No. 08-661

IN THE
Supreme Court of the United States

AMERICAN NEEDLE, INC.,

Petitioner,

v.

NATIONAL FOOTBALL LEAGUE, *et al.*,

Respondents.

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

BRIEF FOR THE NFL RESPONDENTS

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QUESTION PRESENTED

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

Whether, under the standards articulated in *Copperweld*, a professional sports league and its separately owned member clubs, which collectively produce an entertainment product that no member club could produce on its own, constitute – or at least can function as – a single entity for Section 1 purposes.

LIST OF PARTIES

Plaintiff below was: American Needle, Inc.

Defendants below were:

National Football League
NFL Properties LLC
Arizona Cardinals Football Club, Inc.
Atlanta Falcons Football Club, LLC
Buffalo Bills, Inc.
Panthers Football, LLC
Cincinnati Bengals, Inc.
Cleveland Browns Football Company LLC
Dallas Cowboys Football Club, Ltd.
PDB Sports, Ltd. (d/b/a The Denver Broncos Football Club, Ltd.)
The Detroit Lions, Inc.
Green Bay Packers, Inc.
Houston NFL Holdings, L.P.
Indianapolis Colts, Inc.
Jacksonville Jaguars, Ltd.
Kansas City Chiefs Football Club, Inc.
Miami Dolphins, Ltd.
Minnesota Vikings Football, LLC
New England Patriots L.P.
New Orleans Louisiana Saints, L.L.C.
New York Football Giants, Inc.
New York Jets LLC
The Oakland Raiders, L.P.
Philadelphia Eagles, LLC
Pittsburgh Steelers Sports, Inc.
The St. Louis Rams Partnership
Chargers Football Company, LLC
San Francisco Forty Niners, Limited
Football Northwest LLC

Buccaneers Limited Partnership
Tennessee Football, Inc.
Pro-Football, Inc.
Reebok International Ltd.

CORPORATE DISCLOSURE STATEMENT

None of the NFL respondents has parent corporations except as follows:

Arizona Cardinals Holdings, Inc. (Arizona Cardinals Football Club, Inc.)
Rooney Enterprises, Inc. (Pittsburgh Steelers Sports, Inc.)
KSA Industries, Inc. (Tennessee Football, Inc.)
Washington Football, Inc. and WFI Group, Inc. (Pro-Football, Inc.)

There is no publicly held company owning 10 percent or more of the stock of any NFL respondent or of the parent corporations listed above.

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The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 538 F.3d 736. The decision of the district court (Pet. App. 22a-28a) is reported at 496 F. Supp. 2d 941.

JURISDICTION

The court of appeals entered its judgment on August 18, 2008. The petition for a writ of certiorari was filed on November 17, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

1. Respondents include the National Football League, an unincorporated association of 32 member clubs, and 30 of its member clubs (collectively, the "NFL"). The NFL produces an entertainment product known as "NFL Football," an annual, highly integrated series of professional football games that culminates in the Super Bowl championship. For over forty years, the League and its member clubs have promoted NFL Football by collectively licensing and marketing their identifying trademarks for use on consumer products. These activities are conducted by the clubs' jointly owned affiliate, respondent NFL Properties.

Petitioner American Needle, Inc. ("ANI") manufactures headwear, including caps that incorporate the marks and logos of various sports teams. For many years, ANI was one of several headwear licensees of NFL Properties. In 2001, NFL Properties declined to renew ANI's license, choosing instead to grant an exclusive headwear license to Reebok International.

2. ANI filed this action on December 4, 2004, challenging the NFL clubs' practice of collectively licensing their trademarks. ANI alleged that the decades-old "agreement" among the member clubs to collectively market such intellectual property was unlawful under Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2, at least after the 2001 decision to collectively license the marks to a single headwear manufacturer.

Prior to merits discovery, the NFL moved for summary judgment. Relying on principles established in *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984) ("*Copperweld*"), and *Chicago Professional Sports Ltd. Partnership v. National Basketball Association*, 95 F.3d 593, 598-99 (7th Cir. 1996) ("*Bulls II*"), the NFL argued that, in collectively licensing their marks and logos as a means of promoting their inherently integrated entertainment product, the League and its member clubs are, or at least function as, a single entity and therefore cannot constitute the plurality of economic actors required for a Section 1 conspiracy.

On that basis, after permitting discovery limited to the single-entity issue, the district court granted summary judgment dismissing ANI's claims. Pet. App. 22a-28a. The district court held (i) that, in determining whether the member clubs of a professional sports league constitute a single entity, the league's operations should be considered "one facet at a time"; and (ii) that the undisputed material facts demonstrated that "the NFL and the teams act as a single entity in licensing their intellectual property." Pet. App. 24a, 28a.

3. The court of appeals unanimously affirmed. Pet. App. 1a-19a. After dispensing with ANI's challenge to the district court's discovery rulings (Pet. App. 9a-11a), the court turned to the merits of the single-entity issue. Following its decision in *Bulls II* ("We see no reason why a sports league *cannot* be treated as a single firm . . . .") (Pet. App. 13a), the court held that a professional sports league "*could* be considered a single entity," and that the "question of 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.'"

The court then held (Pet. App. 16a-18a) that "the NFL teams share a vital economic interest in collectively promoting NFL football" in competition "with other forms of entertainment," and it 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." In reaching its conclusion, the court rejected (Pet. App. 15a-16a) as inconsistent with *Copperweld* the proposition that the NFL could not be a single entity unless its member clubs had a "complete unity of interest."

ARGUMENT

Although the result reached by the court below is correct, the courts of appeals are divided on whether a professional sports league of separately owned teams can constitute a single entity for purposes of Section 1. That division reflects a deeper split among the circuits over the application of this Court's *Copperweld* decision to joint ventures that involve a high degree of economic integration, such as those in

which the members, though separate in some formal respects (such as ownership), are inherently interdependent in other respects, such as the production, promotion, and sale of the venture's products. This issue is a recurring one that limits the ability of professional sports leagues and similar joint ventures to engage in and enhance interbrand competition, and it opens the door to repeated, costly antitrust suits that burden not only the joint venture participants but also the federal courts.

The NFL Respondents are taking the unusual step of supporting certiorari in an effort to secure a uniform rule that (i) recognizes the single-entity nature of highly integrated joint ventures and (ii) obviates the uncertainty, chilling effects, and forum shopping that inevitably result from the current conflict among the circuits. If the petition is granted, the NFL will argue that professional sports leagues, which produce a product that no member club could produce on its own, and other joint ventures that involve a similarly high degree of economic integration, should be deemed single entities for Section 1 purposes, at least with respect to core venture functions, notwithstanding that the venture participants are separately owned and may not have a complete unity of interests.

* * *

In *Copperweld*, this Court confirmed that Section 1 "reaches unreasonable restraints of trade effected by a 'contract, combination . . . or conspiracy' between *separate* entities." 467 U.S. at 768. The Court explained that concerted activity of the kind intended to be addressed by Section 1 involves "a

sudden joining of two independent sources of economic power previously pursuing separate interests" and "deprives the marketplace of the independent centers of decisionmaking that competition assumes and demands." *Id.* at 769, 771-72. In determining whether a plurality exists, this Court held, "substance, not form," should govern. *Id.* at 773 n.21.

In the quarter century since *Copperweld*, some circuits, initially relying on pre-*Copperweld* authority from the Ninth Circuit, effectively adopted a categorical rule treating the venture decisions of professional sports leagues as agreements among independent competitors subject to Section 1 scrutiny.[1] Other circuits, led by the Seventh Circuit, have adopted a more nuanced, economics-based approach, recognizing that the same enterprises can be single economic entities with respect to at least some of their functions.[2]

The proper resolution of this division among the courts of appeals has important implications for the application of Section 1 not only to professional sports leagues, but also to highly integrated joint ventures in other sectors of the economy. This case presents an appropriate opportunity to resolve this recurring circuit dispute, to provide further guidance on the principles recently articulated by this Court in

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[1] *See Los Angeles Mem'l Coliseum Comm'n v. National Football League*, 726 F.2d 1381, 1390 (9th Cir. 1984) (NFL clubs are "independent business entities").

[2] *See Bulls II*, 95 F.3d at 598-99 ("We see no reason why a sports league *cannot* be treated as a single firm . . . .").

Texaco Inc. v. Dagher, 547 U.S. 1 (2006), and to permit resolution, early in the litigation, of Section 1 antitrust challenges to the decisionmaking of highly integrated joint ventures.

1. The courts of appeals are divided on whether sports leagues can constitute a single entity under the standards articulated in *Copperweld*. The Seventh Circuit has now twice held that a professional sports league *can* constitute a single entity even if its member teams are separately owned. Pet. App. 13a-18a; *Bulls II*, 95 F.3d at 598; *cf. Brown v. Pro Football, Inc.*, 518 U.S. 231, 248-49 (1996) ("[T]he [teams] that make up a professional sports league are not completely independent economic competitors, as they depend upon a degree of cooperation for economic survival"; they are "more like a single bargaining employer"); *see also National Football League v. N. Am. Soccer League*, 459 U.S. 1074, 1077 (1982) (Rehnquist, J., dissenting from denial of petition for certiorari) (the NFL "competes *as a unit* against other forms of entertainment" (emphasis added)). The Fourth and Fifth Circuits have reached similar conclusions. *See Seabury Mgmt. v. Prof'l Golfers' Ass'n of Am.*, 52 F.3d 322 (4th Cir. 1995) (unpublished opinion reported at 1995 WL 241379); *Eleven Line, Inc. v. N. Tex. State Soccer Ass'n*, 213 F.3d 198, 205 (5th Cir. 2000).

By contrast, the First, Second, and Ninth Circuits, disregarding *Copperweld*'s directive to focus on "substance, not form," have effectively adopted a categorical rule that professional sports leagues comprised of separately owned teams *cannot* constitute a single entity, regardless of the extent of

the teams' economic interdependence or integration. *See Fraser v. Major League Soccer*, 284 F.3d 47, 55 (1st Cir. 2002); *Sullivan v. National Football League*, 34 F.3d 1091, 1099 (1st Cir. 1994); *Los Angeles Mem'l Coliseum Comm'n v. National Football League*, 726 F.2d 1381 (9th Cir. 1984); *N. Am. Soccer League v. National Football League*, 670 F.2d 1249, 1256-58 (2d Cir. 1982); *see also National Hockey League Players Ass'n v. Plymouth Whalers Hockey Club*, 419 F.3d 462, 469-70 (6th Cir. 2005) (dicta).

Although the decisions of the Second and Ninth Circuits predate *Copperweld*, more recent rulings by those circuits have endorsed their earlier holdings. *See Freeman v. San Diego Ass'n of Realtors*, 322 F.3d 1133, 1148 n.17 (9th Cir. 2003) ("*Los Angeles Memorial Coliseum* was decided before *Copperweld*, but nothing in the latter impugns our holding in the former."); *U.S. Football League v. National Football League*, 842 F.2d 1335, 1372 (2d Cir. 1988).[3]

These conflicting decisions reflect a deeper division among the courts of appeals over the application of *Copperweld* to highly integrated joint ventures. The Eighth Circuit, for example, has held that a cooperative of separately owned electrical utilities was not subject to Section 1 because its

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[3] *See also Jack Russell Terrier Network v. Am. Kennel Club, Inc.*, 407 F.3d 1027, 1033-36 (9th Cir. 2005) (following *Los Angeles Memorial Coliseum*, stating that "the N.F.L. teams at issue in that case were wholly independent business entities," and distinguishing plaintiff's allegations in suit against non-profit national dog club and its regional affiliates).

members, which were interdependent, functioned as a single entity. *See Mt. Pleasant v. Associated Elec. Coop., Inc.*, 838 F.2d 268, 274-77 (8th Cir. 1988). By contrast, the Ninth Circuit has extended *Los Angeles Memorial Coliseum* to hold that, as a general rule, a single entity cannot exist in the absence of "economic unity," *i.e.*, "substantial common ownership," thus effectively eliminating the possibility that a joint business venture with separately owned members could constitute a single entity. *Freeman*, 322 F.3d at 1148; *see also Sullivan*, 34 F.3d at 1099 ("the critical inquiry is whether the alleged antitrust conspirators have a unity of interests"); *but see Bulls II*, 95 F.3d at 598 (rejecting as "silly" the proposition that single-entity status requires "a complete unity of interest").

This division in approach among the courts of appeals is direct and entrenched. The circuits have issued conflicting opinions even as to the same entity: The Seventh Circuit below, for example, held that the NFL and its member teams constitute a single entity for at least some purposes, while the Ninth Circuit has held categorically that the teams of the NFL are not a single entity. Pet App. at 18a; *Los Angeles Mem'l Coliseum Comm'n*, 726 F.2d at 1390.

The First and Seventh Circuits have explicitly recognized this division among the circuits. *See Fraser*, 284 F.3d at 55 (noting that the Seventh Circuit's approach in *Bulls II* "has not been adopted in this circuit, and we must work with the framework of existing circuit law" (internal citation omitted) (citing *Sullivan*, 34 F.3d at 1099)); *Bulls II*, 95 F.3d at 599 (citing decisions of the First and

Second Circuits, among others, that had refused to treat professional sports leagues as single entities); Pet. App. at 13a (following *Bulls II* but noting conflict with First Circuit decisions in *Fraser* and *Sullivan*).

The lack of uniformity in circuit precedent means that a single decision of a professional sports league (or similarly integrated joint venture) will be treated differently by courts in different circuits. Unlike in the Seventh Circuit, core business decisions of the league may be subject to the uncertainty of a full rule-of-reason analysis in the First, Second or Ninth Circuits.[4] For the NFL and other nationwide joint ventures, that uncertainty chills collaboration and decisionmaking, and it inevitably decreases interbrand competition. *See, e.g., Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 594 (1986) (mistaken standards that permit inference of conspiracy when none should be found "are especially costly, because they chill the very conduct the antitrust laws are designed to protect").

Further consideration of the question by other courts of appeals is likely to exacerbate the conflict without providing further illumination. *See, e.g., Super Sulky, Inc. v. U.S. Trotting Ass'n*, 174 F.3d

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[4] Generally, restraints resulting from the decisions of legitimate joint ventures are evaluated under a rule-of-reason analysis rather than a *per se* rule of illegality. *See, e.g., Texaco Inc. v. Dagher*, 547 U.S. 1, 5 (2006) (Court "presumptively applies rule of reason analysis"); *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 23 (1979).

733, 741 (6th Cir. 1999) ("[T]he notion of concerted action liability in the field of professional sports is at best confusing."); Pet. App. 12a ("murky waters"). And, because defendants ultimately prevail in or settle most of these suits (albeit only after substantial litigation burden and expense), future opportunities for this Court to resolve the conflict are likely to be few and far between.[5]

2. The application of *Copperweld* to professional sports leagues is a frequently recurring issue. In recent years, for example, the NFL has been sued under Section 1 for business decisions about where to produce its integrated entertainment product (*i.e.*, where to locate its clubs),[6] where to seek new capital (*i.e.*, rules governing ownership qualification),[7] how to present its integrated entertainment product to

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[5] The petition is correct in asserting a division among the courts of appeals, but it is incorrect in asserting (Pet. 8-10) that the decision below conflicts with this Court's decision in *Radovich v. National Football League*, 352 U.S. 445 (1957). Nothing in *Radovich* precludes a finding that the NFL or any other professional sports league constitutes a single entity, and nothing in this Court's much later decision in *Copperweld* suggests that *Radovich* should be seen as limiting the "substance, not form" approach to single-entity status. *Copperweld*, 467 U.S. at 773 n.21.

[6] *See, e.g., Hamilton County Bd. of Comm'rs v. National Football League*, 491 F.3d 310 (6th Cir. 2007); *VKK Corp. v. National Football League*, 244 F.3d 114 (2d Cir. 2001); *St. Louis Convention & Visitors Comm'n v. National Football League*, 154 F.3d 851 (8th Cir. 1998).

[7] *Sullivan v. National Football League*, 34 F.3d 1091 (1st Cir. 1994); *Murray v. National Football League*, No. Civ. A. 94-5971, 1996 WL 363911 (E.D. Pa. Jun. 28, 1996).

viewers on a national basis,[8] rules governing the equipment that may be used by players in games,[9] and terms and conditions of player employment,[10] as well as the trademark licensing activities that are the subject of this lawsuit.

The experience of the NFL is not unusual among professional sports leagues; nor has the cascade of antitrust suits against them abated. Major League Baseball, the National Hockey League, NASCAR, and the ATP Tour each is currently defending, or has recently defended, Section 1 antitrust suits challenging its decisions about how to produce its integrated entertainment product. *See, e.g., Major League Baseball Properties, Inc. v. Salvino, Inc.*, 542 F.3d 290 (2d Cir. 2008) (challenge to trademark licensing decisions); *Madison Square Garden, L.P. v. National Hockey League*, No. 1:07-CV-08455 (S.D.N.Y.) (challenge to online marketing decisions); *Deutscher Tennis Bund v. ATP Tour Inc.*, No. 1:07-cv-00178 (D. Del.) (challenge to tournament schedule decisions); *Kentucky Speedway, LLC v. National Ass'n of Stock Car Auto Racing, Inc.*, No. 2:05-CV-00138 (E.D. Ky.) (challenge to race location decisions).

3. Most of the antitrust cases against the NFL cited above were filed in circuits that categorically

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[8] *Shaw v. Dallas Cowboys Football Club, Ltd.*, 172 F.3d 299 (3d Cir. 1999).

[9] *Aculeus 5 LLC v. NFL Properties LLC*, No. 2:04-CV-042 (C.D. Ca.).

[10] *Brown v. Pro Football, Inc.*, 518 U.S. 231 (1996); *McNeil v. National Football League*, 790 F. Supp. 871 (D. Minn. 1992).

reject single-entity status for professional sports leagues. In those cases (unlike in the Seventh Circuit), there was no opportunity for the NFL to demonstrate at the threshold that it is a single entity as defined by *Copperweld*: *i.e.*, that its activities neither (i) represent a "sudden joining of two independent sources of economic power previously pursuing separate interests" nor (ii) "deprive[] the marketplace of [previously] independent centers of decisionmaking." 467 U.S. at 769, 771. Such conclusions follow directly from the fact that the member clubs of the NFL have no independent value, no purpose, indeed no meaningful reason for existence but for their participation in the League itself. *See, e.g., Bulls II*, 95 F.3d at 598-99 ("a league with one team would be like one hand clapping"); VII Philip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 1462b, at 194 (2d ed. 2003) ("Coordination within an otherwise lawful enterprise does not create additional market power or facilitate a restraint.").[11]

As a result, the suits described above (except this action) were allowed to proceed on the merits for a full rule-of-reason analysis. The large majority of the cases required years of litigation before resolution; in *St. Louis Convention & Visitors Commission*, for

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[11] Even in the Eighth Circuit, which appears to have a more nuanced approach to *Copperweld* (*see* pp. 5, 7-8, above), a district court held that the NFL is collaterally estopped by the Ninth Circuit's pre-*Copperweld* ruling in *Los Angeles Memorial Coliseum Commission* from asserting that it is a single entity. *See St. Louis Convention & Visitors Comm'n v. National Football League*, 154 F.3d 851, 865 n.9 (8th Cir. 1998) (issue not reached on appeal).

example, the NFL prevailed by directed verdict (unrelated to the single-entity issue) after years of burdensome discovery, motions practice, and a six-week jury trial. The other professional sports leagues have had similar experiences, resulting in years of litigation and enormous burden and expense.

Application of *Copperweld*'s "substance, not form" test permitted an early resolution below based on the conclusion that "nothing in § 1 prohibits the NFL teams from cooperating so the league can compete against other entertainment providers." Pet App. 18a. Other courts of appeals, by foreclosing this possibility, presumably would have required broad discovery and, if necessary, trial on the merits in an effort to decide the case based on a full rule-of-reason analysis. Allowing for potential early resolution of such antitrust challenges furthers judicial economy and avoids unnecessary discovery, motions practice, trial, and other litigation burdens. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 1967 (2007) (noting expense and burden of antitrust discovery and litigation).

4. The principle implicated by the question presented is not limited to professional sports leagues. Indeed, the question whether a highly integrated joint venture among separately owned entities is or can function as a single entity has important implications throughout the economy. *See, e.g., Dagher*, 547 U.S. at 5 (joint ventures are "an important and increasingly popular form of business organization"); *Mt. Pleasant*, 838 F.2d at 268 (applying single-entity framework to evaluate

collective decisions by members of an electricity cooperative).

In *Dagher*, this Court considered a Section 1 challenge to the pricing decisions of a petroleum joint venture, and it confirmed that such decisions were not price fixing "in the antitrust sense." 547 U.S. at 6. Recognizing that the "agreement" challenged there reflected "little more than price setting by a single entity – albeit within the context of a joint venture," the Court held that as a "single entity, a joint venture, like any other firm, must have the discretion to determine the prices of the products that it sells." *Id.* at 6-7. The Court noted that the challenged practice involved a "core activity of the joint venture itself – namely, the pricing of the very goods [it] produced and sold." *Id.* at 7-8.

Section 1 challenges to joint ventures, including the suits against the petroleum venture, electrical cooperative, and professional sports leagues discussed above, 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." In this case, for example, it was undisputed that the purpose of the challenged licensing was to promote the NFL's jointly-produced entertainment product, which no member club could produce on its own.

In *Dagher*, the Court did not have the opportunity to address whether the single-entity doctrine renders Section 1 "inapplicable to joint ventures" that involve extensive integration and interdependence among

separately owned entities. *Id.* at 7 & n.2; *see Fraser*, 284 F.3d at 56 ("But what the Supreme Court has never decided is how far *Copperweld* applies to more complex entities and arrangements that involve a high degree of corporate and economic integration but less than that existing in *Copperweld* itself."). That question is squarely presented in this case.

* * *

Granting the petition for certiorari would resolve the inconsistent application of Section 1 to professional sports leagues and other highly integrated joint ventures, provide needed guidance on the principles recently articulated in *Dagher*, and permit early resolution of antitrust challenges without the need for full rule-of-reason litigation.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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