No. 08-661

In the Supreme Court of the United States

AMERICAN NEEDLE, INC., PETITIONER

v.

NATIONAL FOOTBALL LEAGUE, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Establishing a violation of Section 1 of the Sherman Act, 15 U.S.C. 1, requires proof of collective action involving "*separate* entities." *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752, 768 (1984). For several decades, the National Football League (NFL) and its member teams have agreed to license their trademarks and logos to manufacturers (such as petitioner) exclusively through National Football League Properties (NFLP). In 2001, NFLP granted an exclusive headwear license to petitioner's competitor, following ratification by the teams.

The question presented is whether NFLP, the NFL, and the teams functioned as a single entity in taking these actions, and therefore did not violate Section 1.

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INTEREST OF THE UNITED STATES

The Department of Justice and the Federal Trade Commission have primary responsibility for enforcing the federal antitrust laws and have a strong interest in their correct application. At the Court's invitation, the United States filed a brief as amicus curiae at the petition stage of this case.

STATEMENT

Section 1 of the Sherman Act, 15 U.S.C. 1, prohibits concerted action unreasonably in restraint of trade. "It does not reach conduct that is wholly unilateral"; rather, a Section 1 plaintiff must prove concerted action taken by "*separate* entities." *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752, 768 (1984) (citations and

internal quotation marks omitted). The Court in *Copperweld* held that a parent corporation and its wholly owned subsidiary were not separate entities for antitrust purposes, and therefore did not engage in concerted action subject to Section 1. This case concerns the application of the separate-entities requirement to the licensing of trademarks and logos by the National Football League (NFL) and its member teams.

1. The NFL is an unincorporated association of 32 separately owned and operated teams that equally share some but not all revenues. Pet. App. 2a; Dep. of Gary M. Gertzog 198-208 (04-cv-7806 Docket entry No. 101 (N.D. Ill. Mar. 15, 2007)) (Gertzog Dep.). In 1963, the teams formed National Football League Properties (NFLP), "a separate corporate entity charged with * * * developing, licensing, and marketing the intellectual property the teams owned, such as their logos, trademarks, and other indicia." Pet. App. 3a. The teams (and the NFL itself) subsequently granted NFLP the exclusive right to license their trademarks and logos, though each team retained ownership of its intellectual property. *Id.* at 22a-23a, 27a; J.A. 320-321, 357, 386-387.

For many years, NFLP granted headwear licenses to multiple vendors, including petitioner, permitting them to manufacture and sell baseball caps and stocking hats bearing team marks and logos. Pet. App. 3a. The licenses covered the marks and logos for the NFL and all the teams, and they required vendors to sell "product lines bearing, in the aggregate, the marks identifying all member clubs." J.A. 139.

In December 2000, following a vote by the teams, NFLP entered into a memorandum of understanding with respondent Reebok International Ltd. (Reebok) under which Reebok became the exclusive headwear

licensee for ten years. Pet. App. 3a. NFLP later declined to renew petitioner's headwear license. *Id.* at 3a-4a.

2. Petitioner brought suit, alleging that the agreement among NFLP, the NFL, the teams, and Reebok (collectively, respondents) to enter into an exclusive headwear license violated Sections 1 and 2 of the Sherman Act, 15 U.S.C. 1 and 2. Pet. App. 1a. In their answer, NFLP, the NFL, and the teams (collectively, the NFL respondents) contended that they were incapable of conspiring "with one another within the meaning of the antitrust laws because they are a single economic enterprise, at least with respect to the conduct challenged in the complaint." J.A. 99.

After permitting limited discovery on whether the NFL respondents functioned as a "single entity" in licensing marks and logos, the district court granted summary judgment for respondents on petitioner's Section 1 claim. Pet. App. 22a-28a. The court held that, "with regard to the facet of their operations respecting exploitation of intellectual property rights, the NFL and its 32 teams are, in the jargon of antitrust law, acting as a single entity." *Id.* at 24a. "That determination," the court explained, "is essentially a conclusion that in that facet of their operations they have so integrated their operations that they should be deemed to be a single entity rather than joint venture[rs] cooperating for a common purpose." *Ibid.*[1]

3. The court of appeals affirmed. Pet. App. 1a-19a. Respondents invoked *Copperweld* to argue that the NFL respondents functioned as a single entity under Sec-

[1] For related reasons, the court also rejected petitioner's Section 2 claims. Pet. App. 20a-21a, 24a.

tion 1. In addressing that argument, the court of appeals stated that "in some contexts, a league seems more aptly described as a single entity immune from antitrust scrutiny, while in others a league appears to be a joint venture between independently owned teams that is subject to review under [Section] 1." *Id.* at 12a. Relying on circuit precedent, the court held that "whether a professional sports league is a single entity should be addressed not only 'one league at a time,' but also 'one facet of a league at a time.'" *Id.* at 13a (quoting *Chicago Prof'l Sports Ltd. P'ship* v. *NBA*, 95 F.3d 593, 600 (7th Cir. 1996)). The court therefore limited its review to the actions of the NFL respondents "as they pertain to the teams' agreement to license their intellectual property collectively via NFL Properties." *Ibid.*

The court of appeals agreed with petitioner that, "when making a single-entity determination, courts must examine whether the conduct in question deprives the marketplace of the independent sources of economic control that competition assumes." Pet. App. 15a. The court nevertheless concluded that, even if "the several NFL teams [had] competing interests regarding the use of their intellectual property that could conceivably rise to the level of potential intra-league competition, those interests [would] not necessarily keep the teams from functioning as a single entity." *Id.* at 16a. The court of appeals therefore stated that it could not "fault the district court for not considering whether the NFL teams could compete against one another when licensing and marketing their intellectual property." *Ibid.*

Rather than focusing on the potential for NFL teams to compete against each other in exploiting their marks and logos, the court of appeals found it decisive that "the NFL teams can function only as one source of economic

power when collectively producing NFL football." Pet. App. 16a. From that premise, the court stated, it "follows that only one source of economic power controls the promotion of NFL football." *Id.* at 16a-17a. The court stressed that the "teams share a vital economic interest in collectively promoting NFL football" because "the league competes with other forms of entertainment * * * and the loss of audience members to alternative forms of entertainment necessarily impacts the individual teams' success." *Id.* at 17a. The court made clear that it regarded the licensing of team marks and logos as a means of promoting the league, emphasizing that, for much of the NFL's history, its "teams have acted as one source of economic power—under the auspices of [NFLP]—to license their intellectual property collectively and to promote NFL football." *Ibid.* The court of appeals concluded that "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 18a.[2]

SUMMARY OF ARGUMENT

The NFL is a legitimate joint venture of 32 separately owned and operated teams that compete vigorously in many respects but, out of reasonable necessity to create and sustain the league, cooperate in others. Although lower courts generally have applied rule-of-reason analysis when challenges to the conduct of sports leagues have been brought under Section 1 of the Sherman Act, this Court has not definitively addressed whether or when such a hybrid organization may be considered a "single entity" for purposes of Section 1.

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[2] The court of appeals also affirmed the district court's rejection of petitioner's Section 2 claims. Pet. App. 18a.

This Court's decisions make clear that concerted action occurs when separately owned teams form a league, or cede to the league authority over an aspect of their operations. Similarly, there is concerted action when teams decide collectively to constrain "the way in which they will compete with one another" in the marketplace. *NCAA* v. *Board of Regents*, 468 U.S. 85, 99 (1984). Because such agreements restrict actual or potential competition among the teams, they are subject to Section 1, though they may ultimately be found procompetitive and lawful.

The reasoning of *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752 (1984), and *Texaco Inc.* v. *Dagher*, 547 U.S. 1 (2006), however, supports a more nuanced analysis to the extent that teams (or other joint venturers) have effectively merged an aspect of their operations, completely eliminating competition among themselves in that respect. In *Copperweld*, the Court held that, because a parent and its subsidiary are not actual or potential competitors, collaboration between the two does not "raise the antitrust dangers that [Section] 1 was designed to police." 467 U.S. at 769. *Dagher* illustrates that similar considerations are relevant when competitors have entered into a joint venture.

The functional analysis of the enterprises in *Copperweld* and *Dagher* can be extended to the NFL, which is a legitimate joint venture among competitors. Single-entity treatment for the teams and the league is appropriate if, but only if, two conditions are satisfied. First, the teams and the league must 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. Second, the challenged restraint must not

significantly affect actual or potential competition among the teams or between the teams and the league outside their merged operations. Only a limited range of conduct would qualify for single-entity treatment under this standard, since most forms of collaboration are not equivalent to an effective merger, and many restraints have competitive effects on more than one aspect of operations.

Petitioner contends that the conduct of NFL teams is always subject to Section 1 because the teams are separately owned and controlled. But courts and commentators have recognized that neither the single-entity nor the conspiracy characterization is apt for all actions of a hybrid organization like the NFL. While Section 1 scrutiny is appropriate for restraints that affect actual or potential competition among the teams (or between the teams and the league), it should not be applied to putative horizontal agreements among the participants in a hybrid organization when such competitive concerns are absent.

The NFL respondents' request for a broad judicially created exemption from Section 1 also should be rejected. That proposal extends far beyond the rationale of *Copperweld* and *Dagher*, and it oversimplifies the competitive landscape the teams inhabit. Such blanket proposals are properly addressed only to Congress. Moreover, the limited record makes this case an unsuitable vehicle for considering such a wide-ranging limitation on the application of Section 1. The decisions below were specific to the NFL respondents' licensing of marks and logos, and the record lacks key evidence about other aspects of the league's operations. More generally, a broad-brush approach to the single-entity

concept could affect antitrust enforcement far beyond the sports-league context.

The judgment below should be vacated, and the case remanded. Although the court of appeals was correct that each "facet" of the league's operation must be considered separately, its analysis of the particular facet at issue here—licensing of marks and logos—was flawed and incomplete. On remand, the lower courts should clarify the scope of petitioner's Section 1 claim, perhaps allow appropriate additional discovery, and then apply the principles from this Court's decision.

ARGUMENT

A. Agreements That Restrict Actual Or Potential Competition Constitute Concerted Action Subject To Section 1 Of The Sherman Act

"The Sherman Act contains a 'basic distinction between concerted and independent action.'" *Copperweld*, 467 U.S. at 767 (quoting *Monsanto Co.* v. *Spray-Rite Serv. Corp.*, 465 U.S. 752, 761 (1984)). "The conduct of a single firm is governed by [Section] 2 alone and is unlawful only when it threatens actual monopolization." *Ibid.* "It is not enough that a single firm appears to 'restrain trade' unreasonably, for even a vigorous competitor may leave that impression." *Ibid.*

Section 1 concerns only concerted action, which "is judged more sternly than unilateral activity under [Section] 2." *Copperweld*, 467 U.S. at 768. Unlike Section 2, Section 1 does not require proof that the concerted activity "threatens monopolization." *Ibid.* "Congress treated concerted behavior more strictly than unilateral behavior" because "[c]oncerted activity inherently is fraught with anticompetitive risk" and "deprives the marketplace of the independent centers of decisionmak-

ing that competition assumes and demands." *Id.* at 768-769. "[S]uch mergings of resources may well lead to efficiencies that benefit consumers, but their anticompetitive potential is sufficient to warrant scrutiny even in the absence of incipient monopoly." *Id.* at 769.

Consistent with this fundamental distinction, the Court in *Copperweld* held that "an internal 'agreement' to implement a single, unitary firm's policies" between a parent and a wholly owned subsidiary is not concerted action under Section 1 because it "does not raise the antitrust dangers that [Section] 1 was designed to police." 467 U.S. at 769. The Court explained:

> A parent and its wholly owned subsidiary have a complete unity of interest. * * * With or without a formal 'agreement,' the subsidiary acts for the benefit of the parent, its sole shareholder. If a parent and a wholly owned subsidiary do 'agree' to a course of action, there is no sudden joining of economic resources that had previously served different interests, and there is no justification for [Section] 1 scrutiny.

Id. at 771. For that reason, "the logic underlying Congress' decision to exempt unilateral conduct from [Section] 1 scrutiny * * * similarly excludes the conduct of a parent and its wholly owned subsidiary." *Id.* at 776.

In *Dagher*, this Court applied a similar approach to price-setting by a joint venture formed by two oil companies that had "end[ed] competition between [them] in the domestic refining and marketing of gasoline." 547 U.S. at 4. The Court explained that the formation of the venture was tantamount to a merger in those aspects of operations, see *ibid.*, and that the act of formation was subject to antitrust scrutiny under the rule of rea-

son, *id.* at 6 n.1 (citing *Copperweld*, 467 U.S. at 768). Once the venture was formed, however, the venturers acted "in their role as investors, not competitors" in pricing the venture's products and thus operated in that aspect of operations "as a single firm." *Id.* at 6.[3] Significantly, the venturers no longer participated independently in the pertinent market, *id.* at 5, and thus as in *Copperweld*, the agreements between them did not "raise the antitrust dangers that [Section] 1 was designed to police." *Copperweld*, 467 U.S. at 769.[4]

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[3] This Court explained that conclusion by observing that "[w]hen 'persons who would otherwise be competitors pool their capital and share the risks of loss as well as the opportunities for profit . . . such joint ventures [are] regarded as a single firm competing with other sellers in the market.'" *Dagher*, 547 U.S. at 6 (quoting *Arizona* v. *Maricopa County Med. Soc'y*, 457 U.S. 332, 356 (1982) (second set of brackets in original)). That dictum from *Maricopa* was an apt description of the joint venture in *Dagher*, and pointed to the correct result. But the Court in *Maricopa* (which preceded *Copperweld*) did not purport to supply a test for single-entity conduct.

It would not be sensible to treat capital pooling and risk sharing as a complete test for single-entity treatment. For example, venturers could contribute capital to a venture and share its profits and losses, yet remain in competition with it (or among themselves). Moreover, if sharing profits and losses were the test, cartelists "could evade the antitrust law simply by creating a 'joint venture' to serve as the exclusive seller of their competing products. So long as no agreement explicitly listed the prices to be charged, the companies could act as monopolists through the 'joint venture,' setting prices together for their competing products." *Major League Baseball Props., Inc.* v. *Salvino, Inc.*, 542 F.3d 290, 335 (2d Cir. 2008) (Sotomayor, J., concurring).

[4] Strictly speaking, this Court in *Dagher* held only that it would be error "to condemn the internal pricing decisions of a legitimate joint venture as *per se* unlawful," and found it unnecessary to "address petitioners' alternative argument that [Section] 1 of the Sherman Act is inapplicable to joint ventures." 547 U.S. at 7 & n.2. But *Dagher*'s reasoning and result generally reflect a natural extension of *Copperweld*.

This Court, however, has consistently applied Section 1 to agreements affecting the type or degree of ongoing competition between participants in an established joint venture. In *NCAA* v. *Board of Regents*, 468 U.S. 85 (1984), decided eight days after *Copperweld*, the Court considered a Section 1 challenge to the NCAA's restrictions on member institutions' ability to enter into separate contracts to televise their football games (ostensibly part of a plan to minimize the effect of televised games on stadium attendance). The Court acknowledged that "a certain degree of cooperation is necessary" to preserve the "type of competition that [the NCAA] and its member institutions seek to market." *Id.* at 117. The Court nonetheless concluded that because the plan "prevent[ed] member institutions from competing against each other," the member institutions had "created a horizontal restraint—an agreement among competitors on the way in which they will compete with one another." *Id.* at 99; see William F. Baxter, *Antitrust: A Policy in Search of Itself*, 54 Antitrust L.J. 15, 16-17 (1985) ("An agreement that was unambiguously horizontal was involved [in *NCAA*], an agreement that explicitly restricted certain aspects of rivalry between the defendant organizations.").

The Court in *NCAA* held that the challenged restraint violated Section 1. See 468 U.S. at 120. Many agreements among joint venturers, however, while subject to Section 1 scrutiny because they restrict actual or potential competition among the venturers, are ultimately deemed lawful. Most restraints—including restraints related to a legitimate joint venture—are judged by the "rule of reason." *Leegin Creative Leather Prods., Inc.* v. *PSKS, Inc.*, 551 U.S. 877, 885 (2007) ("The rule of reason is the accepted standard for testing whether a prac-

tice restrains trade in violation of [Section] 1."). That standard considers, as appropriate, "specific information about the relevant business," "the restraint's history, nature, and effect," and the participants' market power. *Id.* at 885-886 (citation omitted).

Courts applying Section 1 have recognized the procompetitive potential of joint ventures in a number of circumstances. See *Broadcast Music, Inc.* v. *CBS*, 441 U.S. 1, 23 (1979) (*BMI*). Courts also have applied rule-of-reason analysis to "ancillary" restraints, which are concerted action, and which are analyzed as part of a joint venture because they are "subordinate and collateral" to the joint venture—that is, reasonably necessary to "make the [venture] more effective [or efficient] in accomplishing its purpose." *Rothery Storage & Van Co.* v. *Atlas Van Lines, Inc.*, 792 F.2d 210, 224 (D.C. Cir. 1986), cert. denied, 479 U.S. 1033 (1987); see also *Dagher*, 547 U.S. at 7; *Major League Baseball Props., Inc.* v. *Salvino, Inc.*, 542 F.3d 290, 338-339 (2d Cir. 2008) (Sotomayor, J., concurring); *United States* v. *Addyston Pipe & Steel Co.*, 85 F. 271, 281 (6th Cir. 1898) (Taft, J.), aff'd, 175 U.S. 211 (1899).

Judge Bork's decision in *Rothery Storage* is particularly instructive. There, moving companies had formed a joint venture to offer a nationwide van line and had adopted a policy prohibiting participants from interstate carriage on their own account. 792 F.2d at 211-213. The venturers argued that the policy was exempt from Section 1 scrutiny under *Copperweld* because they were part of a single enterprise. *Id.* at 214. The court rejected that argument because the venturers were "actual or potential competitors" of the venture when the challenged policy went into effect and had "agreed to a policy that restricted competition." *Ibid.* (citing *NCAA*,

468 U.S. at 99). The court therefore subjected the challenged policy to Section 1 rule of reason analysis. Under that analysis, the court upheld the policy as a permissible ancillary restraint reasonably necessary to make the venture more efficient. *Id.* at 229.

These cases show that, after proper analysis, concerted action among joint venturers is sometimes found lawful. But the need to undertake that analysis is equally a reminder that the "central evil addressed by Sherman Act [Section] 1" is the "eliminat[ion of] competition that would otherwise exist." 7 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 1462(b) at 193-194 (2d ed. 2003) (Areeda & Hovenkamp). That concern persists even after a legitimate joint venture has been formed if additional restraints have the effect of further reducing competition among the venturers.[5]

B. As With Many Joint Ventures, The NFL And Its Member Teams Should Be Regarded As A Single Entity For Some But Not All Aspects Of The League's Operations

The NFL and its teams—like most professional sports leagues—"comprise a hybrid arrangement, somewhere between a single company (with or without wholly owned subsidiaries) and a cooperative arrangement between existing competitors." *Fraser* v. *MLS*, 284 F.3d 47, 58 (1st Cir.) (Boudin, J.), cert. denied, 537 U.S. 885

[5] Indeed, the initial formation of a particular joint venture might satisfy rule-of-reason review in circumstances where a merger between the same entities would not, precisely because the joint venture preserves competition in some aspects of the venturers' business. This distinction between joint ventures and mergers would make little sense if the formation of a joint venture (standing alone) immunizes all subsequent agreements among the venturers from Section 1 scrutiny, because the entities involved then would simply create a joint venture and proceed to add restraints at will.

(2002). The 32 individually owned teams compete with one another in many ways, including for fans and players. See, *e.g.*, *Brown* v. *Pro Football, Inc.*, 518 U.S. 231, 249 (1996) (noting that professional football players "often negotiate their pay individually with their employers," NFL teams); *Sullivan* v. *NFL*, 34 F.3d 1091, 1098 (1st Cir. 1994) (the NFL teams "compete with each other, both on and off the field, for things like fan support, players, coaches, ticket sales, local broadcast revenues, and the sale of team paraphernalia"), cert. denied, 513 U.S. 1190 (1995); cf. *NCAA*, 468 U.S. at 99 ("The NCAA is an association of schools which compete against each other to attract television revenues, not to mention fans and athletes."). Yet "the clubs that make up a professional sports league are not completely independent economic competitors, as they depend upon a degree of cooperation for economic survival," *Brown*, 518 U.S. at 248, and they sometimes "compete[] as a unit against other forms of entertainment," *NFL* v. *North Am. Soccer League*, 459 U.S. 1074, 1077 (1982) (Rehnquist, J., dissenting from denial of certiorari). The NFL is thus like many other joint ventures in the general sense that it was formed by actors who have integrated in some aspects while continuing to compete in others, though the precise mix of cooperation and competition seen in many sports leagues is not often seen outside that realm.

Because of its hybrid nature, there is no "one 'right' characterization" for all the conduct of a professional sports league. *Chicago Prof'l Sports Ltd. P'ship* v. *NBA*, 95 F.3d 593, 600 (7th Cir. 1996) (*Bulls II*) (Easterbrook, J.); 7 Areeda & Hovenkamp ¶ 1478d, at 329 ("The courts have largely understood that sports leagues lie in between ordinary business firms, whose

collaboration is suspect, and totally integrated enterprises subject only to [Section] 2."). As the court of appeals concluded, Pet. App. 13a, the proper approach to such arrangements is to "focus on the particular [conduct] under antitrust scrutiny," 7 Areeda & Hovenkamp ¶ 1478d, at 332, and whether it "raise[s] the antitrust dangers that [Section] 1 was designed to police," *Copperweld*, 467 U.S. at 769.

1. Formation of a league by independent teams, and further steps to limit competition among the teams, are concerted actions

The coming together of competitors to form a joint venture is subject to scrutiny under Section 1, even if, as in *Dagher*, the result is effectively a merger with respect to some or all of the joint venturers' operations. 547 U.S. at 6 n.1 ("Had respondents challenged [the venture] itself, they would have been required to show that its creation was anticompetitive under the rule of reason."); *Copperweld*, 467 U.S. at 771 (concerted action occurs when "there is [a] sudden joining of economic resources that had previously served different interests"). As with other joint ventures, concerted action therefore occurs when separately owned professional sports teams form a league. And as with other joint ventures, further concerted action occurs when the teams collectively decide, after the initial formation of the league, to centralize additional functions in the venture, or place additional constraints on "the way in which they will compete with one another" in the marketplace. *NCAA*, 468 U.S. at 99. To be sure, such a constraint may be a lawful ancillary restraint if it is reasonably necessary to, and enhances the efficiency of, the legitimate and procompetitive league arrangement. But

the agreement is nonetheless concerted action subject to Section 1 because it limits actual or potential competition. See pp. 8-12, *supra*.[6]

2. In adopting a restraint, the league and the teams act as a single entity only with respect to aspects of their operations that have been effectively merged, and only when the restraint does not affect competition among the teams, or the teams and the league, outside their merged operations

Although a collective decision to limit competition among the teams is concerted action subject to review under Section 1, subsequent conduct simply reflecting that limitation presents more nuanced issues. In the case of hybrid organizations such as professional sports leagues, many lower courts have treated the participants' conduct as concerted, while also attempting to "reshape [S]ection 1's rule of reason toward a body of more flexible rules for interdependent multi-party enterprises." *Fraser*, 284 F.3d at 58-59. Treating such conduct as concerted is correct with respect to any aspect of the league's operations as to which the teams actually or potentially compete. *NCAA*, 468 U.S. at 99.

But where teams have effectively merged an aspect of their operations—that is, where they have completely eliminated competition among themselves in that activity—post-"merger" decisions that affect only that activity do not "raise the antitrust dangers that [Section] 1 was designed to police." *Copperweld*, 467 U.S. at 769. To be sure, *Copperweld*'s holding is limited to the

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[6] In a proper case, collective decisions about formation of a joint venture or the centralization of additional functions in it could—like the merger of previously independent firms—be challenged well after the fact, once anticompetitive effects occur or are discovered.

parent-subsidiary structure, *id.* at 767, and *Dagher*'s single-entity discussion was dicta, see note 4, *supra*. Nonetheless, the reasoning of those decisions logically extends to the NFL as a legitimate joint venture among competitors.[7]

Single-entity treatment for the teams and the league is appropriate with respect to a restraint on an aspect of their operations if, but only if, two conditions are satisfied. First, the teams and the league must 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. Second, the challenged restraint must not significantly affect actual or potential competition among the teams or between the teams and the league outside their merged operations. Cf. 7 Areeda & Hovenkamp ¶ 1478d, at 329 ("[T]he rules of a sports league should be regarded as 'conspiratorial' when they affect the conduct of individual participants in their nonventure business but as unilateral when they have no such effect.").

The first part of this test ensures that in the relevant aspect of operations, there exists the absence of competition that this Court has identified with single-entity conduct. It does not suffice for the teams merely to cooperate to some degree or to impose some restrictions on competition with respect to the challenged conduct. Separate entities can collaborate in an aspect of their operations without integrating, and many forms of inte-

[7] This analysis applies to joint ventures in which the venturers are (or were) actual or potential competitors of one another or of the venture. Different issues are presented when the venturers neither competed with each other before formation nor compete with one another or their venture after formation.

gration are not equivalent to a partial merger. See FTC & U.S. Dep't of Justice, *Antitrust Guidelines for Collaborations Among Competitors* § 1.3, at 5 (Apr. 2000) (*Competitor Collaboration Guidelines*).[8]

The second part of the test is needed to adapt the reasoning of *Copperweld* to account for the potential competitive effects of joint ventures that cannot arise in the context of corporate affiliates subject to common control. Because a parent and its wholly owned subsidiary together comprise "a single, unitary firm[]," *Copperweld*, 467 U.S. at 769, there is no danger that collective action in one aspect of the firm's operations will prevent competition that might otherwise occur in another sphere of endeavor. In the joint venture context, by contrast, the venture's actions in a merged aspect of operations can have competitive effects on the venturers in non-merged aspects. See *Competitor Collaboration Guidelines* § 1.3, at 5 (even if the collaboration is treated as a merger, "[e]ffects of the collaboration on competition in other markets are analyzed [separately]"). For example, as the United States observed in its brief in

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[8] In keeping with their accumulated experience reviewing business combinations, the Department of Justice and Federal Trade Commission ordinarily treat the formation of a joint venture as an effective merger "in whole or in part," and will analyze it pursuant to the Horizontal Merger Guidelines, when:

> (a) the participants are competitors in that relevant market; (b) the formation of the collaboration involves an efficiency-enhancing integration of economic activity in the relevant market; (c) the integration eliminates all competition among the participants in the relevant market; and (d) the collaboration does not terminate within a sufficiently limited period [in general, ten years] by its own specific and express terms.

Competitor Collaboration Guidelines § 1.3, at 5 (footnotes omitted).

Dagher, the oil companies there conceivably could have used their joint venture's pricing agreement "to manipulate the value of the companies' trademarks or to facilitate price fixing in markets where the two continued to compete." U.S. Br. at 15 n.9, *Dagher*, *supra* (No. 04-805) (U.S. *Dagher* Br.). Or, "if a joint venture is a supplier of inputs to the venture participants, the venture can conceivably facilitate a cartel by artificially inflating the venture participants' input costs." *Ibid.*

The two-part test is consistent with *Copperweld* and *Dagher*. Because the parent in *Copperweld* controlled the actions of the subsidiary, the two were aligned in all aspects of the company's operations, and there was no danger that collective decision-making in one sphere of the business could prevent competition that might otherwise have existed in another. In *Dagher*, "Texaco and Shell Oil did not compete with one another in the relevant market," 547 U.S. at 5, and there was no evidence that the challenged pricing restraint had effects in any market in which the two competed, see U.S. *Dagher* Br. 15 n.9. The test also correctly classifies venture formation as concerted action, because before the act of formation, the venturers have not merged their operations, and thus do not satisfy the first part of the test. See *Dagher*, 547 U.S. at 6 n.1; pp. 15-16, *supra*.[9]

Under this test, single-entity treatment will be appropriate in the sports-league context in some but not all situations. For example, teams do not compete in establishing the rules of on-field play, but rather have effectively merged their operation with respect to such

[9] The test also would properly classify cartel decisions as concerted action. Cartels are not legitimate joint ventures. By definition, cartels do not involve an effective merger, and their agreements affect actual or potential competition among participants.

decisions. So long as decisions in this sphere do not affect actual or potential competition among the teams in other areas, then conduct establishing the "rules defining the conditions of the contest," *NCAA*, 468 U.S. at 117, is reasonably viewed as that of a single entity. Similarly, the league and the teams may act as a single entity when hiring referees or establishing the structure of the central administrative staff.

By contrast, a rule forbidding teams from poaching one another's coaching talent—an aspect in which they surely compete—would properly be classified as concerted action. See *Law* v. *NCAA*, 134 F.3d 1010, 1019 (10th Cir.) (rule restricting coaches' salary was concerted action under Section 1), cert. denied, 525 U.S. 822 (1998). Such a rule would be an agreement by the teams on "the way in which they will compete with one another" in the marketplace, and therefore is concerted action under Section 1. *NCAA*, 468 U.S. at 99.[10] In short, collaboration among the teams is subject to Section 1 scrutiny except in those situations where actual or

[10] Leading commentators offer other examples:

> [T]he NFL's decision to have a schedule consisting of 12 one-hour games per year is clearly an "output limitation," because it could have more or longer games, but it is also an essentially unilateral act because it affects nothing but the output of the NFL as an entity. By contrast, a rule stating that the NFL schedule consists of 12 games *and* that the individual team owners are forbidden from organizing additional games among NFL teams or between NFL and non-NFL teams should be regarded as collaborative, because it affects the individual members' nonventure conduct.

7 Areeda & Hovenkamp ¶ 1478d, at 329. "Of course, such a rule might be 'reasonable,' and thus lawful." *Ibid.* The scope and substance of that inquiry would depend on factors such as the rule's relationship to the venture, the rationale for its adoption, and the nature of its effect on competition.

potential competition among the teams, and between the teams and the league, is clearly absent.

3. The approaches advocated by petitioner and the NFL respondents are inconsistent with the functional analysis of Copperweld*,* Dagher*, and* NCAA

a. Petitioner contends (at 14-15, 17-21, 39-42, 55) that single-entity treatment is never appropriate for the NFL because the teams are separately owned and controlled. That argument is inconsistent with the reasoning of *Copperweld* and *Dagher*. As explained above, the functional approach the Court adopted in those cases—focusing on the absence of competition in the relevant sphere and the consequent inability of the challenged restraint to raise Section 1 concerns—can appropriately be applied to the league on a "facet by facet" basis. See Pet. App. 13a. The distinction between unilateral and concerted conduct under the Sherman Act does not hinge on "the form of an enterprise's structure." *Copperweld*, 467 U.S. at 772. Rather, "[r]ealities must dominate the judgment." *Id.* at 774 (quoting *Appalachian Coals, Inc.* v. *United States*, 288 U.S. 344, 360 (1933)). If the NFL teams have effectively merged an aspect of their business, and if a further restraint in the merged aspect does not significantly affect competition in nonintegrated operations, then the restraint does not pose the risks that Section 1 is intended to address, notwithstanding the teams' separate ownership and control.

Petitioner emphasizes (at 4, 6-7, 27-28, 47-48, 53) that the NFL teams retain ownership of their marks and logos and voted on the Reebok contract. Neither fact establishes that the teams are incapable of acting as a single enterprise. In *Dagher*, Texaco and Shell Oil certainly had some independent interests and ownership

rights—for example, the companies retained ownership of their respective trademark rights, see *Dagher* v. *Saudi Refining, Inc.*, 369 F.3d 1108, 1112 (9th Cir. 2004). Nevertheless, because the two companies no longer competed in the pertinent market, their agreement on the prices for gasoline sold under their trademarks did not eliminate competition. And while a vote may be concerted action by independent entities deciding "the way in which they will compete with one another," *NCAA*, 468 U.S. at 99, it may also be the mechanism by which the governing body of a single entity makes its decisions, see *Dagher*, 547 U.S. at 6 (joint venturers acted "in their role as investors" in approving pricing strategy). Under the functional approach of *Copperweld* and *Dagher*, the critical inquiry is not how the league's owners make decisions, but whether those decisions restrain actual or potential competition among the teams.

b. The NFL respondents contend that single-entity treatment applies in virtually every Section 1 suit against the league.[11] See NFL Cert. Br. 4. That approach is also inconsistent with the Court's functional approach in *Copperweld*, *Dagher*, and *NCAA*, and could significantly harm antitrust enforcement.

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[11] The NFL respondents suggest that single-entity treatment could be limited to "core venture functions." NFL Cert. Br. 4. But the broad range of disputes in which the NFL respondents suggest that a single-entity defense might be viable—including disputes about "where to locate its clubs," "where to seek new capital," "how to present its integrated entertainment product to viewers on a national basis," "rules governing the equipment that may be used by players in games," "terms and conditions of player employment," and "the trademark licensing activities that are the subject of this lawsuit," *id.* at 10-11—indicates that the NFL respondents consider virtually all of their activities to be "core venture functions."

The teams that formed the NFL chose a hybrid structure with separate ownership, rather than merging into a single enterprise. The difference is not just a matter of form, *Copperweld*, 467 U.S. at 774, but creates "functional differences" that are "significant for antitrust policy." *Fraser*, 284 F.3d at 57. "First, there is a diversity of entrepreneurial interests that goes well beyond the ordinary company," which "distinguishes *Copperweld*" and "makes the potential for actual competition closer to feasible realization." *Ibid*. Second, the owners of the teams "are not mere servants of [the league]; effectively, they control it," raising the prospect of horizontal agreements that eliminate whatever competition was preserved in forming the league. *Ibid*.; see also note 5, *supra*. Notably, the NFL has an extensive web of operations, ranging from the games themselves, to broadcasting, to sponsorship, to facilities, to licensing, to merchandising, to advertising—all of which may implicate the teams' various "entrepreneurial interests" in many ways. See note 11, *supra*.

Indeed, Congress and this Court have long assumed that Section 1 applied to the NFL's activities in the broadcasting and player markets. Congress granted the NFL a limited exemption from the antitrust laws as part of the Sports Broadcasting Act of 1961 (SBA), 15 U.S.C. 1291-1295, which was necessary only because Section 1 applied in the first instance. See *NCAA*, 468 U.S. at 104 n.28 ("[t]he legislative history of [the SBA] demonstrates Congress' recognition that agreements among league members to sell television rights in a cooperative fashion could run afoul of the Sherman Act"). Likewise, the Court has held that a player's complaint stated a cause of action against the NFL under Section 1. *Radovich* v. *NFL*, 352 U.S. 445, 454 (1957).

Such longstanding assumptions about the reach of existing law strongly suggest that only Congress has the prerogative to grant the sweeping exemption from Section 1 the NFL respondents seek.

Even if the NFL respondents' single-entity argument were not subject to those substantial objections, this case is a particularly unsuitable vehicle for considering such a wide-ranging limitation on the application of Section 1. On the record here, there is no way to know whether the swath of conduct the NFL seeks to carve out from Section 1 "raise[s] the antitrust dangers that [Section] 1 was designed to police," *Copperweld*, 467 U.S. at 769. The lower courts limited their analyses to the conduct of the teams and league in licensing marks, Pet. App. 13a, and the district court rejected petitioner's request for discovery that the court deemed irrelevant to the legality of that conduct, *id.* at 28a. To adopt the broad rule the NFL respondents seek, this Court would have to assume numerous facts not in the record, and pass on issues never addressed below.

The NFL respondents propose that a broad-brush single-entity approach could be limited to "highly integrated joint ventures" and to their "core venture functions." NFL Cert. Br. 4. No court below has addressed that contention, and there is no obvious principle for identifying a "highly integrated joint venture" or a "core venture function," either in general or in this case. Nor is it clear what effect such an approach might have on a broad spectrum of joint ventures outside the context of sports leagues. For example, real estate brokerage firms in a metropolitan area might set up a venture controlling "where to locate [offices]," how "to seek new capital," "how to present" listings to potential clients, "terms and conditions of [realtor] employment," and

"trademark licensing." Cf. *id.* at 10-11.[12] Or charge card companies could combine to provide a payment-card network with restrictive membership rules for participating banks.[13] Accepting the NFL respondents' argument in this case could lead courts to conclude that Section 1 is unconcerned with such restrictions even when they affect actual or potential competition. That would unacceptably undermine Section 1's purpose.

The NFL respondents also suggest (NFL Cert. Br. 13) that expansive single-entity treatment is warranted to reduce litigation costs. But unless the NFL respondents propose an abdication of Section 1 scrutiny, such reductions are unlikely to materialize.[14] Indeed, deter-

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[12] The Department of Justice and Federal Trade Commission have brought several enforcement actions against realtors' adoption of anti-competitive restraints not unlike these within joint ventures offering multiple listing services. See, *e.g.*, *United States* v. *Consolidated Multiple Listing Serv., Inc.*, No. 3:08-CV-1786-SB (D.S.C. May 2, 2008); *United States* v. *National Ass'n of Realtors*, No. 05C-5140 (N.D. Ill. Oct. 4, 2005); *In re West Penn Multi-List*, No. C-4247 (F.T.C. Feb. 20, 2009); *In re MiRealSource, Inc.*, No. 9321 (F.T.C. Oct. 12, 2006).

[13] See U.S. Br. in Opp. at 21-22, *Visa, U.S.A., Inc.* v. *United States*, 543 U.S. 811 (2004) (No. 03-1521). In *Visa*, the Second Circuit affirmed the district court's finding of a Section 1 violation. *United States* v. *Visa, U.S.A., Inc.*, 344 F.3d 229, 234, 244 (2003), cert. denied, 543 U.S. 811 (2004).

[14] "[T]he inquiry into whether separate economic interests are maintained by the participants in a joint enterprise is likely to be no easier than a full Rule of Reason analysis." *Bulls II*, 95 F.3d at 605 (Cudahy, J., concurring). Conversely, applying the rule of reason need not be unduly burdensome. In analyzing the reasonableness of a restraint, courts engage in an "enquiry meet for the case." *California Dental Ass'n* v. *FTC*, 526 U.S. 756, 781 (1999). An abbreviated analysis is appropriate when "the experience of the market has been so clear, or necessarily will be, that a confident conclusion about the principal tendency

mining whether a particular joint venture is "highly integrated," which presumably would require analysis of the venture as a whole, may be more difficult than determining whether the venturers have merged their operations in a particular sphere. In any event, Section 1's rule of reason necessarily entails litigation over some practices that are ultimately upheld. Conduct that has the effect of restricting competition among NFL teams may be found lawful—perhaps as an ancillary restraint—but it should not escape Section 1 scrutiny altogether. See *Salvino,* 542 F.3d at 338-340 (Sotomayor, J., concurring) (applying ancillary-restraints doctrine to trademark licensing dispute involving baseball teams).

* * * * *

Properly restricted to situations in which a legitimate joint venture such as a sports league has effectively merged part of its operations, the single-entity concept can be a useful tool for identifying conduct that raises no Section 1 concern. Any more expansive application of the single-entity concept, however, would unjustifiably limit the scope of the Sherman Act.

C. The Court Of Appeals Did Not Determine Whether The Challenged Conduct Restricted Actual Or Potential Competition

The court of appeals correctly limited its review to the actions of the NFL respondents "as they pertain to the teams' agreement to license their intellectual property collectively via NFL Properties." Pet. App. 13a. Its analysis of that conduct, however, was misconceived.

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of a restriction will follow from a quick (or at least quicker) look, in place of a more sedulous one." *Ibid.*

The court of appeals viewed promotion of NFL football as the purpose of licensing team marks and logos. Pet. App. 16a-18a. The court then reasoned that, because individual teams cannot independently *produce* football games, the NFL respondents function as a single entity in "the *promotion* of NFL football." *Id.* at 16a-17a (emphasis added). Emphasizing that the NFL teams had collectively licensed their intellectual property for decades and that "antitrust law encourages cooperation inside a business organization" to "foster competition between that organization and its competitors," the court concluded that the NFL respondents function as a single entity "when promoting NFL football through licensing [their] intellectual property." *Id.* at 17a-18a. This reasoning is flawed in several respects.

1. The court of appeals did not clearly identify the challenged conduct

As a threshold matter, the court of appeals failed to distinguish among the various decisions by the teams and league related to licensing of marks and logos. The record suggests (at least) four separate actions potentially relevant to the instant dispute:

- the teams' decision to form NFLP and begin collective licensing efforts in 1963, see Pet. App. 3a
- the teams' subsequent decision to make NFLP their exclusive licensing agent, see, *e.g.*, J.A. 320-321 (Miami Dolphins agreed to make NFLP its exclusive licensing agent in 1970); J.A. 350, 357, 386-387 (signatories to the NFL Trust made NFLP their exclusive licensing agent in 1982)

- the decision to offer only a blanket license for all marks and logos rather than also offering licenses for select teams, see Gertzog Dep. 167
- the decision to have a single headwear licensee rather than multiple licensees, see Pet. App. 3a[15]

Identifying which of those actions petitioner challenges is critical to determining whether this case involves concerted action subject to Section 1. The first two actions were concerted action subject to Section 1 scrutiny because they changed the way the teams competed in the marketplace, see pp. 15-16, *supra*. The court of appeals may have understood petitioner not to challenge those agreements, see p. 32 & note 17, *infra*, but its opinion appears to exempt them from Section 1 scrutiny on the ground that the licensing of team marks and logos was intended to promote NFL football. That reasoning extends single-entity treatment to agreements that are obviously concerted "in the antitrust sense." *Dagher*, 547 U.S. at 6. By contrast, the appropriate treatment of the latter two actions is unclear on this record, and would require further factual development and analysis under the test laid out above.

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[15] The record is not entirely clear on the relationship between the NFLP/Reebok contract and the team/NFLP licensing agreements. The NFLP/Reebok contract lasts for ten years—beyond the original term of the team/NFLP licensing agreements, which were scheduled to expire in 2004. J.A. 209; Pet. App. 3a. The team/NFLP licensing agreements were extended in 2004, see Gertzog Dep. 83-87, 108-113, but it is unclear what effect the existence of the Reebok contract had on that extension.

2. The court of appeals' analysis of the purpose of the licensing activities was deficient

In discussing the purposes served by licensing team marks and logos, the court of appeals referred solely to the promotion of NFL football. See Pet. App. 16a-18a. If the court viewed the promotion of NFL football as the *sole* purpose of the relevant licensing activities, its assessment was surely wrong. The sale of merchandise bearing team marks and logos is a source of revenue, and the merchandise serves to promote the individual teams as well as the NFL. See Pet. Br. 3-4.

The court of appeals may have meant only that the promotion of NFL football is *a* purpose of the licensing activities. But even assuming that sales of team apparel serve in part to increase public awareness of, and interest in, the league as a whole, that fact would not itself justify treating the teams and league as a single entity with respect to the conduct challenged here. Nor, for that matter, would that fact alone support a finding that the challenged licensing arrangements are lawful concerted action under Section 1 rule of reason analysis. The restraints here might be upheld as permissible ancillary restraints if they were reasonably necessary to realizing the efficiencies of the league. See, *e.g.*, *Rothery Storage*, 792 F.2d at 224; *Salvino*, 542 F.3d at 338-339 (Sotomayor, J., concurring). But the court of appeals was not called upon to apply that standard to the record in this case because the NFL respondents sought summary judgment only on the single-entity issue.

3. The teams' need to cooperate to produce games does not imply that the teams must license intellectual property collectively

Contrary to the court of appeals' understanding, the teams could continue to function as "independent centers of decisionmaking," *Copperweld*, 467 U.S. at 769, with respect to the licensing of their individually owned intellectual property, even if they must cooperate to produce games. The teams are separately owned, Pet. App. 2a, and could individually pursue licensing strategies that diverge from those of the group and that are independent of promoting NFL football as a whole.[16] But the court of appeals expressly refused to consider "whether the NFL teams could compete against one another when licensing and marketing their intellectual property." *Id.* at 16a. Nor did the court consider whether some potential licensees might prefer to contract with select teams, rather than with the entire league.

The court of appeals appears to have assumed that collective licensing of intellectual property would qualify as single-entity conduct if it enabled the teams to compete more effectively against other forms of entertainment. Pet. App. 18a. But collective conduct does not cease to be concerted action simply because it has pro-

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[16] For example, in *Dallas Cowboys Football Club, Ltd.* v. *NFL Trust*, No. 95-civ-9426 (S.D.N.Y. Jan. 11, 1996), the Dallas Cowboys challenged the teams' agreement allowing NFLP control over their marks. J.A. 407-408, 437-438. That suit alleged that "[t]he marks of the member clubs are not of equal, or even comparable, value," J.A. 419; that "[t]he marks of a relative handful of clubs generally account for the bulk of the revenues in any given year," *ibid.*; and that "[m]any licensees would prefer to buy the right to use the marks of only a few member clubs," J.A. 422. The case was settled before the district court rendered a decision on any antitrust issues.

competitive effects. In *BMI*, for instance, this Court noted that the availability of a blanket license for copyrighted music may enhance competition. 441 U.S. at 20. The Court nevertheless observed that the creation and issuance of the blanket license "involve[d] concerted action," *id.* at 10, and stated that the efficiencies of a blanket license could be considered under the rule of reason, *id.* at 24.

4. The absence of competition could be the result of an agreement not to compete

The court of appeals emphasized that the NFL teams have collectively licensed their intellectual property for decades. Pet. App. 17a. But Section 1 is concerned with both actual and potential competition, and the mere absence of competition does not demonstrate its infeasibility. Rather, the lack of competition could be the result of an agreement not to compete. See, *e.g.*, *Freeman* v. *San Diego Ass'n of Realtors*, 322 F.3d 1133, 1149 (9th Cir.) (Kozinski, J.) ("Absence of actual competition may simply be a manifestation of the anticompetitive agreement itself, as where firms conspire to divide the market."), cert. denied, 540 U.S. 940 (2003). Such an agreement is concerted activity within the meaning of the antitrust laws, rather than the action of a single entity.

D. The Case Should Be Remanded For Further Proceedings

The court of appeals' reasoning in this case is problematic, but its judgment may be correct. The case should be remanded for the lower courts to clarify the scope of petitioner's Section 1 claim, perhaps allow appropriate additional discovery, and then apply the principles from this Court's decision.

In the lower courts, petitioner repeatedly stated that it was challenging only the "agreement to grant an exclusive license to Reebok." J.A. 64-66 (Compl. paras. 21, 23, 25, 27, 31); see Pet. S.J. Resp. 25 ("the creation of [the] exclusive license * * * is the only conduct alleged to have been unlawful"). Petitioner appears not to have challenged the teams' decades-old agreement to license their marks and logos collectively, or NFLP's decision to offer only blanket licenses containing the marks and logos of the NFL and all the teams.[17] Petitioner has since objected to this characterization of its claim. See Pet. Supp. Br. 10-12; cf. Pet. Br. 1, 8, 14, 56-57. This is a pivotal threshold issue that was not clearly addressed by the courts below. See pp. 27-28, *supra*.

A remand would allow the lower courts to clarify the scope of petitioner's challenge and to apply the correct single-entity analysis in the first instance. If petitioner is challenging the teams' decisions to form NFLP or to make NFLP their exclusive licensing agent, then those actions should be held to be concerted action. If petitioner challenges the choice to offer only a blanket license, or the choice to have only a single headwear licensee, the lower courts should consider whether the teams had already effectively merged their licensing activities and whether those choices affected actual or potential competition in other, non-merged activities.

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[17] See, *e.g.*, Pet. App. 23a ("[Petitioner] does not claim that the NFL and its 32 teams previously acted improperly by delegating to [NFLP] the authority to grant licenses."); Pet. C.A. Br. 39 ("[Petitioner's] complaint does not challenge the Teams' historic use of NFLP as a common licensing agent."); Pet. S.J. Resp. 25 ("As we have previously advised the court, [petitioner] has not challenged the use of NFLP as a common licensing agent. Neither has [it] challenged NFLP's use of group (blanket) licenses *per se*.").

Those inquiries probably call for further development of the record, and possibly more discovery than the district court permitted, see Pet. App. 28a. This Court should instruct the lower courts to conduct proceedings for this purpose and to apply the appropriate legal standard in the first instance.

CONCLUSION

The judgment of the court of appeals should be vacated and the case remanded for further proceedings.

Respectfully submitted.

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