No. 08-661

In the Supreme Court of the United States

AMERICAN NEEDLE, INC., PETITIONER

v.

NATIONAL FOOTBALL LEAGUE, ET AL.

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

ELENA KAGAN
Solicitor General
Counsel of Record
CHRISTINE A. VARNEY
Assistant Attorney General
MALCOLM L. STEWART
Deputy Solicitor General
DEANNE E. MAYNARD
Assistant to the Solicitor General
CATHERINE G. O'SULLIVAN
NICKOLAI G. LEVIN
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

DAVID C. SHONKA
Acting General Counsel
Federal Trade Commission
Washington, D.C. 20580

QUESTION PRESENTED

For several decades, the National Football League (NFL) and its member teams have collectively licensed their trademarks and logos to manufacturers through a common licensing agent, National Football League Properties (NFLP). Until 2001, NFLP granted headwear licenses to several vendors. In 2001, however, NFLP entered into an exclusive headwear licensing contract with one company, following ratification by the teams. The question presented in this case is as follows:

Whether NFLP, the NFL, and the teams functioned as a "single entity" when granting the company an exclusive headwear license and therefore could not violate Section 1 of the Sherman Act, 15 U.S.C. 1, which requires proof of collective action involving "*separate* entities," *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752, 768 (1984).

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This brief is filed in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

Section 1 of the Sherman Act, 15 U.S.C. 1, prohibits concerted action unreasonably in restraint of trade. To establish a violation, a plaintiff must prove collective action involving "*separate* entities." *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752, 768 (1984). This case involves the application of the separate-entity requirement to the licensing of logos and trademarks 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 play one an-

other in more than 250 football games per season. Pet. App. 2a. Each season culminates in a championship game known as the Super Bowl. *Ibid*.

In 1963, the NFL 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 subsequently entered into agreements granting NFLP the exclusive right to license their logos and trademarks, although the teams retained ownership of their intellectual property. *Id.* at 22a-23a, 27a; Pet. Statement of Additional Facts Ex. 8, at NFLP 00084; see Resp. C.A. Supp. App. 14, para. 23; Dep. of Gary M. Gertzog 108-109 (04-cv-7806 Docket entry No. 101 (N.D. Ill. Mar. 15, 2007)) (Gertzog Dep.).

For many years, NFLP granted headwear licenses to multiple vendors, including petitioner, for use in manufacturing baseball caps and stocking hats displaying team marks and logos. Pet. App. 3a. The licenses included the marks and logos for the NFL and all of the teams, and they required vendors to "distribute and sell on a national basis product lines bearing, in the aggregate, the marks identifying all member clubs." Resp. C.A. Supp. App. 10, para. 8; see Gertzog Dep. 167 (NFLP sells only "the complete package" of marks and logos for the NFL and all the teams).

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; Gertzog Dep. 218. That agreement was finalized in May 2001 after the teams ratified the contract. Pet. App. 3a; Gertzog Dep.

224. NFLP subsequently declined to renew petitioner's headwear license. Pet. App. 3a-4a.

2. In December 2004, petitioner brought suit alleging that the agreement of NFLP, the NFL, the teams, and Reebok (collectively, respondents) to grant Reebok 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 to the complaint, respondents contended that "[t]he NFL Defendants" 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." Pet. C.A. App. 18.

After limited discovery on whether NFLP, the NFL, and the teams functioned as a "single entity" in licensing trademarks and logos, the district court granted summary judgment to 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. In arguing that NFLP, the NFL, and its teams func-

[1] The court also granted summary judgment to respondents on petitioner's Section 2 conspiracy-to-monopolize claim, Pet. App. 23a-24a, and, in a subsequent ruling, on petitioner's remaining Section 2 claims, explaining that "the 'single entity' ruling dooms the section 2 claims." *Id.* at 21a.

tioned as a single entity that was immune from Section 1 liability, respondents relied in part on *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752 (1984), in which this Court held that "a parent corporation and its wholly owned subsidiary are a single entity for antitrust purposes." Pet. App. 5a; see *id.* at 4a-5a. The court of appeals noted that it had "yet to render a definitive opinion as to whether the teams of a professional sports league can be considered a single entity in light of *Copperweld*," and that "[t]he characteristics that sports leagues generally exhibit make the determination difficult." *Id.* at 12a. The court explained 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 § 1." *Ibid.*

Citing its decision in *Chicago Professional Sports Ltd. Partnership* v. *NBA*, 95 F.3d 593 (7th Cir. 1996) (*Bulls II*), 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.'" Pet. App. 13a (quoting *Bulls II*, 95 F.3d at 600). The court therefore "limit[ed] [its] review to (1) the actions of the NFL, its members teams, and NFL Properties; and (2) the actions of the NFL and its member teams 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 deemed it unnecessary to consider "whether the league's member teams can compete with one another when licensing and marketing their intellectual property." *Ibid.*; *id.* at 15a-16a. In the court's view, although "the several NFL teams could have competing interests regarding the use of their intellectual property that could conceivably rise to the level of potential intraleague competition, those interests do not necessarily keep the teams from functioning as a single entity." *Id.* at 16a.

The court ultimately rejected petitioner's contention that, by jointly licensing their intellectual property, "the NFL teams have deprived the market of independent sources of economic power." Pet. App. 16a. The court explained that "[c]ertainly the NFL teams can function only as one source of economic power when collectively producing NFL football." *Ibid.* The court stated that "[i]t thus follows that only one source of economic power controls the promotion of NFL football." *Id.* at 16a-17a. The court explained that "the NFL teams share a vital economic interest in collectively promoting NFL football" because "the league competes with other forms of entertainment for an audience of finite (if extremely large) size, and the loss of audience members to alternative forms of entertainment necessarily impacts the individual teams' success." *Id.* at 17a. The court also emphasized that for decades "the NFL teams have acted as one source of economic power—under the auspices of NFL Properties—to license their intellectual property collectively and to promote NFL football." *Ibid.*

The court of appeals concluded that "nothing in § 1 prohibits the NFL teams from cooperating so the league can compete against other entertainment providers. Indeed, antitrust law encourages cooperation inside a business organization—such as, in this case, a professional sports league—to foster competition between that organization and its competitors." Pet. App. 18a. The court stated that, "[v]iewed in this light, the NFL teams are best described as a single source of economic power when promoting NFL football through licensing the teams' intellectual property." *Ibid.*[2]

DISCUSSION

The potential implications of the court of appeals' decision are problematic. The court's reasoning could be understood to extend single-entity treatment to separately owned NFL teams with respect to their decision to collectively license their intellectual property, without regard to the possibility that the teams' agreement would eliminate the potential for meaningful competition among them, simply because potential efficiencies are associated with collective marketing by participants in a lawful venture to produce NFL football. Neither *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752 (1984), nor any other decision of this Court supports such an expansive application of the single-entity concept.

Nonetheless, this Court's review is not warranted. The court of appeals specifically limited its holding to the facts of this case. Petitioner's asserted injury appears to flow not from any anticompetitive effects of the teams' agreement to market their intellectual property collectively, but only from a subsequent and independent decision to contract with a single licensee. And, although some of the court of appeals' reasoning is prob-

[2] The court of appeals also agreed with the district court that "the failure of [petitioner's] § 1 claim necessarily dooms its § 2 monopolization claim." Pet. App. 18a.

lematic, the court's holding does not conflict with any decision of this Court or any other circuit. Neither petitioner nor the NFL respondents have presented a question warranting review in this particular case, and the sports-league context is not a suitable one in which to address broader questions concerning the application of single-entity principles to joint ventures generally. Accordingly, the Court should deny the petition.

A. Although The Court Of Appeals' Reasoning Is Problematic In Some Respects, Its Fact-Specific Holding Does Not Warrant This Court's Review

1. "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)). Section 1 "does not reach conduct that is 'wholly unilateral'"; rather, it prohibits concerted action involving "*separate* entities." *Id.* at 768 (quoting *Albrecht* v. *Herald Co.*, 390 U.S. 145, 149 (1968)). In contrast to Section 2, which regulates the unilateral conduct of a single firm "when it threatens actual monopolization," Section 1 does not require proof that the activity "threatens monopolization." *Id.* at 767-768. As the Court explained in *Copperweld*, concerted activity is "judged more sternly" because it "inherently is fraught with anticompetitive risk." *Id.* at 768-769. Such activity "deprives the marketplace of the independent centers of decisionmaking that competition assumes and demands," because "two or more entities that previously pursued their own interests separately are combining to act as one for their common benefit." *Id.* at 769.

Applying that understanding of Section 1 in *Copperweld*, this Court held that a parent company and its wholly owned subsidiary could not be held liable for conspiring with one another. 467 U.S. at 771. The Court reasoned that those two entities have "a complete unity of interest." *Ibid.* The parent can control the actions of its wholly owned subsidiary, and if they "'agree' to a course of action, there is no sudden joining of economic resources that had previously served different interests." *Ibid*. In so concluding, the Court in *Copperweld* extended single-entity treatment only to a parent and its wholly owned subsidiary. *Id.* at 767, 777. The Court did not consider "under what circumstances, if any," such treatment might be appropriate in other contexts. *Id*. at 767.

2. In this case, the court of appeals extended "single entity" status to the NFL and its separately owned teams with respect to their collective licensing of intellectual property. Pet. App. 18a. Because individual football teams cannot independently *produce* football games, *ibid*., the court asserted, "only one source of economic power controls the *promotion* of NFL football," *id*. at 16a-17a (emphasis added). Emphasizing that "antitrust law encourages cooperation inside a business organization * * * to foster competition between that organization and its competitors," the court 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.

Contrary to the court of appeals' apparent understanding, an agreement to restrict competition among separate firms does not cease to be concerted action simply because it may be efficiency-enhancing. In *NCAA* v. *Board of Regents*, 468 U.S. 85 (1984), decided eight days after *Copperweld*, this 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. Like the court of appeals in this case (Pet. App. 16a-17a), the Court in *NCAA* 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." 468 U.S. at 117. The Court further assumed that most of the restrictions the NCAA imposed are "procompetitive because they enhance public interest in intercollegiate athletics." *Ibid.* Nonetheless, the Court concluded that in enacting a plan that "prevents 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. Although the particular nature of the industry—one in which some "horizontal restraints on competition [we]re essential if the product [wa]s to be available at all," *id.* at 101—led the Court to apply rule-of-reason review rather than a per se rule of illegality, the Court did not suggest that an agreement regarding the way in which competitors in such an industry compete escapes antitrust scrutiny altogether. *Id.* at 100-101. Applying the rule of reason to the facts of that case, the Court held that the particular restraints at issue violated Section 1. *Id.* at 120.

Similarly, in *Broadcast Music, Inc.* v. *CBS*, 441 U.S. 1 (1979) (*BMI*), the Court acknowledged that the issuance of a blanket license of copyrighted music by different composers may "accompan[y] the integration of sales, monitoring, and enforcement against unauthorized copyright use" and may thereby enhance competition. *Id.* at 20. The Court nevertheless observed that the creation and issuance of the blanket license "involve[d] concerted action," *id.* at 10, and was subject to scrutiny under the rule of reason, *id.* at 24.

The court of appeals in this case, however, adopted a different analysis. It specifically condoned the district court's failure to "consider[] whether the NFL teams could compete against one another when licensing and marketing their intellectual property." Pet. App. 16a. The effect of declaring the league and its teams to be a single entity for this purpose was to preclude, as a matter of law, any consideration under Section 1 of the possibility that a loss of competition among the teams outweighed the efficiency-enhancing potential of the joint licensing.

There of course are circumstances in which the NFL and its member teams enter into agreements that do not constitute concerted activity within the meaning of Section 1—*i.e.*, arrangements "among competitors on the way in which they will compete with one another." *NCAA*, 468 U.S. at 99. For example, because a single football team cannot produce football games independently, coordination among individually owned NFL teams is necessary to determine which teams will play each other on particular dates. Coordination with respect to the "rules defining the conditions of the contest," *id.* at 117, likewise should be viewed as the conduct of a single entity.

Even if NFL teams act as a single entity when producing football games, however, they 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. The teams are separately owned, Pet. App. 2a, and, although licensing income currently is shared equally among the teams, *id.* at 23a, other revenues are not so shared, see Gertzog Dep. 198-208, and licensing income also need not be. Indeed, individual teams may have commercial interests as to the licensing of intellectual property that diverge from those of the group as a whole.[3] But the lower courts in this case did not consider whether the NFL teams "could compete against one another when licensing and marketing their intellectual property." Pet. App. 16a. Nor did the courts consider whether some potential licensees might prefer to contract with select teams offering relatively attractive terms, rather than with the entire league.

The court of appeals emphasized that the NFL teams have collectively licensed their intellectual property for decades. Pet. App. 17a. But this is to say no more than that an agreement not to compete has persisted; it is surely not to say that the agreement is appropriate. See, *e.g.*, *Freeman* v. *San Diego Ass'n of Realtors*, 322 F.3d 1133, 1149 (9th Cir.) ("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). A cartel, for example, may have a long history, but that

[3] For example, in *Dallas Cowboys Football Club, Ltd.* v. *NFL Trust*, No. 95-civ-9426 (S.D.N.Y. Oct. 18, 1996), the Dallas Cowboys challenged the teams' agreement allowing NFLP control over their marks. See, *e.g.*, Pet. Statement of Additional Facts Ex. 12, paras. 1-4, 94-98. That suit alleged that "[t]he marks of the member clubs are not of equal, or even comparable, value," *id.* para. 40; 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," *id.* para. 49.

does not insulate the agreements supporting it from antitrust scrutiny.[4]

As the court of appeals observed, the teams' collective licensing of their intellectual property may reflect the procompetitive purpose of enabling NFL football to compete more effectively against other forms of entertainment, and that procompetitive effect may outweigh any anticompetitive effect. Pet. App. 16a-17a; see *BMI*, 441 U.S. at 19-24 (discussing efficiencies to a blanket license for copyrighted music); U.S. Dep't of Justice & FTC, *Antitrust Guidelines for the Licensing of Intellectual Property* para. 5.5, at 28 (1995) ("pooling arrangements are often procompetitive"). Those efficiencies, however, would be considered as part of a rule-of-reason inquiry. *BMI*, 441 U.S. at 24. The existence of a potential procompetitive justification for joint conduct in a particular sphere is not, standing alone, a sufficient basis for eschewing rule-of-reason analysis altogether by treating units such as the NFLP, the NFL, and 32 separately owned and managed football teams as a "single entity" for purposes of antitrust analysis of that conduct.

3. Although some of the court of appeals' analysis suggests a rule of broad significance—and one, as suggested above, of a troubling nature—the court's holding is expressly limited to the particular conduct in this

[4] In *Texaco Inc.* v. *Dagher*, 547 U.S. 1 (2006), the Court rejected the claim that the owners of a joint venture were engaged in horizontal price-fixing when they set the prices of the venture's products, emphasizing that the owners no longer competed independently in the market. *Id.* at 5-8. Because the plaintiffs did not "put forth a rule of reason claim," the Court did not address whether Section 1 "is inapplicable to joint ventures." *Id.* at 7 n.2. The Court noted, however, that the defendants' initial decision to eliminate competition by forming the joint venture and ceasing their independent operations would have been subject to challenge under Section 1. *Id.* at 6 n.1.

case. Pet. App. 13a. Indeed, the court cautioned 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.'" *Ibid.* (quoting *Chicago Prof'l Sports Ltd. P'ship* v. *NBA*, 95 F.3d 593, 600 (7th Cir. 1996)). The court relied on "uncontradicted evidence" that NFL teams "share a vital economic interest in collectively promoting NFL football," *id.* at 17a, and it emphasized petitioner's failure to dispute that the purpose of the collective licensing agreement was to promote NFL football, *ibid.*

Moreover, the court of appeals may not have focused on the potential elimination of competition among the teams because petitioner repeatedly stated that it was not challenging the teams' decades-old decision to license their marks and logos collectively. See, *e.g.*, Pet. App. 23a; 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*."). Instead, petitioner challenged only the "agreement to grant an exclusive license to Reebok." Pet. C.A. App. 6-8 (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"). Choosing Reebok as the sole licensee involved no "sudden joining of two [or more] independent sources of economic power previously pursuing separate interests," *Copperweld*, 467 U.S. at 771; the "joining" occurred decades earlier when the teams first opted to use NFLP as their exclusive licensing agent.

B. The Decision Below Does Not Conflict With Any Decision Of This Court Or Another Court Of Appeals

Although the court of appeals' reasoning is in some tension with this Court's precedents, see pp. 7-12, *supra*, its holding does not conflict with any decision of this Court or another court of appeals.

1. Petitioner contends (Pet. 8-10) that the decision below conflicts with *Radovich* v. *NFL*, 352 U.S. 445 (1957). In *Radovich*, however, the Court held only that the Sherman Act exemption for baseball, see *Toolson* v. *New York Yankees, Inc.*, 346 U.S. 356 (1953); *Federal Base Ball Club* v. *National League of Prof'l Base Ball Clubs*, 259 U.S. 200 (1922), did not apply to the NFL, and that the complaint stated a cause of action. *Radovich*, 352 U.S. at 449-454. The Court "express[ed] no opinion as to whether or not [the defendants] ha[d], in fact, violated the antitrust laws." *Id.* at 454. Nor did the Court address the question whether the teams and the league could be considered a "single entity" for particular purposes.

Citing then-Justice Rehnquist's dissent from denial of certiorari in *NFL* v. *North American Soccer League*, 459 U.S. 1074 (1982), petitioner also argues (Pet. 9) that this Court "has never retreated from its decision that the NFL and other professional sports leagues are subject to rule of reason scrutiny." But this Court has never held that every action by the NFL and its teams is subject to the rule of reason, nor did Justice Rehnquist's dissent take that position. See *NFL*, 459 U.S. at 1076-1080 (taking issue only with the manner in which the court of appeals had applied the rule of reason to the facts of that case). Indeed, Justice Rehnquist expressed the view that, in some respects, the NFL "competes as a unit against other forms of entertainment." *Id.* at 1077.

2. Petitioner contends (Pet. 10-12) that the decision below conflicts with decisions of other circuits. But no court of appeals has held that the NFL and its member teams are separate entities when collectively licensing their intellectual property—the issue to which the court below expressly "limit[ed] [its] review." Pet. App. 13a. Although petitioner (Pet. 10-12) and the NFL respondents (Br. 6-10) construe various decisions as holding that professional sports teams are separate entities for purposes of Section 1, those cases involved player hiring or other kinds of rules, and many of the decisions did not involve the NFL.[5]

Nor has any other court of appeals expressly rejected the Seventh Circuit's approach of analyzing "one league at a time," "one facet of a league at a time." Pet. App. 13a (quoting *Bulls II*, 95 F.3d at 600). Although some earlier decisions can be read as sweeping more broadly, see, *e.g.*, *Los Angeles Mem'l Coliseum Comm'n* v. *NFL*, 726 F.2d 1381, 1387-1390 (9th Cir.), cert. denied 469 U.S. 990 (1984); *North Am. Soccer League* v. *NFL*, 670 F.2d 1249, 1257-1258 (2d. Cir.), cert. denied, 459 U.S. 1074 (1982), more recent decisions reflect a consensus that "the single-entity inquiry is unique to the facts

[5] *Major League Baseball Properties, Inc.* v. *Salvino, Inc.*, 542 F.3d 290 (2d Cir. 2008) (cited in NFL Resp. Br. 11), did involve a trademark licensing dispute between an apparel manufacturer and Major League Baseball Properties, Inc. (MLBP). But in affirming the district court's decision to apply the rule of reason to that claim, the Second Circuit did not address whether MLBP, the league, and the teams were a single entity for purposes of Section 1, presumably because the district court had not addressed the issue. See *Major League Baseball Props., Inc.* v. *Salvino, Inc.*, 420 F. Supp. 2d 212, 218-221 (S.D.N.Y. 2005).

of each case" and is a "functional one," *Jack Russell Terrier Network* v. *American Kennel Club, Inc.*, 407 F.3d 1027, 1034 (9th Cir. 2005); see *Freeman*, 322 F.3d at 1148, 1149 (observing that "the single-entity inquiry is fact-specific" and listing several relevant functional considerations); cf. *NHL Players Ass'n* v. *Plymouth Whalers Hockey Club*, 419 F.3d 462, 470 (6th Cir. 2005) (concluding that, "when they adopt eligibility rules," the teams are separate entities); *Eleven Line, Inc.* v. *North Tex. State Soccer Ass'n*, 213 F.3d 198, 205 (5th Cir. 2000) (focusing on the "unique feature" of the defendant organizations).

Petitioner (Pet. 10-11) and the NFL respondents (Br. 6-7 & n.3) contend that the decision below conflicts with, *inter alia*, *Los Angeles Memorial Coliseum* and *North American Soccer League*. In *Los Angeles Memorial Coliseum*, the Ninth Circuit rejected the NFL's single-entity defense to a challenge by the Los Angeles Coliseum and the Oakland Raiders to the league rule requiring approval of three-fourths of the teams before a team could relocate to another's home territory. See 726 F.2d at 1385-1390. In *North American Soccer League*, the Second Circuit rejected application of the same defense to a challenge to the league rule banning owners of NFL teams from also owning other major professional sports teams. 670 F.2d at 1256. Those decisions predated *Copperweld*, however, and they involved aspects of the relevant leagues' operations quite different from the merchandise-licensing agreement at issue here.[6] The deci-

[6] Although one Ninth Circuit panel has suggested that "nothing in [*Copperweld*] impugns our holding" in *Los Angeles Memorial Coliseum*, *Freeman*, 322 F.3d at 1148 n.17, a subsequent panel observed that *Los Angeles Memorial Coliseum* "predated the Supreme Court's

sions in *Los Angeles Memorial Coliseum* and *North American Soccer League* therefore do not conflict with the Seventh Circuit's ruling in this case, which discussed *Copperweld* as relevant authority, see Pet. App. 4a-5a, 12a-15a, and was expressly limited to a single "facet" of the NFL's operations, see *id.* at 13a.

Petitioner (Pet. 10) and the NFL respondents (Br. 8) further contend that the First and Seventh Circuits are in conflict, pointing to (*ibid.*) the First Circuit's observation that the approach of *Bulls II* "has not been adopted in this circuit." *Fraser* v. *MLS*, 284 F.3d 47, 55 (1st Cir. 2002), cert. denied, 537 U.S. 885 (2002). The First Circuit, however, read *Bulls II* as suggesting that "sports leagues in general be treated as single entities." *Ibid.* The Seventh Circuit in this case did not read *Bulls II* so broadly. Pet. App. 12a-13a. Moreover, nothing in *Fraser* indicates that the First Circuit would reach a different result than the court below if it were presented with the facts of this case. Indeed, in *Fraser*, the First Circuit expressly recognized that teams may assume different roles in different circumstances—with different consequences for antitrust enforcement. See 284 F.3d at 56-57. The *Fraser* court ultimately concluded that "the single entity problem" presented in that case "need not be answered definitively," *id.* at 59, because it resolved the Section 1 claim on other grounds, *id.* at 59-61.

Similarly, in *Sullivan* v. *NFL*, 34 F.3d 1091 (1994), cert. denied, 513 U.S. 1190 (1995), although the First Circuit's reasoning could be read to suggest a broader approach, its holding was limited to the particular NFL rule at issue, which prohibited owners from selling

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clarifying discussion in *Copperweld*." *Jack Russell Terrier Network*, 407 F.3d at 1036 n.16.

shares of a team to the public. *Id.* at 1098-1099. The First Circuit rejected "the NFL's *Copperweld* challenge" because the evidence "support[ed] a finding that NFL teams compete against each other for the sale of their ownership interests." *Id.* at 1099. Unless and until the First Circuit, or any other circuit, expressly considers and rejects the Seventh Circuit's approach of considering the single-entity question "one league at a time," "one facet of a league at a time," Pet. App. 13a (quoting *Bulls II*, 95 F.3d at 600), review by this Court is unnecessary.

C. Neither Petitioner Nor The NFL Respondents Have Presented A Question Warranting Review In This Case

1. Petitioner suggests (Pet. 8-9) that the NFL and its teams should never be viewed as a single entity, regardless of the nature of the activity, because the teams are separately owned and "do not share capital, profits or losses." Pet. 3. As the Court cautioned in *Copperweld*, however, the separate-entity inquiry should not turn on "the form of an enterprise's structure." 467 U.S. at 772. Instead, "[r]ealities must dominate the judgment." *Id.* at 774 (quoting *Appalachian Coals, Inc.* v. *United States*, 288 U.S. 344, 360 (1933)); see 7 Philip E. Areeda & Herbert Hovenkamp, *Antitrust Law* para. 1478d, at 329-332 (2d ed. 2003) (explaining that some "rules of a sports league should be regarded as 'conspiratorial'" while others should be deemed "unilateral," and that the single-entity inquiry should "focus on the particular rule under antitrust scrutiny").

Petitioner also contends (Pet. 3-4) that concerted action by the teams was involved when Reebok was made the sole licensee because the teams—which retain ownership of their marks and logos (Pet. App. 27a)—

voted on the Reebok contract before it went into effect. But the mere fact of a vote is not dispositive of the single-entity inquiry. A vote could represent concerted action by independent entities "on the way in which they will compete with one another," *NCAA*, 468 U.S. at 99, but it also could represent an action by the governing body of a single entity. For instance, in *Texaco Inc.* v. *Dagher*, 547 U.S. 1 (2006), this Court observed that the decision by joint venturers to charge the same price for the venture's two brands of gasoline was not unlawful concerted action but simply "price setting by a single entity" because, in approving the pricing, the companies had acted "in their role as investors, not competitors." *Id.* at 6.

2. Although the NFL respondents prevailed below, they agree (Br. 4, 10-14) with petitioner that this Court's review is warranted. The NFL respondents urge (Br. 4) the Court to discard the court of appeals' facet-by-facet approach to the single-entity question and issue a broader holding that single-entity treatment is appropriate in virtually every Section 1 suit against the league.[7] They argue (Br. 13) that such a rule is warranted to facilitate "early resolution" of suits brought against them, in order to "avoid[] unnecessary discov-

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[7] The NFL respondents suggest (Br. 4) that single-entity treatment may be limited to "core venture functions." But the broad range of disputes in which the NFL respondents suggest (Br. 10-11) that a single-entity defense might be viable—which includes disputes concerning "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"—indicates that the NFL respondents consider virtually all aspects of league operations to be "core venture functions" subject to single-entity treatment.

ery, motions practice, trial, and other litigation burdens."

As discussed above, however, "the single-entity inquiry is unique to the facts of each case." *Jack Russell Terrier Network*, 407 F.3d at 1034. In many situations, extensive discovery into the nature of the coordination and its effect on competition among the teams would be required to make a single-entity determination. See, *e.g.*, *Bulls II*, 95 F.3d at 605 (Cudahy, J., concurring) ("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").[8] This case would be a particularly unsuitable vehicle to consider the broad rule that the NFL respondents seek. That is so both because the court of appeals' application of the facet-by-facet approach resulted in a decision in respondents' favor and because petitioner repeatedly disclaimed any challenge to the teams' longstanding practice of licensing their marks and logos collectively—the only aspect of the challenged licensing agreement that involves joint action among potential competitors. See p. 13, *supra*.

The NFL respondents also contend (Br. 13) that this Court's review is warranted because "[t]he principle implicated by the question presented is not limited to professional sports leagues" and "has important implications throughout the economy." In their view (Br. 14),

[8] Moreover, single-entity treatment is not the NFL respondents' only means of avoiding trial. Sports leagues have been able to obtain summary judgment on other grounds, as plaintiffs have failed to prove market power or injury to competition, *Salvino*, 542 F.3d at 334, anticompetitive conduct, *Neeld* v. *NHL*, 594 F.2d 1297, 1300 (9th Cir. 1979), or an agreement to restrain trade, *Toscano* v. *PGA*, 258 F.3d 978, 985 (9th Cir. 2001).

cases involving sports leagues "frequently implicate the same type of 'core' venture activities at issue in *Dagher*—the production, marketing, and sale of their jointly created products—and raise similar questions about whether their decisions are or should be construed as agreements among independent economic actors 'in an antitrust sense.'" But the court below specifically "limit[ed] [its] review" to the NFL teams' collective licensing of their intellectual property. Pet. App. 13a. The court did not cite *Dagher*, much less opine on what constitutes a "'core' venture activit[y]" in the NFL or more generally. The application of *Dagher* and the single-entity concept to integrated joint ventures involves complex and fact-specific issues that should be left for a case in which the court below addressed them. Cf. *NCAA* v. *Smith*, 525 U.S. 459, 470 (1999) ("we do not decide in the first instance issues not decided below").

In addition, the somewhat idiosyncratic nature of the relationship between individual NFL teams and the league as a whole makes this case an unsuitable vehicle for resolving broader questions of the kind the NFL respondents identify. On the one hand, decisions concerning some important aspects of the league's operations, such as the scheduling of games and the promulgation of rules, must be made collectively if the league is to function in anything like its current manner. See *NCAA*, 468 U.S. at 117. On the other hand, the primary product marketed by the NFL is robust inter-team competition on the field of play, engendering associated rivalry off the field. The appeal of that product could be reduced substantially if individual teams were (or were perceived by potential customers to be) simply and for all purposes components of a larger "single entity." Absent good reason to believe that this combination of attributes is typical of joint ventures generally, a decision by the Court in this case would do little to clarify the application to other joint ventures of the principles announced in *Copperweld*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELENA KAGAN
Solicitor General

CHRISTINE A. VARNEY
Assistant Attorney General

MALCOLM L. STEWART
Deputy Solicitor General

DEANNE E. MAYNARD
Assistant to the Solicitor General

CATHERINE G. O'SULLIVAN
NICKOLAI G. LEVIN
Attorneys

DAVID C. SHONKA
Acting General Counsel
Federal Trade Commission

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