No. 82-1260

In the Supreme Court of the United States

OCTOBER TERM, 1982

COPPERWELD CORPORATION, ET AL., PETITIONERS

v.

INDEPENDENCE TUBE CORPORATION

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 SUPPORTING PETITIONERS

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QUESTION PRESENTED

The United States will address the following question:

Whether joint activities of corporations under common control should be deemed conduct of a single economic enterprise, rather than conspiracy in restraint of trade within the meaning of Section 1 of the Sherman Act, 15 U.S.C. 1.

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This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States.[1]

STATEMENT[2]

The court below upheld a jury finding that petitioners Copperweld Corporation and its wholly-owned subsidiary, Regal Tube Company, conspired to restrain trade in the structural steel tubing market, in violation of Section 1 of the Sherman Act, 15 U.S.C. 1. Respondent Independence Tube Corporation, plaintiff below, alleged that joint actions of the petitioners caused a third company (Yoder) to cancel its contract to provide respond-

[1] The Federal Trade Commission joins in this brief.

[2] Because the petition and the brief in opposition describe the facts and the proceedings below in some detail, we provide only a very brief statement.

ent with a tubing mill, and that as a result respondent was unable to enter the structral steel tubing market until some nine months later than if Yoder had not cancelled the contract.[3] In affirming the jury verdict, the court of appeals relied on a line of this Court's decisions[4] for the proposition that a parent corporation and its wholly-owned subsidiary may be treated as separate entities capable of conspiring within the meaning of Section 1 of the Sherman Act (Pet. App. A10-A11). Referring to a list of factors set out in one of its prior decisions,[5] the court of appeals concluded that the evidence supported the jury's conclusion that petitioners were sufficiently separate to be subject to Section 1 liability for their joint activities (*id.* at A11-A17, A40-A42).

DISCUSSION

The court below held that petitioners, a parent corporation and its wholly-owned subsidiary, constitute separate economic entities for purposes of Section 1 of the Sherman Act, 15 U.S.C. 1, and that their "concerted" conduct directed against respondent therefore violates the Act.[6] That decision, and the intraenterprise conspiracy

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[3] Respondent originally contended that Yoder had conspired with petitioners. However, the jury found that Yoder had not participated in a conspiracy (Pet. App. A6).

[4] These decisions include *United States* v. *Yellow Cab Co.*, 332 U.S. 218 (1947); *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211 (1951); *Timken Roller Bearing Co.* v. *United States*, 341 U.S. 593 (1951); and *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134 (1968).

[5] *Photovest Corp.* v. *Fotomat Corp.*, 606 F.2d 704 (7th Cir. 1979), cert. denied, 445 U.S. 917 (1980).

[6] Section 1 of the Sherman Act, 15 U.S.C. 1, provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony * * *.

doctrine on which it is based,[7] are at odds with the system of distinct standards Congress has created under the Sherman Act for unilateral conduct, on the one hand, and concerted conduct, on the other. The intraenterprise conspiracy doctrine fails to accord recognition to the fact that corporations under common control, like a corporation and its officers or unincorporated divisions, actually constitute a single economic entity and that coordinated conduct among components of such an entity is the product of common control; it should not be viewed as falling within the category of concerted activity Congress intended to prohibit under Section 1 of the Act. The doctrine has generated considerable litigation and has led to confusion among the federal courts and uncertainty within the business community. Moreover, application of the doctrine to commonly controlled corporations tends to undermine the goals of the antitrust laws. For these reasons, review is warranted so that the Court may consider the intraenterprise conspiracy issue raised in the first question presented by the petition.[8]

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[7] The doctrine of "intraenterprise conspiracy" has grown out of a line of this Court's decisions beginning with *United States* v. *Yellow Cab Co.*, 332 U.S. 218 (1947). See note 4, *supra*.

[8] Petitioners' first question refers to the proper legal standard for determining when a parent corporation is capable of conspiring with its wholly-owned subsidiary in violation of the Sherman Act. Petitioners' discussion makes clear (Pet. 19-22) that the underlying question is whether Congress intended Section 1 of the Sherman Act to reach joint conduct by commonly controlled corporations.

We believe the second question presented by the petition, which involves the proof necessary to establish injury to competition in a Section 1 case, does not warrant review by this Court. There is no conflict between the decision below and any decision of this Court or of any other circuit. Moreover, there appears to be no clear legal error preserved for this Court's review. The lower courts did not equate injury to a competitor with injury to competition, and the court of appeals was correct insofar as it held that injury to competition does not require a showing that petitioners' market share increased. Petitioners point to no alternative instruction that they requested and the court rejected; indeed, the instruction quoted by the court of appeals appears (Pet. App. A21) to have

1. Under the scheme of antitrust enforcement created by the Sherman Act, Congress has sought to foster independent economic decision making by establishing more stringent legal standards for multiparty conduct than for unilateral action. Section 1 of the Act reaches only conduct in the form of contracts, combinations or conspiracies, and thus does not address unilateral conduct.[9] Concerted conduct is prohibited under Section 1 whenever it constitutes an unreasonable restraint of trade,[10] regardless of whether there is any danger of monopoly. In contrast, under Section 2 of the Act, which does reach unilateral action,[11] there is no violation unless analysis of market structure and conduct indicates the presence of at least a dangerous probability of monopolization.[12]

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been similar to one proposed by petitioners (see Brief of Plaintiff and Counter-Defendants-Appellees at SA-7 to SA-8 (Defendants' Revised Instruction No. 34)). Finally, if this Court holds, as we urge it to, that Section 1 does not apply to the conduct at issue, it would not be necessary to reach the second question.

[9] See, *e.g.*, *Spectrofuge Corp.* v. *Beckman Instruments, Inc.*, 575 F.2d 256, 286 (5th Cir. 1978), cert. denied, 440 U.S. 939 (1979); *Contractor Utility Sales Co.* v. *Certain-Teed Products Corp.*, 638 F.2d 1061, 1074 (7th Cir. 1981); *Roesch, Inc.* v. *Star Cooler Corp.*, 671 F.2d 1168, 1171 (8th Cir. 1982); *Brenner* v. *World Boxing Council*, 675 F.2d 445, 451 (2d Cir. 1982), cert. denied, No. 81-2301 (Oct. 4, 1982); *Blankenship* v. *Herzfeld*, 661 F.2d 840, 846 (10th Cir. 1981).

[10] *Standard Oil Co. of New Jersey* v. *United States*, 221 U.S. 1 (1911). Some forms of concerted conduct, such as horizontal price-fixing and market allocation, will be deemed per se unlawful, without analysis of market structure or market power, because they promise no significant economic benefits. See *Northern Pacific Ry.* v. *United States*, 356 U.S. 1, 5 (1958).

[11] Section 2 of the Sherman Act, 15 U.S.C. 2, prohibits monopolization and attempts to monopolize, whether by means of unilateral activity or joint conduct. In addition, it prohibits conspiracies to monopolize.

[12] See, *e.g.*, *Berkey Photo, Inc.* v. *Eastman Kodak Co.*, 603 F.2d 263, 271-275 (2d Cir. 1979), cert. denied, 444 U.S. 1093 (1980).

Sound policy considerations underlie Congress' distinction in the legal standards applied to unilateral conduct, on the one hand, and multiparty conduct, on the other. The purpose of the antitrust laws is to foster economic well-being by encouraging vigorous competition among individual enterprises. Except in the context of acquisitions, which are subject to a rule-of-reason examination, and also excepting for the moment the doctrine now under discussion, antitrust doctrine wisely does not attempt to control the size or organization of business entities. Size and organization are recognized to be the products of private endeavors to create competitive and hence efficient business entities. The behavior of those entities is then subjected to one or the other of two statutory standards: the comparatively restrictive standard imposed by Section 1 on multifirm behavior, and the substantially more permissive standard imposed by Section 2, which prohibits monopolization. This statutory pattern, and the sound economic policy it reflects, would be undermined if individual enterprises were constrained in their competitive efforts by the threat of antitrust liability, in the absence of a dangerous probability of monopolization.[13] By contrast, Congress' determination to impose a stricter Sherman Act standard on concerted conduct, *i.e.*, to prohibit unreasonable restraints of trade without requiring any danger of monopolization, is consistent with the con-

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[13] See, *e.g.*, *Berkey Photo, Inc.* v. *Eastman Kodak Co.*, *supra*, 603 F.2d at 273-274; *United States* v. *Empire Gas Corp.*, 537 F.2d 296, 302-307 (8th Cir. 1976), cert. denied, 429 U.S. 1122 (1977). Cf. *Walker Process Equipment, Inc.* v. *Food Machinery & Chemical Corp.*, 382 U.S. 172, 177-178 (1965).

The courts have held that some forms of less dangerous, but nonetheless anticompetitive, unilateral conduct may be subject to Section 5 of the Federal Trade Commission Act, 15 U.S.C. (& Supp. V) 45. See *FTC* v. *Motion Picture Advertising Service Co.*, 344 U.S. 392, 394-395 (1953). In addition, state tort or contract law may provide relief for certain types of unilateral conduct that harm competitors. Indeed, in this case the jury found that petitioners had tortiously interfered with respondent's contractual rights. Pet. App. A6-A7.

cern about multiparty conduct reflected in the common law treatment of conspiracies.[14] In addition, it is supported by the recognition that, in a system designed to foster independent economic decision making, there is little reason to tolerate concerted business conduct among rivals unless it involves an integration of resources under common control that holds out the possibility of increased output, lower prices, or other procompetitive benefits that cannot be attained by individual firms.

2.a. This case presents the question whether Congress intended application of the more stringent Section 1 standard to a firm's conduct solely because it chooses to do business through legally distinct, but commonly controlled, corporations, rather than through a single corporation with multiple divisions. The difficulty with the intraenterprise conspiracy doctrine is that it evaluates conduct within a single competitive unit by the stringent standard for conspiracy cases, simply on the basis of an enterprise's choice of corporate form. Thus, under the doctrine, joint action by a parent corporation and its wholly-owned subsidiary, which is not substantively different from unilateral action by a company with unincorporated divisions, is treated as if it were cartel behavior. In some cases, such as refusal to deal with a third party, application of the intraenterprise conspiracy doctrine can have drastic effects; conduct that would otherwise be judged as unilateral, with its legality dependent on whether it raised a danger of monopolization in the particular economic setting, could be viewed as a concerted refusal to deal, and thus per se illegal, when measured under Section 1 conspiracy standards.[15] Use of

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[14] See, *e.g.*, *United States* v. *Feola*, 420 U.S. 671, 693-694 (1975); *Callanan* v. *United States*, 364 U.S. 587, 593-594 (1961); *United States* v. *Rabinowich*, 238 U.S. 78, 88 (1915).

[15] The difficulty with the intraenterprise conspiracy doctrine can be appreciated if one views legitimate and efficient unilateral conduct, *i.e.*, that which does not raise a danger of monopolization, as being at one end of the spectrum, with collaborative per se illegal agreement at the other, and all other conduct whose antitrust

the formalistic distinction of separate incorporation to impose the strict Section 1 standard on what is essentially single-firm behavior is inconsistent with the principle of economic reality courts normally have applied in interpreting the antitrust laws.

Specifically, the courts generally have been careful to avoid reading the Sherman Act in a manner that discourages, rather than promotes, competition among individual economic units. Section 1 of the Act prohibits any "person" from engaging in concerted conduct that unreasonably restrains competition. Section 8 of the Sherman Act, 15 U.S.C. 7, defines the term "person" to include corporations and associations, as well as individuals. Thus, it might be possible to read Section 1 to apply to restraints resulting from concerted action by any two or more "persons," so that it could be invoked against joint conduct by a firm and its officers or employees, or by two officers cooperating on behalf of their firm. However, the courts have avoided a formalistic approach that would focus solely on the legal definition of "person" and disregard the fact that in a complex economy the relevant economic unit is likely to be larger than a single individual. The courts uniformly have held that although a corporation and its officers and employees are separate legal persons, concerted action among them amounts to action by a single economic enterprise and therefore does not violate Section 1.[16] The rationale for this approach is

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legality is determined by its efficiency and reasonableness under the circumstances in the middle. By making the legal result turn on the form of internal organization adopted by the enterprise, the intraenterprise conspiracy doctrine can have the effect in some cases of pulling the court from one end of the spectrum of legality to the other for reasons unrelated to competitive effects.

[16] See, *e.g.*, Pet. App. A9; *H & B Equipment Co.* v. *International Harvester Co.*, 577 F.2d 239, 244 (5th Cir. 1978); *Spectrofuge Corp.* v. *Beckman Instruments, Inc., supra*, 575 F.2d at 286-287; *Dussouy* v. *Gulf Coast Investment Corp.*, 660 F.2d 594, 603 (5th Cir. 1981); *Nelson Radio & Supply Co.* v. *Motorola, Inc.*, 200 F.2d 911, 913-914 (5th Cir. 1952), cert. denied, 345 U.S. 925 (1953); *Joseph E. Seagram & Sons, Inc.* v. *Hawaiian Oke & Liquors, Ltd.*, 416 F.2d 71, 82-

that "[a] corporation can act only through its employees, and if an agreement between a corporation and an employee could be a Sherman Act conspiracy, the plurality requirement [of Section 1] would lose all meaning." *H & B Equipment Co.* v. *International Harvester Co.*, 577 F.2d 239, 244 (5th Cir. 1978).[17] For similar reasons, the courts have held Section 1 inapplicable to concerted action by a corporation and its unincorporated divisions. The divisions are part of a single economic unit, as well as a single legal unit, and "[t]reble damages should not be assessed against a corporation merely because it has adopted an organizational division of labor * * *." *Id.* at 244.[18]

b. Despite their recognition of economic reality in dealing with conduct of corporate officers and divisions, and their acknowledgment that "as a practical matter, there may be little difference between a wholly-owned subsidiary and a fully integrated division" (Pet. App.

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84 (9th Cir. 1969), cert. denied, 396 U.S. 1062 (1970); *Poller* v. *Columbia Broadcasting System, Inc.*, 284 F.2d 599, 603 (D.C. Cir. 1960), rev'd on other grounds, 368 U.S. 464 (1962); *Morton Buildings of Nebraska, Inc.* v. *Morton Buildings, Inc.*, 531 F.2d 910, 916-917 (8th Cir. 1976); *Schwimmer* v. *Sony Corp. of America*, 677 F.2d 946, 953 (2d Cir. 1982), cert. denied, No. 82-277 (Nov. 8, 1982); *Tose* v. *First Pennsylvania Bank, N.A.*, 648 F.2d 879, 893-894 (3d Cir.), cert. denied, 454 U.S. 893 (1981). The courts recognize an exception to this principle in the case of an individual who conspires with the corporation to further his own interests and thus is not acting on behalf of the corporation. See, *e.g.*, *H & B Equipment Co.*, *supra*, 577 F.2d at 244; *Morton Buildings of Nebraska, Inc.*, *supra*, 531 F.2d at 916-917.

[17] See also, *e.g.*, *Nelson Radio & Supply Co.* v. *Motorola, Inc.*, *supra*, 200 F.2d at 914 (corporation does not violate Section 1 when it exercises its right to select customers and to refuse to sell its goods through its officers and agents, which is the only medium through which it can possibly act); *Dussouy* v. *Gulf Coast Investment Corp.*, *supra*, 660 F.2d at 603 (citing agency principles and application of Section 2 of the Sherman Act to single firm conduct).

[18] See also, *e.g.*, Pet. App. A9; *Spectrofuge* v. *Beckman Instruments*, *supra*, 575 F.2d at 287; *Joseph E. Seagram & Sons, Inc.* v. *Hawaiian Oke*, *supra*, 416 F.2d at 83-84.

A9), the courts of appeals have construed this Court's decisions as requiring—at least in some situations—the application of Section 1 to action by separately incorporated components of the same economic unit. See, *e.g.*, Pet. App. A9-A11. *United States* v. *Yellow Cab Co.*, 332 U.S. 218 (1947), is generally recognized as the source of this "intraenterprise conspiracy" doctrine. The violation alleged in *Yellow Cab* included the consolidation under single control of formerly independent corporations as a means of effectuating an illegal agreement not to compete. *Id.* at 229.[19] Thus, the combination initially eliminated competition that otherwise would have existed among independent corporations and created a new entity whose market power posed a threat to competition.[20] In this context, the Court rejected the suggestion that a restraint illegal under Section 1 could not result from "a conspiracy among those who are affiliated or integrated under common ownership" (*id.* at 227); it stated that "the common ownership and control of the various corporate appellees are impotent to liberate the alleged combination and conspiracy from the impact of the [Sherman] Act" (*ibid*).[21] The language the Court employed was broad. However, its decision can be viewed as holding only that separately incorporated, commonly controlled corporations are subject to Section 1 if the agree-

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[19] The complaint in *Yellow Cab* also alleged that the combination constituted a conspiracy to monopolize in violation of Section 2 of the Sherman Act.

[20] Defendants had "obtained 86% of the Chicago market [for sale of taxicabs], 15% of the New York City market, 100% of the Pittsburgh market and 58% of the Minneapolis market." 332 U.S. at 224. The Court viewed the complaint as alleging that these market shares had been achieved " 'by deliberate, calculated purchase for control.' " 332 U.S. at 227-228 (quoting *United States* v. *Reading Co.*, 253 U.S. 26, 27 (1920)).

[21] The Court further stated that "the fact that the competition restrained is that between affiliated corporations cannot serve to negative the statutory violation where, as here, the affiliation is assertedly one of the means of effectuating the illegal conspiracy not to compete." 332 U.S. at 229.

ment at issue has the purpose or effect of bringing formerly independent corporations under common ownership, thereby restraining competition.[22]

The Court applied and expanded its *Yellow Cab* statements in *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211 (1951); *Timken Roller Bearing Co.* v. *United States*, 341 U.S. 593 (1951); and *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134 (1968). In *Timken Roller Bearing Co.* the alleged violations included acquisitions of partial ownership interests in horizontal competitors and agreements among those corporations to fix prices and allocate territories. Justice Black there noted that the ownership interests "were obtained as part of a plan to promote the illegal trade restraints" (341 U.S. at 600) and characterized the resulting intercorporate relationship as "the core of the conspiracy" (*id.* at 601). Thus, *Timken* resembles *Yellow Cab* in that the result the Court reached could have been justified on the ground that the acquisitions themselves implemented illegal agreements between formerly independent companies and for that reason constituted an unlawful restraint.

However, in *Kiefer-Stewart Co.* and *Perma Life Mufflers, Inc.*, the Court applied the broad language of *Yellow Cab*, rather than what can be viewed as its more limited holding, to find Section 1 violations by commonly owned corporations in cases in which the alleged violations did not include a combination of formerly independent en-

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[22] Some commentators have suggested this reading of *Yellow Cab*. See, *e.g.*, Handler & Smart, *The Present Status of the Intracorporate Conspiracy Doctrine*, 3 Cardozo L. Rev. 23 (1981), reprinted in Pet. App. I. The cases cited by the Court in *Yellow Cab* (see 332 U.S. at 227-228) seem to support this reading. In *Appalachian Coals, Inc.* v. *United States*, 288 U.S. 344, 360-361, 376-377 (1933), which involved formation of a joint selling agency, the Court emphasized that whether or not a combination challenged as violating Section 1 took the form of a corporation was irrelevant: While an otherwise restrictive combination "cannot escape because it has chosen corporate form," a combination that does not restrain competition "is not to be condemned because of the absence of

tities.[23] In neither of these decisions did the Court refer to the significance of the distinction between the legal standards applied to unilateral and concerted conduct under the Sherman Act; nor did it mention any economic considerations indicating that there would have been significant competition between entities under common ownership and control in the absence of the challenged agreements.[24]

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corporate integration." 288 U.S. at 377. In *United States* v. *Reading Co.*, 253 U.S. 26, 57 (1920), the restraint identified by the Court arose from acquisitions by a holding company that gave it control of competing railroads and coal companies. And in *United States* v. *Crescent Amusement Co.*, 323 U.S. 173, 189 (1944), the Court upheld a divestiture decree on the ground that "the *creation* of the combination is itself the violation" (emphasis added).

[23] In *Kiefer-Stewart*, the Court found that commonly owned corporations had entered into an illegal conspiracy to fix maximum resale prices. It rejected defendants' argument that "their status as 'mere instrumentalities of a single manufacturing-merchandizing unit' makes it impossible for them to have conspired in a manner forbidden by the Sherman Act." 340 U.S. at 215. It was the Court's view that "this suggestion runs counter to our past decisions that common ownership and control does not liberate corporations from the impact of the antitrust laws" (*ibid.*, citing *United States* v. *Yellow Cab Co., supra*). The Court added, without explanation, that "[t]he rule is especially applicable where, as here, respondents hold themselves out as competitors" (*ibid.*).

In *Perma Life*, the Court held that certain sales agreements between a parent corporation and its wholly owned subsidiary violated Section 1. (The Court also read the complaint as charging conspiracies outside the group of affiliated corporations, 392 U.S. at 142, but its holding was not confined to those conspiracies.) No acquisition was involved, and again the Court offered no explanation for the decision to impose Section 1 liability, other than that the defendants had "availed themselves of the privilege of doing business through separate corporations, [and] the fact of common ownership could not save them from any of the obligations that the law imposes on separate entities." 392 U.S. at 141-142, citing *Timken Roller Bearing Co.*, v. *United States, supra*, 341 U.S. at 598, and *United States* v. *Yellow Cab Co., supra*, 332 U.S. at 227.

[24] In at least one case, however, the Court has recognized that ownership and control can be more significant than separate legal identity. In *Sunkist Growers, Inc.* v. *Winckler & Smith Citrus*

c. The Court's intraenterprise conspiracy decisions have posed a dilemma for the lower courts, at least in part because the decisions are at odds with the general Sherman Act scheme of applying a less stringent legal standard to unilateral, as distinguished from concerted, conduct. The Third[25] and Fifth Circuits[26] have held, without qualification, that concerted action by a parent

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Products Co., 370 U.S. 19 (1962), the Court held that where 12,000 growers had organized into three separate legal entities, those commonly owned entities should be deemed a single organization, so that their dealings with each other were shielded from antitrust liability by the Capper-Volstead Act.

The Court's most recent reference to the intraenterprise conspiracy notion was in *United States* v. *Citizens & Southern National Bank*, 422 U.S. 86 (1975). There the Court, citing *Yellow Cab*, *Kiefer-Stewart*, *Timken*, and *Perma Life*, stated that "even commonly owned firms must compete against each other, if they hold themselves out as distinct entities." 422 U.S. at 116. However, in *Citizens & Southern* the United States did not argue that an agreement between a corporate parent and its legally controlled subsidiaries constituted concerted action cognizable under Section 1. Rather, the government pointed out that the alleged corporate parent owned only five percent of the stock of the smaller banks and was prohibited by state law from owning or controlling more. In that context, the government contended that the smaller banks should have been viewed as legally and economically distinct decision makers fully subject to Section 1 if they agreed with C&S to fix prices or restrain competition in some other manner (Brief for the United States at 24-25, noting that C&S lacked the power legally to require the smaller banks to conform their competitive behavior to its wishes). However, the Court held that C&S's "de facto" branching through "5-percent banks" was procompetitive and that no illegal agreement among the banks had been proved. 422 U.S. at 114, 117-120.

[25] *Columbia Metal Culvert Co.* v. *Kaiser Aluminum & Chemical Corp.*, 579 F.2d 20, 33 & n.49 (3d Cir.), cert. denied, 439 U.S. 876 (1978); *Martin B. Glauser Dodge Co.* v. *Chrysler Corp.*, 570 F.2d 72, 81 (3d Cir. 1977), cert. denied, 436 U.S. 913 (1978); *Cromar Co.* v. *Nuclear Materials & Equipment Corp.*, 543 F.2d 501, 511-512 (3d Cir. 1976); *Coleman Motor Co.* v. *Chrysler Corp.*, 525 F.2d 1338, 1345 (1975).

[26] *H & B Equipment Co.* v. *International Harvester Co.*, *supra*, 577 F.2d at 244-245; *Battle* v. *Liberty National Life Ins. Co.*, 493 F.2d 39, 44 (5th Cir. 1974), cert. denied, 419 U.S. 1110 (1975).

corporation and its wholly-owned subsidiary is subject to the standards of Section 1. The Seventh, Eighth and Ninth Circuits, however, have sought to limit the doctrine to situations in which a parent and subsidiary are sufficiently like independent entities that agreements between them should be subject to Section 1.[27] Those circuits require consideration of numerous factors, whose relative weight and importance are left to the factfinder, in determining "how much separation [the companies] in fact maintained in the conduct of their business" (Pet. App. A16).[28] Such a multi-factor analysis naturally

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[27] The courts below followed the Seventh Circuit's earlier decision in *Photovest Corp.* v. *Fotomat Corp.*, 606 F.2d 704 (1979), cert. denied, 445 U.S. 917 (1980). As the court of appeals noted (Pet. App. A11), its analysis is similar to that applied by the Eighth and Ninth Circuits, citing *Ogilvie* v. *Fotomat Corp.*, 641 F.2d 581 (8th Cir. 1981), and *Knutson*, v. *Daily Review, Inc.*, 548 F.2d 795 (9th Cir. 1976), cert. denied, 433 U.S. 910 (1977). See also, *e.g.*, *Hunt-Wesson Foods, Inc.* v. *Ragu Foods, Inc.*, 627 F.2d 919, 927 n.5 (9th Cir. 1980), cert. denied, 450 U.S. 921 (1981); *William Inglis & Sons Baking Co.* v. *ITT Continental Baking Co.*, 668 F.2d 1014, 1054-1055 (9th Cir. 1981), cert. denied, No. 81-2083 (Oct. 4, 1982).

The remaining circuits have not articulated an intraenterprise conspiracy standard. In *George R. Whitten, Jr., Inc.* v. *Paddock Pool Builders, Inc.*, 508 F.2d 547 (1974), cert. denied, 421 U.S. 1004 (1975), the First Circuit considered the intraenterprise conspiracy issue and concluded that in that case "under the *Yellow Cab* doctrine the evidence is sufficient to portray a plurality of actors concerting their efforts toward a common end." 508 F.2d at 557. However, it is not clear from the opinion whether that conclusion is based on factors other than separate incorporation. The Second Circuit has mentioned the issue in several cases, but has not decided it, concluding that, even if there were capacity to conspire, no conspiracy in restraint of trade had been proved. See, *e.g.*, *Syracuse Broadcasting Corp.* v. *Newhouse*, 319 F.2d 683, 687-688 (2d Cir. 1963); *Reisner* v. *General Motors Corp.*, 671 F.2d 91, 100 (2d Cir. 1982), cert. denied, No. 82-35 (Oct. 4, 1982).

[28] For example, the jury here was instructed to determine whether "the two companies, in fact, operated as separate entities" by considering the companies' histories; whether they had separate staffs and offices; whether the parent paid the subsidiary's expenses; the extent of the subsidiary's policymaking independence; the extent of

limits predictability, and both the lower courts and commentators have observed that the intraenterprise conspiracy doctrine has engendered uncertainty. See, *e.g.*, Pet. App. A11-A12. The doctrine has spawned considerable litigation in the lower courts, presumably in part because of the uncertainty surrounding it.

3. We submit that treatment of commonly controlled corporations as a single economic entity for Sherman Act purposes would clarify the law and render it more consistent with the congressional goals underlying the Sherman Act.[29]

a. Antitrust analysis relies on the basic asssumption that an individual or a corporation will organize and use those productive assets subject to its control so as to maximize the profits of the controlling party.[30] Of course, a corporation may decide to operate through separately incorporated subsidiaries and may grant the subsidiaries a considerable degree of operational independence. In some cases, several subsidiaries may appear to "compete" with one another or with the parent. Despite this appearance, corporations under common control cannot properly be viewed as "independent units" or "com-

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the subsidiary's outside sales; whether the companies had separate records and accounts; whether they were "separate participants" in the alleged unlawful acts; whether the companies had separate officers and directors; and "any other facts that you find that are relevant." Pet. App. A40-A41.

[29] In referring to commonly controlled corporations, we view ownership as the determinant of control. In the case of a parent corporation and its wholly-owned subsidiary, it is clear that the parent has ultimate control of the productive assets of the subsidiary. Two wholly-owned subsidiaries of the same parent also would be commonly controlled. Common control could exist in the case of substantial partial ownership as well; in the case of ownership of more than 50% of a subsidiary's stock it may be appropriate (and it would serve judicial economy) to presume that there is common control.

[30] See, *e.g.*, L. Sullivan, *Antitrust* 22-33 (1977); R. Posner & F. Easterbrook, *Antitrust: Cases, Economic Notes, and Other Materials*, 4-11, 728-729, 1060-1069 (2d ed. 1981); 2 P. Areeda & D. Turner, *Antitrust Law* 267-281 (1978).

petitors" in an economic or antitrust context.[31] The relationship between them—even in the absence of "agreement"—will be the result primarily of management decisions rather than market forces.[32] The controlling entity will determine the extent of any "competition" or operational "independence" of the subordinate units on the basis of its conclusions about how best to maximize the profits of the aggregate enterprise—an objective that may be inconsistent with maximizing competition among the commonly controlled units.[33]

It is significant that respondent does not contend that all agreements between commonly controlled corporations should be cognizable under Section 1. Respondent would apply Section 1 only in cases in which the subsidiaries maintain some degree of operational independence and in which the joint conduct disadvantages the trade of third parties (Br. in Opp. 15-16). As we have noted, a general pattern of operational independence, which results from organizational decisions by a controlling entity, does not warrant application of Section 1 to particular instances of what is essentially unilateral conduct. Moreover, the attempt to distinguish between internal and external restraints of trade by commonly controlled corporations is inconsistent with the rationale

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[31] The fact that a parent corporation and its controlled subsidiaries are "held out" as, or appear to the public to be, competitors does not provide an antitrust policy reason to treat them as independent economic decision makers. Basing liability on a "holding out" theory suggests that some misrepresentation causes injury to the public. But none of this Court's Section 1 decisions that mention the public appearance of independence as a reason for treating commonly-controlled firms as independent decision makers suggests that the public was deceived or that deception concerning common control of corporations implicates the policies that led Congress to impose stricter standards on multiparty conduct than on actions of a single economic decision maker.

[32] See Posner & Easterbrook, *supra*, at 729-730.

[33] For an economic analysis of decision making by commonly controlled units of a firm, see, *e.g.*, Hirshleifer, *Economics of the Divisionalized Firm*, 30 J. Bus. 96 (1957).

underlying Section 1.[34] It is the structural relationship of the commonly controlled corporations to each other, not the effect of their conduct on third parties, that determines whether such corporations should be viewed as independent economic decision makers whose agreements involve an aggregation of economic power and thus trigger Section 1 concerns.

A holding that joint action of commonly controlled corporations does not, in itself, constitute an agreement within the meaning of Section 1, would not impair the government's antitrust enforcement capabilities. Anticompetitive conduct by a parent and its controlled subsidiary would still be subject to Section 2 of the Sherman Act and Section 5 of the Federal Trade Commission Act in appropriate circumstances.[35] If unilateral conduct does

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[34] Such a distinction has been articulated from time to time as a means of limiting the scope of this Court's broad language in *Yellow Cab* and its progeny, while expanding the scope of the Sherman Act prohibition against unilateral conduct. In 1955, a majority of the Attorney General's National Committee to Study the Antitrust Laws expressed the view that Section 1 of the Sherman Act applied to concerted action by a corporate parent and its subsidiary directed against a third party even if the Section 2 criteria for an attempt to monopolize were not met. *Report* at 35. Indeed, a footnote in the 1977 *Antitrust Guide for International Operations* of the Antitrust Division of the Department of Justice (see Pet. 20-21; Br. in Opp. 14, 21) suggested that under existing law, "coercive attempts by members of a corporate group to drive third parties out of business or out of markets" would be illegal under Section 1. But the Division has not developed or pursued that suggestion in its enforcement activities and has looked instead to Section 2 criteria in such situations. As some commentators have noted, the intraenterprise conspiracy doctrine has been invoked primarily in private treble damages actions. See Pet. 14, quoting Handler & Smart, *supra*, 3 Cardozo L. Rev. at 24-25.

[35] Acquisitions that themselves pose a significant threat to competition are subject not only to Sections 1 and 2 of the Sherman Act, but also to the strictures of Section 7 of the Clayton Act, 15 U.S.C. (& Supp. V) 18. If the acquisition is not itself unlawful, subsequent conduct of the firm created by the acquisition, like that of any other firm, is properly viewed as unilateral, regardless of the firm's internal structure.

not violate the standards of these statutes, Section 1 should not be used to prohibit it (see page 6, *supra*), since there is no indication that Congress intended application of a more stringent standard to unilateral conduct only in the fortuitous circumstance that the economic entity involved has chosen to operate through separate subsidiaries rather than divisions.[36] The difference between these alternative forms of an economic entity's internal organization is entirely unrelated to the purposes of the Sherman Act in differentiating between Section 1 and Section 2 conduct, and federal enforcement policy reflects the understanding that the Act should not be interpreted or applied in a manner that may needlessly impair the ability of an economic entity to adopt whatever form of internal organization will enable it to compete most effectively (see pages 19-20, *infra*).

In applying other provisions of the antitrust laws, courts and enforcement agencies recognize that the formal corporate structure of single economic entities is irrelevant to issues of anticompetitive effect. For example, parent corporations and separately incorporated subsidiaries are considered as one for the purpose of determining market power in Section 2 cases.[37] Subsidiaries also are analyzed in determining whether an acquisition would be illegal under Section 7 of the Clayton Act, 15 U.S.C. (& Supp. V) 18, because of a resulting increase in concentration of market power.[38] Under Fed-

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[36] Even if one thought that Section 2 of the Sherman Act should be construed more liberally, *i.e.*, to reach unilateral conduct that restrains trade, but does not raise a danger of monopoly, there is no reason to impute to Congress an intent to apply a stricter standard to those enterprises that organize themselves into separate subsidiaries.

[37] See, *e.g.*, *United States* v. *Grinnell Corp.*, 384 U.S. 563, 567 (1966); *United States* v. *American Telephone & Telegraph Co.*, 524 F. Supp. 1336, 1345, 1348 n.33 (D.D.C. 1981).

[38] For example, the Department of Justice Merger Guidelines (2 Trade Reg. Rep. (CCH) ¶ 4500 (June 14, 1982)) focus on the market shares of "firms" (the economic units), rather than "corporations."

eral Trade Commission regulations implementing the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. (& Supp. V) 18a, an acquisition made through a separate subsidiary is subject to the premerger reporting requirements of the Act to the same extent as an acquisition made directly by the parent; in addition, the regulations expressly define as a single "person" all entities under common control.[39] These practices are consistent with the principle, articulated by this Court,[40] that the antitrust laws look to economic substance rather than form.

We do not suggest that the various legal "persons" within a single economic entity cannot conspire or otherwise violate the law in other legal contexts. The mere fact that corporate officers and employees work within a single economic entity does not mean they cannot be co-conspirators in some types of cases. For example, it is clear that corporate officials within a single economic entity can conspire with each other, *e.g.*, to defraud the government and thereby violate the law. In addition, where a conspiracy among distinct economic entities exists, a criminal or civil action can be brought under the Sherman Act against responsible officials, as well as the corporations for which they acted.

Rather, our point is that joint conduct by commonly controlled corporations in itself is simply not the sort of "agreement" Congress intended to address under Section 1 of the Sherman Act. Section 1 embodies a concern with aggregations of economic power; it declares illegal those contracts, combinations and conspiracies that are "in restraint of trade." When two or more "persons" within a single economic entity merely act together, there is no

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[39] 16 C.F.R. 801.1(a)(1). Mergers of commonly controlled corporations will not lessen competition, because they do not alter control. For this reason, creation of, or mergers among, wholly-owned subsidiaries of the same parent are expressly exempted from the Commission's premerger notification rules. See 16 C.F.R. 802.30.

[40] See, *e.g.*, *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36, 46-47 (1977); *Appalachian Coals, Inc.* v. *United States*, *supra*, 288 U.S. at 377.

restraint of trade among them, since they are under common control in any event, regardless of whether they are separate legal entities. In addition, joint action in itself does not change the effect of the conduct on third parties or in the market as a whole, since the participation of a subsidiary, like that of a corporate officer, adds nothing to what would be accomplished by the parent's unilateral direction of the productive assets available to it. Section 1 deals with collaborative practices in which the economic resources under one source of control are joined with those of another. The predicate for Section 1's proscriptions is missing, therefore, where the participants are all part of a single entity. It is simply illogical to impute to Congress an intention to apply the more stringent Section 1 standard to such joint action merely because the controlling entity has chosen one form of internal business organization rather than another.

b. The present state of the law with respect to intraenterprise conspiracy not only fails to conform to the statutory scheme of distinct legal standards for unilateral and multiparty conduct; it actually undermines the goals of the antitrust laws in several respects. First, application of the intraenterprise conspiracy doctrine may interfere with efficient business organization. A firm normally will choose the form of internal organization that maximizes its effectiveness as a competitor, thereby maximizing its efficiency and profits. There is no need to invoke the antitrust laws to correct a firm's mistaken appraisal of its own self-interest, since market forces will accomplish that task. However, the threat of antitrust actions alleging intraenterprise conspiracy may cause a firm to avoid separately incorporated subsidiaries, even if that organizational structure otherwise would be most efficient.[41]

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[41] Respondent contends (Br. in Opp. 22) that there is no empirical evidence that the threat of Section 1 liability has deterred separate incorporation. However, the existence of subsidiaries merely shows that some corporations are willing to take the antitrust risk; others may have been deterred from doing so. Cf. *Joseph E. Seagram &*

Second, the intraenterprise conspiracy doctrine does not provide the business community with clear guidance. The existing confusion and conflict among the circuits concerning the doctrine, and the number and complexity of factual issues that courts have considered in applying the doctrine, create difficulties for firms seeking to make efficient choices regarding corporate structure. Under the current state of the law, it is virtually impossible for firms to determine in advance the extent of potential antitrust liability involved in separate incorporation or to know how operations of separately incorporated subsidiaries should be conducted in order to avoid Section 1 liability.

Decisions such as that of the court below create inefficiencies in the judicial process as well. The possibility of treble damages awards based on intraenterprise conspiracy encourages the filing of federal antitrust suits alleging what appear to be at worst unilateral business torts that do not raise monopoly concerns.[42] Moreover, application of an "all factors" test precludes dismissal at an early stage of litigation, even in cases in which common control is undisputed. Finally, the wide-ranging

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Sons, Inc. v. *Hawaiian Oke & Liquors, Ltd.*, *supra*, 416 F.2d at 82-84 (indicating that Seagram converted its subsidiaries to divisions after *Kiefer-Stewart*). Moreover, the threat of Section 1 liability may constrain structuring of relationships among subsidiaries.

Respondent notes (Br. in Opp. 22-23) that tax considerations, rather than considerations of efficiency, were apparently the motive for separate incorporation in this case. But legal efforts to minimize tax liability can increase efficiency, and thus consumer welfare, in that they allow the firm to attain a given level of profits at a lower product price to consumers. In any event, the responses of business entities to the incentives provided by the tax system presumably are those Congress sought to encourage; if not, they should be addressed through the tax laws without the distortion that results from the intraenterprise conspiracy doctrine.

[42] Here the "restraint" alleged is essentially an interference with contract claim. Respondent dismissed its Section 2 claims before trial (Pet. App. A6).

(and ultimately irrelevant[43]) factual inquiries undertaken in intraenterprise conspiracy cases result in the waste of scarce judicial resources. In view of the considerable volume of private litigation involving the intraenterprise conspiracy doctrine, the effect on the judicial process is not insignificant.

Accordingly, it is not surprising that "[a]cademic discussion of the intra-enterprise conspiracy doctrine is almost uniformly critical" (Pet. App. A9; footnotes omitted).[44] Petitioners and amici cite numerous scholarly articles supporting the view that the doctrine impairs economically efficient organization and fails to advance antitrust objectives. Respondent (Br. in Opp. 14-15) cites commentary to the effect that this Court's decisions support an intraenterprise conspiracy challenge to conduct of a parent and subsidiary that unreasonably restrains the trade of third parties. But respondent provides no authority for the proposition that unilateral conduct by a firm that controls, and operates through, separately incorporated subsidiaries is analogous, in terms of Section 1 concerns about aggregations of economic power, to concerted action by otherwise independent firms.[45]

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[43] Most of the factors considered under an "all factors" test look not to whether there are truly independent decision makers, but to how control is exercised or to whether a parent corporation has chosen to delegate considerable operational independence.

[44] See also, *e.g.*, *Harvey* v. *Fearless Farris Wholesale, Inc.*, 589 F.2d 451, 456 n.8 (9th Cir. 1979) ("the [intraenterprise conspiracy] theory has been subjected to much criticism and comment").

[45] Respondent contends (Br. in Opp. 23-25) that a holding that joint actions by commonly controlled corporations do not constitute an agreement for purposes of Section 1 of the Sherman Act would be inconsistent with other areas of the law in which separately incorporated subsidiaries are treated as distinct from the parent firm. However, subsidiary corporations are not uniformly treated as independent economic units. See, *e.g.*, 26 U.S.C. (& Supp. V) 1501-1504 (consolidated tax returns) and 26 U.S.C. 482 (Secretary's authority to allocate income and deductions among related entities). Even if they were, this would not compel a similar result under the Sherman Act, which embodies different policies from those underlying other areas of the law.

c. Contrary to respondent's contention (Br. in Opp. 8, 19-25), a holding by this Court that commonly controlled corporations do not "conspire" in restraint of trade within the meaning of Section 1 simply by acting together would not amount to a judicially created "antitrust exemption." Rather, like the courts' treatment of intracorporate activity involving officers, employees, and unincorporated divisions, it would simply reflect the recognition that joint conduct within a single economic entity is not the sort of concerted action Congress intended to subject to the strictures of Section 1. The intraenterprise conspiracy notion derives from this Court's prior decisions (see pages 8-11, *supra*); it is entirely appropriate for the Court to reexamine those decisions if it concludes that "the need for clarification of the law in this area justifies reconsideration." *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36, 47 (1977). The Court's decision in *GTE Sylvania* to reexamine its prior decision in *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365 (1967), was prompted by its recognition that "*Schwinn* has been the subject of continuing controversy and confusion, both in the scholarly journals and in the federal courts. The great weight of scholarly opinion has been critical of the decision, and a number of the federal courts * * * have sought to limit its reach." 433 U.S. at 47-48 (footnotes omitted). The Court in *GTE Sylvania* also recognized that reexamination was warranted because the *Schwinn* holding was inconsistent with economic principles underlying the antitrust laws. See 433 U.S. at 51-59.

A judicial reassessment of the intraenterprise conspiracy doctrine is appropriate for similar reasons. This case is a proper vehicle for such reassessment, since the only joint action on which the verdict was based was between a corporation and its wholly-owned subsidiary. The Court should grant certiorari in order to hold that when common control of two corporations is itself lawful under the antitrust laws, the mere fact that those corporations

coordinate their activities will not form the basis for finding concerted action in violation of Section 1 of the Sherman Act. Such a holding would preserve the congressionally mandated distinction between the treatment of joint conduct and unilateral conduct embodied in Sections 1 and 2 of the Sherman Act. It also would resolve the confusion in the courts of appeals concerning application of the intra-enterprise conspiracy concept and would provide increased certainty to the business community. Finally, it would allow economic entities to select the most efficient form of internal organization without risking antitrust liability.

CONCLUSION

The petition for a writ of certiorari should be granted as to the first question presented.

Respectfully submitted.

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