No. 08-661

IN THE

Supreme Court of the United States

AMERICAN NEEDLE, INC.,
Petitioner,

v.

NATIONAL FOOTBALL LEAGUE, ET AL.,
Respondents.

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

SUPPLEMENTAL BRIEF OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES
(continued)

Page

Miscellaneous

INTRODUCTION

The brief for the United States concedes that the "expansive application of the single-entity concept" embraced by the court below is supported by "[n]either *Copperweld* nor any other decision of this Court" (U.S. Br. at 6) (citation omitted); that the court below erred in "apparent[ly]" concluding that claimed efficiencies can transform "an agreement to restrict competition among separate firms" into single-entity conduct (*id.* at 8); that "[t]he potential implications of [this] decision are problematic" (*id.* at 6); and that some of the court's "analysis suggests a rule of broad significance" of "a troubling nature" (*id.* at 12) that "is in some tension with this Court's precedents" (*id.* 14). The United States is also constrained to admit that multiple other circuits "can be read as" rejecting the Seventh Circuit's erroneous approach (*id.* at 15). It nonetheless recommends against granting certiorari, contending that this rejection purportedly has not been sufficiently definitive. *See id.* The United States is simply incorrect. The circuit conflict on this important federal issue is extensive and clear, and this Court's review is needed.

I. THE LOWER COURTS ARE SQUARELY IN CONFLICT OVER WHETHER TEAMS THAT ARE INDEPENDENTLY OWNED AND ARE ACTUAL OR POTENTIAL COMPETITORS CAN BE TREATED AS A SINGLE ENTITY

The United States principally argues that the other circuits have yet to reject single-entity treatment for sports leagues in the specific context of collective licensing of intellectual property. But this artificially narrow factual focus misses the

fundamental legal point over which the circuits disagree. As courts and commentators have recognized, other courts of appeals have "overwhelmingly rejected" the notion that a league of separately owned teams that are potential competitors can be deemed a single entity. *See, e.g.*, Stephen F. Ross & Stefan Szymanski, *Antitrust and Inefficient Joint Ventures: Why Sports Leagues Should Look More Like McDonald's and Less Like the United Nations*, 16 MARQ. SPORTS L. REV. 213, 238 (2006). Those holdings necessarily entail rejection of the Seventh Circuit's view that the NFL teams' collective licensing of their intellectual property is subject to single-entity treatment.

A. Courts And Commentators Have Recognized The Existence Of A Fundamental Judicial Conflict

The courts of appeals themselves have rejected the United States' suggestion that there is no circuit conflict. As Judge Boudin wrote in *Fraser v. Major League Soccer, L.L.C.*, 284 F.3d 47, 55-56 (1st Cir. 2002), the approach to the single-entity doctrine adopted by the Seventh Circuit "has not been adopted in this circuit," and "[s]ingle entity status for ordinarily organized leagues *has been rejected in several other circuits as well.*" *Id.* (emphasis added). In turn, citing *Fraser*, the court below expressly recognized the First Circuit's disagreement with the Seventh Circuit's "embrace[] [of] the possibility that a professional sports league *could* be considered a single entity under *Copperweld*." Pet. App. 13a (emphasis in original).

Commentators likewise have recognized that there is "strong precedent to the contrary" of the

Seventh Circuit's decisions in *Chicago Professional Sports Ltd. Partnership v. National Basketball Association*, 95 F.3d 593, 599 (7th Cir. 1996) (*Bulls II*), and *American Needle*, because "courts have largely held that independent ownership ... and competition between ... teams within a league prevent single entity status." Ross C. Paolino, *Upon Further Review: How NFL Network Is Violating The Sherman Act*, 16 SPORTS LAW. J. 1, 34 (Spring 2009) (ellipses in original; internal quotation marks omitted); *see also* 7 PHILIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW, ¶ 1478d, at 327 (2d ed. 2003) ("[t]he courts have mainly rejected" single-entity treatment of sports leagues); Marc Edelman, *Why the Single Entity Defense Can Never Apply to NFL Clubs: A Primer on Property-Rights Theory in Professional Sports,* 18 FORDHAM INTELL. PROP. MEDIA & ENTM'T L.J. 891, 893 n.11 (2008) ("Many courts have rejected the single-entity defense in the scope of premier American sports leagues."); Ross & Szymanski, *supra*, at 238 (single-entity position of sports leagues has been "overwhelmingly rejected").

The courts and commentators have identified this judicial conflict for a reason: the different legal principles applied by the circuits are not reconcilable. In holding that NFL teams may be treated as a single entity in collective licensing of their intellectual property, the Seventh Circuit held that even independently owned and operated teams that are potential competitors may collectively be deemed a single entity. Pet. App. 16a. Indeed, the Seventh Circuit found no need even to *consider* "whether the NFL teams could compete against one another when licensing and marketing their intellectual property." *Id.*

In contrast, other judicial circuits have held that independent ownership of teams and their status as potential competitors are incompatible with single-entity treatment. *See, e.g., Los Angeles Mem. Coliseum Comm'n v. Nat'l Football League*, 726 F.2d 1381 (9th Cir. 1984) (*Raiders*) (rejecting single-entity treatment because NFL clubs are "independent business entities" and "compete with one another off the field"); *Sullivan v. Nat'l Football League*, 34 F.3d 1091, 1099 (1st Cir. 1994) ("NFL member clubs compete in several ways off the field, which itself tends to show that the teams pursue diverse interests and thus are not a single enterprise under § 1."); *Volvo N. Am. Corp. v. Men's Int'l Prof'l Tennis Council*, 857 F.2d 55, 71 (2d Cir. 1988) ("Courts have consistently held that, since joint ventures—including sports leagues and other such associations—consist of multiple entities, they can violate § 1 of the Sherman Act."); *Nat'l Hockey League Players Ass'n v. Plymouth Whalers Hockey Club*, 419 F.3d 462, 470 (6th Cir. 2005) ("Just as the National Football League could not accurately be characterized as a 'single economic entity,' neither could the OHL, which exists only as constituted by its twenty member teams.") (internal citation omitted).

This legal principle necessarily conflicts with the judgment below. Under this principle, the fact that the teams are independently owned and "compete in several ways off the field," *Sullivan*, 34 F.3d at 1099, eliminates the possibility of single-entity treatment. *A fortiori*, it conflicts with the Seventh's Circuit's holding (Pet. App. 16a) that the NFL teams are a single entity in the collective-licensing context without even any inquiry into whether they are potential competitors in this regard.

B. The United States' Attempt To Portray The Case Law As Potentially Consistent With The Decision Below Is Unsustainable

The United States concedes that these cases' across-the-board rejection of single-entity treatment for sports leagues "can be read" as conflicting with the law of the Seventh Circuit. (U.S. Br. at 15.) While it argues that the other circuits nonetheless have not definitively rejected the Seventh Circuit's approach, that argument is without merit.

In particular, the United States errs in suggesting (*id.* at 15-16) that "more recent" decisions "reflect a consensus" that has moved away from broad rules (such as the above cases' broad rejection of treating sports leagues as single entities) in favor of a fact-specific approach. The two Ninth Circuit decisions that the United States cites as establishing this "consensus"—*Jack Russell Terrier Network v. American Kennel Club, Inc.*, 407 F.3d 1027, 1034 (9th Cir. 2005), and *Freeman v. San Diego Association of Realtors*, 322 F.3d 1133, 1148-49 (9th Cir. 2003)—in fact "distill[] general principles" that are irreconcilable with the Seventh Circuit's approach: "The crucial question is whether the entities alleged to have conspired *maintain an 'economic unity,'* and whether the entities were *either actual or potential competitors.*" *Jack Russell*, 407 F.3d at 1034 (emphasis added). "'[W]here firms are not an economic unit and are at least potential competitors'"—a description that indisputably applies to the NFL teams in the trademark-licensing context, but which the Seventh Circuit deems irrelevant—"'they are usually not a single entity for antitrust

purposes.'" *Id.* (quoting *Freeman*, 322 F.3d at 1148-49).

The United States' effort to dismiss *North American Soccer League v. NFL*, 670 F.2d 1249, 1257 (2d Cir. 1982) (*NASL*), and the Ninth Circuit's *Raiders* decision as pre-*Copperweld* cases that addressed aspects of league operations other than licensing of intellectual property fares no better. The United States fails to note both that *NASL* was expressly reaffirmed by the Second Circuit *after Copperweld*, *see Volvo*, 857 F.2d at 71, and that *NASL* and *Volvo* rely on reasoning that *categorically* excludes single-entity treatment for NFL teams and similar leagues. *See id.* ("Courts have consistently held that . . . sports leagues . . . consist of multiple entities"); *NASL*, 670 F.2d at 1252 ("[t]he NFL teams are separate economic entities"). Likewise, the Ninth Circuit has expressly reaffirmed *Raiders*, *see Freeman*, 322 F.3d at 1148-49, and *Raiders*—like the later Ninth Circuit cases *Jack Russell* and *Freeman*—is based on legal principles that necessarily preclude single-entity treatment in the collective-licensing context. 726 F.2d at 1390; *see also Sullivan*, 34 F.3d at 1099 ("We do not agree that *Copperweld* ... affects the prior precedent concerning the NFL."). Indeed, *Freeman* and the First Circuit's *Sullivan* decision were rendered *after* the Seventh Circuit suggested its contrary approach in *Bulls II*.

The United States further errs in suggesting (U.S. Br. 17-18) that *Sullivan* is distinguishable because it is "limited to the particular NFL rule" at issue there and was based on evidence showing that the teams competed against each other for the sale of ownership interests. The *Sullivan* court in fact rejected the

NFL's single-entity defense entirely, holding that "NFL member clubs compete in several ways off the field, which itself tends to show that the teams pursue diverse interests and thus are not a single enterprise under § 1." *Id.* at 1099. Moreover, the Seventh Circuit here refused even to consider whether the NFL teams are competitors or potential competitors in the licensing of intellectual property, directly contrary to the approach that the *Sullivan* court took. *Compare* Pet. App. 16a, *with Sullivan*, 34 F.3d at 1099. The circuit conflict is palpable.[1]

Indeed, in the precise context of trademark licensing, the Second Circuit recently held that antitrust claims against Major League Baseball Properties based on the teams' decision to license collectively (and exclusively) should be assessed under the Rule of Reason. *See Major League Baseball Props., Inc. v. Salvino, Inc.*, 542 F.3d 290, 334 (2d Cir. 2008). The United States protests (U.S. Br. at 15, n.5) that the Second Circuit did not there address any single entity defense. But Second Circuit precedent already foreclosed that argument. *See Volvo*, 857 F.2d at 71; *NASL*, 670 F.2d at 1257. The decision below thus directly conflicts with the Second

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[1] *Fraser* of course reaffirmed *Sullivan*'s broad approach. *Fraser*, 284 F.3d at 55-56. While the United States speculates that *Fraser* may somehow have misread *Bulls II* (U.S. Br. 17), the point remains that *Fraser* broadly rejected single-entity treatment for professional sports leagues. The United States also suggests (*id.*) that *Fraser* leaves open the possibility of treating sports leagues as single entities, but fails to note that, in this regard, *Fraser* was addressing only a "unique structure" in which all the teams in a league were owned by a single company. 284 F.3d at 53.

Circuit even on the specific issue of collective licensing.

In all events, this Court regularly grants certiorari to resolve conflicting views of the law without insisting that the differing approaches have been applied in each circuit to precisely the same set of facts. *See, e.g., Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 280 (1998) (granting certiorari when "[t]he Fifth Circuit's analysis represents one of the varying approaches adopted by the Courts of Appeals"); *United States v. Nat'l Bank of Commerce*, 472 U.S. 713, 719 (1985) (granting certiorari when decision "appeared to us to conflict, directly or in principle, with decisions of other Courts of Appeals"); *Saxbe v. Wash. Post Co.*, 417 U.S. 843, 846 (1974) (resolving "an apparent conflict in approach to [a] question"). The Court should do so here as well, because the lower courts are applying fundamentally different legal principles to the single-entity question.

II. THIS CASE SQUARELY PRESENTS AN IMPORTANT QUESTION OF LAW THAT IS RIPE FOR THIS COURT'S REVIEW

For the same reason that the United States misses the legal point on which the circuits are in irreconcilable conflict, it errs in suggesting (U.S. Br. 18-19) that the case does not present a question warranting review. Whether independently owned teams that compete or potentially compete with each other are entitled to single-entity immunity from antitrust scrutiny is an important federal question that is indeed ripe for and in need of this Court's review.

As an initial matter, the single-entity question could not be more squarely or cleanly presented here. Petitioner's antitrust claim is a substantial one that survived a motion to dismiss, and summary judgment was sought and granted below solely on single-entity grounds. Accordingly, there is no potential alternative ground that could even arguably prevent this Court from resolving the issue.

Nor does (or could) the United States seriously contest the issue's importance. The major sports leagues account for significant economic activity, *see, e.g.*, Edelman, *supra*, at 891 (NFL club revenues alone were over $6.5 billion in 2008), and they have become increasingly aggressive in centralizing that activity—as evidenced, for example, by centrally controlled national cable and Internet broadcast packages like NBA League Pass and NHL Center Ice, which are insulated from competition by league rules prohibiting individual teams from competing.

The courts, Congress, and commentators, moreover, have all recognized the importance to consumer welfare of antitrust constraints—or the absence thereof—in the sports league context. *See, e.g., Major League Baseball v. Crist*, 331 F.3d 1177, 1188) (11th Cir. 2003) ("[T]he welfare losses stemming from the potentially anticompetitive agreements among professional sports clubs have been well documented."); *Competition in Sports Programming and Distribution: Are Consumers Winning*, Hearing Before S. Comm. on the Judiciary, 109th Cong. 24 (2006); Brandon L. Grusd, *The Antitrust Implications of Professional Sports' League-Wide Licensing and Merchandising Arrangements*, 1 VA. J. SPORTS & LAW 1 (1999); Paolino, *supra*, 16

SPORTS LAW. J. at 26. Failure promptly to resolve the circuit conflict would be particularly problematic, because it would perpetuate uncertainty about the fundamental antitrust status of the leagues, and because fans, teams, and leagues cannot practically operate under different rules in different circuits. This Court "ha[s] repeatedly emphasized the importance of clear rules in antitrust laws." *Pac. Bell Tel. Co. v. linkLine Commc'ns, Inc.*, 129 S. Ct. 1109, 1120-21 (2009).

Furthermore, the United States repeatedly errs (U.S. Br. 13, 20) in speculating that the decision below may somehow have resulted from petitioner's having purportedly "disclaimed any challenge" to the teams' "licensing their marks and logos collectively—the only aspect of the challenged licensing agreement that involves joint action among potential competitors." (*Id.* at 20). To the contrary, the anticompetitive nature of the teams' agreement to license their marks collectively was fundamental to the claimed antitrust violation from the beginning. For example, petitioner's opposition to the NFL's motion to dismiss made clear that it was challenging the teams':

> *enter[ing] into a horizontal agreement to restrict (actually eliminate) their own use of their respective intellectual property, to deal only through National Football League Properties* (which they created), to grant a license only to Reebok, and, necessarily, to refuse to deal with any other licensee.

R.14 at 2-3 (emphasis added). Petitioner maintained this position throughout, including on appeal. *See* Opening Br. on Appeal, at 47 (challenging "the

district court's view that the Teams are free to combine their Club Marks in NFLP for the purpose of limiting market competition"). *See also, e.g.*, R.14 at 12 n.6; R.20 at 1; R.20 at 11; R.104 at 5-6; R.120 at 5. The courts below, in turn, fully understood that a central issue was "whether or not the 32 teams can agree on designating a common actor to exploit their various intellectual property rights, and on being bound by the decisions of that common actor." Pet. App. 24a.

Indeed, the United States' depiction of petitioner's antitrust claim as somehow attacking Reebok's exclusive license without challenging the NFL teams' collective licensing makes no sense. What makes Reebok's license exclusive—and, more importantly, what makes that exclusivity anticompetitive—is *precisely* the teams' horizontal agreement to refrain from competing with Reebok or with each other by licensing their marks independently. That horizontal agreement is *inherently* at the core of petitioner's claim.

In its brief, the United States appears to confuse (1) petitioner's statements that it was not advancing an antitrust claim challenging the NFL teams' collective licensing *standing alone* with (2) a legal position that the teams' collective licensing was not a component of petitioner's claim *at all* or was unobjectionable. (U.S. Br. 13.) The record is clear that the NFL teams' decision to license their intellectual property collectively and exclusively — rather than competing individually—was a central part of petitioner's antitrust claim throughout. It is likewise clear that the courts below understood this, and that it was they, not petitioner, that

(erroneously) held that the suppressed potential for competition among the teams was legally irrelevant to the single-entity issue. Pet. App. 16a.

In sum, this case cleanly presents an important conflict over a fundamental issue of antitrust law. Immediate resolution of the issue is necessary and appropriate.[2]

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari.

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[2] The United States quibbles with petitioner's position on the *merits* of the single entity issue, suggesting (U.S. Br. 18-19) that the grant of the Reebok license by vote of the teams may not be "dispositive of the single-entity inquiry." But possible disagreement on the merits of the issue is not an argument against granting certiorari. Moreover, the United States' reliance in this regard on *Texaco, Inc. v. Dagher*, 547 U.S. 1, 6 (2006), is an error, as in *Dagher* the joint venturers were not potential competitors in the relevant market, and the joint venture itself was a unitary, fully-integrated entity wholly different from the collection of independently owned NFL teams that compete with each other. *Id.* at 5-6.

Respectfully Submitted,

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