 129, 138-43, 270. In each case, the new club receives a *pro rata* share of the existing clubs' collective revenue streams, an assignment of players to stock its roster, and a *pro rata* ownership interest in all league assets, including NFL intellectual property, league contractual rights, and NFL Properties LLC. J.A. 138-39, 143, 283; Dist. Ct. Doc. 101 at 189; CB Art. 10.3; CB 1999 Res. EC-1.

NFL Football is further defined by the League's decisions about *how* its entertainment product will be produced, including, for example, the rules and length of the game, the equipment to be used, the number and identity of the game officials, and the playoff format. J.A. 138, 199, 289-90; CB Arts. 4.4(F), 11, 19-22. And, as further described below (at pp. 6-9), the League controls how NFL Football will be promoted.

The League also controls the overall conduct and business decisions of its member clubs. J.A. 198-99. Among other things, the League requires each member club not to engage in "conduct detrimental to the welfare of the League or professional football." The Commissioner has authority to fine and otherwise sanction member clubs that violate that requirement. J.A. 291-301.

The unitary nature of the League's product and the interdependence of its member clubs are reflected in the clubs' sharing over 80 percent of their revenues. J.A. 138-39. These arrangements afford all member clubs, in markets large and small, comparable opportunities to acquire the resources necessary to compete effectively on the football field. This, in turn, increases competitive balance—the likelihood of close games and uncertain championship races—thereby improving the quality and appeal of NFL Football. J.A. 139.

The business of the NFL member clubs is the production and promotion of their joint entertainment product. J.A. 285. Accordingly, each club's economic value derives from its membership in the NFL and its role in the production of NFL Football. J.A. 125-27.

B. NFL Intellectual Property

The intellectual property of the NFL and its member clubs, which is regulated by the Constitution and Bylaws of the League itself, *see, e.g.*, CB Arts. 4.4, 19.8, 19.9, is an integral part of NFL Football. For example, the competition on the field features the clubs' names, the logos that adorn the players' uniforms, the uniform designs, and each club's official colors. Production of NFL Football requires the collective deployment of this intellectual property; no club alone could supply the intellectual property necessary to produce a single NFL game.

The clubs' intellectual property derives its value from the production of NFL Football. J.A. 125-27. Consumers buy hats, shirts, and other goods bearing club marks—*e.g.*, a blue star on a silver background (the Dallas Cowboys), the letter G in a green oval (the Green Bay Packers), a turquoise dolphin wearing a football helmet (the Miami Dolphins)—not because those symbols have intrinsic value or independent appeal, but rather because they represent affiliation with an NFL team. J.A. 137-38. As Petitioner's president testified by declaration, fans purchase these products to "express their support for, or affinity with, a particular [t]eam." J.A. 264; *see also id.* (relative popularity of club's marks depends in part on its "longevity as a member of the League"). Standing alone, a logo consisting of a silver background and a blue star would have no material value. J.A. 125-27.

To protect and deploy its jointly generated value, the League (sometimes acting through NFL Properties, as described below) controls the use of this intellectual property. For example, the League assigns the member clubs official colors, takes the lead in developing and registering the marks of any new member club, and must approve any changes in a club's name, marks, or logos. J.A. 137-43; CB Art. 19.9. Thus, when the club that had previously played in Cleveland moved to Baltimore, it was required to leave behind the Cleveland Browns "name, logo, trademarks, heritage, history and memorabilia" for use by a new club, to be created jointly by the then-existing member clubs, that was to begin play in Cleveland several years later. CB 1996 Res. G-1.

League and club marks and logos are necessary not only for the production of NFL Football but also for its promotion. J.A. 137-38. Reflecting the League's judgment that coordinated, nationwide promotion of every member club is necessary for the success of

NFL Football, almost every aspect of League and club operations relating to intellectual property—including licensing of marks for use on apparel—is integrated and collectively pursued. J.A. 128-30, 137-41, 144. The NFL member clubs "may not separately license identifying marks for use on apparel products." J.A. 144. Instead, the League sells only a "complete package" of marks and "requires each apparel licensee to manufacture, distribute and sell on a national basis product lines bearing, in the aggregate, the marks identifying all member clubs." J.A. 139, 203.

Recognizing that their intellectual property derives its value from and serves to promote NFL Football, the clubs share equally in the revenues and costs associated with those licensing efforts. J.A. 138-39. Even though each club formally owns its own marks, royalties from products bearing the mark of a single club are shared equally among all thirty-two. J.A. 138-39. The clubs thus share, for example, the rewards of increased demand for licensed products associated with the Super Bowl champion and the risks of diminished demand for products associated with teams that fail to make the playoffs. J.A. 264 (relative popularity of products bearing a club's marks depends in part on the club's "recent success on the field"); *cf.* J.A. 538 (licensed merchandise with Steelers logos "selling at a record pace" because of Super Bowl victory).

For nearly fifty years, the League's centralized licensing efforts have been conducted by NFL Properties, an entity owned and controlled by the member clubs on an equal basis. J.A. 126, 136-37. NFL Properties' purpose is to promote NFL Football—to "enhance the ability of the NFL to compete with other entertainment providers by increasing the visibility of NFL Football, promoting loyalties, and fostering rivalries that are integral to the success of that product." J.A. 138. That purpose is reflected in NFL Properties' Articles of Incorporation, which expressly define its function: "to conduct and engage in advertising campaigns and promotional ventures on behalf of the NFL and the member teams." Pet. App. 18a (brackets omitted).

To fulfill its purpose, NFL Properties undertakes activities, including marketing and trademark protection efforts, that serve to "enhance overall fan interest in NFL Football across the nation." J.A. 141. These activities include serving since its formation as the exclusive representative of the League and its member clubs in licensing their marks and logos (with limited exceptions for local advertising and local sponsorships). J.A. 128, 137, 144-45; *see also, e.g.*, J.A. 321-22 (sample of clubs' grant of exclusive licenses to NFL Properties, with special provisions concerning matters such as local advertising); 350-51, 357, 381-85, 387 (Trust agreement and license agreement between Trust and NFL Properties). Through these activities, NFL Properties has "contributed to the success, popularity, and growth of NFL Football over the past 40 years." J.A. 144.[2]

[2] As part of the League's promotional efforts, the member clubs have also been delegated limited rights to distribute (or sell) merchandise bearing their own marks. J.A. 208. The distributing/selling club is permitted to keep the mark-up (an extra incentive to promote NFL Football), *see* J.A. 542, but as with all NFL-licensed products, the clubs share equally in the licensing revenues associated with such merchandise. J.A. 138-39 ("royalties associated with a Green Bay Packers cap . . . are divided equally among all 32 member clubs").

C. American Needle's Headwear License

Petitioner American Needle, Inc. ("ANI") manufactures hats and caps. J.A. 61. For decades, ANI was one of several companies that obtained from NFL Properties a blanket license to manufacture headwear incorporating the marks and logos of all NFL clubs. J.A. 62, 139-40, 263-65.

In 2000, NFL Properties decided to issue only a single headwear license. Bids were solicited from numerous then-current and prospective licensees, including ANI. Reebok International Ltd. ("Reebok") won the bidding, and NFL Properties granted an exclusive headwear license to Reebok in 2001. J.A. 62-63. ANI's license, which expired the same year, was not renewed. J.A. 63.

D. Course of Proceedings and Disposition Below

1. District Court Proceedings

Petitioner filed this suit in the United States District Court for the Northern District of Illinois on December 1, 2004, naming as defendants the NFL, 30 of its 32 member clubs, NFL Properties, and Reebok. J.A. 54-60.

Petitioner explicitly disclaimed any challenge to (i) the formation of the NFL or NFL Properties, (ii) NFL Properties' acting as the exclusive licensor for NFL and member club intellectual property, and (iii) NFL Properties' decision to offer that intellectual property for use on headwear only through a blanket license. *See generally* Dist. Ct. Doc. 93 at 25; ANI Ct. App. Br. 39-40; Pet. App. 4a; J.A. 256.

Petitioner challenged only the "December 2000 [decision of the] NFL, NFLP, and the individual NFL

Teams . . . to grant an exclusive license to a single marketer of apparel and headwear," and the subsequent 2001 decision of "NFLP, in combination with the NFL Teams and the NFL," to "grant [that] exclusive license to Reebok." J.A. 62-63. Petitioner claimed that these decisions violated Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2. J.A. 64-66; Dist. Ct. Doc. 93 at 25 ("[T]he creation of [Reebok's] exclusive license . . . is the only conduct alleged to have been unlawful.").

The NFL Defendants moved for summary judgment on the ground that, in collectively licensing their names, marks, and logos, they function as a single entity and do not constitute the plurality of separate economic entities required for a Sherman Act conspiracy. Dist. Ct. Doc. 47.

After discovery addressing the single-entity issue, the district court (Moran, J.) agreed. Relying principally on *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984), and *Chicago Professional Sports Limited Partnership v. National Basketball Ass'n*, 95 F.3d 593 (7th Cir. 1996) (*"Bulls II"*), the court approached the single entity analysis by focusing on the "facet" of league operations at issue: the collective licensing and marketing of league and club names, marks, and logos.

The district court found that the member clubs' "cooperative marketing does serve to promote NFL football," and held that the "undisputed" facts "lead undeniably to the conclusion that the NFL and the teams act as a single entity in licensing their intellectual property." J.A. 259-60; *see also* J.A. 260 ("The economic reality is that the separate ownership[] [of the member clubs] had no economic significance . . . .").

On that basis, the court granted summary judgment for defendants on those of Petitioner's claims premised on a conspiracy or agreement among the NFL, NFL Properties, and the member clubs. J.A. 260-61. The district court later granted summary judgment for defendants on the remaining Section 2 claims, holding that a single entity that "own[s] or control[s intellectual] property can license to one or many without running afoul of the antitrust laws." Pet. App. 21a.

2. Court of Appeals Proceedings

The United States Court of Appeals for the Seventh Circuit (Kanne, Sykes, and Tinder, JJ.) unanimously affirmed. Pet. App. 1a.

The court began its analysis by noting that the Seventh Circuit had "embraced the possibility that a professional sports league *could* be considered a single entity under *Copperweld.*" Pet. App. 13a (citing *Bulls II*, 95 F.3d at 598). The court then implemented *Bulls II*'s holding that the single entity determination "should be addressed not only 'one league at a time,' but also 'one facet of a league at a time.'" *Id.* (quoting *Bulls II*, 95 F.3d at 600).

Rejecting the premise "that the NFL teams can be a single entity only if the teams have 'a complete unity of interest,'" *id.* at 15a (quoting *Bulls II*, 95 F.3d at 598), the court framed the single-entity question as "whether the conduct in question deprives the marketplace of the independent sources of economic control that competition assumes." *Id.*

The court recognized that "the NFL teams can function only as one source of economic power when collectively producing NFL football." *Id*. at 16a. And it observed that "the record amply establishes" that "the NFL teams have acted as one source of economic power—under the auspices of NFL Properties—to license their intellectual property collectively and to promote NFL football." *Id.* at 17a.

Accordingly, the court concluded, ANI's "assertion that the NFL teams have deprived the market of independent sources of economic power unravels." *Id.* at 16a. The court held that "only one source of economic power controls the promotion of NFL football": "the NFL teams are best described as a single source of economic power when promoting NFL football through licensing the teams' intellectual property." *Id.* at 16a-18a.

The court also affirmed the district court's grant of summary judgment on ANI's remaining Section 2 claims, holding that "[a]s a single entity for the purpose of licensing, the NFL teams are free under § 2 to license their intellectual property on an exclusive basis." *Id.*[3]

SUMMARY OF ARGUMENT

Drawing a fundamental distinction between concerted and independent action, the Sherman Act limits coordination among independent sources of economic power, but it takes care not to chill competition by a single firm. As this Court observed in *Copperweld*, inherent in that distinction is recognition that economic realities, not matters of form, dictate whether the burdens of Section 1 scrutiny should apply to conduct that in substance is that of a single economic entity.

[3] The Court of Appeals also rejected ANI's challenge to the district court's discovery rulings. Pet. App. 9a-11a. That issue, as well as the appellate court's holding on the Section 2 claims, is not before this Court.

A professional sports league like the NFL is not a collaboration among independent sources of economic power. A sports league produces a single entertainment product, a structured series of athletic competitions leading to a championship, that no member club could produce on its own, and it competes as a unit against other entertainment producers. Accordingly, a sports league can and should be regarded as a single entity for purposes of Section 1 in at least some aspects of its operations.

Because the NFL and its member clubs function as one source of economic power when collectively producing NFL Football, they also function as a single economic entity in promoting that product, including through the collective licensing of their intellectual property. As undisputed evidence confirmed, such intellectual property is an integral part of the production of NFL Football as well as its promotion; it derives its economic value from that production and promotion; and it has, for decades, been employed collectively for promotional purposes, including through blanket licenses for use on headwear.

Petitioner's contrary position, that every business decision of a professional sports league is subject to Section 1 scrutiny, is not supported by this Court's precedents. Because the member clubs are not independent sources of economic power, their collaboration differs from that of traditional joint ventures among actual (or potential) competitors like those addressed in *BMI* and similar cases. And collaboration *within* a league to produce a joint product differs from agreements *between* leagues of the kind addressed by this Court in *NCAA* and *Radovich* (and to which Section 1 unquestionably applies).

The NFL's internal decisions about how to produce and promote NFL Football, like the decisions of the venture in *Dagher* about how to market and price its products, are not and should not be subject to the burdens of Section 1 scrutiny. That is true even if the League's members do not share a complete unity of interests. Law partners or nearby stores in the same chain may have competing interests, but that does not imply that their internal agreements should be treated as conspiracies potentially in restraint of trade.

Legislative developments after enactment of the Sherman Act do not suggest a different result. The Sports Broadcasting Act and the Curt Flood Act were explicitly and narrowly limited; neither reflected a view that Section 1 applies or should apply to the production and promotion of a league's entertainment product. And any effort to divine such a view from unenacted legislation would be unfounded; over the years, Congress has failed to enact not only bills seeking to exclude from Section 1 the internal decisions of sports leagues, but also bills seeking affirmatively to place such decisions within Section 1's scope.

The government recognizes that a sports league functions as a single entity in some facets of its operations, but it proposes a supplemental test that is neither helpful nor necessary. *Copperweld* focuses on whether venture members are independent sources of economic power, not on which aspects of their operations are or are not "effectively merged." And it would chill interbrand competition to engage in *post hoc* evaluations of a legitimately formed venture's decisions about how best to produce and promote its product. If a league's formation or its nonventure activities are challenged, existing precedent provides straightforward standards to resolve such questions.

Petitioner challenged only the League's decision in 2000 to replace several headwear licensees with a single licensee; it disclaimed any challenge to the formation of the NFL or NFL Properties, or to the League's decades-old decision to license its intellectual property only through a blanket license from a single source. As demonstrated by the undisputed record evidence and confirmed by the perspective of those licensees, that decision was the act of a single economic entity.

ARGUMENT

I. THE NFL'S DECISION ABOUT HOW BEST TO PROMOTE NFL FOOTBALL IS THE DECISION OF A SINGLE ENTITY.

The antitrust laws draw a "basic distinction between concerted and independent action." *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 761 (1984). Concerted action, addressed by Section 1 of the Sherman Act, involves "unreasonable restraints of trade effected by a 'contract, combination . . . or conspiracy' between *separate* entities." *Copperweld*, 467 U.S. at 768. Independent action—the action of a single economic entity—is governed by Section 2 of the Act, which deems such conduct unlawful only if it "threatens actual monopolization." *Id*. at 767.

The "central evil" addressed by Section 1 is the "elimina[tion of] competition that would otherwise exist." VII Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 1462b at 193-94 (2d ed. 2003). That is because concerted behavior

> deprives the marketplace of the independent centers of decisionmaking that competition assumes and demands. In any conspiracy, two or more entities that previously pursued their own inter-

> ests separately are combining to act as one for their common benefit. This not only reduces the diverse directions in which economic power is aimed but suddenly increases the economic power moving in one particular direction.

Copperweld, 467 U.S. at 769.

The Sherman Act's different, and less stern, treatment of unilateral conduct reflects the statute's fundamental purpose of encouraging, rather than inhibiting, competition among independent firms for the benefit of consumers. *Id.* at 767-69, 775-76; *see also Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 890 (2007). Because the conduct of a "single aggressive entrepreneur" may enhance, rather than restrain, "precisely the sort of competition that promotes the consumer interests that the Sherman Act aims to foster," this Court has recognized that care must be taken not to chill "[c]oordination within a firm" that "may be necessary if a business enterprise is to compete effectively." *Copperweld*, 467 U.S. at 767-69; *see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 594 (1986) (standards that permit an inference of concerted conduct when none should be found are "especially costly" because of their chilling effect).

This "logic underlying Congress' decision to exempt unilateral conduct from § 1 scrutiny," 467 U.S. at 776, was addressed by *Copperweld* in a specific context: "whether the coordinated acts of a parent and its wholly owned subsidiary can, in the legal sense contemplated by § 1 of the Sherman Act, constitute a combination or conspiracy." *Id.* at 759.

As a threshold matter, the *Copperweld* Court emphasized that "substance, not form, should determine" the answer, and it refused to endorse any approach that "looks to the form of an enterprise's structure and ignores the reality." *Id.* at 772, 773 n.21. It recognized that the intraenterprise conspiracy doctrine—which held that agreements between any legally distinct entities, including parents and subsidiaries, could be subject to Section 1 scrutiny—gave "undue significance" to corporate form and, as a result, "treat[ed] as . . . concerted activity . . . what is really unilateral behavior flowing from decisions of a single enterprise." *Id.* at 766-67.

The Court made clear that "separate incorporation does not necessarily imply a capacity to conspire," *id.* at 773 n.21, and it emphasized that "a business enterprise should be free to structure itself in ways that serve efficiency of control, economy of operations, and other factors dictated by business judgment without increasing its exposure to antitrust liability," *id*. at 773; *see also id.* at 771 ("[A] rule that punished coordinated conduct simply because a corporation delegated certain responsibilities to autonomous units . . . would serve no useful antitrust purpose but could well deprive consumers of the efficiencies that decentralized management may bring.").[4]

The *Copperweld* analysis built on this Court's decision in *Sunkist Growers, Inc. v. Winckler & Smith*

[4] As the government pointed out in *Copperweld*, "[t]he difficulty with the intraenterprise conspiracy doctrine is that it evaluates conduct *within a single competitive unit* by the stringent standard for conspiracy cases, simply on the basis of an enterprise's choice of corporate form." U.S. Br. on Pet. at 8, *Copperweld*, 467 U.S. 752 (No. 82-1260) (emphasis added).

Citrus Products Co., 370 U.S. 19 (1962), in which the Court refused to rely on "organizational distinctions" among separately incorporated associations of citrus growers when asked to deem their cooperative marketing efforts subject to Section 1. *Id.* at 29.[5] The Court recognized that the growers were "in practical effect . . . one 'organization' or 'association' even though they have formally organized themselves into three separate legal entities" that did not share identical ownership. *Id.* As Professor Areeda wrote shortly before *Copperweld* was decided, *Sunkist*'s "denigration of organizational form as an antitrust consideration is so clear, straightforward, and compelling that there is no good reason to limit it [to agricultural settings]." Phillip Areeda, Comment: *Intraenterprise Conspiracy in Decline*, 97 Harv. L. Rev. 451, 461 (1983).

This Court had followed a similar approach in *United States v. Citizens & Southern National Bank*, 422 U.S. 86 (1975), a case involving separately incorporated banks in which a bank holding company had only modest ownership interests. As Professor Areeda described, the Court there "looked to economic substance" and concluded that "because the sponsored banks were not set up to be competitors, section 1 did not compel them to compete." Areeda, *Intraenterprise Conspiracy in Decline*, 97 Harv. L. Rev. at 461.

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[5] Although *Sunkist Growers* arose in the context of the Capper-Volstead Act, which affords immunity from Section 1 to agricultural organizations, the Court emphasized that it was "squarely presented" with the question "whether . . . the three legal entities" formed by the growers "can be considered independent parties for the purposes of the conspiracy provisions of §§ 1 and 2 of the Sherman Act." 370 U.S. at 27.

The *Copperweld* Court similarly observed:

> The existence of an unincorporated division reflects no more than a firm's decision to adopt an organizational division of labor. A division within a corporate structure pursues the common interests of the whole rather than interests separate from those of the corporation itself; a business enterprise establishes divisions to further its own interests in the most efficient manner. Because coordination between a corporation and its division *does not represent a sudden joining of two independent sources of economic power previously pursuing separate interests, it is not an activity that warrants § 1 scrutiny*.

467 U.S. at 770-71 (emphasis added). Applying that logic to a corporation and its legally separate but wholly owned subsidiary, which had "objectives [that] are common, not disparate," the Court held in *Copperweld* that "there is no justification for § 1 scrutiny." *Id.* at 771.

The question presented here is whether the same principles apply to a professional sports league, a single competitive unit that "structures itself" as an association of separately owned member clubs in order to produce and promote a product that no member club can produce on its own.

A. A Professional Sports League Can and Should Be Regarded as a Single Entity in at Least Some Aspects of Its Operations.

Starting with the premise that "all agreements between separately owned and controlled entities operating in interstate commerce" are "within the sweep of Section 1," Petitioner contends that every business decision of a professional sports league is subject to Section 1 scrutiny. Pet. Br. 10, 17; *see also id.* at 17-21.

That premise, which would convert every league of separately owned clubs into a walking antitrust conspiracy, ignores the core principle underlying *Copperweld*: Section 1 focuses on agreements between and among "independent sources of economic power previously pursuing separate interests." The separate ownership of the member clubs (the league's "form") says nothing about whether they are independent sources of economic power, especially given that each is inherently incapable of creating on its own the product that results from their collaboration. *Copperweld*, 467 U.S. at 772, 773 n.21; *see also City of Mt. Pleasant v. Associated Elec. Coop., Inc.*, 838 F.2d 268, 276 (8th Cir. 1988) (rejecting "analysis solely in terms of legal ownership and control").

1. There is "no reason why a sports league *cannot* be treated as a single firm in [a] typology" that allocates an organization or an aspect of its operations to "the 'unilateral' side" or to the "'concerted' side of the line" based on functional principles that reflect the objectives of Section 1. *Bulls II*, 95 F.3d at 598. Accordingly, the Seventh Circuit adopted in *Bulls II* and applied here an approach that "ask[s] *Copperweld*'s functional question one league at a time—and perhaps one facet of a league at a time." *Bulls II*, 95 F.3d at 600; Pet. App. 13a.

The government concurs with that general approach, arguing that the "NFL and its member teams should be regarded as a single entity for some but not all aspects of the league's operations." U.S. Br. 13; *see also id.* at 6-7, 19-20. Numerous commentators agree. *See, e.g.*, VII Areeda & Hovenkamp, *Antitrust Law*

¶ 1478d at 332 (urging "focus on the particular rule under antitrust scrutiny"); Gregory J. Werden, *Antitrust Analysis of Joint Ventures: An Overview*, 66 Antitrust L.J. 701, 705 (1998) (NFL "acts as a single entity" for some but not all purposes).

2. The structure of a professional sports league has distinct characteristics. For example, to use Professor Areeda's language, the member clubs of the NFL, though separately owned, "were not set up to be competitors" except on the football field. Areeda, *Intraenterprise Conspiracy in Decline*, 97 Harv. L. Rev. at 461. They were instead set up to "produce[] a single product" as to which "cooperation is essential (a league with one team would be like one hand clapping)." *Bulls II,* 95 F.3d. at 598-99. *Accord* Robert H. Bork, *The Antitrust Paradox* 278 (1978) ("[S]ome activities can only be carried out jointly. Perhaps the leading example is league sports.").

As a result, even if separately owned as a formal matter, a member club of a professional sports league "is not the firm as understood in economic theory." Walter C. Neale*, The Peculiar Economics of Professional Sports,* 78 Quar. J. of Econ. 1, 4 (Feb. 1964); *see also id.* at 2, 6, 13. "Rather, the firm is the league," and "only a single league can produce that most useful of all products joint, the World Champion." *Id.* at 4, 6. The teams compete on the playing field, but in an economic sense "they combine in a single firm." Simon Rottenberg, *The Baseball Players' Labor Market*, 64 J. Political Econ. 242, 255 (Jun. 1956); *see also* Bork*, supra*, at 278 ("the league is best viewed as being the firm").

As Justice Rehnquist pointed out, the NFL "competes *as a unit*" against "sports and other forms of entertainment in the entertainment market." *Nat'l*

Football League v. N. Am. Soccer League, 459 U.S. 1074, 1077 (1982) (Rehnquist, J., dissenting from denial of certiorari) (emphasis added). "Although individual NFL teams compete with one another on the playing field, they rarely compete in the market place." *Id*.[6]

As a result of the league structure, "transactions that in virtually any other industry would occur within a single organization instead take place between separate organizations (teams)." George G. Daly, *The Baseball Player's Labor Market Revisited*, *reprinted in Diamonds Are Forever: The Business of Baseball*, at 18 (Paul M. Sommers ed., 1992). But that fact has no antitrust significance for a legitimately formed league, which "should be free to structure itself in ways that serve efficiency of control, economy of operations, and other factors dictated by business judgment"—even if the structure involves separate ownership of its member clubs—"without increasing its exposure to antitrust liability." *Copperweld*, 467 U.S. at 773.[7]

Accordingly, the consumer welfare premise of the antitrust laws—recognition that "consumers will ben-

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[6] An entrepreneur could establish a squad of players to engage in barnstorming or *ad hoc* exhibitions (as do the Harlem Globetrotters), but structured league competition, involving a series of games leading to a common championship, represents "a vastly different" product. *Major League Baseball Props., Inc. v. Salvino, Inc*., 542 F.3d 290, 296 (2d Cir. 2008).

[7] The formation of a professional sports league, like that of any joint venture, would be subject to antitrust scrutiny. "But in certain respects, a joint venture, once formed, necessarily acts as a single economic entity." Werden, *Antitrust Analysis of Joint Ventures*, 66 Antitrust L.J. at 704. *See generally infra* pp. 38-39, 52.

efit from more economic competition and well-rewarded competitors"—is properly applied at the league level, *i.e.*, to competition between the league and other entertainment providers, but "not at the level of intraleague relations." John C. Weistart, *League Control of Market Opportunities: A Perspective on Competition and Cooperation in the Sports Industry*, 1984 Duke L.J. 1013, 1033; *see also Leegin Creative Leather Prods., Inc.*, 551 U.S. at 890 ("primary purpose of the antitrust laws is to protect [interbrand] competition" (internal quotation marks omitted) (quoting *State Oil Co. v. Khan*, 522 U.S. 3, 15 (1997))).

B. Undisputed Record Evidence Confirms That, in Deciding How Best To Promote Its Entertainment Product, the NFL Acts as a Single Entity.

The district court held that the "undisputed" facts "lead undeniably to the conclusion that the NFL and the teams act as a single entity in licensing their intellectual property." J.A. 260. The Court of Appeals, engaging in *de novo* review, unanimously reached the same conclusion. Pet. App. 16a-18a.

1. Those conclusions flow from the lower courts' determination that "the NFL teams can function only as one source of economic power when collectively producing NFL football," Pet. App. 16a, and they are fully consistent with the government's recognition that the NFL and its member clubs are a single economic entity with respect to at least some production-related activities. U.S. Br. 13, 16-21.

Because no member club is capable of producing the League's entertainment product alone, the member clubs "are interdependent, not independent," in producing NFL Football. *City of Mt. Pleasant*, 838 F.2d at 277; *see supra* p. 3. They therefore are not (and cannot be) "independent sources of economic power." *Copperweld*, 467 U.S. at 771; *see also Brown v. Pro Football, Inc.*, 518 U.S. 231, 248 (1996) ("[T]he [teams] that make up a professional sports league are not completely independent economic competitors, as they depend upon a degree of cooperation for economic survival."). Like the members of the electric cooperative deemed a single entity in *City of Mt. Pleasant*, their economic "power depends, and has always depended, on the cooperation among themselves." 838 F.2d at 277.

2. The promotion of NFL Football no more represents a joinder of independent centers of decision-making than does its production. Internal coordination to market a venture's product is precisely the type of coordination "within an otherwise lawful enterprise" that, after formation, is not subject to additional Section 1 scrutiny. VII Areeda & Hovenkamp, *Antitrust Law* ¶ 1462b at 194; *see, e.g.*, *Sunkist Growers*, 370 U.S. at 29 (growers that "organized themselves into three separate legal entities" were single economic entity, "banded together for processing and marketing purposes," even though "advertising," "sales," and "processing" were undertaken by separate legal entities).

The core of the analysis is not simply that the inherently interdependent clubs compete as a unit against other entertainment providers and that no member club is capable of producing the League's entertainment product alone. It extends to the fact that the clubs' names, marks, and logos are an integral part of the production of NFL Football, from which the clubs and their intellectual property (*e.g.*, the turquoise dolphin with the helmet) derive their value. *See supra* pp. 6-7; *see also, e.g.*, *Univ. of Pittsburgh v. Champion Prods. Inc.*, 686 F.2d 1040, 1047 (3d Cir. 1982) ("entire impetus" for sale of a licensed product is "consumer's desire to identify" with the success of his or her favored team).

At the most basic level, without use of other member clubs' names, marks, and logos, a member club could not sell a game program or display the opposing team's identifying information on signage in its stadium. Integrated use of league and club intellectual property also allows the League (through NFL Properties) to promote, for example, the playoffs and the Super Bowl by licensing the use of both teams' marks on products that engage consumers and encourage them to attend or watch the NFL's showcase events.

Any suggestion that the NFL member clubs may cooperate without Section 1 scrutiny in the production of NFL Football, but not in its promotion, would thus make no sense. Section 1 does not reach, and should not reach, a venture's internal decisions about how to sell or promote its product. *See Texaco Inc. v. Dagher*, 547 U.S. 1, 6-7 (2006) ("no reason to treat Equilon differently just because it chose to sell gasoline under two distinct brands"). As Judge Easterbrook observed in *Bulls II*:

> To say that participants in an organization may cooperate is to say that they may control what they make and how they sell it: the producers of *Star Trek* may decide to release two episodes a week and grant exclusive licenses to show them, even though this reduces the number of times episodes appear on TV in a given market . . . .

95 F.3d. at 598. Any different conclusion would risk chilling internal coordination to improve the quality of the product, thereby diminishing competition among independent entertainment providers to the detriment of consumers. *Copperweld*, 467 U.S. at 767-69; *Matsushita*, 475 U.S. at 594.

3. These principles apply with compelling force here given the extensive, undisputed evidence (i) confirming that the intellectual property of the League and its member clubs exists "to promote NFL Football" and (ii) demonstrating that, for decades, the intellectual property has been used collectively for that purpose.

As the Court of Appeals expressly recognized, there is no dispute that "the NFL teams collectively license their intellectual property" in order to "promote NFL football." Pet. App. 17a; *see also* J.A. 137-38, 141; *supra* pp. 6-9. Indeed, reflecting that common use and purpose, the member clubs share equally any revenues derived from and costs associated with licensed products, even those bearing the mark of a single club. J.A. 138-39. The fact that these licensing activities may generate revenues is not inconsistent with their promotional purpose. Such revenues represent one way in which the member clubs jointly "reap fully the rewards," as well as assume the risks, of their efforts to produce and promote their integrated entertainment product. J.A. 125.[8]

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[8] The government questions whether promotion of NFL Football is "*a* purpose" or "the *sole* purpose" of the League's licensing activities, U.S. Br. 29, but the answer has no practical or antitrust significance. Every fan who dons an NFL-licensed cap or sweatshirt becomes a walking promotion for NFL Football; NFL Football in turn creates demand for NFL-licensed products. League licensing decisions are thus no different from a venture's

For nearly fifty years, NFL Properties, the exclusive licensor of the marks and logos of the League and its member clubs in virtually all circumstances, has served as the "single driver" of that promotional vehicle, "pursu[ing] the common interests of the whole." *Copperweld*, 467 U.S. at 770-71. *See* J.A. 137-39, 141, 144-45, 311, 321, 387; *see also, e.g.*, *Nat'l Football League Props., Inc. v. Wichita Falls Sportswear, Inc.*, 532 F. Supp. 651, 654-55 (W.D. Wash. 1982) (noting history of NFL Properties and its exclusive rights to license club marks); *Nat'l Football League Props., Inc. v. Consumer Enters., Inc.*, 327 N.E.2d 242, 244 (Ill. App. Ct. 1975) (same).

Those promotional activities have included licensing the names, marks, and logos of the League and the clubs for use on apparel. J.A. 125, 137-38, 141, 144-45. The League's decisions about how to conduct those activities, including its decision that the interests of the League and its member clubs were best served by deploying that intellectual property through a single headwear licensee (and the subsequent selection of Reebok over Petitioner to fill that role), therefore represent the conduct of a single economic entity, not separate economic actors. *Copperweld*, 467 U.S. at 771. *See generally* VII Phillip E. Areeda, *Antitrust Law* 355 (1986) ("decisions [of a lawful venture] should be regarded as

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decision to set a price for its product or to determine how its product is sold; each constitutes the action of a single entity. *See Dagher*, 547 U.S. at 6; *Bulls II*, 95 F.3d at 598. That is true even if the entity seeks by its promotional activities to generate revenues directly (*e.g.*, through royalties) as well as indirectly (*e.g.*, through increased game attendance, increased broadcast viewership, or goodwill resulting from committing the revenues to "charitable and educational" causes, J.A. 351).

those of a single entity rather than the parents' daily conspiracy on every purchase-sale-hiring-licensing choice"); *Dagher*, 547 U.S. at 6.[9]

4. The conclusion that the NFL and its member clubs operate as a single economic entity in licensing their intellectual property is fully consistent with the perspective-based approach suggested by the Seventh Circuit in *Bulls II*. There, the court observed that "[f]rom the perspective of fans and advertisers (who use sports telecasts to reach fans), 'NBA Basketball' is one product from a single source even though the Chicago Bulls and Seattle Supersonics are highly distinguishable, just as General Motors is a single firm even though a Corvette differs from a Chevrolet." 95 F.3d at 599; *see also Sunkist Growers*, 370 U.S. at 29 ("There is no indication . . . that outsiders considered and dealt with the three entities as independent organizations.").

From the perspective of the licensees, who for nearly fifty years have known nothing other than integrated, single-source licensing by NFL Properties, J.A. 202; *see also* J.A. 137, 144-45, 203—indeed, from the perspective of Petitioner, which itself engaged in and benefited from such licensing for decades, J.A. 62, 263-65—there can be no question that there is one product from a single source at issue here.

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[9] The delegation of limited authority to license club marks locally creates no "competition" between independent sources of economic power; the resulting economic activity, a creation of the League itself, constitutes an element of the League's promotional efforts in competition with other entertainment providers. *See supra* p. 9; *cf. City of Mt. Pleasant*, 838 F.2d at 271, 277 (each member of cooperative "set[] its own rates for the power it [sold]" but was not an independent competitor of the others).

II. MODERN PRECEDENT AND ECONOMIC PRINCIPLES CONFIRM THE DISTINCTIONS BETWEEN LEAGUE ACTIVITIES AND COLLABORATIONS OF INDEPENDENT COMPETITORS.

A. League Activities Are Fundamentally Different From Traditional Competitor Collaborations.

The precedents upon which Petitioner and its amici principally rely—cases involving traditional collaborations among independent competitors—provide little, if any, guidance about the operations of sports leagues comprised of separately owned but inherently interdependent member clubs.

Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1 (1979) ("*BMI*"), for example, involved a collaboration among actual competitors—individual creators of copyrighted music who competed separately to sell the rights to their works—to create a blanket license for rights to those same works. Each composer was an independent source of economic power with respect to his or her works and related licenses, and each continued to compete independently after their collaboration. *See id.* at 4-5, 11.

In *BMI,* the challenged blanket license was an *additional*, more efficient means of licensing independently created and independently licensed works. Its beneficiaries were composers "unable to compete *fully effectively*." *Id.* at 23 (emphasis added). In contrast, absent collaboration, the member clubs of a professional sports league are inherently unable to compete *at all*. *See* J.A. 191-92 (composers "could each produce what they produced separately and did not have to join together in order to produce it," which "is emphatically not true of the NFL Defendants in this case who can't produce the primary product at all by themselves").

Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 792 F.2d 210 (D.C. Cir. 1986), and *Freeman v. San Diego Ass'n of Realtors*, 322 F.3d 1133 (9th Cir. 2003), similarly involved joint venture partners that could independently produce a product that competed with the output of the joint venture.

In *Rothery*, defendant Atlas Van Lines provided interstate moving services "by employing independent moving companies throughout the country as its agents." 792 F.2d at 211. Some of these agents, like Atlas itself, had been common carriers with independent legal authority to operate on an interstate basis; until deregulation, others of Atlas' agents (the "non-carrier" agents) lacked such authority. *See id.* at 211-12.

Plaintiffs challenged the decision of Atlas and its affiliates to terminate their relationship with any company that, after deregulation, handled interstate moves on its own account as well as for Atlas. In rejecting Atlas' attempt to invoke *Copperweld*, the D.C. Circuit emphasized that at the time their decision took effect, *i.e.*, after deregulation, "every agent in the system was an actual or potential competitor" because each could independently offer the service sold by the venture. *Rothery*, 792 F.2d at 214.

The member clubs of a professional sports league resemble the non-carrier agents in *Rothery*, which prior to deregulation could not provide interstate transportation services absent collaboration. None of the NFL member clubs can produce NFL Football on its own. Unlike the Atlas agents following deregulation, an agreement among the clubs, at least insofar as it involves the production or promotion of their joint entertainment product, is not an agreement between competitors of the kind with which Section 1 is concerned.

Freeman also involved a traditional joint venture among actual and potential competitors—an alliance among independent real estate associations, each of which had engaged in actual competition for database subscribers and set its own pricing for its services. The associations combined to form a countywide database to be run by a new entity. *Freeman*, 322 F.3d at 1140, 1144.

Critical to the Ninth Circuit's rejection of single entity status in *Freeman* was the fact that each association was fully capable of providing alone the service (multiple listing service access for brokers) sold by the venture: The associations "are, or have been, actual or potential competitors." *Id.* at 1148 (internal quotation marks omitted) (quoting *City of Mt. Pleasant*, 838 F.2d at 276).

In *BMI*, *Rothery*, and *Freeman* (as well as *National Collegiate Athletic Ass'n v. Board of Regents*, 468 U.S. 85 (1984) ("*NCAA*"), discussed *infra* at pp. 42-43), the venture participants were competitors of one another before the venture was created. In each case, the venture was formed to produce or market more efficiently a product that each venture participant could continue to produce itself. A sports league, in contrast, is not merely an efficiency-enhancing vehicle. It creates a new product of a kind that none of its members could produce on its own. Section 1 concerns about "an effort to stifle competition," *Copperweld*, 467 U.S. at 769, are not implicated by such an arrangement. *See* VII Areeda & Hovenkamp, *Antitrust Law* ¶ 1462b at 193-94 (Section 1 addresses "eliminat[ion of] competition that would otherwise exist").

The foregoing distinction is fundamental. Traditional joint ventures bring together entities that had been actual or potential economic competitors and often remain so after formation of the venture. A professional sports league may combine economic competitors in its formation (if created by the consolidation of existing competing leagues, as with the AFL and NFL), but in producing and promoting its collective product, a legitimately formed league like the NFL does not "deprive[] the marketplace of the independent centers of decisionmaking that competition assumes and demands." *Copperweld*, 467 U.S. at 769. As the courts below both held, undisputed record evidence demonstrates that the NFL did not deprive the market of independent centers of decisionmaking here.[10]

In the end, therefore, Petitioner and its amici miss the mark in suggesting that the Seventh Circuit's decision expands the ability of traditional joint ven-

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[10] Just as a sports league is different from a combination of horizontal competitors, it is also distinct from a venture that combines complementary assets (*e.g.*, manufacturing and distribution services) of different parties in a vertical relationship. In such ventures, any partner could purchase the inputs necessary to create the venture product; a manufacturer, for example, could purchase distribution services (or develop them internally) in lieu of collaborating with a distribution partner. Similarly, the Harlem Globetrotters could (and do) contract with a squad of players to act as an "opposing team" to present their entertainment product. By contrast, a single club could not purchase or develop internally assets necessary to create a *league* product such as NFL Football; the product itself inherently requires the participation of multiple clubs. *See generally* J.A. 158-66.

tures to restrain competition among their members. This case does not involve a joint venture whose members are independent sources of economic power. As long as the challenged conduct relates to production or promotion of their integrated product, it is meaningless to characterize the NFL's members as economic competitors and inappropriate to subject them to potential Section 1 liability.[11]

B. The "Competition" Generated By the NFL Is Distinct From Competition Between Independent Sources of Economic Power.

Petitioner and its amici fail to distinguish between (a) internal "competition" generated by the NFL to create and promote its integrated entertainment product, and (b) genuine competition among independent sources of economic power of the kind that the antitrust laws were intended to address.

The principal product generated by a sports league is athletic competition. For such competition to be successful, it must be perceived as genuine (*see infra* p. 39 n.14) and balanced. Games and championship races must be close and of uncertain outcome, and each club must have an opportunity to succeed on the field for the entertainment product to be appealing.

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[11] Petitioner and its amici warn of assertedly dire consequences for labor relations in professional sports if a league and its member clubs were deemed a single entity in the circumstances presented here. That argument "neglects that the labor market for NFL players is organized around a collective bargaining relationship that is provided for and promoted by federal labor law, and that the NFL clubs, as a multi-employer bargaining unit, can act jointly in setting the terms and conditions of players' employment . . . without risking antitrust liability." *Clarett v. NFL*, 369 F.3d 124, 130 (2d Cir. 2004).

See J.A. 139; *see also* Rottenberg, *The Baseball Players' Labor Market*, 64 J. Political Econ. at 255 (The member clubs of a professional sports league "combine in a single firm in which the success of each branch requires that it be not 'too much' more efficient than the other. If it is, output falls.").

The need for such balance reinforces the conclusion that, notwithstanding separate ownership, the member clubs are not economic competitors in the production and promotion of their product. J.A. 139. If there were any doubt about that issue, it would be resolved by the member clubs' periodically creating additional clubs to join with them—not to compete in an antitrust sense against them—in producing NFL Football.

The "competition" generated by the NFL is more broadly one of creating rivalries between and among member clubs. Such "competition" is no different from the result of a decision of Macy's Inc., the holding company that owns both Macy's and Bloomingdale's, to open a Macy's-branded store next to one of its Bloomingdale's-branded stores, or the decision of a law firm to base a portion of partners' compensation on business generation. Any rivalry between the two stores or among the law partners occurs within a single entity and thus is not competition "in the antitrust sense." *Dagher*, 547 U.S. at 6.

That fundamental distinction is illustrated by *Dagher*, which involved alleged limits on competition between Texaco- and Shell Oil-branded gasoline, both sold by the joint venture at uniform prices. This Court concluded that "the pricing policy challenged here amounts to little more than price setting by a single entity—albeit within the context of a joint venture—and not a pricing agreement between competing entities with respect to their competing products." *Id.* at 6. Like the NFL's production and promotional activities, the pricing of putatively competing brands of gasoline in *Dagher* was the act of a single entity, not of independent collaborators. *Id.*[12]

By contrast, Petitioner's reliance on *Major League Baseball Properties, Inc. v. Salvino, Inc.*, 542 F.3d 290 (2d Cir. 2008), is misplaced. In that case, the single-entity issue was not before the appellate court—nor was it addressed by the district court—presumably because of pre-*Copperweld* Second Circuit precedent holding that agreements among separately owned member clubs of a professional sports league are always subject to rule of reason scrutiny. *N. Am. Soccer League v. NFL*, 670 F.2d 1249, 1257-58 (2d Cir. 1982); *Major League Baseball Props., Inc. v. Salvino, Inc.*, 420 F. Supp. 2d 212, 218-21 (S.D.N.Y. 2005). The majority opinion therefore applied traditional rule of reason analysis to the challenged conduct (which it upheld as lawful), notwithstanding its recognition that "[i]n creating the MLB Entertainment Product, the Clubs plainly do not operate separately or independently but rather are interdependent entities in an organization that is highly integrated." 542 F.3d at 309, 332, 334.

The *Salvino* concurring opinion, also treating the MLB clubs as collaborating in a traditional joint venture, applied the ancillary restraints doctrine to uphold the challenged restraint. *See id.* at 340-41 (Sotomayor, J., concurring). That analysis, which focused on whether the restraint was reasonably necessary to achieve the "efficiency-enhancing" bene-

[12] As the government notes, although *Dagher* did not directly address the question of whether the entities were a single economic entity, *Dagher*'s "reasoning and result generally reflect a natural extension of *Copperweld*." U.S. Br. 10 n.4.

fits of the venture, *id.* at 339, necessarily assumed that the venture members, like the composers in *BMI*, were independent sources of economic power collaborating to produce more efficiently a product that each could produce alone.

If, however, *Salvino* had been filed in a Circuit without precedent barring the single entity defense, a focus on "efficiency enhancement" would not have been warranted because, absent the challenged collaboration, none of the venture members could produce the product at all. *See Dagher*, 547 U.S. at 7-8 (declining to apply ancillary restraints doctrine to evaluate joint venture's pricing policy). As the government aptly noted in *Dagher*, "owners of a legitimate joint venture are not required to assume the burden of demonstrating that each decision about the joint venture's conduct is reasonably necessary to achieve the venture's purposes." U.S. Br. at 9, *Dagher*, 547 U.S. 1 (Nos. 04-805, 04-814).

C. Single Entity Treatment Does Not Require a "Complete Unity of Interests."

Contrary to Petitioner's suggestion, this Court's observation in *Copperweld* that a parent and its wholly owned subsidiary "ha[d] a complete unity of interest," 467 U.S. at 771, does not determine whether member clubs of a professional sports league may be deemed a single entity.

If that passage were intended as a limiting principle, the resulting proposition of law would (as Petitioner suggests) subject to full rule of reason review not only routine business decisions of professional sports leagues (each member club of which has a selfish interest in winning the league championship), but also routine business decisions of other highly integrated entities, such as law firms whose partners rarely, if ever, have identical interests. *See Bulls II*, 95 F.3d at 598 (some partners "would be better off with a lockstep compensation agreement . . . [while] others would prosper under an 'eat what you kill' system"); *City of Mt. Pleasant*, 838 F.2d at 277 (separately owned members of power cooperative not "independent sources of economic power" although it "will always be true that separate companies, in one enterprise, that are located in separate areas and serve separate customers, will have varying interests").[13] It would also be inconsistent with *Sunkist Growers*, in which the Court found three growers associations to be a single entity despite differing ownership interests. 370 U.S. at 27-29; *see also Citizens & S. Nat'l Bank*, 422 U.S. at 112-13, 121 (separate incorporation and minority ownership interest did not necessarily entail the capacity to conspire under Section 1).

More fundamentally, Petitioner's argument ignores the fact that, regardless of differences in interest among an entity's component parts, antitrust law encourages cooperation inside a business organization to facilitate competition between that organization and other producers. Because "[c]oordination within an otherwise lawful enterprise does not create addi-

[13] For that reason, Petitioner garners no support from its reliance on the Dallas Cowboys' lawsuit over the allocation of licensing responsibilities within the NFL. *See, e.g.*, Pet. Br. 5-6, 48, 52-53. That dispute reflected a disagreement, ultimately resolved internally, about how best to promote, and how best to allocate the value flowing from, the integrated entity's product. *See, e.g.*, *City of Mt. Pleasant*, 838 F.2d at 277 ("Even though the cooperatives may quarrel among themselves on how to divide the spoils of their economic power, it cannot reasonably be said that they are *independent sources* of that power.").

tional market power or facilitate a restraint," it is not—and should not be—a subject of Section 1 scrutiny. VII Areeda & Hovenkamp, *Antitrust Law* ¶ 1462b at 194; *id.* ¶ 1476d at 309 ("a lawfully formed partnership" of physicians or lawyers "should be treated like a post-merger entity," because "antitrust policy favors aggressive competition by the lawfully formed entity"); Werden, *Antitrust Analysis of Joint Ventures*, 66 Antitrust L.J. at 704-05 ("When a joint venture itself participates in the marketplace, its ordinary actions as a market participant are those of a single entity.").

Those principles are compelling here. Differences in interest among the NFL member clubs, each of which vies for superiority on the athletic field, are inherent, pro-competitive elements of the League's product.[14] They have nothing to do with the purpose of Section 1, *i.e.*, to protect against collusion among "independent sources of economic power previously pursuing separate interests."

Nonetheless, the proposition that a single entity must have a complete unity of interests has repeatedly led to Section 1 scrutiny of NFL decisions about the production of its entertainment product. *See, e.g.*, *Sullivan v. Nat'l Football League,* 34 F.3d 1091, 1099 (1st Cir. 1994) ("the critical inquiry is whether the alleged antitrust conspirators have a 'unity of interests'"); *Los Angeles Mem'l Coliseum Comm'n v. Nat'l Football League*, 726 F.2d 1381, 1390 (9th Cir. 1984)

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[14] "A league's legitimacy"—the perception among consumers that its games and championship races are genuine—"is enhanced by the independent ownership and management of individual teams." Daly, *The Baseball Player's Labor Market Revisited*, at 18; *see also Bulls II,* 95 F.3d at 597 (separate ownership "promotes local boosterism, which increases interest").

(same). Such holdings are fundamentally unsound because they ignore the distinction between (i) combinations that bring together entities that had been and could continue to be actual or potential competitors and (ii) enterprises (such as the NFL) that do not.[15]

Even some of those decisions recognize that a professional sports league is not a traditional joint venture comprised of genuine competitors. For example, the Ninth Circuit correctly observed in *Los Angeles Memorial Coliseum Commission* that "the NFL teams are not true competitors, nor can they be." 726 F.2d at 1391.[16]

In short, this Court's observation in *Copperweld*—that "[a] parent and its wholly owned subsidiary have a complete unity of interest," 467 U.S. at 771—did not, and logically cannot, establish a limiting principle that bars single entity treatment for professional sports leagues. "*Copperweld* does not hold that only conflict-free enterprises may be treated as single entities." *Bulls II,* 95 F.3d at 598.

[15] The discussion of single entity issues in *Fraser v. Major League Soccer, L.L.C.*, 284 F.3d 47 (1st Cir. 2002), on which Petitioner relies, was dictated by *Sullivan*, as the First Circuit expressly acknowledged in its opinion. *Fraser*, 284 F.3d at 55 ("we must work with the framework of existing circuit law"). The Section 1 issues in *Fraser* were ultimately resolved on other grounds.

[16] The Ninth Circuit nonetheless rejected the League's single-entity defense in that case, applying pre-*Copperweld* precedents. 726 F.2d at 1388-90.

D. *Radovich* and *NCAA*, Which Address Inter-League Restraints, Do Not Preclude Single Entity Treatment of a Single Sports League.

Petitioner argues that this Court has "repeatedly rejected arguments that the teams in the NFL and similar sports leagues are not capable of conspiring in restraint of trade." Pet Br. 28. That statement, which encompasses conspiracies *between* a sports league and other entertainment providers, is true as far as it goes. *See, e.g.*, *Sunkist Growers*, 370 U.S. at 30 (single entity finding "in no way detracts from earlier cases holding agricultural cooperatives liable for conspiracies with outside groups"). But it says nothing about the circumstances presented here, where the challenged decision was made *within* a league as opposed to across league boundaries.[17]

In *Radovich v. NFL*, 352 U.S. 445 (1957), upon which Petitioner (at 28-29) and its amici extensively rely, plaintiff alleged an agreement between the Pacific Coast League and the NFL not to hire him. The defendants included both leagues, one of the Pacific Coast League's member clubs, and its commissioner. *Id.* at 446 n.2. In that case, the Court held

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[17] The only asserted "agreement" at issue before this Court is *within* a league: the NFL's decision to "no longer grant multiple licenses" and instead to "grant an exclusive license to a single marketer of apparel and headwear." J.A. 62; *see also supra* pp. 10-11. Petitioner had also challenged the subsequent license agreement between the NFL and Reebok, arguing that Reebok created the plurality necessary to establish an agreement; the courts below rejected that theory, which Petitioner did not pursue here. *See, e.g.*, Pet. App. 18a ("[a]s a single entity for the purpose of licensing, the NFL teams are free under § 2 to license their intellectual property on an exclusive basis").

only that the rule of *Federal Baseball Club, Inc. v. National League of Professional Baseball Clubs*, 259 U.S. 200 (1922), which deemed the business of organized baseball outside the scope of interstate commerce, did not apply to other professional sports. 352 U.S. at 451. The "single entity" issue was not mentioned or even hinted at in the Court's opinion, which addressed an alleged *inter*-league restraint.

The same flaw underlies Petitioner's reliance on *NCAA*. That case did not involve an intra-league restraint. Contrary to the repeated assertions of Petitioner and its amici (*e.g.*, Pet. Br. 16, 29, 45), the NCAA is not a league. At the time of the decision, the NCAA's members included dozens of leagues and conferences, each of which was separately capable of generating a season of athletic competition. *See Bd. of Regents v. Nat'l Collegiate Athletic Ass'n*, 546 F. Supp. 1276, 1285 (W.D. Okla. 1982) (identifying by name seven major football conferences that belonged to the NCAA).

As this Court recognized, "there is no single league or tournament in which all college football teams compete." *NCAA*, 468 U.S. at 118. Instead of a league, the NCAA was "an association of schools which compete against each other to attract television revenues." *Id.* at 99; *see id.* at 89 (NCAA "has approximately 850 voting members"). Its members were not integrated or interdependent in any material way. In fact, the NCAA did not even act as a centralized sales agent with respect to the television broadcasts at issue. *Id.* at 113.

Equally important, the principal product of NCAA members is education, not entertainment. As the Seventh Circuit observed in *Bulls II*:

> Unlike 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. It makes professional basketball; *only* it can make "NBA Basketball" games; and unlike the NCAA the NBA also "makes" teams.

95 F.3d at 599.

This Court recognized that, even absent an integrated structure, some of the NCAA's restrictions on competing schools (*e.g.*, rules governing player payments and class participation designed to maintain the sport's amateur status) were "essential" if college football was to "be available at all." 468 U.S. at 101-02. Accordingly, it deemed the challenged restraint subject to the rule of reason rather than *per se* scrutiny. *Id.* at 100. But the Court did not have before it—and gave no indication that it was addressing—an agreement among interdependent components of a single entity, like a league, that compete as a unit against other entertainment providers.

In short, *Radovich* and *NCAA* shed no light on whether the member clubs of a professional sports league can or should be deemed a single entity for any purpose, much less the purpose of promoting the member clubs' collective product. If those two cases demonstrate anything of relevance here, they serve as a reminder that "single entity" status does not extend to agreements between a league and one of its competitors.

E. Legislative Developments Since Enactment of the Sherman Act Do Not Affect the Single Entity Analysis.

Relying on two narrow statutes and several unenacted bills, Petitioner and its amici argue that Congress has "ratified" their position that Section 1 applies to every decision of a sports league of separately owned member clubs. Pet. Br. 31. That position is fundamentally unsound.

1. "[T]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *United States v. Price*, 361 U.S. 304, 313 (1960). When a later statute is offered as "an expression of how the [later] Congress interpreted a statute passed by another Congress more than a half century before," "such interpretation has very little, if any, significance." *Rainwater v. United States*, 356 U.S. 590, 593 (1958); *see also Massachusetts v. EPA*, 549 U.S. 497, 529-30 (2007) (rejecting efforts to "invoke[] postenactment congressional actions," including passage of several statutes). That principle is demonstrably applicable here.

The Sports Broadcasting Act ("SBA"), 15 U.S.C. § 1291, which provides that "[t]he antitrust laws . . . shall not apply" to sales by major sports leagues of the right to telecast their games, was enacted to reverse a specific court decision invalidating a league television contract. S. Rep. No. 87-1087, at 1 (1961); H. Rep. No. 87-1178, at 2 (1961); *see also United States v. Nat'l Football League*, 196 F. Supp. 445, 446 (E.D. Pa. 1961). Petitioner is wrong in asserting that the SBA reflects Congress' view that "the antitrust laws are otherwise applicable" to sports league decisions and practices. Pet. Br. 34.

Among other things, that argument cannot be reconciled with the statute's application to Major League Baseball, which at the time of enactment was deemed not to involve interstate commerce and was thus outside the scope of the antitrust laws. *See generally Flood v. Kuhn,* 407 U.S. 258 (1972). Moreover, Congress provided in the SBA that "[n]othing contained in [the act] shall be deemed to change, determine, or otherwise affect the applicability or nonapplicability of the antitrust laws" to any practice other than those covered by Section 1291. 15 U.S.C. § 1294.[18]

The Curt Flood Act, 15 U.S.C. § 26b, similarly offers no support for Petitioner's position. That statute was enacted to overturn in part a series of judicial holdings that baseball is not a "business affecting interstate commerce." *Id.* § 26b(a); *see, e.g.*, *Fed. Baseball Club, Inc.*, 259 U.S. 200. The Congress that enacted the Curt Flood Act expressed no view about any issue other than the interstate commerce question. *See, e.g.*, S. Rep. No. 105-118, at 5 (1997); *see also id.* at 2 & n.1; 144 Cong. Rec. H9942, H9944 (Oct. 7, 1998) (remarks of Rep. Bunning) (noting interstate commerce exemption and stating that statute "provides for a limited repeal *of that exemp-*

[18] As this Court observed in *NCAA*, the SBA "reflects [Congress'] awareness of" a district court ruling invalidating certain NFL telecasting practices as a violation of Section 1. 468 U.S. at 104 n.28. But it does not follow, as Petitioner suggests, *see* Pet. Br. 33-34, that Congress believed that the district court ruling was consistent with the law of the land, or that Section 1 was intended to apply to any aspect of sports league operations, including the broadcasting practices addressed by the district court's ruling, as Congress often enacts legislation "intended to be a reaffirmation" of existing law. *See, e.g.*, *United States v. Wise*, 370 U.S. 405, 415 (1962).

tion" (emphasis added)); *id.* S9494, S9496 (July 30, 1998) (remarks of Sen. Hatch) (bill is "absolutely neutral with respect to the state of the antitrust laws between all entities and in all circumstances other than" baseball player employment).

Like the SBA, the Curt Flood Act provided that "[n]o court shall rely on the enactment of this section as a basis for changing the application of the antitrust laws" to any other practice, and it further provided that it "does not . . . otherwise apply the antitrust laws to" any other practices, including "the licensing of [baseball teams'] intellectual property rights" or practices of other sports. 15 U.S.C. § 26b(b).

Petitioner's insistence that there must be broader meaning in the SBA and the Curt Flood Act is therefore inconsistent with the statutes' plain language and incorrect as a matter of law. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 150-51 (2000) (statute reversing contrary court ruling "reaffirm[ed]" congressional policy); *United States v. Wise*, 370 U.S. 405, 414 (1962) ("no change was either intended or effected").

2. Nor can Petitioner and its amici find support in unenacted bills. "[F]ailed legislative proposals are a particularly dangerous ground on which to rest an interpretation of a prior statute." *Cent. Bank, N.A. v. First Interstate Bank, N.A.*, 511 U.S. 164, 187 (1994) (internal quotation marks and citation omitted). "A bill can be proposed for any number of reasons, and it can be rejected for just as many others." *Solid Waste Agency v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 170 (2001).

The danger of using failed legislation to interpret Section 1 is easily demonstrated here. All of the bills upon which Petitioner relies had language excluding professional sports leagues from the scope of Section 2 of the Act; that fact may explain why they did not pass.[19] More importantly, Congress has also rejected legislation that would have affirmatively subjected sports league practices to the antitrust laws.[20] Congress' failure to enact those bills—like its failure to enact the bills upon which Petitioner relies—provides no meaningful insight into the intended application of the Sherman Act.

III. THE GOVERNMENT'S PROPOSED TEST IGNORES THE INHERENT INTERDEPENDENCE OF THE MEMBER CLUBS.

A. The Government's Test Is Inconsistent with *Copperweld*.

The government agrees that a professional sports league and its member clubs should be treated as a single entity in some circumstances, but only when (1) the teams and the league "have effectively merged the relevant aspect of their operations, thereby eliminating actual and potential competition among the teams and between the teams and the league in that operational sphere" and (2) the challenged restraint does not "significantly affect actual or

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[19] *See* S. 1439, 104th Cong. (1995); H.R. 823, 6467, S. 2784 and 2821, 97th Cong. (1982); S. 2391, 88th Cong. (1964); H.R. 4229, 4230, 4231, and S. 1526, 82nd Cong. (1951).

[20] *See, e.g.*, H.R. 11033, 92d Cong. (1971) ("the business of providing for profit public games or contests between any teams of professional players shall not be exempt from the prohibitions contained in sections 1, 2, and 3" of the Sherman Act); H.R. 6876, 6877, 8023, 8124, and 10378, 85th Cong. (1957-58) (the antitrust laws "shall apply" to professional baseball, football, basketball, and hockey, with certain exceptions).

potential competition among the teams or between the teams and the league outside their merged operations." U.S. Br. 6-7. As applied to the production or promotion of a sports league's entertainment product, that proposed test, which no court has endorsed, is misconceived.

1. *Copperweld* did not ask whether a parent and its subsidiary were "effectively merged"; it asked whether they constituted "independent sources of economic power previously pursuing separate interests." The first prong of the government's test assumes the answer to the latter question by treating the member clubs as if each were capable of creating alone the product created by the league.

Premised on the aptly named *Competitor Collaboration Guidelines*, the first prong might make sense if it were to apply to collaborations among independent competitors like those addressed in cases involving traditional joint ventures (*see supra* pp. 30-34). But there is no meaningful basis for its application where the entities at issue were not actual or potential competitors before the "combination," *i.e.*, where collaboration is essential for their product to be created in the first instance.

The second prong of the government's test, which focuses on distinctions among undefined "operational spheres," is equally infirm. That prong would require a reviewing court to parse for "potential competition" myriad "operational spheres" of clubs that, absent the collaboration at issue, cannot produce the product at all. Thus, even in cases challenging operations that the government concedes are "effectively merged," such as prescribing rules of on-field play, the test would require the league to defend the operations if they had an alleged effect, intended or not, on "actual or potential competition among teams" in some other, later-identified "operational sphere." U.S. Br. 19-20. *Copperweld* squarely rejected the notion that the application of Section 1 turns on such a *post hoc*, effects-based test. 467 U.S. at 776.

In addition, the government's test would lead to confusion, to endless and costly rounds of litigation, and ultimately to nonsensical results. The government would distinguish, for example, between (a) the NFL's decision to structure a season of games culminating in a Super Bowl championship (under the test, the act of an "effectively merged" single entity), and (b) the NFL's decision that member clubs will play no additional games *against each other* (under the test, the act of "collaborators" subject to Section 1 scrutiny). U.S. Br. 7, 20 n.10 (citing VII Areeda & Hovenkamp, *Antitrust Law* ¶ 1478d at 329). It would defy common sense to apply such different standards to these two interrelated decisions.[21]

2. As evidenced by the fact that it would subject to full rule of reason analysis even a league's scheduling decisions, the government's test would subject to potential Section 1 attack every decision of a profes-

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[21] For the same reasons—and as the government recognizes—"[t]he critical inquiry is not how the league makes decisions, but whether those decisions restrain actual or potential competition" among independent competitors. U.S. Br. 22. If, as here, the clubs are not independent sources of economic power, Section 1 scrutiny should not depend on whether a challenged decision is made by the Commissioner (*e.g.*, leasing league office space), by the League's centralized business unit (*e.g.*, licensing marks and logos), or by the League *qua* league through a vote of its Executive Committee (*e.g.*, where to produce its product). *See Copperweld*, 467 U.S. at 771 (rejecting "rule that punished coordinated conduct simply because a corporation delegated certain responsibilities to autonomous units").

sional sports league (or any other venture to which the test was applied). That would chill "[c]oordination within a firm" to the detriment of competition and consumer welfare. *Copperweld*, 467 U.S. at 767-69; *see also id.* at 771; *Matsushita*, 475 U.S. at 594; U.S. Br. 7 ("[o]nly a limited range of conduct would qualify for single-entity treatment under [government's] standard").

Moreover, the government's test would run afoul of the core principle underlying *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), which teaches that antitrust litigation, a "sprawling, costly, and hugely time-consuming undertaking," should be resolved at the earliest appropriate opportunity, with the "minimum expenditure of time and money by the parties and the court." *Id.* at 558, 560 n.6 (internal quotation marks and citations omitted). That point is illustrated by the *Salvino* case (*see supra* pp. 36-37), which also involved sports league licensing. *Salvino* consumed "three years of discovery," 542 F.3d at 296, and six years of district court proceedings before summary judgment was granted under the rule of reason because of the plaintiff's inability to show that the challenged restraint had an adverse competitive effect, 420 F. Supp. 2d at 216, 220-21.[22]

The burdens and chilling effects associated with the application of Section 1 to a single entity's decisions about promoting its product are not limited to situations involving exclusive licenses. Consider, for example, a decision by the NFL or an "agreement" by

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[22] If the member clubs of a sports league are not separate sources of economic power, there can be "no reasonably founded hope that the discovery process will reveal relevant evidence to support a § 1 claim." *Twombly*, 550 U.S. at 559 (internal quotation marks, brackets, and citation omitted).

its member clubs to protect the image of NFL Football by not licensing their marks for use on t-shirts featuring obscene images. If a disappointed would-be licensee brought a Section 1 challenge, the League could offer substantial procompetitive benefits in an effort to justify the restraint, but (in the absence of a single entity determination) the plaintiff could nonetheless demand (as Petitioner did here) full merits discovery and a jury trial with attendant costs and uncertainties.

The burdens and costs of such scrutiny, as well as the associated chill on potentially procompetitive decisionmaking, might serve the purposes of Section 1 if the challenged restraint had resulted from an agreement between independent licensors (*e.g.*, John Deere and International Harvester, each of which licenses its marks for use on apparel to promote its principal product, farm equipment). But where the decision concerns how best to promote and protect a joint product that none of the venture members can produce on its own, application of Section 1 would inhibit, rather than promote, the Sherman Act's procompetitive purposes and undermine the principles reaffirmed in *Twombly*.

B. A Supplemental Test Is Not Needed.

Moreover, the government's proposed test is not necessary. Under *Copperweld*, unless its member clubs are "independent sources of economic power previously pursuing separate interests," 467 U.S. at 771, a legitimately formed sports league is ordinarily a single economic entity in the production and promotion of its entertainment product. As confirmed by extensive, undisputed evidence here, that conclusion would encompass the NFL's decision to promote

NFL Football by licensing the clubs' marks on an exclusive basis through NFL Properties.

To be sure, in some circumstances, a league's formation may appropriately be subject to Section 1 scrutiny. *See Dagher*, 547 U.S. at 6 n.1 ("Had respondents challenged Equilon itself, they would have been required to show that its creation was anticompetitive under the rule of reason."). An example would be the merger of previously independent competing leagues that formed the modern NFL in 1970. But that merger would have been subject to antitrust scrutiny under existing precedent, as this Court confirmed in *Copperweld*, without the need for an additional and potentially burdensome test that might, simply through its potential application, chill efforts by the League to compete in the marketplace.[23]

There are also times when the member clubs of a professional sports league could be involved in "nonventure" activities and in those respects would not be functioning as a single economic entity. If, for example, the member clubs decided to engage in a business that does not inherently require collaboration, such as a trucking company, any reduction in actual or potential competition among them or between the clubs and the league would appropriately be subject to scrutiny under the ancillary restraints doctrine, and, as appropriate, traditional rule of reason standards. *Dagher*, 547 U.S. at 7-8. Again, the *Copperweld* standard covers this type of situation; the member clubs presumably would be "independent sources of economic power" where any of them could

[23] In fact, the 1970 AFL-NFL merger was approved by Congress. *See* 15 U.S.C. § 1291.

compete separately in an activity unrelated to the production or promotion of their integrated entertainment product.

Finally, the Court need not determine today whether the *Copperweld* standard would lead to a different conclusion if applied to a venture-related aspect of league operations not presented in this case. We recognize that if the member clubs of a professional sports league appear to have genuine autonomy in a particular aspect of their operations—if, in the words of Judge Easterbrook, "from the perspective of" a category of suppliers or consumers, the clubs reasonably appear to be completely autonomous—that might support an argument to treat them as if they were independent sources of economic power in that particular area.[24] But if the government's test is intended to ensure that such circumstances are within the scope of Section 1 review, it is neither necessary nor helpful.

In this case, the *Copperweld* standard resolves the "single entity" question in a straightforward manner. Where a professional sports league uses intellectual property to produce and promote a product that no member club could produce on its own, where the formation of that league has not been challenged, and where for decades licensees have dealt with a single source to obtain such intellectual property, the member clubs of the league are not independent sources of economic power either in fact or from the perspective of the actor on the other side of the transaction.

[24] As a potential example, for decades each NFL club has had authority to negotiate virtually all of the terms and conditions of its coaches' employment. Thus, from the perspective of coaches, there may be no "single driver," *Copperweld*, 467 U.S. at 771, in that narrow aspect of league operations.

IV. THERE IS NO REASON FOR FURTHER DEVELOPMENT OF THE RECORD.

Finally, contrary to the government's unfounded suggestion, there is no factual ambiguity or other reason to remand for "further development of the record." U.S. Br. 27-28, 32-33. The government speculates about other "actions potentially relevant to the instant dispute," but Petitioner explicitly limited its challenge to the NFL's decision in 2000 to "have a single headwear licensee rather than multiple licensees," and its subsequent decision to make Reebok that licensee. *Id.* at 27-28; *see also* J.A. 62-63, 256; Dist. Ct. Doc. 93 at 25 ("[T]he creation of [Reebok's] exclusive license . . . is the only conduct alleged to have been unlawful."); ANI Ct. App. Br. 39-40; Pet. App. 4a.

As the government correctly observed in its brief opposing certiorari, "[c]hoosing Reebok as the sole licensee involved no 'sudden joining of two [or more] independent sources of economic power previously pursuing separate interests.'" U.S. Br. on Pet. at 13 (quoting *Copperweld*, 467 U.S. at 771). Even if one assumes that the clubs were once independent sources of economic power, "the 'joining' occurred decades earlier when the teams first opted to use NFLP as their exclusive licensing agent." *Id.*

Thus, the only question is whether the League's decision in 2000—in the context of its unchallenged, decades-old, integrated licensing activities—to replace several licensees with an exclusive licensee was the act of a single economic entity. For all the reasons discussed above, the undisputed record evidence was more than sufficient to resolve that question and to answer it in the affirmative.

CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully submitted,

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