No. 19-1098

In the Supreme Court of the United States

NATIONAL FOOTBALL LEAGUE, *ET AL.*,

Petitioners,

v.

NINTH INNING, INC., *ET AL.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF EXPERT ANTITRUST ECONOMISTS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICI CURIAE*

This brief is submitted on behalf of a group of economists ("Supporting Economists"), listed in Appendix A, with deep experience in assessing collaborative efforts ("ventures") to create new products ("venture products"), including consideration of incentives relating to venture formation, initial and ongoing investments, and venture operations. Supporting Economists also have extensive academic and practical experience in assessing (i) whether a venture poses any risk to competition where venture members have no ability to compete independent of the venture as competitive firms with respect to the venture product, and (ii) the circumstances under which a full "rule of reason" analysis would be essential to capture the venture's likely competitive effects. Supporting Economists have an interest in ensuring that the antitrust laws are applied to joint ventures in a manner consistent with procompetitive economic principles.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

There is a critical need for the Court to clarify the application of Section 1 of the Sherman Act, 15 U.S.C. § 1, to the internal decision making of legitimate (*i.e.*, non-sham) ventures. It would promote competition and innovation to confirm that a venture that creates

[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* and their counsel made a monetary contribution to its preparation or submission. Counsel of record for all parties received notice at least 10 days prior to the due date of *amici*'s intention to file this brief. All parties have consented to the filing of this brief.

a venture product—which no venture member has created, or can create efficiently, by itself—may control how to distribute and sell the venture product without implicating Section 1. That principle, which by definition poses no risk to *ex ante* competition, is fully applicable here because the only restraints Respondents allege are ones on the distribution of the venture product, NFL Football.[2] Importantly, this case is not about restraints on teams' individual activities involving non-venture products, such as the licensing of their own trademarks or other intellectual property.

We also agree with Petitioners and the District Court that Respondents failed to allege facts necessary to a Section 1 claim under the rule of reason, which clearly would be the correct antitrust standard to apply to a non-sham venture's venture-level decisions on how to distribute and sell its venture products, were such decisions subject to antitrust scrutiny. If left to stand, the Ninth Circuit's decision would relieve antitrust plaintiffs of their full rule of reason obligations to allege and prove anticompetitive effects in a relevant antitrust market.

As economists, however, we further observe that Respondents fail more fundamentally: because no NFL venture member can make the venture product alone, they have not even alleged a restraint on what we believe to be the proper concern of U.S. antitrust law: *ex ante* competition among the venture members. Instead, they seek to hold the NFL and its members

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[2] As we discuss below, NFL Football is a product that consists of a series or network of competitions leading up to playoffs and a championship game; it is not any one game or one team's games. *See infra* at p. 7.

liable for not creating additional *ex post* competition. In holding that Respondents have stated a viable antitrust claim, the Ninth Circuit's decision enables plaintiffs and courts to ignore the inherently procompetitive features and incentives of ventures that create new products that their members cannot create alone. As a matter of fundamental economic principles, such an approach is contrary to consumers' interests and, in fact, poses decidedly anticompetitive risks in its own right. To allow this case to proceed, even on a rule of reason basis, creates enormous and unjustifiable costs that translate into disincentives to invest in procompetitive ventures.

While Supporting Economists leave it to others to explain the current ambiguity and conflict in the law over these issues, the economic underpinnings of the dispositive principle we propose–or, at a minimum, full rule of reason pleading requirements–are unambiguous. The incentives to create and invest in output-enhancing collaborative efforts, including disruptive innovation, are protected and enhanced when the fruits of those collaborative efforts are captured by the venture itself. And it is the venture that should determine how best to maximize profits in distributing and selling the venture product. This naturally would include the ability to decide, and as necessary or desirable change, how the venture product is distributed and sold, depending on the venture's ongoing assessment of marketplace conditions.

In the present matter, only the NFL venture itself can create NFL Football. This necessarily means that venture control over the distribution and sale of NFL Football creates no risk of harming *ex ante* competition, as no individual team can offer the venture product as a "firm" independent of the venture in the first place (or ever). This is inherently true whether considering the sale of live, in-person viewing of games or of electronic transmissions, including television broadcasts and online streaming. Every game of every season, and its transmission to viewers, is necessarily a venture-level product.

Under the Ninth Circuit's approach, the most successful new-product ventures may be targeted with Section 1 claims whenever their unique innovations are sufficiently successful to tempt others (including competitors, distributors or even opportunistic venture members) to seek treble damages for the venture's ordinary competitive activities. This approach turns the very success that drives innovation against any venture whose new venture product leaps to the lead in the competitive battle. *See Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407-08 (2004) (explaining that the incentives to be able to charge what the market will bear, including even for alleged monopolists, is what drives innovation in the first place). As here, the lure of treble damages will induce antitrust plaintiffs to ask courts to insert themselves directly into venture structure and operations, judicially requiring *intra*-venture competition in the sale of venture products – again, products that can be created only by the venture.

At least in the Ninth Circuit, ventures will thus be forced to choose between an inefficient and counterproductive (even self-destructive) way of distributing and selling venture products on the one hand, and costly and distracting antitrust litigation on the other. This choice not only is a significant deterrent on investment and innovation, it also is an assured recipe for false positives in litigation outcomes. The

Court should make clear that, because restraints on venture members as to the distribution and sale of venture products do not limit *ex ante* competition, they are not restraints "in the antitrust sense" (*Texaco Inc. v. Dagher*, 547 U.S. 1, 6 (2006) (citing *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 9 (1979) ("When two partners set the price of their goods or services they are literally 'price fixing,' but they are not *per se* in violation of the Sherman Act")), and therefore cannot implicate Section 1.[3] In any case, as Petitioners explain, these *intra*venture restraints on the distribution and sale of the venture product cannot be condemned without full rule of reason review, including at the pleading stage. *See American Needle, Inc. v. National Football League*, 560 U.S. 183, 203 (2010).

ARGUMENT

I. Critical Procompetitive Incentives Are Promoted By A Principle That A Venture Can Control How To Sell And Distribute What Only The Venture Itself Can Create.

A. Ventures That Create Products Are Particularly Procompetitive.

Collaborations, even ones among pre-existing competitors, can be the optimal solution to complex ownership or contracting challenges that otherwise might prevent independent firms with complementary resources from responding to consumer demand. *See generally* Ronald H. Coase, *The Nature of the*

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[3] This does not mean that antitrust scrutiny should not apply to restrictions on a venture member's competitive products that exist or are created independent of the venture, a case that is not presented here.

Firm, 4 Economica 386 (1937). As the federal antitrust enforcement agencies have observed, even a competitor collaboration

> may enable participants to offer goods or services that are cheaper, more valuable to consumers, or brought to market faster than would be possible absent the collaboration . . ., allow its participants to better use existing assets, or . . . provide incentives for them to make output-enhancing investments that would not occur absent the collaboration.

Federal Trade Commission & U.S. Dep't of Justice, *Antitrust Guidelines for Collaborations Among Competitors*, § 2.1 (April 2000), perma.cc/RX9D-38GL. And, in this respect, there are any number of venture types that enhance efficiency or minimize bargaining failures, including R&D ventures, product-design ventures, production ventures and marketing or sales ventures. *See* Oliver E. Williamson, *Markets and Hierarchies: Analysis and Antitrust Implications*, 25-26, 39-40 (1975); Oliver E. Williamson, *The Economics of Governance*, 95:2 Am. Econ. Rev. 1, 10 (May 2005). Each of these ventures, in varying degrees, can increase output, quality or efficiency, generating value that individual firms cannot achieve alone.

A venture that creates a wholly new product by combining the complementary assets of firms that did not, and in fact could not, compete alone with respect to that product is a particularly output-enhancing (and thus, as an economic matter, desirable) form of collaboration. By definition, such ventures harness raw innovation rather than merely attempt to capture efficiencies in making or distributing pre-existing products. And, when done through collaboration, these product-creating ventures can be quite successful in driving the creative disruption that often leads to tangible innovation in the U.S. and global economies.

The NFL is just such a collaboration. Its venture product, NFL Football, is a series, or network, of competitions leading up to playoffs and a championship game. Moreover, as their popularity shows, NFL Football broadcasts, from consumers' perspective, are an integral part of the product itself–they are how the vast majority of consumers experience NFL Football. By definition, NFL Football, including live games and their broadcasts, cannot be created by any one team or group of teams. *See* Franklin M. Fisher, Christopher Maxwell, Evan Sue Schouten, *The Economics of Sports Leagues – The Chicago Bulls Case*, 10 Marquette Sports L.J. 1, 5 (1999).[4] Indeed, from an economic perspective, one of the main forms of "utility" that fans find in NFL Football is in following the race itself, including the yearly quest to make the playoffs or even win the Super Bowl. *See* Walter C. Neale, *The Peculiar Economics of Professional Sports*, 78 Quarterly Journal Economics 1, 3-4 (1964). That "race utility" (*id.* at 3), and each game that makes up the race, are part of a product that *can be created only by the venture itself.* The members of the NFL thus are not each other's competitors with respect to the venture product, as they cannot offer the product without the venture. This point is equally true across industries:

[4] Dr. Fisher was the Jane Berkowitz Carlton and Dennis William Carlton Professor of Microeconomics at MIT, a Director of the National Board of Economic Research and a past recipient of the John Bates Clark Medal. He served as the economic expert for the NBA in *Chicago Prof'l Sports Ltd. v. NBA*, 95 F.3d 593 (7th Cir. 1996) ("*Bulls II*").

whether in league sports, high tech, pharmaceuticals and biologics, or elsewhere, ventures that create wholly new products for consumers do not involve, let alone reduce, pre-existing competition as to those products.

As a matter of economics, this point should be front and center in evaluating any antitrust challenge to how a venture and its members distribute and sell their venture products.

B. Investment Incentives Are Critical To Venture Formation And Competitive Positioning.

A fundamental economic tenet of venture formation and operation is that investment incentives are fostered when venture members can capture the full value of what their venture has created. *See*, *e.g.*, Howard H. Chang, David Evans & Richard Schmalansee, *Some Economic Principles for Guiding Antitrust Policy Towards Joint Ventures*, 1998 Colum. Bus. L. Rev. 223, 238 (1998) ("Firms must generally expect to appropriate a substantial position of the benefits from their investments to make those investments in the first place"). To capture the value it creates, the NFL venture as a whole, like any other legitimate venture that creates its own product, must be able to decide how to structure itself and how best to make venture products and bring them to the marketplace.

Allowing ventures to make these decisions centrally is fundamentally consistent with ventures' unique attributes. Economists have long agreed that ventures often are the optimal and most efficient form of organization, for example, when parties wish to carry out activities that involve relationship-specific investments, where transactions are complex and non-standard, or, as Professor Williamson's work has shown, where the parties are mutually dependent on outcomes, such as where their assets, "either physical assets or knowledge, . . . are only valuable inside a relationship." Royal Swedish Academy of Sciences, *Economic Governance: The Organization of Cooperation, The Prize in Economic Sciences 2009, Information for the Public* 4, perma.cc/YS8R-GFF6 (discussing Professor Williamson's work upon his receiving the 2009 Nobel Prize for Economics). The NFL is just such a venture, particularly with respect to distributing and selling the venture product, NFL Football.[5] The NFL venture is best suited to negotiate the complex and risky broadcasting arrangements on which its success depends.

Accordingly, investment incentives require that league ventures, like any other firm that makes a product, should determine how best to maximize revenues and profits from the distribution and sale of

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[5] There also is every good economic reason for the NFL to organize itself the way it does with localized teams and ownership: "League sports demand a form of organization in which local autonomy is both present and seen to be so." Fisher *et al.*, 10 Marquette Sports L.J. at 6. Not only does this ensure that each team has specific local knowledge and contracts that can benefit the venture as a whole, it also generates fan interest and loyalty. Hence, to "preserve interest in the league's product, teams must be seen to act independently in competing for players and for coaches, and in competition on the field." *Id.* But the extent of this local independence and resulting competition is itself created and defined by the NFL venture; they do not exist in the abstract absent the venture. And the venture's own determination that some of its elements should be the product of intraventure competition does not mean that the venture could not also reasonably decide to handle other aspects of its business, including the distribution of broadcast rights, centrally.

their venture products. Here, the venture alone creates NFL Football, so the venture, not any individual member, should determine how best to distribute and sell what the venture makes. That other sports-league ventures might decide to allow member clubs to sell broadcast rights (*see In re Nat'l Football League's Sunday Ticket Litig.*, 933 F.3d 1136, 1154 (9th Cir. 2019) (citing the National Hockey League and Major League Baseball)) does not change the fact that the decision itself belongs to the venture, not to individual clubs pursuing their own individual interests.

C. The Avoidance Of Free Riding On Venture Success Is Central To Protecting Those Incentives.

Many ventures, not just professional sports leagues, must confront incentives for free riding and opportunism that naturally develop with the venture's success. The question in the present case is whether the NFL venture, in distributing and selling the venture product, should be able to confront those incentives by preventing members from also distributing and selling the venture product as they wish. From an economic perspective, the answer is yes, based on the long-understood value of addressing negative externalities that can arise in ventures, especially where the venture sells the venture product.

In economics, a negative externality exists when the actions of one firm impose a cost to others that such firm has not had to take into account in its own profit and loss calculation. Free riding is a classic example. Free riding includes, for instance, a venture member taking advantage of the venture's success to sell venture products on its own without accounting for the impact on the venture and its other members. *See generally* Chang *et al.*, 1998 Colum. Bus. L. Rev.

at 238, 244-46. Such sales of the venture product, over the objection of the venture as a whole, pose a particularly acute risk when, as with the NFL, the venture itself sells the venture product. *See* Fisher *et al.*, 10 Marquette Sports L.J. at 10-11.

In the specific context of sports leagues, free riding by individual teams is a fundamental negative externality that must be, and regularly is, addressed. Outside of the broadcast area, for example, leagues have adopted a variety of mechanisms to address the licensing of team-owned trademarks and other IP, an activity that may involve no more than one team's exploitation of its own popularity, or, conversely, could involve a team's exploitation of the success of the league as a whole, and of other teams' investments in that success. Such externalities typically are addressed through exclusive group licensing. *See MLB Prop. Inc. v. Salvino, Inc.*, 542 F.3d 290, 340 (2d Cir. 1980).

The specific factual circumstances–such as the IP's economic significance apart from the venture product–might warrant treating exclusive group licensing of team IP as affecting something other than just the venture product. Here, in contrast, because the games and their broadcasts form the venture product, free riding with respect to the broadcasts is a negative externality of the most fundamental concern; it threatens to undermine the incentives to create and maintain the league product itself. Similarly, in *Bulls II*, the Chicago Bulls created a significant negative externality when they took a free ride on the NBA to sell games nationwide over the WGN superstation. *See Bulls II,* 95 F.3d at 596. As Dr. Fisher explained, this popularity was "not merely a consequence of the Bulls' own efforts," but stemmed also from league-wide efforts to promote the game, as well as other teams' efforts. Fisher *et al.*, 10 Marquette Sports L.J. at 11. To permit the Bulls, over the league venture's objection, "to reap the entire reward for such efforts would be to give them a free ride." *Id.* In turn, this free riding "discourages efforts [by other members and the league] that would otherwise be productive"–*e.g.*, restricting teams from separately making their own television arrangements so that the venture can "offer its chosen carriers with a guarantee of exclusivity in national telecasts." *Id.*

The same incentives to create negative externalities exist as to the distribution and sale of the NFL's venture product, including offering exclusivity for the Sunday Ticket broadcast product. Accordingly, as a matter of fundamental economic principles, the league should be able to check individual teams' opportunistic incentives to exploit the venture's investment in the venture product for their own gain. No league rule blocking these negative externalities should be subject to antitrust condemnation without, at a minimum, full rule of reason review. By allowing plaintiffs to proceed with their challenge without satisfying the pleading requirements of the rule of reason, the Ninth Circuit's decision penalizes, and thus discourages, conduct that is likely to be procompetitive.

Moreover, as we discuss further in the following section, a venture rule that counters these externalities merely by determining how the venture product may be sold or distributed is not, as a matter of economics, a restraint of trade in the first place. By subjecting a rule that limits only the venture product's sale and distribution to antitrust scrutiny at all, the

Ninth Circuit's decision addresses a nonexistent competition problem and disincentivizes new-product ventures by imposing unnecessary regulatory costs.

II. There Is No Risk To *Ex Ante* Competition From A Principle That Permits Collaborations To Control How They Distribute And Sell What Only They Can Make.

A. At Formation, No *Ex Ante* Competition Exists In The Sale Of The Venture Product.

The precise question of how antitrust law should approach a venture in the circumstances presented here was addressed perceptively by Judge Bork in *The Antitrust Paradox*. Framing the analysis of a non-sham venture's alleged price fixing, market divisions and other horizontal restraints, Judge Bork distinguished between "[w]hen the parties [to the venture] are capable of operating alone" and venture conduct that can "only be carried out jointly." Robert H. Bork, *The Antitrust Paradox* 278 (1978). As to the latter category, Judge Bork observed:

> Perhaps the leading example is league sports. When a league of professional lacrosse teams is formed, it would be pointless to declare their cooperation illegal on the ground that there are no other professional lacrosse teams. In this case the league is best viewed as being the firm, and horizontal merger limitations are inappropriate…. *The upshot is that when integration is essential if the activity is to be carried on at all, the integration and restraints that make it efficient should be completely lawful.*

Id. at 278-79 (emphasis added). In contrast, when integration is useful, but not essential, ancillary restraints require further inquiry and justification. *Id.* at 279.

Similarly, as Dr. Gregory Werden has observed, a joint venture's restraint on competition that "would not have existed absent the joint venture" should "not [be] analyzed separately from the joint venture itself." Gregory J. Werden, *Antitrust Analysis of Joint Ventures – An Overview*, 66 Antitrust L.J. 701, 711 (1998).[6] Thus, "at least when its participants could not have produced that product," Dr. Werden concludes that "it is not price fixing for a joint venture to set the price of [its] product," just as a joint venture's raw material purchase "from one supplier rather than another . . . is not a group boycott." *Id.* at 705 n.18. And, just as the Seventh Circuit suggested that "the NBA is best understood as one firm when selling broadcast rights" (*Bulls II*, 95 F.3d at 599-60), Dr. Werden explains that a joint venture such as the NFL should be treated as a "single entity" in "its ordinary actions as a market participant" (Werden, 66 Antitrust L.J. at 705 and n.17 (citing *Bulls II*, 95 F.3d at 599-60)).

In sum, what both Bork and Werden have shown is that, when a venture imposes limitations on venture members' distribution and sale of a venture product, including restraints on free riding, it cannot impair competition as to the venture product, and hence

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[6] Until his recent retirement, Dr. Werden was the Senior Economic Counsel at the Antitrust Division of the Department of Justice and a recipient of the Attorney General's May C. Lawton Lifetime Service Award. Dr. Werden wrote the referenced article in his individual capacity while he was Director of Research in the Antitrust Division's Economic Analysis Group.

there is no competition at risk in treating the restraints as the acts of a single firm. By contrast, the Ninth Circuit's implicit premise that even restraints such as these must be tested under the rule of reason ignores these crucial insights and undermines a venture's ability to take on interbrand competition from outside the venture, such as competition sports leagues face from each other. *See Bulls II*, 95 F.3d at 600 (citing competition the NBA faces "with a thousand other producers of entertainment" in the distribution and sale of broadcast rights).

From this perspective, the NFL's internal decision-making with respect to the distribution and sale of NFL Football inherently does not risk a reduction in competition among member teams that warrants antitrust concern. This is not a situation where competitors existed *ex ante*, but then placed all their competitive assets into a venture–something that requires antitrust scrutiny at the formation stage. *See Dagher*, 547 U.S. at 4 (noting that the formation of the joint venture whose pricing was at issue "was approved by consent decree . . . by the Federal Trade Commission," as well as by four state Attorneys General). Nor is it even a circumstance where a venture member has created its own product and can compete independently of the venture–as with, for example, team IP or music performance rights, where the rights holder can choose to participate in a new group license or continue to compete independently. *See*, *e.g.*, *American Needle*, 560 U.S. 183 (team-owned IP); *Broadcast Music,* 441 U.S. at 11 (individual copyrights); *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 89, 106 (1984) (independent colleges); *Polygram Holdings, Inc. v. FTC*, 416 F.3d 29, 36-37 (D.C. Cir. 2005) (upholding liability for market division as to products "not part of the venture"). The NFL's alleged restraints here, by contrast, are the easiest case: the venture product would not exist without initial and ongoing cooperation, and no team has its own NFL Football product or can make it alone; thus, any restraint as to venture product output raises no risk of reducing the *ex ante* competition that warrants antitrust protection. In these circumstances, it is the marketplace that should determine whether the venture's output-related decisions satisfy consumer demand.

B. In Operations, No Team Can Compete As A Firm Independent Of The Venture Product.

In the face of this indisputable lack of actual or potential *ex ante* competition between any venture team and the NFL venture in the creation or sale of NFL Football, the Ninth Circuit appears to avoid economic reality by focusing on the *ex post* ability of teams to control the facilities in which they play their NFL games. The decision's logic appears to be that, if a team can control who enters its stadium, it then controls who can create broadcasts of its games, which in turn means that each team, in the court's view, can license broadcast rights to its games on an individual basis. Based on that premise, the court views competition among teams in the broadcast of NFL Football as not materially different from competition among teams as to non-venture products such as the licensing of team IP (*e.g.*, for hats bearing a single team's logo).

This sequence of thoughts makes no economic sense. First, as discussed above, no NFL team is a competitor in the distribution and sale of NFL Football broadcasts unless it can create the NFL Football venture product, including broadcasts, by itself in the first place. But these team products are not possible without the cooperation of the league and other teams. By contrast, each team can create products as an independent firm in the sale or licensing of its *own* freestanding IP, such as logo-bearing clothing, without the cooperation of the other teams (even if, just as with any given songwriter's copyrights, the *value* of that one team's IP may be much less when distributed by itself).

Second, and similarly, as for IP specifically, there is no basis for the suggestion that the ability to control a camera crew's access to the stadium allows an NFL team to make or *sell* an NFL Football broadcast without cooperation as to the IP of the NFL and the other NFL teams (most obviously that day's opponent). The diversely-owned IP inherent in the transmission of an NFL game is a fundamental component of the NFL Football product itself. Cooperation with respect to that IP, in addition to the creation of the venture-product game itself, makes the broadcast product possible; there is no marketplace reality where this is not the case.

In the court below, a group of economists supporting plaintiffs took the position that each team could produce and broadcast NFL Football on its own (with just its opponent of the day), but chose instead to pool its broadcast rights in order to anticompetitively maximize revenues. As they characterized the choice, these economists argued that "[e]ach team owner has the opportunity to behave in the same manner *as college independents,* or the opportunity to adopt the local/national approach of other pro sports leagues." Brief of *Amici Curiae* Economists in Support of Plaintiffs-Appellants and in Support of Reversal, No. 17-56119, p.16 (Feb. 12, 2018) (emphasis added).

This argument is seriously misplaced. "College independents" embody the *opposite* of a league product. The whole premise of the NFL venture, which jointly produces and sells NFL Football, is that the teams by definition are not "independents"; on the contrary, the venture and its product form a highly *interdependent* enterprise, both economically and functionally, that literally would not exist if teams unilaterally acted as "independents," separately arranging for their own games and broadcasts. Moreover, where other leagues have chosen to allow some individual team out-of-market broadcast licensing, those decisions are necessarily made at the venture level and account for the very externalities that are inherent in professional sports league ventures.

Finally, as we explained above, the notion that members of a legitimate venture should not be allowed or encouraged collectively to seek to maximize revenues *of the venture–created product* is contrary to the most basic economic theory of a "firm" and to the most fundamental incentives that generate venture formation and innovation in the first place. Respondents' argument for a judicially forced *ex post* short-term increase in output could be applied just as easily to the conduct of any firm whose unilateral choices about how to sell its product did not satisfy the wishes of some buyers. But, as the Ninth Circuit has observed, "[t]he antitrust laws do not grant the government a roving commission to reform the economy at will" (*United States v. Westinghouse Elec. Corp.*, 648 F.2d 642, 648 (9th Cir. 1981)), and we believe this same observation should apply equally to private plaintiffs as well. The short-run regulatory solution Respondents seek here, apparently designed to force the NFL to provide even more competition than it did through its creation, threatens long-run incentives to create the very products they want more of. We discuss the economic implications of this threat in the next section.

III. Antitrust Challenges To Purely Intraventure Restraints Necessarily Target The Most Successful Collaborations With Regulatory-Like Intervention.

If, as here, there is no *ex ante* competition at risk, yet a court allows antitrust plaintiffs to seek a remedy forcing a highly successful venture to create *intra*venture competition among its members, how would we view that result economically? The answer is disturbing from a market performance perspective. Specifically, the ventures most at risk from judicial intervention under Section 1 are those that achieve the most valuable innovations–the ones that either enjoy widespread consumer acceptance or uniquely answer customer demand.

Further, because judicially-forced *intra*venture competition between venturers that were not *ex ante* competitors creates a relationship that had never existed between them–again, teams cannot participate in the marketplace except through the venture–any alleged reduction in price and profits that would otherwise accrue to venture members in the but-for world (itself a questionable proposition) would be regulatory in nature. The remedy could not restore non-existent *ex ante* competition; instead, it would simply reallocate the venture's surplus between the venture and its members, with no reason to expect increased output or quality, or lower prices to consumers.

Indeed, if the Sherman Act is used to condemn profit maximization by legitimate ventures in the sale of newly-created venture products, absent at least full rule of reason scrutiny, then antitrust law will have become a *de facto* regulatory mechanism to micromanage *ex post* the internal decisions of legitimate ventures rather than an enforcement tool to address anticompetitive behavior. And in the process, the law will have embraced the danger that Judge Learned Hand warned of: "The successful competitor, having been urged to compete, must not be turned upon when he wins." *United States v. Aluminum Co. of America*, 148 F.2d 416, 430 (2d Cir. 1945).

IV. Condemning The Alleged Venture Conduct Under A "Quick Look" Will Solidify Disincentives And Increase False Positives.

Absent clear direction from this Court, it may be tempting for courts, as the Ninth Circuit did here, to ignore the inherently procompetitive incentives motivating a venture's decision that it alone will determine how to sell the venture product. Such a myopic view of antitrust jurisprudence would hinder consideration of economic *proof* of anticompetitive effects (including, for example, market definition and "but for" harm to output, price or quality). This has at least two second-order effects that are quite important to the efficient operation of markets and allocation of resources relating to venture formation and innovation.

First, the feedback effects from Section 1 litigation risks are quite real for legitimate ventures, as any significant or ongoing false positives can dramatically undermine investment incentives. *See* Chang *et al.*, 1998 Colum. Bus. L. Rev. at 266. The principle applies directly when, as here, prospective venture members join a venture and make *ex ante* investments, but then are exposed to *ex post* risk of a court determining that the venture must, in effect, compete against itself if and when it becomes particularly successful.

Second, the risks of false positives are particularly acute in the venture setting. Ventures that create a new product and participate as sellers in the marketplace itself, are, for efficiency and governance reasons, very likely to coordinate across any number of price and non-price dimensions in selling their venture products. Yet, this is precisely what leads to significant false positives, condemning ordinary venture conduct as *per se* violations or through a quick look. *See, e.g., Dagher,* 547 U.S. at 7 and n.3 (rejecting either *per se* or quick-look liability for the "internal pricing decisions of a legitimate joint venture"). By contrast, confirmation that it cannot be "price fixing for a joint venture to set the price of a product it produces, at least when its participants individually could not have produced that product" (Werden, 66 Antitrust L.J. at 705 and n.18), and thus that the restraints at issue here are not restraints "in the antitrust sense" (*Dagher,* 547 U.S. at 6), would ensure that "meritless group boycott and price-fixing claims, which could erroneously be decided under the per se rule, [are] rejected as a matter of law" (Werden, 66 Antitrust L.J. at 705 and n.18).

Dr. Werden effectively predicted the false positive that this Court's *Dagher* decision reversed, as well as the false positive embodied in the Ninth Circuit's decision here as to the Sunday Ticket venture product. It cannot be a violation for the NFL to determine how to distribute and sell NFL Football when member teams "individually could not have produced that product." *Id.*

At the bare minimum, courts must test these alleged anticompetitive effects and inherent procompetitive justifications with full rule of reason inquiry–and plaintiffs must allege facts that would support liability based on the full rule of reason. As it is, the ambiguity in circuit law the Ninth Circuit's decision has created encourages lower courts to second-guess the output decisions of ventures and to continue to mistake the ordinary marketplace activities of legitimate ventures in the distribution and sale of venture products for pernicious restraints of trade.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX

APPENDIX A

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