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

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

Daryl Joseffer
Tara S. Morrissey
U.S. CHAMBER LITIGATION CENTER
1615 H. Street, N.W.
WASHINGTON, DC 20062

Pratik A. Shah
Counsel of Record
James E. Tysse
J. Matthew Schmitten
Mitchell E. Khader
AKIN GUMP STRAUSS HAUER & FELD LLP
2001 K Street, N.W.
Washington, DC 20006
(202) 887-4000
pshah@akingump.com

Counsel for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATUTES:

OTHER AUTHORITIES:

INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases that raise issues of concern to the nation's business community.

Many of the Chamber's members use joint venture structures to achieve their business goals. In forming or investing in such ventures, Chamber members have relied on the (heretofore) settled understanding that these ventures would be subject to full rule-of-reason review in any antitrust challenge. The Chamber files this brief to explain how the Ninth Circuit's decision unsettles that reliance and exposes joint ventures to costly antitrust litigation and liability. That exposure, in turn, risks abandonment of an efficient and pro-competitive business structure—to the detriment of the Chamber's members and U.S. consumers.

---

[1] This brief is filed with the written consent of all parties. No counsel for any party authored this brief in whole or in part, nor did any party or other person or entity other than *amicus curiae*, its members and its counsel make a monetary contribution intended to fund the brief's preparation or submission. Counsel of record for all parties received notice of this filing at least 10 days prior to the due date.

INTRODUCTION AND SUMMARY OF ARGUMENT

If cooperation in a professional sports league to produce and telecast its core product (games) is not entitled to full rule-of-reason review, as the Ninth Circuit holds, then no joint venture will be: Because that product cannot exist but for the cooperation of multiple economic actors, cooperation within a league (as distinguished from competition between different sports leagues) should be treated with the solicitude reflected in the full rule of reason. Consistent with that understanding—and with explicit congressional authorization—NFL teams have been jointly marketing the telecasts of their football games for most of the NFL's existence (since the passage of the Sports Broadcasting Act ("SBA") of 1961, 15 U.S.C. §§ 1291-1295).

In the decision below, however, the Ninth Circuit held that plaintiffs could challenge the NFL's joint marketing of their telecasts under Section 1 of the Sherman Act *without having to allege (let alone prove) injury to competition—i.e.,* anticompetitive harm within a well-defined antitrust market. In the Ninth Circuit's view, the fact that NFL teams do not individually sell their games' telecasts was enough to show a "naked restriction on output." Pet. App. 22a. That means, on remand, plaintiffs can proceed with costly discovery while petitioners presumably will bear the burden of *disproving* anticompetitive harm. *E.g.*, *California Dental Ass'n v. FTC*, 526 U.S. 756, 770 (1999).

The Chamber, which agrees with petitioners that the Ninth Circuit's decision conflicts with those of other circuits and this Court, files this brief to highlight the sea change in antitrust law that this decision will beckon for joint ventures more broadly (not just sports leagues). The NFL's marketing of telecasts of jointly produced and licensed NFL football games presents the extreme case where antitrust law would be expected to be *most* accommodating of cooperation within a joint venture. It follows inexorably that the Ninth Circuit's abbreviated rule-of-reason analysis will be applied to most (if not all) joint venture agreements, including with respect to the distribution of the joint venture's core products. The exception—abbreviated rule of reason, without the ordinary requirement to prove (or even allege) competitive harm to a well-defined antitrust market—will become the rule in joint venture cases.

The Ninth Circuit's holding, in turn, portends increased liability for otherwise lawful and pro-competitive joint ventures around the country. That will deter utilization of an increasingly important and prevalent mechanism of innovation, particularly involving shared intellectual property rights, in sectors spanning health care, entertainment, and technology. It will also undermine the last half century of this Court's decisions and Congressional interventions on behalf of joint ventures that contemplate a full rule-of-reason analysis. This Court should grant review of the first question presented, before the Ninth Circuit's outlier rule becomes the *de facto* national standard.

ARGUMENT

I. THE NINTH CIRCUIT'S DECISION WILL FORCE A SEA CHANGE IN FEDERAL ANTITRUST LAW'S TREATMENT OF LAWFUL JOINT VENTURES.

In order to state a claim under Section 1 of the Sherman Act, a plaintiff bears the initial burden to prove that the challenged restraint (in the form of a contract or conspiracy among two or more entities) has a substantial anticompetitive effect that harms consumers in a relevant market. *See Ohio v. American Express Co.*, 138 S. Ct. 2274, 2284 (2018). To prove an anticompetitive effect, a plaintiff must typically allege at the pleading stage (and later prove) that the defendants have market power within a well-defined antitrust market, such that they have the power to increase price or reduce output within the putative market. *Id.*

The Ninth Circuit, however, parts company with all other courts of appeals by effectively suspending the necessity to prove anticompetitive effect for joint venture cases. That holding is both destructive to joint ventures—a common, popular, and eminently *pro*-competitive form of business organization—and out of step with modern antitrust principles.

A. The Ninth Circuit's Decision Threatens The Joint Venture Business Structure

1. Joint ventures are prevalent, pro-competitive business structures.

Joint ventures, "an important and increasingly popular form of business organization," *Texaco Inc. v. Dagher*, 547 U.S. 1, 5 (2006), play a vital role in the 21st-century economy. A joint venture is formed when "persons who would otherwise be competitors pool their capital and share the risks of loss as well as the opportunities for profit." *Id.* at 6 (quoting *Arizona v. Maricopa Cty. Med. Soc.*, 457 U.S. 332, 356 (1982)).

Joint ventures are common throughout the United States. They abound in virtually every industry—insurance, energy, healthcare, finance, entertainment, technology, and software, to name a few. For example, joint ventures between non-profit hospitals and for-profit entities in the U.S. healthcare industry alone are estimated "in the thousands." Roger P. Meyers, *Risky Ventures: The Impact of IRS Health Care Joint Venture Policy*, 42 U. MICH. J. L. REFORM 481, 487 (2009). Joint ventures are the default business form in the energy and construction industries. Matthew DiLallo, *Why Do Energy Companies Form Joint Ventures?*, THE MOTLEY FOOL (Mar. 21, 2013); Shelar P. S. and Konnur B. A., *Review on Joint Ventures and Public-Private Partnership in Construction Industry,* 4 INT'L J. ENG'G TECH. SCI. & RES. 12 (Dec. 2017). And joint ventures are fueling America's drive toward autonomous and electric vehicles. Michael Wayland, *Automakers investing*

billions in partnerships as industry races toward autonomous and electric vehicles, CNBC (Dec. 7, 2019).

Joint ventures are also often used in independent film production (and film distribution more broadly) as well as the music industry. *See* Howard M. Frumes, *Surviving Titanic: Independent Production in an Increasingly Centralized Film Industry*, 19 LOY. L.A. ENT. L.J. 523, 533-536, 562 (1999); Jonathan A. Mukai, *Joint Ventures and the Online Distribution of Digital Content*, 20 BERKELEY TECH. L.J. 781 (2005). By way of example, until Disney's recent acquisition of Fox, Hulu was a joint venture of several content providers (including Disney and the parent companies of Universal Studios and Warner Brothers). *See* Edmond Lee, *Disney to Buy Comcast's Hulu Stake and Take Full Control of Streaming Service*, THE NEW YORK TIMES (May 14, 2019).

In short, many of the country's most familiar products come from corporate joint ventures, from high technology like aerospace, integrated circuits for computers, and pharmaceuticals; to everyday consumer products like beer, children's toys, car tires, and breakfast cereals; and everything in between. *See* Sarath Sanga, *A Theory of Corporate Joint Ventures*, 106 CAL. L. REV. 1437, 1440 n.7 (2018).

A host of reasons explain their prevalence. Joint ventures "hold the promise of increasing a firm's efficiency and enabling it to compete more effectively." *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768 (1984). The specific justifications behind the decision to operate as a joint venture are as myriad

as the industries in which they exist. Joint ventures can be effective vehicles to spread risk efficiently across larger asset portfolios or to increase available capital for a project.[2] They allow for the synergistic combination of complementary assets, such as intellectual property rights, without the costs of a fuller integration.[3] And they permit smaller partners to achieve economies of scale and to reduce costs associated with distribution and duplication.[4]

Sports leagues in general—and the NFL in particular—illuminate the benefits of joint ventures. If the NFL could not operate as a joint venture, it could not create or broadcast its core product: NFL games. The creation and broadcast of NFL games inescapably require the cooperation of multiple economic actors with distinct intellectual and real property rights, including the competing teams, the NFL itself, and the network that creates the telecast. No single team

---

[2] James Bamford, David Ernst, & David G. Fubini, *Launching a World-Class Joint Venture*, HARV. BUS. REV. (Feb. 2004); *see also* Matthew DiLallo, *Why Do Energy Companies Form Joint Ventures?*, THE MOTLEY FOOL (Mar. 21, 2013) (explaining this benefit as the primary rationale for energy sector joint ventures, where the cost of development and the risks involved in exploration are both high, but individual companies tend to be very small).

[3] Thomas A. Pirainio, Jr., The Antitrust Analysis of Joint Ventures After the Supreme Court's Dagher Decision, 57 EMORY L.J. 735, 773 (2008) (citation omitted).

[4] Dennis W. Carlton and Steven C. Salop, Symposium: High Technology, Antitrust & The Regulation Of Competition: You Keep On Knocking But You Can't Come In: Evaluating Restrictions On Access To Input Joint Ventures, 1 HARV. J. L. & TECH. 319, 323-324 (1996).

could create and market an NFL telecast without first obtaining the consent and cooperation of multiple other stakeholders.

The NFL's DirecTV telecasts continue to compete for consumers' attention and dollars with other football leagues (including the new XFL), other sports leagues, other forms of non-sports entertainment—and, of course, the free over-the-air broadcasts of NFL games every Sunday. The joint venture structure ensures that the NFL can effectively compete for viewers by producing entertaining telecasts and obtaining the consent of the various stakeholders needed to make those telecasts happen. That is why, at least when it comes to the core activity of putting on games for the public, commentators agree that sports leagues are generally pro-competitive.[5]

---

[5] *See, e.g.*, Stephen F. Ross, *Antitrust Options to Redress Anticompetitive Restraints and Monopolistic Practices by Professional Sports Leagues*, 52 CASE W. RES. L. REV. 133, 134 (Jan. 2001) ("Sports leagues present special challenges for those interested in a sound, consumer-oriented approach to antitrust enforcement. As the Supreme Court has recognized, sports leagues operate in an industry where some agreements among competitors—perhaps even all the competitors—is necessary for there to be a product at all. In addition to the need for joint action to produce a product, sports leagues have perhaps a unique interest in maintaining a significant degree of competitive balance [which necessarily requires a high level of cooperation] among the teams within their venture.") (footnote omitted); Donald G. Kempf, Jr., *The Misapplication of Antitrust Law to Professional Sports Leagues*, 32 DEPAUL L. REV. 625, 628 (1983) ("In most industries and professions, each firm's success comes at the expense of other firms. In a professional sports league,

2. The Ninth Circuit's decision permits attacks on joint ventures absent any competitive harm.

The Ninth Circuit's decision threatens to upend a pro-competitive form of enterprise by exposing not just the NFL, but all joint ventures, to enhanced antitrust scrutiny and liability (including treble damages).

As petitioners point out, the Ninth Circuit committed serious interpretive errors with serious practical consequences. The NFL has jointly marketed the telecasts of its teams' games for nearly 60 years—*i.e.*, for most of its existence. Pet. App. 11a. The NFL and teams have done so as media technology advanced with cable and, later, satellite television distribution deals.[6] Yet the Ninth Circuit held that the fact that the teams do not individually sell their games' telecasts was enough to show a "naked restriction on output." Pet. App. 22a. That supposed "naked" restraint, moreover, effectively absolved plaintiffs of the requirement of proving (or even alleging) anticompetitive harm to a well-defined antitrust market. *See* Pet. 20-27.

But every restraint agreed to by members of a joint venture will—at least superficially—restrain output. The salient question is what an antitrust plaintiff must show to establish liability and extract

---

however, each team's success is dependent upon the success of the other teams in the league.").

[6] The NFL's first cable telecast deal was in 1987, and its arrangement with DirecTV began in 1994. *In re Nat'l Football League's Sunday Ticket Antitrust Litig.*, 933 F.3d 1136, 1147 (9th Cir. 2019).

treble damages. The Ninth Circuit's holding collapses the inquiry down to whether the plaintiffs are challenging a "restraint." If so, they have adequately pleaded their Sherman Act case—without any further burden to demonstrate anticompetitive harm. If that is correct, it is hard to imagine a scenario in which *any* plaintiff suing *any* joint venture would ever need to satisfy the ordinary requirements of the rule of reason. After all, the purportedly "naked" restraint here is not something distinct from the core product of the joint venture—like apparel or product endorsements—but rather the very thing that the joint venture is necessary to create: the telecast of an NFL football game.

3. The Ninth Circuit's decision will have far-reaching effects on joint venture liability nationwide.

The Ninth Circuit held that an abbreviated rule-of-reason analysis applies on the extreme facts at issue here, involving (i) the core product of a sports league, (ii) a distribution system that had been in place for generations without objection from any state or federal antitrust agency, and (iii) a product that is derivative of an antitrust-immune joint telecast. It follows that *no* plaintiff will bear the burden of pleading that *any* challenged joint venture restraint creates anticompetitive effects within a well-defined market. That will make the Ninth Circuit a haven for antitrust plaintiffs challenging joint ventures with operations touching the country's largest circuit.

For the reasons just discussed, under the Ninth Circuit's novel framework, any challenge to any

restraint on participants in a joint venture will likely proceed to full discovery. And because the burden would be on *defendants* to prove pro-competitive justifications that outweigh the alleged anticompetitive harm, many of those defendants may face trial as well. (More realistically, the Ninth Circuit's rule will allow plaintiffs challenging joint venture agreements to wield treble-damages-backed leverage in settlement negotiations.)

Making matters worse, the Ninth Circuit—home to many high-tech and other joint ventures—will become the *de facto* national regulator of such ventures in the United States. The decision below makes the Ninth Circuit the friendliest jurisdiction in which to bring challenges to joint venture restraints. And antitrust law is unique in that private lawsuits benefit from nationwide service of process. *See* 15 U.S.C. § 22 (Clayton Act: "Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found."). So there would be little to prevent most plaintiffs from bringing joint venture challenges within the Ninth Circuit.

The upshot is clear: If this Court does not intervene, the Ninth Circuit's ruling will fundamentally alter how joint ventures are treated under the antitrust laws in the United States.

B. Heightened Scrutiny Of Joint Venture Restraints Breaks With The Last Half-Century Of Antitrust Law.

The Ninth Circuit's decision does not follow from precedent or statute. On the contrary, it is based on an outmoded conception of antitrust liability as it relates to sports leagues and other joint ventures. Both this Court's cases, as well as decades of legislative enactments, reject the premises on which the Ninth Circuit relied.

1. The Ninth Circuit's premises are inconsistent with this Court's modern antitrust precedents.

The Ninth Circuit invoked a 1953 district court opinion involving the NFL decided by Judge Grim, not only for historical context but as support for its holding. *See, e.g.,* Pet. App. 20a ("This is the exact type of arrangement that Judge Grim concluded violated the Sherman Act *** ."). Specifically, the Ninth Circuit held that plaintiffs "adequately allege an injury to competition" because the "agreements at issue are similar to those that have historically required an exemption from antitrust liability by the SBA." *Id.* (citing *United States v. National Football League*, 116 F. Supp. 319 (E.D. Pa. 1953)).

No case other than Judge Grim's 1953 opinion supports that proposition, and the Petition discusses several subsequent circuit cases that hold precisely the opposite. Judge Grim's opinion—which was never appealed, *see* Pet. App. 10a—was wobbly then and, more importantly, does not withstand scrutiny under today's antirust jurisprudence.

Antitrust law's present treatment of cooperation within enterprises would be unrecognizable to lawyers or jurists in the 1950s. Judge Grim authored his opinion more than twenty years before this Court's decision in *Continental Television v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977), widely recognized as the genesis of modern antitrust doctrine. *E.g.*, 2 FEDERAL ANTITRUST LAW § 9.7 (2019); *cf.* Richard A. Posner, *The Rule of Reason and the Economic Approach: Reflections on the* Sylvania *Decision*, 45 U. CHI. L. REV. 1, 5-12 (1977) (correctly predicting a wave of overturned precedent in the wake of *GTE Sylvania*). Since then, this Court has consistently overruled precedent that required onerous scrutiny of intra-enterprise restraints.

For instance, at the time of Judge Grim's decision, it was *per se* unlawful for a franchisor to create territorial limitations on franchise agreements, *see United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967), or for companies in a vertical relationship to agree to a maximum or minimum resale price, *see Albrecht v. Herald Co.*, 390 U.S. 145 (1968); *Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911). Even companies under *common ownership* (*e.g.*, parent-subsidiary or sister corporations wholly owned by the same parent) could be held to "conspire" with each other under the Sherman Act. *See United States v. Yellow Cab Co.*, 332 U.S. 218 (1947).

This Court has overruled every one of those cases. *See GTE Sylvania*, 433 U.S. 36 (overruling *Arnold, Schwinn & Co.*); *State Oil Co. v. Khan*, 522 U.S. 3 (1997) (overruling *Albrecht*); *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007)

(overruling *Dr. Miles*); *Copperweld Corp.*, 467 U.S. 752 (1984) (overruling *Yellow Cab*). And many other of the Court's cases decided since Judge Grim's decision similarly manifest antitrust law's increasing accommodation of intra-enterprise cooperation. *See BMI v. Columbia Broad. Sys.*, 441 U.S. 1 (1979) (holding that blanket musical copyright licenses by ASCAP and BMI were not *per se* unlawful despite fact that creating license meant that copyright owners had to agree on price); *Texaco Inc*, 547 U.S. 1 (2006) (holding that it was not *per se* unlawful for Texaco and Shell to jointly price gasoline produced via joint venture); *cf. American Needle Inc. v. National Football League*, 560 U.S. 183, 203 (2010) ("When restraints on competition are essential if the product is to be available at all *** the agreement is likely to survive the Rule of Reason.") (internal quotation marks and citations omitted).

In the modern era, this Court has sparingly applied a standard more exacting than the full rule-of-reason test to conduct within an enterprise. In those select occasions, the enterprise in question was *not* in the business of producing joint output, but rather consisted of otherwise unrelated competitors limiting competition over price, output, or marketing. *See National Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679 (1978) (National Society of Professional Engineers rule prohibiting price competition before a customer selected an engineer for a job held per se unlawful); *Arizona v. Maricopa Cty. Med. Soc'y*, 457 U.S. 332 (1982) (per se unlawful for a group of competing physicians in the same county to agree to

maximum fees that their members could claim from payors).

Although the Ninth Circuit relies heavily on *NCAA v. Board of Regents*, 468 U.S. 85 (1984), that case is no exception. Like *Professional Engineers* and *Maricopa County*, the restraint at issue in *Regents* was not between members of an enterprise that produced a joint product. It involved an agreement to reduce output between *competing sports leagues*, rather than between competing teams *within a sports league*. *Regents*, moreover, arose after a trial in which plaintiffs presented a full rule-of-reason case—and after plaintiffs presented (and the district court found) direct evidence of anticompetitive harm—a fundamental element that the Ninth Circuit excused below. To the extent any language in *Regents* can be read more broadly, so as to encompass the very different situation here, *Regents* should be cabined to its facts to avoid conflicting with the rest of this Court's modern antitrust jurisprudence.

In sum, antitrust doctrine has evolved substantially regarding the proper treatment of joint ventures, and it is far more hospitable today than it was in 1953.

2. The Ninth Circuit's decision undermines Congress's protection of joint ventures from unwarranted antitrust regulation.

As this Court has grown more accommodating of joint ventures, Congress has as well. A number of federal statutes seek to facilitate cooperation within joint ventures and to ensure that courts do not

mistakenly treat such coordination the same as they would treat coordination outside joint ventures. The Ninth Circuit's unjustified abbreviation of the rule of reason therefore undermines both judicial and legislative efforts.

Since Judge Grim's decision, Congress has enacted at least a half dozen antitrust statutes relating to competitor collaborations. In each one, Congress has provided greater leeway in recognition of the greater economic understanding of the pro-competitive justifications for joint ventures.

Most relevant to this case, Congress passed the SBA in 1961 to overturn Judge Grim's injunction so that the NFL could pool its games' telecasts (as the AFL was already doing). Pet. App. 9a-10a. The Ninth Circuit notes that the SBA does not cover satellite and cable broadcasts, but fails to appreciate the historical context. In 1961, cable as we know it did not exist, and satellite television was still more than a generation away.[7] By doing what it needed to overturn Judge Grim's injunction, Congress effectively gave professional football complete antitrust immunity for the joint marketing of game telecasts. That Congress has not updated the SBA to accommodate cable and satellite distribution is unremarkable. There was no

[7] Cable television was emerging in some areas of the country in 1961, but did not become widespread until after the deregulatory Cable Communications Policy Act of 1984, Pub. L. 98-549. *See* Patricia Aufderheide, *Cable Television and the Public Interest*, 42 J. COMM. 1, 52–65 (1992). The NFL's agreement with DirecTV, which began the same year (1994) that the company started, has essentially existed since the inception of subscription home satellite television. Pet. App. 50a-51a.

need to do so because, under prevailing antitrust principles, the NFL has jointly marketed its telecasts for over a generation without antitrust impediment. The SBA and modern antitrust law are in accord; both recognize that this sort of joint marketing relationship is beneficial and should be permitted.

Beyond the SBA, several pieces of legislation providing (and later expanding) protection for research joint ventures reflect Congress's solicitous attitude toward this business structure. But the Ninth Circuit's decision in this case would undermine those statutes. In 1984, Congress passed the National Cooperative Research Act ("NCRA"), Pub. L. 98-462, 98 Stat. 1815, which provided that antitrust lawsuits against all U.S. research joint ventures would not be deemed illegal *per se* but would be evaluated under the rule of reason. The Act even provided for damages and attorneys' fees for prevailing *defendants*. *See id.* at 1816-1818.

Congress expanded that protection through the National Cooperative Production Amendments of 1993, Pub. L. 103-42, 107 Stat. 117. Among Congress's findings were that "the antitrust laws may have been mistakenly perceived to inhibit procompetitive cooperative innovation arrangements, and so clarification serves a useful purpose in helping to promote such arrangements." *Id.* at 117.

Congress once again amended—and expanded—the NCRA's protection in 2004. *See* Standards Development Advancement Act of 2004, Pub. L. 108-237, 118 Stat. 661. There, Congress provided that the rule-of-reason standard also applies to standard-

setting organizations, a particular species of joint venture that produce a "standard" rather than a product or service. *Id.*

Other statutes reflect the same congressional desire to provide greater protection for cooperation within business ventures. *See, e.g.*, Federal Trade Commission Act Amendments of 1994, Pub. L. 103-312, 108 Stat. 1691 (removing agricultural cooperatives from the FTC's jurisdiction); 15 U.S.C. § 37 (providing antitrust immunity for charitable giving annuities and charitable trusts). *Amicus* is not aware of a single counterexample, *i.e.*, any statute since 1953 where Congress has demanded *increased* antitrust scrutiny of joint ventures.

Where Congress has gone, the expert regulatory agencies charged with enforcing federal antitrust law have followed. Significantly, while the U.S. Department of Justice in 1953 brought an enforcement action that ultimately led to Judge Grim's injunctions, neither it nor the Federal Trade Commission has brought a challenge to the NFL's joint marketing of its telecasts in the twenty-five years since the DirectTV deal. The same is true of all fifty state attorneys general charged with enforcing state antitrust laws.

The Ninth Circuit's abbreviated application of the rule of reason risks short-circuiting the proper inquiry for joint ventures more broadly. That court's rule for restraints within a joint venture no longer requires plaintiffs to plead and prove anticompetitive injury within a well-defined antitrust market. This Court should grant review to ensure that the Ninth Circuit's mistaken conclusion does not govern, as a practical

matter, a broad swath of joint venture agreements in the United States.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

Daryl Joseffer
Tara S. Morrissey
U.S. CHAMBER LITIGATION CENTER

Pratik A. Shah
Counsel of Record
James E. Tysse
J. Matthew Schmitten
Mitchell E. Khader
AKIN GUMP STRAUSS HAUER & FELD LLP

April 8, 2020