No. __-____

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Sherman Act's rule of reason requires plaintiffs to allege and prove harm to competition in a properly defined antitrust market. In the First, Second, Third, Sixth, and Seventh Circuits, challenged agreements among joint venture participants governing the venture's core activities are assessed under this full rule of reason. In contrast, in the decision below, the Ninth Circuit held that agreements governing the distribution of a venture's jointly produced product—in this case, NFL Football telecasts—could be condemned without full rule-of-reason review, *i.e.*, without requiring plaintiffs to establish harm to competition in a properly defined antitrust market.

The Ninth Circuit compounded the problem by permitting plaintiffs—who purchased nothing from the joint venture—to pursue a damages claim against the venture notwithstanding this Court's limitation on indirect purchaser claims in *Illinois Brick*. Consistent with rulings of the Third and Eighth Circuits, but contrary to rulings of the Fourth and Eleventh Circuits, the Ninth Circuit held that an antitrust plaintiff may assert a damages claim against alleged co-conspirators as long as the plaintiff purchased from a middleman that also participated in the alleged conspiracy, even if the alleged conspiracy did not concern the price plaintiffs paid.

The questions presented are:

1. Whether an agreement among the members of a joint venture on how best to distribute the venture's

jointly created core product may be condemned under the Sherman Act without requiring the plaintiff to establish that defendants harmed competition in a properly defined antitrust market?

2. Whether, notwithstanding this Court's decision in *Illinois Brick*, antitrust damages claims may be brought by indirect purchasers who do not allege that they paid a price fixed by the alleged conspirators?

PARTIES TO THE PROCEEDING BELOW AND RULE 29.6 STATEMENT

Petitioners (Defendants-Appellees below) are the National Football League; NFL Enterprises, LLC; Arizona Cardinals, Inc.; Atlanta Falcons Football Club LLC; Baltimore Ravens, LP; Buffalo Bills, Inc.; Panthers Football, LLC; Chicago Bears Football Club, Inc.; Cincinnati Bengals, Inc.; Cleveland Browns, LLC; Dallas Cowboys Football Club, Ltd.; Detroit Lions, Inc.; Green Bay Packers, Inc.; Houston NFL Holdings, LP; Indianapolis Colts, Inc.; Jacksonville Jaguars, Ltd.; Kansas City Chiefs Football Club, Inc.; Miami Dolphins, Ltd.; Minnesota Vikings Football Club, LLC; New England Patriots, LP; New Orleans Louisiana Saints, LLC; New York Football Giants, Inc.; New York Jets Football Club, Inc.; Raiders Football Club, LLC; Philadelphia Eagles Football Club, Inc.; Pittsburgh Steelers Sports, Inc.; San Diego Chargers Football Co.; San Francisco Forty Niners, Ltd.; the Rams Football Company, LLC; Buccaneers, LP; Tennessee Football, Inc.; Washington Football, Inc.; Football Northwest LLC; Denver Broncos Football Club; DIRECTV, LLC; and DIRECTV Holdings LLC.

Pursuant to Supreme Court Rule 29.6, Petitioners disclose the following:

1. The National Football League is an unincorporated association of 32 member clubs and has its principal executive office at 345 Park Avenue, New York, New York 10154.

2. NFL Enterprises LLC is wholly owned by NFL Ventures, L.P.

3. The 32 member clubs of the National Football League are as follows:

   a. Arizona Cardinals Football Club LLC, d/b/a Arizona Cardinals;

   b. Atlanta Falcons Football Club, LLC, d/b/a Atlanta Falcons;

   c. Baltimore Ravens Limited Partnership, d/b/a Baltimore Ravens (Baltimore Football Company, LLC is the general partner);

   d. Buffalo Bills, LLC, d/b/a Buffalo Bills;

   e. Panthers Football, LLC, d/b/a Carolina Panthers;

   f. The Chicago Bears Football Club, Inc., d/b/a Chicago Bears;

   g. Cincinnati Bengals, Inc., d/b/a Cincinnati Bengals;

   h. Cleveland Browns Football Company LLC, d/b/a Cleveland Browns;

   i. Dallas Cowboys Football Club, Ltd., d/b/a Dallas Cowboys (JWJ Corporation is the general partner);

j. PDB Sports, Ltd. d/b/a Denver Broncos (Bowlen Sports, Inc. is the general partner);

k. The Detroit Lions, Inc., d/b/a Detroit Lions;

l. Green Bay Packers, Inc., d/b/a Green Bay Packers;

m. Houston NFL Holdings, L.P., d/b/a Houston Texans (RCM Sports & Leisure, L.P. is the general partner; Houston NFL Holdings G.P., L.L.C. is the general partner of RCM Sports);

n. Indianapolis Colts, Inc., d/b/a Indianapolis Colts;

o. Jacksonville Jaguars, LLC, d/b/a Jacksonville Jaguars;

p. Kansas City Chiefs Football Club, Inc., d/b/a Kansas City Chiefs;

q. The Los Angeles Rams, LLC, d/b/a Los Angeles Rams;

r. Chargers Football Company, LLC, d/b/a Los Angeles Chargers;

s. Miami Dolphins, Ltd., d/b/a Miami Dolphins (South Florida Football Associates LLC is the general partner);

t. Minnesota Vikings Football, LLC, d/b/a Minnesota Vikings;

u. New England Patriots LLC, d/b/a New England Patriots;

v. New Orleans Louisiana Saints, LLC, d/b/a New Orleans Saints;

w. New York Football Giants, Inc., d/b/a New York Giants;

x. New York Jets LLC, d/b/a New York Jets;

y. Raiders Football Club, LLC, d/b/a Las Vegas Raiders;

z. Philadelphia Eagles, LLC, d/b/a Philadelphia Eagles;

aa. Pittsburgh Steelers LLC, d/b/a Pittsburgh Steelers;

bb. Forty Niners Football Company LLC, d/b/a San Francisco 49ers;

cc. Football Northwest LLC, d/b/a Seattle Seahawks;

dd. Buccaneers Team LLC, d/b/a Tampa Bay Buccaneers;

ee. Tennessee Football, Inc., d/b/a Tennessee Titans (a subsidiary of KSA Industries, Inc.); and

ff. Pro-Football, Inc., d/b/a Washington Redskins (a subsidiary of WFI Group, Inc., which is a subsidiary of Washington Football, Inc.).

4. DIRECTV, LLC, a California limited liability company, is a wholly-owned subsidiary of DIRECTV Holdings LLC.

   a. DIRECTV Holdings LLC, a Delaware limited liability company, is a wholly-owned subsidiary of The DIRECTV Group, Inc.

   b. The DIRECTV Group, Inc., a Delaware corporation, is a wholly-owned subsidiary of DIRECTV Group Holdings, LLC.

   c. DIRECTV Group Holdings, LLC, a Delaware limited liability company, is a wholly-owned subsidiary of AT&T Inc.

   d. AT&T Inc., a Delaware corporation, is a publicly traded company on the New York Stock Exchange.

   e. There is no one person or group that owns 10% or more of the stock of AT&T Inc.

Other than what is listed above, no Petitioner has a parent corporation. Other than AT&T Inc., no publicly-held corporation owns more than 10 percent of any Petitioner's stock.

Respondents (Plaintiffs-Appellants below) are Ninth Inning, Inc., 1465 Third Avenue Restaurant

Corp., Robert Gary Lippincott, Jr., and Michael Holinko.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the district court (App. 44a-99a (unsealed), 174a-211a (sealed)) is unreported. The Ninth Circuit's opinion (App. 1a-43a) is reported at 933 F.3d 1136 (9th Cir. 2019). The Ninth Circuit's order denying rehearing en banc (App. 100a-101a) is unreported.

JURISDICTION

The Ninth Circuit issued its decision on August 13, 2019. A timely petition for rehearing en banc was denied on October 10, 2019. On December 2, 2019, Justice Kagan extended the time for filing this petition to February 7, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent statutory provisions are reproduced in the appendix to this petition. App. 102a-107a.

STATEMENT OF THE CASE

This antitrust case seeks to overturn arrangements for telecasting NFL Football that have been in place, and that have served the NFL's hundreds of millions of fans, for over 25 years.

Coordination among the members of integrated joint ventures, including but not limited to professional sports leagues, undeniably can have procompetitive effects. Without such cooperation, the joint venture's product cannot be created or improved, licensed or distributed, or made more responsive to consumer demand. That is why this Court has recognized that such agreements to cooperate are both subject to and "likely to survive the Rule of Reason." *Am. Needle, Inc. v. Nat'l Football League*, 560 U.S. 183, 203 (2010).

Such procompetitive agreements cannot survive scrutiny under the rule of reason, however, if a court refuses to apply it. Here, in conflict with decisions of multiple other courts of appeals, the Ninth Circuit permitted a challenge to the core activities of a joint venture—producing and distributing its joint product—to proceed without requiring plaintiffs to satisfy the ordinary, minimum requirements of a rule-of-reason case, *i.e.*, a properly defined antitrust market and anticompetitive effects within that market. Moreover, deepening a different circuit conflict, the court of appeals broadened a purported exception to the direct purchaser rule of *Illinois Brick* by allowing indirect purchasers who do not allege that they paid a price

fixed by the alleged conspirators nevertheless to pursue a damages claim against them. Each of those holdings warrants this Court's review.

1. Joint ventures are common throughout the modern economy. "[A]n important and increasingly popular form of business organization," *Texaco, Inc. v. Dagher*, 547 U.S. 1, 5 (2006), joint ventures "hold the promise of increasing a firm's efficiency and enabling it to compete more effectively," *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 768 (1984). That is because many products are most efficiently produced—and some can *only* be produced—through the joint activity of multiple "independent centers of decisionmaking." *Id.* at 769.

"Perhaps the leading example" of a business activity that "can only be carried out jointly . . . is league sports." *NCAA v. Bd. of Regents*, 468 U.S. 85, 101 (1984) (quoting R. Bork, The Antitrust Paradox 278 (1978)). NFL Football is illustrative. The NFL and its 32 member clubs operate as an integrated joint venture that produces and distributes NFL Football, a structured series of over 250 professional football games culminating in the Super Bowl. *See* App. 124a, 131a, 140a; *Am. Needle*, 560 U.S. at 202-04. As the D.C. Circuit recognized decades ago, "[n]o NFL club can produce this product without agreements and joint action with every other team." *Smith v. Pro Football, Inc.*, 593 F.2d 1173, 1179 (D.C. Cir. 1978).

It is not just logistics and the rules of the game on which the League and its member clubs must agree to create their joint product and make it viable. "The fact that NFL teams share an interest in making the

entire league successful and profitable . . . provides a perfectly sensible justification for making a host of collective decisions." *Am. Needle*, 560 U.S. at 202. Take, for example, the televising of NFL games. The NFL and its member clubs each own distinct intellectual property rights—rights that each must agree to license for a game to be televised. The League and its members thus *must* reach agreements among themselves about the licensing of their intellectual property for use in games; that is the only way that their joint product, NFL Football, can be distributed to consumers on television. To treat that cooperation as an antitrust problem—or even a presumptively serious antitrust concern—would deny the reality that production and distribution of a product like NFL Football are activities that can only be carried out jointly. *See, e.g.*, Bork, *supra*, at 278 ("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.").

For precisely that reason, this Court has gone out of its way to make clear that "[f]ootball teams that need to cooperate are not trapped by antitrust law." *Am. Needle*, 560 U.S. at 202. "When 'restraints on competition are essential if the product is to be available at all,' *per se* rules of illegality are inapplicable, and instead the restraint must be judged according to the flexible Rule of Reason." *Id.* at 203 (quoting *NCAA*, 468 U.S. at 101). Under that rule, "the plaintiff has the initial burden to prove that the challenged restraint has a substantial anticompetitive effect that harms consumers in the relevant market." *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2284 (2018).

Moreover, precisely because professional sports leagues "unquestionably" have "interest[s] that may well justify a variety of collective decisions made by the teams," the Court has emphasized that in this context, not only must the full rule of reason be applied, but it might be easily determined that the challenged conduct is lawful under that standard. *Am. Needle*, 560 U.S. at 203-04. Notably, the Court confirmed these principles in the specific context of joint licensing by the NFL teams of their separately owned intellectual property.

2. Plaintiffs in this putative class-action antitrust litigation demand that the NFL fundamentally restructure its longstanding arrangements for telecasting its core venture product—arrangements that have led to increasing viewership of NFL Football for over a quarter century.

Most regular-season NFL games are played on Sunday afternoons. App. 50a, 139a-140a. Those games, which are broadcast live, attract significant audiences. App. 50a, 124a, 156a-157a. While many fans prefer to watch a particular team, consumer demand for each NFL broadcast is not solely attributable to a single team, a single game, or even a single season. Instead, demand derives from each team's, game's, and season's relationship to the joint venture's product as a whole. *See* App. 129a-131a. In particular, fans' interest in watching games—especially games not involving their favorite team—depends on a host of decisions made by the League. Those decisions involve everything from scheduling to rules designed to preserve and enhance competitive balance, *i.e.*, teams of relatively equal on-field

strength. Even a decision as basic as kick-off time is made by the League, not the participating teams, with an eye to maximizing the value, quality, and attractiveness to consumers of the overall product.

In furtherance of their collective "interest in making the entire league successful and profitable," *Am. Needle*, 560 U.S. at 202, the clubs long ago agreed to pool their broadcast rights and to give the NFL authority to license them. That arrangement has served the League and its fans well, generating dramatic increases in fan interest and viewership, growing revenues, and fostering competitive balance in very different and disparate television markets. Congress enacted a statute nearly 60 years ago to ensure that professional sports leagues—and the NFL in particular—would be able to do just that. When a district court enjoined the NFL from licensing the pooled broadcast rights of the League and its member teams on the theory that the pooling agreement violated the antitrust laws, *see United States v. Nat'l Football League*, 196 F. Supp. 445 (E.D. Pa. 1961), Congress reacted swiftly by enacting the Sports Broadcasting Act (SBA). *See generally U.S. Football League v. Nat'l Football League*, 842 F.2d 1335, 1347 (2d Cir. 1988). Under the SBA:

> The antitrust laws . . . shall not apply to any joint agreement by or among persons engaging in or conducting the organized professional team sports of football, baseball, basketball, or hockey, by which any league of clubs participating in [that] professional [sport] sells or otherwise transfers all or any part of the rights of such league's member clubs in the sponsored

> telecasting of the games . . . engaged in or conducted by such clubs.

15 U.S.C. § 1291.

Accordingly, the clubs have transferred their telecasting rights to the NFL through agreements that are "squarely covered by the SBA." App. 12a. Pursuant to those agreements, the NFL in turn has entered into distribution agreements with CBS and FOX to broadcast Sunday-afternoon regular season games. *See* App. 139a-140a. Those broadcast agreements ensure that every Sunday-afternoon NFL game is available to consumers on free, over-the-air television. App. 139a-140a. Every Sunday during the NFL season, consumers can choose, without any charge or fee, from among at least three NFL games, and the NFL's broadcast agreements ensure that every fan can watch, without any charge or fee, every game of his or her local team(s). App. 49a-51a, 139a-140a.

Under those unquestionably legal broadcast agreements, "the NFL owns the copyright in the telecasts." App. 14a. For a quarter century, to provide consumers additional options for viewing NFL Football, the NFL—as copyright holder—has licensed DIRECTV to redistribute the telecasts in a package known as "NFL Sunday Ticket." App. 136a-137a. That package affords DIRECTV subscribers access to copyrighted telecasts of Sunday afternoon games that are not broadcast in their local market ("out-of-market" games). App. 50a-51a, 141a. Plaintiffs' novel theory is that this arrangement, which expands consumer choice and access to broadcasts of NFL games, is unlawful because it restrains individual teams from

separately distributing broadcasts of their games in competition with the game broadcasts made available by the NFL on free, over-the-air network television. Plaintiffs assert that because the NFL and its member clubs have expanded consumer access to NFL games through Sunday Ticket, the antitrust laws now compel them also to distribute their game broadcasts separately, thus undermining their pre-existing, SBA-protected agreements with broadcast networks.

3. Plaintiffs are commercial entities and individuals who claim to have purchased an NFL Sunday Ticket subscription from DIRECTV. They assert claims on behalf of putative classes of Sunday Ticket subscribers. App. 125a-126a.

Plaintiffs' consolidated amended complaint challenges two aspects of the Sunday Ticket arrangements: (i) the agreement among the NFL and its member clubs to license out-of-market game broadcasts jointly instead of by each club individually; and (ii) the grant of certain exclusive redistribution rights to DIRECTV. App. 51a-52a. As to the former, even though there is no dispute that the NFL obtains the copyright to the telecasts pursuant to SBA-protected joint licensing agreements, App. 14a, plaintiffs insist that the pooling of redistribution rights—to the extent not protected by the SBA—amounts to an illegal horizontal conspiracy among the NFL and its member clubs. As to the latter, while this Court has long treated "exclusive distributorships" as presumptively *pro*competitive, *see, e.g.*, *Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 53-55 (1977), plaintiffs maintain that this exclusive distribution agreement

unlawfully forecloses potential competition among telecasts of NFL games.

The district court granted defendants' motion to dismiss plaintiffs' claims with prejudice, holding that plaintiffs had failed to allege that either aspect of the Sunday Ticket arrangements harmed competition. App. 67a-83a. The district court held further that because the NFL offered multiple games for free every Sunday afternoon, plaintiffs had failed to allege (and could not plausibly allege) that defendants exercised market power in any properly defined antitrust market. App. 90a-94a. In particular, the district court rejected plaintiffs' assertions that there was a "submarket defined as out-of-market football broadcasts," *i.e.*, a market limited to the broadcasts included in the NFL Sunday Ticket product. App. 93a. It found that such a market definition would constitute an impermissible "post-hoc narrowing of the relevant market to cover only those products over which Plaintiffs allege that Defendants have control." App. 94a.

In addition, the district court applied the direct purchaser rule of *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), to hold that plaintiffs, who had not purchased any product or service from the NFL or its member clubs, lacked standing to assert damages claims based on the challenged agreement among those defendants. App. 84a-88a.[1]

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[1] In light of its dismissal, the district court denied as moot the DIRECTV Defendants' motion to compel arbitration. Those parties reserve their right to renew that motion if necessary.

4. A Ninth Circuit panel reversed.

While the appellate panel referred to this Court's admonition in *American Needle* that agreements in the context of a joint venture "must be judged according to the flexible Rule of Reason," *Am. Needle*, 560 U.S. at 203, *see* App. 18a, it nonetheless concluded that this Court's decision in *NCAA* excused plaintiffs from two of the long-established requirements of that rule.

The panel read *NCAA* to stand for the proposition that no legal or practical constraint "requir[es] the teams and the NFL to cooperate in order to produce" NFL game telecasts. App. 25a-28a. Accordingly, the panel (i) held that the Sunday Ticket licensing arrangements could be deemed a "naked" restriction on output, (ii) excused plaintiffs from their burden to plead injury to competition, and (iii) held that "plaintiffs were not required to establish a relevant market." App. 22a. *NCAA*, however, did not involve an economically integrated venture that created, licensed, or distributed a joint venture product. *See* 468 U.S. at 118 ("[T]here is no single league or tournament in which all college football teams compete."). This is a critical distinction.

The panel also concluded that plaintiffs—admittedly indirect purchasers with respect to the NFL and its member clubs—nevertheless could pursue antitrust damages claims against them. App. 30a-35a. To overcome the *Illinois Brick* rule against indirect purchaser damages claims, the panel extended a purported "exception" for plaintiffs who purchased directly from a middleman that had allegedly conspired

to set the price plaintiff had paid; the Ninth Circuit extended that "exception" to purchasers that challenge agreements not involving price-setting but instead allegedly reducing output. App. 34a-35a. Judge N.R. Smith dissented from this portion of the panel's opinion; he would have affirmed the district court's dismissal of damages claims against the NFL and its member clubs based on the challenged "horizontal agreement" among them. App. 38a-43a.

REASONS FOR GRANTING THE PETITION

The decision below creates one circuit split and exacerbates another, all to reinstate a lawsuit seeking to disrupt the settled licensing practices of a joint venture that have benefitted many millions of consumers for a quarter century.

As this Court made crystal clear in *American Needle*, the activities of a joint venture in producing and distributing its core, jointly created product must be subject to a full rule-of-reason analysis that is quick to permit and slow to condemn such joint efforts. Other courts of appeals have so held with respect to agreements among professional sports leagues and their member clubs regarding the production and distribution of their games.

Those courts have insisted that such agreements must not be condemned without *full* rule-of-reason scrutiny—not abbreviated forms of analysis that relieve plaintiffs of their burdens to define a viable antitrust market and identify harm to competition. It could hardly be otherwise. *American Needle* held that full rule-of-reason analysis applies to an agreement to jointly license *separately owned* intellectual property

for use on apparel bearing a *single team's* logo. No less demanding standard could apply to joint licensing agreements involving production and televised distribution of the games themselves—which are inherently *joint* undertakings and are the core product that a league and its members join together to produce.

The decision below breaks sharply from the consensus of the other courts of appeals. According to the Ninth Circuit, an agreement among the NFL and its member clubs to jointly license the rights to televise their jointly produced games is so "naked" a restraint that plaintiffs may challenge it without even identifying the antitrust market in which that agreement purportedly harms competition. Other courts of appeals have rejected exactly that argument—and done so in the context of materially indistinguishable challenges to materially indistinguishable joint ventures.

Making matters worse, the Ninth Circuit reached that conclusion because it labored under the misapprehension that this Court's precedent compelled it. In particular, the court deemed this case "control[led]" by *NCAA*—a case that did not involve either an integrated joint venture or the joint licensing of intellectual property rights. App. 21a. It is little surprise that other circuits have squarely rejected efforts to extend *NCAA* to the activities of professional sports league joint ventures. By embracing plaintiffs' claim that *NCAA* exempts them from the *full* rule-of-reason showing that *American Needle* requires, the Ninth Circuit has created a clear conflict both with this Court's precedent and with decisions of other circuits.

In short, the Ninth Circuit's decision creates a conflict as to a pure question of law. The Ninth Circuit has now held that a core activity of a lawful joint venture may be condemned as a naked restraint, without requiring plaintiffs to satisfy their burden of demonstrating anticompetitive effects in an antitrust market, while other courts of appeals have held that a core activity of a lawful joint venture may never be condemned as a naked restraint and must always be evaluated under the full rule of reason.

The Ninth Circuit also exacerbated a circuit split on an issue arising under the direct purchaser rule of *Illinois Brick*. Under *Illinois Brick* and the law of the Fourth and Eleventh Circuits, plaintiffs would not be able to recover damages against the NFL or its member clubs based on the horizontal agreement among them because (i) they purchase nothing from the NFL and (ii) they do not (and cannot) allege that there is any agreement between the NFL and DIRECTV as to the price that the latter unilaterally sets and charges for Sunday Ticket. Implicitly recognizing this problem, plaintiffs asked the Ninth Circuit to join the Third and Eighth Circuits in extending a purported "co-conspirator" exception to *Illinois Brick* to reach alleged agreements to reduce output rather than to set the price that the purchaser pays—and the Ninth Circuit acceded to that request.

The decision below not only vastly expands the potential for antitrust liability, but also vastly expands the universe of defendants who might be forced to pay treble damages for these purported violations. The Court should grant certiorari to make clear that the

core activities of a joint venture may not be condemned under the antitrust laws if a plaintiff fails to satisfy the full rule-of-reason standard and to restore the rule of *Illinois Brick*.

I. The Court Should Grant Review To Resolve A Circuit Conflict Regarding The Antitrust Standards For Joint Ventures.

A. Several courts of appeals have recognized that antitrust challenges to a joint venture's production and distribution of its joint product must be subject to *full* rule-of-reason analysis.

"When 'restraints on competition are essential if the product is to be available at all,' *per se* rules of illegality are inapplicable, and instead the restraint must be judged according to the flexible Rule of Reason." *Am. Needle*, 560 U.S. at 203 (citation omitted). Consistent with that admonition, circuit courts have repeatedly concluded that the activities of an integrated joint venture like a sports league cannot be condemned without a *full* rule-of-reason analysis—including, *inter alia*, the requirement that a plaintiff seeking to challenge such an arrangement must establish a properly defined antitrust market and demonstrate that defendants reduced competition in that market. *See, e.g.*, *Am. Express*, 138 S. Ct. at 2284 (articulating rule-of-reason standard).

For instance, the Seventh Circuit so held in a closely analogous challenge to the NBA's broadcasting arrangements. *Chicago Prof'l Sports Ltd. P'ship v. Nat'l Basketball Ass'n*, 95 F.3d 593 (7th Cir. 1996)

("*Bulls II*") (Easterbrook, J.). *Bulls II* addressed NBA rules for broadcasts on television "superstations" carried on nationwide cable systems. *Id.* at 595. Recognizing that the NBA is a joint venture that "makes professional basketball [and that] only it can make 'NBA Basketball' games," *id.* at 599, the Seventh Circuit held that the NBA's broadcast rules "may not be condemned without analysis under the *full* Rule of Reason," *id.* at 600 (emphasis added). That review, the court of appeals held, includes "an inquiry into market power and, if there is power, proceeding to an evaluation of competitive effects." *Id.*

The Second Circuit reached the same conclusion in a case concerning an agreement among Major League Baseball clubs to jointly license intellectual property rights. *Major League Baseball Props., Inc. v. Salvino, Inc.*, 542 F.3d 290 (2d Cir. 2008). The Second Circuit began by explaining that MLB, like the NBA and the NFL, is an integrated joint venture:

> The Major League Baseball teams together produce an entertainment product—the "MLB Entertainment Product"—that consists of approximately 2,400 interrelated, professional baseball games per year played by the 30 MLB Clubs, leading to separate playoff games for the American and National Leagues and culminating each season with the World Series between the champion Clubs from the two Leagues. This entertainment product can be produced only by the Clubs operating together in the form of a league; it cannot be produced by any one individual Club, or even a few Clubs.

Id. at 296.

For that reason, the court rejected the antitrust plaintiff's request to "dispense with a full rule-of-reason analysis," and to condemn the MLB Clubs' agreement under either the *per se* rule or an abbreviated "quick look" analysis, on the theory that the agreement effected a "naked" restraint. *Id.* at 317-18. As the court explained, "the fact that the MLB Clubs exist as members of a sports league, and [that] their interests are interdependent," "plainly foreclose[s] the imposition of *per se* or quick-look liability." *Id.* at 323. Instead, the court held that the antitrust plaintiff must satisfy the ordinary requirement of establishing anticompetitive effects within a relevant antitrust market. *Id.* at 317; *see also id.* at 308, 334. The court ultimately rejected the antitrust plaintiff's claims because it had "proffered no evidence that the centralization of licensing . . . caused any actual injury to competition or any evidence that [antitrust defendants] possessed power in the relevant market." *Id.* at 334.

Then-Judge Sotomayor concurred in the judgment. She "join[ed] with the majority in concluding that neither a *per se* nor a quick-look approach is appropriate here." *Id.* at 337 (Sotomayor, J., concurring). In particular, Judge Sotomayor concurred with the majority's conclusion that agreements among the members of a joint venture "should normally be analyzed under a rule of reason, requiring an inquiry into market power and structure and the actual effects of any restraints on trade." *Id.*

She elaborated that full rule-of-reason analysis was not required in circumstances where "a joint venture is essentially a sham, offering no reasonable prospect of any efficiency-enhancing benefit" or where the challenged restraint "is not reasonably necessary to achieve . . . the efficiency-enhancing benefits of a joint venture and serves only as a naked restraint against competition." *Id.* at 338 (citations omitted).

Neither of these situations was present in *Salvino*, however. The MLB joint venture was not "so manifestly anticompetitive that it should be considered a sham cartel." And its joint licensing was "reasonably necessary to achieve [antitrust defendants'] efficiency-enhancing purposes." *Id.* at 340. Judge Sotomayor therefore concluded that MLB should have prevailed as a matter of law because the antitrust plaintiff had "adduced no evidence of an actual adverse effect on competition as a whole in the relevant market." *Id.* at 341 (internal quotation marks and citation omitted).

The First Circuit likewise has concluded that activities of a lawful joint venture with respect to its core product could not be condemned without *full* rule-of-reason analysis. In *Fraser v. Major League Soccer, L.L.C.*, 284 F.3d 47 (1st Cir. 2002) (Boudin, J.), the court addressed a challenge to the joint hiring of players by Major League Soccer. The court first noted that the core product of a sports league—there, MLS Soccer—could be created only jointly, as "individual sports teams, after all, must collaborate to produce a product." *Id.* at 55. The court held that challenges to MLS's integrated salary regime accordingly required full rule-of-reason scrutiny, under which plaintiffs

"would have to show that MLS exercised significant market power in a properly defined market, that the practices in question adversely affected competition in that market and that on balance the adverse effects on competition outweighed the competitive benefits." *Id.* at 59. The First Circuit upheld judgment for MLS because a jury had rejected plaintiffs' proposed market definition. *Id.* at 60-61.

The Third Circuit has reached the same conclusion. In *Deutscher Tennis Bund v. ATP Tour, Inc.*, 610 F.3d 820 (3d Cir. 2010), the ATP had established a hierarchy of tennis tournaments, and required top-ranked players to participate in certain top-tier events. The organizers of a tournament that had been downgraded complained that the ATP and its officers and directors had unlawfully conspired to control and restrict the supply of top players' services. *Id.* at 827. The court rejected the plaintiff's attempt to apply abbreviated antitrust scrutiny—despite claims that the reorganization plan constituted unlawful market allocation—"because for a tennis tour, like other sports leagues, horizontal restraints on competition are essential if the product is to be available at all." *Id.* at 831 (citation and internal quotation marks omitted); *see also id.* at 832-33 (rejecting application of abbreviated scrutiny because "[o]nce a defendant comes forward with plausible procompetitive justification for the challenged restraint, the 'quick look' presumption disappears and the overall reasonableness of the restraint is assessed using a full-scale rule of reason analysis"). The court therefore concluded that the alleged restraints must be evaluated under "the *full* rule of reason," and it rejected plaintiffs' claim because they "did not satisfy their burden of

proving a relevant market." *Id.* at 837 & n.15 (emphasis added).

The Sixth Circuit has recognized and applied these antitrust standards beyond the context of professional sports. In a case involving a joint venture among health care providers, the Sixth Circuit construed this Court's decision in *Dagher* to require full rule-of-reason analysis in any challenge to the core activities of an integrated joint venture. *Med. Ctr. at Elizabeth Place, LLC v. Atrium Health Sys.*, 922 F.3d 713 (6th Cir. 2019). The Sixth Circuit outlined "three categories of restraints" involving joint venture participants that this Court has recognized: "(1) restraints that are *core* to the joint venture's efficiency enhancing purpose; (2) restraints that are *ancillary* to the joint venture's efficiency enhancing purpose; and (3) restraints that are *nakedly* unrelated to the purpose of the joint venture." *Id.* at 724-25. The court explained that antitrust challenges to restraints in the first two of those categories "should be judged under the rule of reason." *Id.* at 724.

In the case before it, the Sixth Circuit determined that the challenged conduct was not a "naked" restraint because it could plausibly contribute to the procompetitive efficiencies of the joint venture, so the rule of reason applied and required plaintiffs to "show that the restraint produced anticompetitive effects within the relevant product and geographic markets." *Id.* at 718 n.1, *see id.* at 723-31 (citation omitted).

B. The decision below conflicts with these decisions and defies this Court's precedents.

The Ninth Circuit's decision in this case conflicts with those of the First, Second, Third, Sixth, and Seventh Circuits. According to the Ninth Circuit, joint venture agreements that are necessary for distribution of the venture's core product—here, NFL Football—can qualify as "naked" restraints. App. 22a-23a. The court therefore declined to apply full rule-of-reason analysis to plaintiffs' challenge, concluding that plaintiffs "were not required to establish a relevant market" or harm to competition. App. 22a. That decision cannot be squared with decisions from other courts rejecting virtually identical arguments.

1. Central to the Ninth Circuit's decision to excuse plaintiffs from establishing harm to competition in a properly defined antitrust market was its view that "*NCAA* controls [its] analysis" because this case and *NCAA* address "the same sorts of restrictions." App. 21a-22a. In fact, the NCAA itself, and the restrictions with which this Court took issue in *NCAA*, are both materially different in critical respects from the joint venture and agreements challenged here. The Second and Seventh Circuits so recognized in rejecting exactly the same reasoning that led the Ninth Circuit astray.

As an initial matter, *NCAA* did not address an integrated joint venture. Unlike the NFL, the NCAA was not then engaged in either joint production or joint licensing; the association did not "act as a selling

agent for any school or for any conference of schools." 468 U.S. at 113. As this Court explained in *Dagher*, for this reason *NCAA* was an "ancillary restraints" case in which "courts must determine whether the *nonventure* restriction is a naked restraint on trade, and thus invalid, or one that is ancillary to the legitimate and competitive purposes of the business association, and thus valid." *Dagher*, 547 U.S. at 7 (emphasis added). But "the ancillary restraints doctrine has no application . . . where the business practice being challenged involves the core activity of the joint venture itself," *id.*—here, the production and televised distribution of NFL Football.

In addition, the fact that the NCAA was not engaged in joint production or licensing meant that it was unable to justify the challenged restraints based on the "procompetitive" effects and "efficiencies" of a "joint selling arrangement." *NCAA*, 468 U.S. at 113. Here, by contrast, those efficiencies are indisputably implicated by the challenged agreements; joint licensing of intellectual property by multiple teams and the NFL is "essential if the product is to be available at all." *Am. Needle*, 560 U.S. at 203 (citation omitted); *see also supra* at 5-8; App. 14a-15a (describing joint selling arrangement).

It is little surprise, then, that the Second and Seventh Circuits rejected the same argument that the Ninth Circuit embraced here. In *Salvino*, the antitrust plaintiff argued that "'*NCAA* . . . is . . . the yardstick that should have been used by the [district] court to evaluate'" MLB's joint licensing. 542 F.3d at 323 (quoting plaintiffs' brief) (alterations in original). The Second Circuit disagreed, finding "the

circumstances in *NCAA* to be different from those [in *Salvino*] in every meaningful respect." *Id.* at 323-24; *see also, e.g.*, *id.* at 325 ("Whereas the Supreme Court noted that the NCAA did not act as a selling agent for those whose product was being sold, precisely the opposite is true of [MLB]."). As it explained, *NCAA* and its abbreviated form of antitrust scrutiny have no application to cases that "involve[] an integrated professional sports league in which the competitors are not independent but interdependent, competitive balance among the teams is essential to both the viability of the Clubs and public interest in the sport, and profit sharing is a legitimate means . . . of maintaining some measure of competitive balance." *Id.* at 331-32.

The Seventh Circuit also rejected *NCAA*'s application in *Bulls II*, emphasizing that "[u]nlike the colleges and universities that belong to the National Collegiate Athletic Association, . . . the NBA has no existence independent of sports." 95 F.3d at 599. As Judge Cudahy emphasized in his concurrence, *NCAA* "involv[ed] a loose alliance of colleges which had agreed on price and output restrictions on broadcast of their football games." *Id.* at 601 (Cudahy, J., concurring). "This framework should not be extended to the more highly integrated and economically unitary NBA." *Id.*; *see also Kingray, Inc. v. Nat'l Basketball Ass'n, Inc.*, 188 F. Supp. 2d 1177, 1195 (S.D. Cal. 2002) (dismissing challenge to NBA's version of Sunday Ticket).

In sum, "[e]xcept for the fact of revenue sharing, none of the factors emphasized by the Supreme Court

in *NCAA* finds even a superficial parallel in the present case." *Salvino*, 542 F.3d at 325. The challenged agreement in *NCAA* was deemed a "naked" restraint because it was a direct output limitation, involving a "loose alliance" of colleges in dozens of football conferences, unrelated to any joint licensing arrangements and therefore unsupported by potential procompetitive effects. *NCAA*, 468 U.S. at 99, 104-15; *Bulls II*, 95 F.3d at 601 (Cudahy, J., concurring).

2. The Ninth Circuit departed just as fundamentally from the decisions of this Court and its sister circuits in declaring an absence of "any binding precedent requiring the teams and the NFL to cooperate in order to produce the telecasts." App. 25a. That premise conflicts directly with this Court's recognition that "NFL teams . . . must cooperate in the *production* and scheduling of games." *Am. Needle*, 560 U.S. at 202 (emphasis added). Every appellate court that had previously considered the question reached the same conclusion, recognizing that professional sports leagues in general—and the NFL in particular—are integrated joint ventures whose members must cooperate in order to produce their joint product. As the D.C. Circuit explained, "[t]he [NFL] clubs operate basically as a joint venture in producing an entertainment product—football games *and telecasts.* No NFL club can produce *this product* without agreements and joint action with every other team." *Smith*, 593 F.2d at 1179 (emphases added); *see also Salvino*, 542 F.3d at 296; *Fraser*, 284 F.3d at 55; *Bulls II*, 95 F.3d at 599.

That consensus is plainly correct, as no "binding precedent" is needed to confirm the obvious conclusion

that it is impossible to produce an NFL telecast without the participation and consent of at least the two competing teams and the NFL itself. Agreement between teams is required because both teams must compete to create the game. Their cooperation with the NFL is required because no competition can be an "NFL game"—with, for example, attendant impact on NFL standings and NFL playoff eligibility—unless it is played as part of the NFL schedule, using NFL branding, pursuant to NFL rules, with NFL referees, and with players allocated under league-wide, collectively-bargained terms.

Moreover, no game telecast could be distributed without the consent of both participating teams and the NFL to use their respective trademarks. *See Spinelli v. Nat'l Football League*, 96 F. Supp. 3d 81, 115 (S.D.N.Y. 2015) ("[T]he majority of photos at issue here are 'collectively owned' because they contain the trademarks of the NFL and at least one NFL Club, or the trademarks of more than one NFL Club, and thus neither the NFL nor any individual NFL Club alone could license these photos."); *Washington v. Nat'l Football League*, 880 F. Supp. 2d 1004, 1005-07 (D. Minn. 2012) (same for historical NFL game footage); *see also Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 23 (1979) (blanket license distributed by venture "is quite different from anything any individual owner could issue").[2]

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[2] The requirement that multiple teams and the NFL participate in the on-field competition and consent to the use of their respective trademarks makes this an even easier case than *American Needle*, which involved joint licensing solely of "*separately* owned intellectual property." 560 U.S. at 201 (emphasis added). Even

Congress recognized all this in enacting the SBA, which permits professional sports leagues like the NFL to market and distribute their joint product via "sponsored telecasts" without antitrust concerns. The Ninth Circuit essentially used the SBA—which had been enacted as a shield against antitrust liability—as a sword against the League, reasoning that because distribution by subscription did not constitute "sponsored telecasts," the challenged agreements here could be condemned without full rule-of-reason scrutiny. App. 17a, 21a-23a. That analysis is deeply flawed.

Even if distribution by subscription does not come within the express protection of the SBA, Congress' recognition and express sanction of the League's essential role in marketing the broadcast rights for NFL games cannot be ignored. Congress itself recognized that the production and distribution of broadcasts of the joint venture's core product requires agreements among the League and its member teams. That reality does not disappear when it comes to the possibility of expanding the distribution of the copyrighted performances that are envisioned and directly protected by the SBA. Indeed, the whole notion that individual teams are obligated by law to compete with the broadcasts created and marketed under the SBA borders on the bizarre.

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in that case, where joint production and jointly owned intellectual property were *not* at issue, this Court declined to characterize the NFL's joint licensing as a naked restraint and instructed the lower courts to "apply[] the Rule of Reason" on remand. *Id.* at 204.

It is also wholly impractical. Contrary to Congress' judgment in the SBA and this Court's recognition in *American Needle* that teams must cooperate to produce their entertainment product, the Ninth Circuit's holding expressly assumes that absent the challenged agreements, "individual teams would create multiple telecasts of each game and would compete against one another by distributing telecasts of their games." App. 5a. That unfounded assumption is tantamount to asserting that if two production companies enter into a joint venture to produce a television drama, those two companies independently can—and under penalty of antitrust challenge legally must—separately market the drama's broadcast rights in competition with one another.

But just as no one would argue that antitrust law obligates joint authors not to assign their copyrights to a single publisher, it makes no sense to insist that the NFL and its member clubs must compete among themselves with respect to broadcast licensing rights. Because any broadcast involves the active participation and intellectual property of at least the two participating teams and the NFL, an agreement regarding assignment of broadcast rights is essential if there are to be broadcasts at all. The Ninth Circuit's decision thus ignores this Court's precedent that where "restraints on competition are essential if the product is to be available at all . . . the agreement is likely to survive the Rule of Reason." *Am. Needle*, 560 U.S. at 203 (citations and internal quotation marks omitted). At a minimum, these agreements cannot be *condemned* without a full rule-of-reason inquiry.

* * *

The decision below cannot be reconciled with decisions of this Court or other courts of appeals. According to the Ninth Circuit, plaintiffs may challenge the distribution of the core product of a joint venture without establishing an antitrust market or any reduction of competition in that market. App. 22a-23a. The court thus relieved plaintiffs of the responsibility to plead two of the critical elements of a full rule-of-reason claim. This holding was dispositive because the district court had correctly concluded that plaintiffs had failed to allege—and could not plausibly allege—either element. *See, e.g.*, App. 89a-94a, 114a. Accordingly, the decision below both creates a clear circuit split and presents an excellent vehicle to resolve it.

C. The question presented is important and warrants review now.

The decision below has wide-ranging implications for all manner of joint ventures. Absent this Court's intervention, integrated joint ventures could be forced to defend their core activities—the creation and distribution of the joint venture product—under an abbreviated antitrust analysis in which plaintiffs are not required to establish a properly defined antitrust market or that competition was restrained in any such market.

The decision thus puts at risk a wide range of joint ventures across the economy, especially those whose activities—integrating separately-owned assets to create and distribute a product that no single member could produce on its own—are particularly likely to

generate procompetitive benefits. Such ventures are common not only in sports, but also in the motion picture, recording, publishing, high-tech, and other industries in which cooperation is commonly required to produce and license products protected by intellectual property laws. *See generally, e.g., Broad. Music*, 441 U.S. 1.

Where such cooperation is either efficient or necessary—and it is often both—inappropriate antitrust standards have the potential to deter the very competition that the antitrust laws were enacted to foster. Indeed, opening the door for treble damage antitrust challenges to the decision-making of integrated joint ventures—on the theory that some alternative arrangement would have enhanced competition among the joint venture's participants *in the joint venture's products*—would chill procompetitive collaboration and diminish inter-brand competition. *See, e.g., Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 594 (1986) (mistaken standards "are especially costly, because they chill the very conduct the antitrust laws are designed to protect").

That prospect certainly applies to the NFL's broadcast arrangements, which for the last quarter century have ensured (i) that every Sunday afternoon NFL game is broadcast on free, over-the-air television and (ii) that every NFL fan in the country has access to several of these broadcasts every Sunday—including every game involving his or her local team(s)—without fee or charge. All of the joint activity leading to those broadcasts has been undertaken pursuant to the express sanction of Congress. The Ninth Circuit's

premise—that the antitrust laws condemn as a "naked restraint" joint efforts to expand consumer choice through further distribution of copyrighted performances produced by congressionally-sanctioned conduct—defies both logic and common sense.

The antitrust laws offer no justification for insisting, as the Ninth Circuit did here, that out-of-market NFL games may lawfully be distributed only by a plethora of separate agreements between and among the two teams participating in each game and some third-party distributor. Such a result would lead to inefficiencies, potential diminutions in output, and potential reductions in quality.

These considerations apply not only to the standards applied at summary judgment or at trial, but also to the pleading standards that determine which challenges to joint ventures will be permitted to impose on defendants the "potentially enormous expense of discovery" common in modern antitrust litigation. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558-59 (2007). The costs of discovery are only accentuated by the risk that "the threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching" summary judgment or trial. *Id.* at 559. Review is therefore necessary to ensure that appropriate pleading standards prevent costly but implausible challenges from deterring the formation of procompetitive ventures in the first place.

II. The Court Should Grant Review To Resolve A Circuit Conflict Regarding The Purported "Co-Conspirator" Exception To *Illinois Brick*.

The Ninth Circuit not only distorted the proper analysis of joint ventures but also bent the traditional rules that limit antitrust damages claims to direct purchasers. In *Illinois Brick Co. v. Illinois*, this Court held that, with very narrow and limited exceptions, only direct purchasers may sue for damages under the antitrust laws. 431 U.S. 720 (1977). The Court should also grant review to resolve a dispute among the courts of appeals as to the existence and scope of a "co-conspirator" exception to this Court's direct purchaser rule.

1. No one disagrees that plaintiffs are indirect purchasers of the product that the NFL produces and provides to DIRECTV for distribution to Sunday Ticket subscribers. Indirect purchasers generally lack standing to bring antitrust damages claims under section 4 of the Clayton Act. As this Court explained in limiting standing to direct purchasers, indirect purchasers generally rely on pass-on theories of harm, and "[p]ermitting the use of pass-on theories under § 4 essentially would transform treble-damages actions into massive efforts to apportion the recovery among all potential plaintiffs that could have absorbed part of the overcharge from direct purchasers to middlemen to ultimate consumers." *Illinois Brick*, 431 U.S. at 735, 737. This Court recently reaffirmed that this is "a bright-line rule that authorizes suits by *direct* purchasers but bars suits by *indirect* purchasers." *Apple Inc. v. Pepper*, 139 S. Ct. 1514, 1520 (2019). Under

these principles, plaintiffs' damages claims arising from the pooling agreement among the NFL and its member clubs would fail at the threshold.

To avoid having pass-on theories "add whole new dimensions of complexity to treble-damages suits and seriously undermine their effectiveness," *Illinois Brick*, 431 U.S. at 737, this Court instructed courts not to "carve out exceptions . . . for particular types of markets," *id.* at 744. That proscription applies categorically, even though the "difficulties and uncertainties" presented by pass-on theories "will be less substantial in some contexts than in others." *Id.* at 743. *Kansas v. UtiliCorp United, Inc.* emphasized the unequivocal nature of this bar: "even assuming that any economic assumptions underlying the *Illinois Brick* rule might be disproved in a specific case, we think it an unwarranted and counterproductive exercise to litigate a series of exceptions." 497 U.S. 199, 217 (1990).

"Despite this admonition, several courts have recognized a 'co-conspirator exception' to *Illinois Brick*" under which an indirect purchaser may nonetheless bring suit. *Dickson v. Microsoft Corp.*, 309 F.3d 193, 214 (4th Cir. 2002) (collecting cases). The Supreme Court has not adopted the co-conspirator exception, and "those circuits that have addressed it have not taken a uniform view of its scope." *Laumann v. Nat'l Hockey League*, 907 F. Supp. 2d 465, 481 (S.D.N.Y. 2012).

The Fourth Circuit has held—and the Eleventh Circuit has indicated—that an indirect purchaser

may sue for damages only if the direct purchaser participated in a conspiracy *to fix the price paid* by the indirect purchaser. By contrast, the Third and Eighth Circuits have carved out a far broader exception permitting indirect-purchaser damages suits regardless of the specific anticompetitive behavior allegedly undertaken by the conspiracy, so long as the plaintiff alleges that the middleman-seller was a participant in the conspiracy in some fashion. By joining this second group and creating an extraordinarily broad "exception" that would swallow the *Illinois Brick* rule, the decision below deepens a conflict among the courts of appeals that requires this Court's resolution.

2. On one side of the circuit split, the Fourth and Eleventh Circuits have concluded that if any "co-conspirator" exception to *Illinois Brick* exists, it is limited to "price-fixing conspiracies" where, for example, "a dealer has illegally conspired with a manufacturer with respect to the price paid by a consumer." *Dickson*, 309 F.3d at 215. Plaintiffs in *Dickson* challenged allegedly anticompetitive conduct by Microsoft relating to its operating system and application software. *See id.* at 198-200. They were not direct purchasers from Microsoft. Rather, plaintiffs had purchased computers with pre-installed Microsoft software from original equipment manufacturers (OEMs), and rested their standing to challenge Microsoft's conduct on their allegations that the direct purchasers (the OEMs) and Microsoft had entered into allegedly anticompetitive "exclusive dealing distribution arrangements." *Id.* at 199.

The Fourth Circuit held that *Illinois Brick* barred plaintiffs' claims against Microsoft. The plaintiffs did

"not allege any conspiracy between Microsoft and the OEM Defendants *to set the resale price of the software*." *Id.* at 200, 213-16 (emphasis added). *Dickson* reasoned that an exception limited to price-fixing conspiracies would fit more comfortably with *Illinois Brick*. As the *Dickson* court explained, "the rationale for concluding that *Illinois Brick* does not apply to a price-fixing conspiracy is that no overcharge has been passed on to the consumer." *Id.* at 215. Any other theory of harm would require "the exact analysis that *Illinois Brick* forbids": a determination of "the overcharge, if any, . . . that was passed on to consumers." *Id.*

Dickson's recognition of this Court's direction to avoid pass-on analysis also undergirds the Eleventh Circuit's recognition that "[n]ot every vertical conspiracy allegation will get around the *Illinois Brick* doctrine." *Lowell v. Am. Cyanamid Co.*, 177 F.3d 1228, 1232 (11th Cir. 1999). In *Lowell*, a group of farmers had sued a manufacturer of crop-protection products and its retail dealers, alleging that the manufacturers and dealers had engaged in a vertical price-fixing conspiracy. *Id.* at 1229. The Eleventh Circuit concluded that *Illinois Brick* did not bar plaintiffs' suit, as "[t]he inapplicability of *Illinois Brick* to vertical conspiracies with no allegations of pass-on (what some have called the 'vertical conspiracy exception') has long been recognized." *Id.* at 1231. However, *Lowell* expressly distinguished the price-fixing conspiracy alleged there—which allegedly fixed the price paid by plaintiffs—from other types of conspiracies. The Eleventh Circuit explained that if, as in this case, plaintiffs allege a "vertical conspiracy on top of a horizontal conspiracy," the vertical conspiracy "does

not . . . 'save' the overall conspiracy claims." *Id.* at 1232. Rather, "the *Illinois Brick* doctrine might apply *even more strongly*" in such a case. *Id.* (emphasis added).

3. In contrast to the Fourth and Eleventh Circuits, the Third and Eighth Circuits have created broad co-conspirator exceptions.

The Third Circuit established a "general co-conspirator exception" extending to all types of conspiracies. *Howard Hess Dental Labs. Inc. v. Dentsply Int'l, Inc.*, 424 F.3d 363, 378-79 (3d Cir. 2005). *Howard Hess* considered dental laboratories' price-fixing and exclusive-dealing claims against a manufacturer of artificial teeth and the manufacturer's dealers. *Id.* at 366. The Third Circuit held that plaintiffs could assert their price-fixing claims. Consistent with *Dickson*, *Howard Hess* reasoned that plaintiffs "who purchase from dealers who are part of a price-fixing conspiracy with the initial seller" are not barred by *Illinois Brick*. *Id.* at 378.

However, with respect to plaintiffs' exclusive-dealing claims, the Third Circuit parted ways with the Fourth and Eleventh Circuits and crafted a "general co-conspirator exception" not limited to price-fixing conspiracies. *Id.* at 378-79. *Howard Hess*'s "general co-conspirator exception" is "limited" only in that the direct purchasers must "be barred from bringing a claim against their former co-conspirator" based on their involvement in the conspiracy. *Id.* at 378. But it is nonetheless broad in that it extends beyond price-fixing conspiracies. *Id.* The Third Circuit acknowledged, in seeking to establish this broader exception,

that doing so "creates the need to ascertain the portion of an overcharge that was passed on"—the very analysis that this Court instructed courts not to undertake in *Illinois Brick* and *UtiliCorp*, and which the Fourth Circuit rejected in *Dickson*. *Id.* at 381. Nonetheless, the Third Circuit reasoned that "the alternative, adopting no general co-conspirator exception, is less desirable" as a policy matter. *Id.*

The Eighth Circuit also extends the co-conspirator exception to conspiracies beyond those fixing the prices paid by indirect-purchaser plaintiffs. In *Insulate SB, Inc. v. Advanced Finishing Systems, Inc.*, 797 F.3d 538 (8th Cir. 2015), a purchaser of spray-foam equipment sued a manufacturer and its distributors, alleging that they had entered into a series of anti-competitive exclusive-dealing agreements, *id.* at 541. Though no price-fixing conspiracy was alleged, the Eighth Circuit nonetheless held that *Illinois Brick* did not bar plaintiff's suit. *Id.* at 542. The court reasoned that it had previously suggested that indirect purchasers could sue as long as they "allege the direct purchasers are 'party to the antitrust violation' and join the direct purchasers as defendants." *Id.* (quoting *Campos v. Ticketmaster Corp.*, 140 F.3d 1166, 1170-71 & nn. 3-4 (8th Cir. 1998)). *Campos* contemplated a co-conspirator exception only in the context of an alleged price-fixing conspiracy, *see* 140 F.3d at 1168, but *Insulate SB* nonetheless extended that dicta to an exclusive-dealing conspiracy.

The Ninth Circuit here held that plaintiffs could pursue a damages claim against the NFL and its member clubs based on the alleged horizontal agreement among them, even though there is no allegation

that the challenged "conspiracy" involved setting the price of Sunday Ticket. The majority opinion below thus joins the Third and Eighth Circuits in extending the purported co-conspirator exception beyond conspiracies that fix the price paid by the plaintiffs. *See* App. 40a (N.R. Smith, J., dissenting) ("Plaintiffs' claim for damages stemming from the alleged horizontal agreement among the NFL Teams would require the very analysis prohibited by the *Illinois Brick* rule").[3]

4. The proper scope of any co-conspirator exception to *Illinois Brick* is a matter of exceptional practical importance in shaping the nature and scope of federal antitrust litigation, as it affects whether defendants can be held liable for damages under the antitrust laws for alleged overcharges reflected in prices that they did not set. In the present case, plaintiffs seek to hold the NFL liable for alleged overcharges reflected in prices that DIRECTV unilaterally sets—in its own discretion—for its own subscribers, based on a supposed horizontal agreement among the NFL teams and the NFL to restrict the output of NFL broadcasts by pooling broadcast rights. If a court can conclude that such horizontal allegations fall outside the *Illinois Brick* bar, remote participants in almost any vertical distribution chain are at risk for similarly indirect claims.

By the same token, the Ninth Circuit's rule invites plaintiffs to threaten remote defendants with treble

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[3] The Ninth Circuit's decision also departed from that court's precedent in *In re ATM Fee Antitrust Litigation*, 686 F.3d 741 (9th Cir. 2012), as noted in Judge Smith's dissent. App. 38a-43a (N.R. Smith, J., dissenting).

damages liability by pursuing flimsy allegations in an effort to connect vertical agreements to alleged horizontal conspiracies. That danger is illustrated in this case as well: For six decades, the NFL and its member clubs have jointly distributed their broadcast rights through agreements with broadcast networks. The notion that an additional vertical distribution agreement with DIRECTV—one that expands consumer choice and access to game broadcasts—somehow converted the underlying agreement among the NFL and its member clubs to pool broadcasting rights into a conspiracy involving DIRECTV, and exposed that pooling agreement to treble damages claims by indirect purchasers, makes nonsense of *Illinois Brick*. *See* App. 32a-33a.

Because this conflict is ripe for the Court's resolution and involves an important issue, review of the second question presented is warranted as well.

CONCLUSION

The petition for a writ of certiorari should be granted.

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