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

BRIEF OF AMICI CURIAE NATIONAL BASKETBALL ASSOCIATION AND NBA PROPERTIES IN SUPPORT OF THE NFL RESPONDENTS' RESPONSE

Jeffrey A. Mishkin
Counsel of Record
Karen Hoffman Lent
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
Four Times Square
New York, NY 10036
Tel: (212) 735-3000
Fax: (212) 735-2000

Richard W. Buchanan
National Basketball Association
645 Fifth Avenue
New York, NY 10022
Tel: (212) 407-8000
Fax: (212) 888-7931

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STATUTES

Pursuant to Rule 37 of the Rules of this Court, the National Basketball Association and NBA Properties ("NBAP") (collectively, the "NBA") submit this brief as *amici curiae* in support of the position of the National Football League Respondents ("NFL") that the petition for a writ of *certiorari* should be granted.[1]

STATEMENT OF INTEREST

The NBA is an integrated business enterprise that engages in the production and marketing of NBA Basketball. The NBA is organized as a joint venture, with each of its thirty members operating a professional basketball team in a particular geographic location in North America. At its core, NBA Basketball consists of an annual schedule of NBA games, produced in accordance with a specified NBA format, played under NBA rules, and leading to a series of playoff games that culminate each year in the determination of an NBA Champion. No individual NBA team is capable of producing NBA Basketball on its own.

In order to promote and expand upon its core business, the NBA, more than forty years ago,

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[1] The parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the *amici curiae*'s intention to file this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* made a monetary contribution to its preparation or submission.

formed NBA Properties, a New York corporation owned equally by the thirty members of the NBA. NBAP serves as the marketing and licensing arm of the NBA and is the owner and/or exclusive licensor of trademarks, trade dress, and other indicia of the NBA and its member teams. Among other things, NBAP contributes to the revenues of the NBA and to the popularity of NBA Basketball by licensing throughout the United States and internationally a wide variety of merchandise and services consisting of or incorporating the intellectual property of the NBA and its member teams.

For many years, both the NBA and NBAP have been subjected to costly and burdensome antitrust litigation premised on the assertion that the member teams of the NBA are economic competitors whose most basic collective activities constitute a "contract, combination . . . or conspiracy" under Section 1 of the Sherman Act, 15 U.S.C. § 1. While some courts of appeals, correctly applying this Court's decision in *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984), have concluded that highly integrated joint ventures such as the NBA can and should be viewed as single entities incapable of conspiring under Section 1, others have incorrectly rejected that conclusion, with the result that the NBA, other professional sports leagues such as respondent NFL, and many other economically integrated joint ventures that operate on a nationwide basis are faced with inconsistent and unpredictable antitrust regulation depending on the particular circuit in which an antitrust challenge is brought. This inconsistency significantly impedes the ability of the NBA to engage in vigorous

interbrand competition against the countless other producers of entertainment products and services. The NBA therefore has a strong interest in seeking from this Court a consistent and uniform standard for applying *Copperweld* to the operation of highly integrated joint ventures such as professional sports leagues.

SUMMARY OF ARGUMENT

The courts of appeals are divided as to the proper application of *Copperweld* to integrated joint ventures operating on a nationwide basis such as professional sports leagues. The absence of a uniform national standard for determining whether such ventures are single economic entities for purposes of Section 1 subjects them to inconsistent antitrust regulation depending upon the circuit in which an antitrust claim is filed. *Certiorari* should be granted to ensure a uniform standard and promote the goal of bringing costly and burdensome antitrust litigation to earlier resolution.

ARGUMENT

A. *Certiorari* Should be Granted In Order to Ensure a Uniform Standard for Applying *Copperweld* to Nationwide Joint Ventures

In *Copperweld*, this Court held that a parent company and its separately incorporated subsidiary constitute a single economic entity that cannot satisfy the plurality of actors required for liability under Section 1 of the Sherman Act. The basis for that holding was that the joint activities of a parent and its subsidiary neither "deprive[] the marketplace

of . . . independent centers of decisionmaking," nor "represent a sudden joining of two independent sources of economic power previously pursuing separate interests." 467 U.S. at 768-69, 771. The manner and extent to which that holding should be applied to professional sports leagues and other integrated joint ventures operating on a nationwide basis has divided the courts of appeals.

In the opinion below, the Seventh Circuit, relying on its own earlier decision in *Chicago Professional Sports Ltd. Partnership v. NBA*, 95 F.3d 593 (7th Cir. 1996) ("*Bulls II*"), found that the NFL teams were "best described as a single source of economic power" and that *Copperweld* therefore required the conclusion that the teams, even though separately owned, functioned as a single entity in the licensing of the league's intellectual property and thus were not subject to attack under Section 1. Pet. App. 18a.

The Seventh Circuit has rejected as "silly" the proposition that single entity status under *Copperweld* requires a "complete unity of interest" among separately incorporated firms. *Bulls II*, 95 F.3d at 598. Yet that is precisely the view of the First Circuit. *See Sullivan v. NFL*, 34 F.3d 1091, 1099 (1st Cir. 1994) ("[T]he critical inquiry is whether the alleged antitrust conspirators have a 'unity of interests.'") (citation omitted). The Fourth and Fifth Circuits appear to agree with the Seventh, having applied *Copperweld* to find the activities of other sports leagues to fall outside the scope of Section 1. *See Eleven Line, Inc. v. N. Tex. State Soccer Ass'n*, 213 F.3d 198, 205 (5th Cir. 2000); *Seabury Mgmt., Inc. v. Profl Golfers' Ass'n of Am., Inc.*, 52 F.3d 322 (4th Cir. 1995) (table decision), text

available at 1995 WL 241379. The Second and Ninth Circuits, however, appear to be in accord with the First. *See Freeman v. San Diego Ass'n of Realtors*, 322 F.3d 1133, 1149 (9th Cir. 2003) ("[W]here firms are not an economic unit and are at least potential competitors, they are usually not a single entity for antitrust purposes."); *U.S. Football League v. NFL*, 842 F.2d 1335, 1371-72 (2d Cir. 1988) (citing approvingly the pre-*Copperweld* decision in *N. Am. Soccer League v. NFL*, 670 F.2d 1249 (2d Cir. 1982)). Under the current state of the law, as the Seventh Circuit aptly observed, the application of *Copperweld* to professional sports leagues "leads us into murky waters." Pet. App. 12a.

The lack of uniformity in the application of *Copperweld* to integrated joint ventures such as professional sports leagues presents a question of exceptional importance for national antitrust policy. No professional sports league operating throughout the country can function successfully if it is subject to inconsistent antitrust regulation depending upon the forum chosen for an antitrust attack. This Court expressly so held in *Flood v. Kuhn*, 407 U.S. 258 (1972), where it found that state antitrust law claims against Major League Baseball were preempted by federal law because "national uniformity [is required] in any regulation of baseball and its reserve[] system." *Id.* at 284-85 (internal quotations omitted; alteration in original). The lower court there explained that regulation of Major League Baseball under differing state antitrust principles was impermissible because it would force the league – which conducts its interdependent operations on a nationwide basis – to adhere to the most onerous

state antitrust standard to which it might be subject. *See Flood v. Kuhn*, 443 F.2d 264, 268 (2d Cir. 1971). Other courts have reached the same conclusion with respect to the NBA (*Robertson v. NBA*, 389 F. Supp. 867, 880 (S.D.N.Y. 1975)) and the NFL (*Partee v. San Diego Chargers Football Co.*, 668 P.2d 674, 678-79 (Cal. 1983)).

It requires no argument that the NBA could not produce NBA Basketball absent a nationally uniform set of rules governing its structure and operation. *See NBA v. Williams*, 45 F.3d 684, 689 (2d Cir. 1995) ("[S]ports leagues need many common rules," including "[n]umber of games, length of season, playoff structures, and roster size and composition."). The divergent application of *Copperweld* forces the league to operate under a cloud of uncertainty as to whether its most basic collective actions will, depending on the forum chosen by an antitrust plaintiff, subject it to a ruling that its member teams have "conspired" in violation of Section 1. Mindful of that ever-present threat, the league is therefore unfairly limited and constrained in its ability to develop business strategies that might enable it to compete more effectively in the larger entertainment marketplace. *See Partee*, 668 P.2d at 678.

B. Adoption of a Uniform Application of *Copperweld* Would Permit Early Resolution of Burdensome Antitrust Litigation

Whether a professional sports league or other integrated joint venture functions as a single entity for purposes of Section 1 is a threshold issue that can

bring otherwise costly and burdensome antitrust litigation to an early end. Recognizing this, the trial court below limited discovery to the single entity issue and then disposed of the case at a substantial savings of time and expense for both the parties and the court. Pet. App. 7a-8a. The trial court's management of this case was consistent with the goals announced by this Court in *Bell Atlantic Corp. v. Twombly*, where it emphasized that deficiencies in a case "'should . . . be exposed at the . . . minimum expenditure of time and money by the parties and the court.'" 550 U.S. 544, 127 S. Ct. 1955, 1966 (2007) (citation omitted) (alteration in original).

If the courts of appeals and the district courts had the benefit of a uniform national standard for applying *Copperweld*, much unnecessary and protracted antitrust litigation might be avoided. The absence of authoritative guidance on this issue promises a continuation of the kind of prolonged antitrust disputes to which the NBA has been subjected in the past. *See, e.g., Bulls II*, 95 F.3d at 598-99 (six years of litigation prior to the Seventh Circuit finding that the interpretation of *Copperweld* applied by the district court was incorrect; parties ultimately settled); *Kingray, Inc. v. NBA*, 188 F. Supp. 2d 1177 (S.D. Cal. 2002) (more than two years of litigation before conspiracy claims were dismissed on standing grounds); *NBA Props., Inc. v. Salvino, Inc.*, No. 99 Civ. 11799 AGS (S.D.N.Y.) (more than two years of litigation before parties settled with NBA's summary judgment motion on single entity grounds pending). These litigations could have been vastly truncated had there been a clear standard announced by this Court, allowing for a threshold

finding that a professional sports league is a single entity whose collective activities fall outside the scope of Section 1.

CONCLUSION

The petition for a writ of *certiorari* should be granted.

Respectfully submitted,

Jeffrey A. Mishkin
Counsel of Record
Karen Hoffman Lent
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP

RICHARD BUCHANAN
NATIONAL BASKETBALL
ASSOCIATION

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