No. 19-1098

IN THE

Supreme Court of the United States

NATIONAL FOOTBALL LEAGUE, *ET AL.*,
Petitioners,

v.

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

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

Brief of *Amici Curiae* Antitrust Law and Business School Professors, and Economists In Support of Petition for a Writ of Certiorari

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INTEREST OF THE *AMICI CURIAE*

This brief is submitted on behalf of professors of antitrust law, sports law, business administration, and economics, as well as economists, with an interest in the proper application of antitrust principles to business conduct (the "Amici").[1] The Amici include leading professors and lecturers at some of the nation's top law schools, business schools, and economics departments, as well as economists, who have analyzed the proper application of antitrust law and economics in industries across the world.

The Amici submit this *amicus* brief to provide the Court with their views on why existing case law—including from this Court—and sound economic principles warrant rejecting the truncated rule-of-reason test that the Ninth Circuit applied here, particularly given that joint ventures are generally regarded as procompetitive enterprises that should not be subject to such stringent antitrust scrutiny.

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[1] Pursuant to Supreme Court Rule 37.6, Amici state that this brief was prepared in its entirety by *amici curiae* and their counsel. No monetary contribution toward the preparation or submission of this brief was made by any person other than *amici curiae* and their counsel. The Amici are listed in the Appendix to this brief. This brief is filed with the consent of both parties.

SUMMARY OF THE ARGUMENT

The Ninth Circuit improperly presumed that the NFL-DirecTV joint venture's distribution of its core product caused anticompetitive effects, adopting a "quick-look" test that assumed but did not require alleging facts showing that the venture harmed competition in a relevant market. Its decision marks a stark departure from existing joint-venture law and threatens to undermine and discourage joint ventures, even though this Court and the lower courts have long recognized that joint ventures are ordinarily procompetitive and lawful, producing products and services that would not exist without cooperation. Indeed, the district court here correctly found that without extensive cooperation among the NFL and its teams, including the pooling of their separate property rights, the broadcasts of NFL games that plaintiffs challenge would not exist in the first place. *See In re NFL Sunday Ticket Antitrust Litig.*, No. 15-02668-BRO, 2017 U.S. Dist. LEXIS 121354, at *43–47 (C.D. Cal. June 30, 2017), *rev'd*, 933 F.3d 1136 (9th Cir. 2019).

Nevertheless, the Ninth Circuit's decision declares presumptively *unlawful* all joint-venture restrictions, including those that are created to preserve the viability of the joint venture. In doing so, the Ninth Circuit dispenses with the normal requirement in all rule-of-reason cases that an antitrust plaintiff plead and prove facts establishing that the challenged conduct had anticompetitive effects within a well-defined antitrust market. In effect, the Ninth Circuit's decision would condemn any attempts to restrict a venture participant's ability to undermine the venture by independently

manufacturing, selling, or distributing a venture-created product.

The Ninth Circuit's decision should be reversed because it conflicts with precedent, including from this Court, holding that restrictions on a joint venture's core activity are at a minimum subject to the full rule-of-reason inquiry. If the Ninth Circuit's decision stands, it would severely undermine procompetitive joint-venture creation to the detriment of consumers.

Moreover, because the challenged agreement concerns the distribution of a joint venture's core product, the Ninth Circuit should have presumed the *procompetitive* effects of the joint venture and applied the Court's "twinkling of an eye" test—what Amici here call the "procompetitive quick-look test"—which this Court identified in *American Needle, Inc. v. NFL*, 560 U.S. 183, 203 (2010). But whether and when to apply the procompetitive quick-look test is subject to a split among the lower courts. This Court should review the Ninth Circuit's decision to provide clarity on this important issue of antitrust law.

ARGUMENT

I. THE NINTH CIRCUIT'S DECISION UPSETS DECADES OF JOINT-VENTURE LAW

Joint ventures "are presumptively lawful and antitrust's duty is only to 'disapprove' those provisions that seem, on balance, to produce greater competitive harms than efficiency gains." Phillip Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 2100 (4th ed. 2018); *see also Broad.*

Music, Inc. v. Columbia Broad. Sys., 441 U.S. 1, 23 (1979) ("*BMI*") (joint ventures are "not usually unlawful"). Such a presumption makes sense: firms enter into joint ventures to lower costs or increase efficiencies, which ultimately benefits consumers. *See* Phillip Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 2100 (4th ed. 2018) (a joint venture "enables its members to produce some input at a lower cost than they would otherwise have paid, or to produce something that consumers prefer"). Joint ventures are common in many industries including publishing, pharmaceuticals, oil and gas, and technology. Such joint ventures are governed by contractual agreements which typically spell out management responsibilities, capital requirements, and rules of ownership over property of the joint venture including any intellectual property rights. When analyzing joint ventures, courts have been careful to balance the competitive gains from the venture with the possibility that the venture is producing anticompetitive effects. *See, e.g.*, *Texaco Inc. v. Dagher*, 547 U.S. 1, 5–7 (2006) (holding that the rule of reason governs joint ventures and requires plaintiffs to "demonstrate that a particular contract or combination is in fact unreasonable and anticompetitive before it will be found unlawful").

The Ninth Circuit's decision to presume anticompetitive effects from the NFL-DirecTV agreement is unwarranted. *See In re NFL Sunday Ticket Antitrust Litig.*, 933 F.3d 1136, 1155 (9th Cir. 2019) ("When there is such an agreement not to compete in terms of output, 'no elaborate industry analysis is required to demonstrate the

anticompetitive character of such an agreement.'") (quoting *NCAA v. Board of Regents*, 468 U.S. 85, 109 (1984)). Indeed, rather than requiring well-pleaded facts that, if true, would have established anticompetitive effects, the Ninth Circuit instead relied on a tautology in refusing to dismiss the complaint: "the complaint adequately alleges the element of injury to competition by alleging that the interlocking Teams-NFL and NFL-DirecTV Agreements injure competition." *Id.* at 1155–56; *but see Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (alleging "legal conclusions" or "a formulaic recitation of the elements of a cause of action will not do").

The Ninth Circuit's decision also disposed of the traditional rule-of-reason burden on plaintiffs to plausibly allege a relevant market and anticompetitive harm within that market. *NFL Sunday Ticket*, 933 F.3d at 1155–56 ("Because the complaint adequately alleged that the defendants have imposed 'a naked restriction' on output, it has not failed to allege market power . . . [or] injury to competition . . . ."). The Ninth Circuit held that the alleged restraint instead should be evaluated under a quick-look test that presumes such harm because it believed that the plaintiffs had alleged a "'naked restriction' on output." *Id.* at 1155–56 ("Here, as in *NCAA*, 'an observer with an even rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect.'") (citation omitted); *see also Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 769–70 (1999) ("In each of these cases [including in *NCAA*], which have formed the basis for what has come to be

called abbreviated or 'quick-look' analysis under the rule of reason, an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets.").

Many joint ventures, however, set restrictions on the price or output of their core product and are not quickly condemned as unlawful "naked restraints" for that reason alone. *See Dagher*, 547 U.S. at 7 ("As a single entity, a joint venture, like any other firm, must have the discretion to determine the prices of the products that it sells . . . ."). Such restrictions are often integral to the viability of the joint venture because they prevent participants from undermining the jointly produced goods or services. Thus, restrictions on the price or output of the core joint-venture product can be procompetitive and should be permissible unless plaintiffs show them to be unlawful under the rule of reason. *BMI*, 441 U.S. at 8–9, 24 (holding *per se* liability did not apply even though "[t]o the Court of Appeals and CBS, the blanket license involves 'price fixing' in the literal sense: the composers and publishing houses have joined together into an organization that sets its price for the blanket license it sells"); *Dagher*, 547 U.S. at 3, 7–8 (holding it is not *per se* illegal for a joint venture to set prices for its products, and refusing to apply the rule under the ancillary restraints doctrine that makes "a naked restraint on trade . . . invalid" because that "doctrine has no application here, where the business practice being challenged involves the core activity of the joint venture itself—namely, the pricing of the very goods produced and sold by [the venture]").

Indeed, in *BMI* this Court was faced with an agreement by music composers to jointly sell the rights to use the composers' copyrighted works through a nonprofit corporation, BMI. 441 U.S. at 4–6. The composers' decision permitted BMI to create a blanket license that content creators such as CBS, and individual users such as bars and restaurants, could purchase. *Id.* Plaintiffs challenged the agreement as an illegal price-fixing arrangement among competitors. *Id.* at 8–9. In reversing the Court of Appeals' decision there, this Court refused to apply a *per se* test and instead held that the restraint at issue must be analyzed under the full rule of reason. *Id.* at 24–25 ("[W]hen attacked, it should be subjected to a more discriminating examination under the rule of reason."). In doing so, the Court recognized that the agreement at issue was "not a naked restraint" but rather one that developed "out of the practical situation in the marketplace," including the prohibitive cost of licensing with individual users. *Id.* at 20 (internal quotation marks and alteration omitted). As a result, the readily apparent benefits of the arrangement suggested that the challenged restraint very well might be procompetitive. *Id.* at 20–21.

Similarly here, the agreement among the NFL teams is necessary to create a new product, the licensing to broadcast out-of-market games. The NFL and each of its teams own their respective intellectual property rights. For example, the NFL owns the NFL's shield logo while each team owns its own logo. *See, e.g.*, *Spinelli v. NFL*, 96 F. Supp. 3d 81, 114 (S.D.N.Y. 2015). Without agreements between and among the broadcasting network, the

NFL, and the NFL teams, there could no television broadcasts because such broadcasts require displaying the NFL's and the NFL teams' protected intellectual property.

The Ninth Circuit's decision retreats to the premise that competition is always better than collaboration. But that notion is contrary to well-established precedent that joint ventures are, in many instances, procompetitive. *See, e.g.*, *BMI*, 441 U.S. at 23 ("Not all arrangements among actual or potential competitors that have an impact on price are *per se* violations of the Sherman Act or even unreasonable restraints. . . . Joint ventures and other cooperative arrangements are also not usually unlawful, at least not as price-fixing schemes, where the agreement on price is necessary to market the product at all."); U.S. Dep't of Justice & FTC, *Antitrust Guidelines for Collaborations Among Competitors* at 1 (2000) ("In order to compete in modern markets, competitors sometimes need to collaborate. . . . Such collaborations often are not only benign but procompetitive. Indeed, in the last two decades, the federal antitrust agencies have brought relatively few civil cases against competitor collaborations."); *see also* U.S. Dep't of Justice & FTC, *Joint Antitrust Statement Regarding COVID-19* (2020), https://www.justice.gov/atr/joint-antitrust-statement-regarding-covid-19 (reaffirming guidance provided in the DOJ and FTC's Antitrust Guidelines for Collaborations Among Competitors).

The fact that the challenged restrictions are not only necessary to the NFL's joint venture but also procompetitive distinguishes this case from those that presume anticompetitive effects, such as *FTC v.*

Indiana Federation of Dentists, 476 U.S. 447 (1986), and *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978). In both *Indiana Federation* and *National Society of Professional Engineers*, this Court presumed anticompetitive effects from the challenged restraints because there were no cognizable justifications for the restrictions. *See Ind. Fed'n*, 476 U.S. at 459–60 (finding alleged restraint had no "competitive virtue"); *Nat'l Soc'y of Prof'l Eng'r*, 435 U.S. at 693–95 (finding the Society's proffered justification was not cognizable under the rule of reason). Here, as in *California Dental Association v. FTC*, 526 U.S. 756 (1999), the joint venture has demonstrable procompetitive effects and thus "fails to present a situation in which the likelihood of anticompetitive effects is comparably obvious." *Id.* at 771 (applying the full rule of reason where the restraint at issue "might plausibly be thought to have a net procompetitive effect, or possibly no effect at all on competition").

The incorrect application of the antitrust laws has the potential to undermine joint-venture creation more broadly and to prevent the development of consumer welfare enhancing products, such as those that are the result of the joint licensing of intellectual property rights. For example, two car manufacturers who jointly built and operated a production facility would have needed to agree on "how big a facility to build," "how many cars to produce," and how best to sell those cars. *See* Phillip Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 2131 (4th ed. 2018) (discussing hypothetical joint venture between GM and Toyota).

Those agreements are undoubtedly lawful, as the joint venture could not succeed without such agreements in place. Nevertheless, applying the Ninth Circuit's standard would mean a plaintiff challenging such a venture almost certainly would survive a motion to dismiss, subjecting the venture partners to expensive discovery and pressure to enter *in terrorem* settlements. *Twombly*, 550 U.S. at 557–58; *see also Matushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 594 (1986) ("[M]istaken inferences in cases such as this one are especially costly, because they chill the very conduct the antitrust laws are designed to protect."). In turn, the near impossibility of dismissing meritless challenges to joint ventures before discovery would likely chill innovation, to the detriment of both the economy and consumers. *See, e.g.*, U.S. Dep't of Justice & FTC, *Antitrust Guidelines for Collaborations Among Competitors* at 1 (2000) ("Nevertheless, a perception that antitrust laws are skeptical about agreements among actual or potential competitors may deter the development of procompetitive collaborations.").

The Ninth Circuit's decision expands the anticompetitive quick-look test to nearly all joint-venture conduct. In doing so, the appellate court's decision discourages a broad swath of beneficial, innovative, and collaborative conduct by disregarding the rule of reason's requirement to plead *and prove* anticompetitive effects. But, as discussed above, joint ventures are generally regarded as lawful, and experience does not support subjecting joint ventures to stricter-than-usual antitrust scrutiny. Therefore, the Amici request that this Court reiterate its rejection of a truncated,

quick-look standard that presumes anticompetitive effects from joint venture activity. *See, e.g.*, *Dagher*, 547 U.S. at 7 n.3 (holding "for the same reasons that *per se* liability is unwarranted" the conduct at issue could not be unlawful "under the quick look doctrine," which is limited to conduct "so plainly anticompetitive that courts need undertake only a cursory examination before imposing antitrust liability").

II. GUIDANCE FROM THIS COURT IS NEEDED TO UNDERSTAND WHICH RULE-OF-REASON TEST APPLIES TO RESTRAINTS ON A JOINT VENTURE'S CORE ACTIVITY

Although this Court has decided several cases concerning how antitrust laws apply to joint ventures, lower courts have still applied this Court's rulings inconsistently. For instance, lower courts have disagreed about when to apply the "procompetitive quick-look test," which this Court discussed in *American Needle*, to determine if a joint venture's activity is procompetitive and therefore lawful. Given this confusion, further guidance from this Court is needed.

In *Dagher*, this Court held that a joint venture's conduct in setting the price of the venture's products could not be condemned as *per se* unlawful. Instead, this Court held that, because the restriction at issue involved the "core activity of the joint venture itself," the restriction was likely lawful. *Id.* at 7–8; *see also BMI*, 441 U.S. at 23 ("Joint ventures and other cooperative arrangements are also not usually unlawful, at least not as price-fixing schemes, where

the agreement on price is necessary to market the product at all.").

The Court took another step toward presuming that restrictions on a joint venture's core product are lawful in *American Needle, Inc. v. NFL*, 560 U.S. 183 (2010). There, it recognized that the fact that the NFL "must cooperate in the production and scheduling of games[] provides a perfectly sensible justification for making a host of collective decisions." *Id.* at 202. While this reasoning might not exempt *all* of the NFL's conduct from antitrust scrutiny, the Court wrote that whether the restraint relates to the venture's core activity informs which test applies to analyze the restraint's legality: "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)). The Court then reconfirmed that "[i]n such instances, the agreement is likely to survive the Rule of Reason." *Id.* at 203 (joint ventures are "not usually unlawful . . . where the agreement . . . is necessary to market the product at all.") (quoting *BMI*, 441 U.S. at 23) (alterations in *American Needle*). Finally, this Court counseled that in certain situations "the Rule of Reason may not require a detailed analysis; it 'can sometimes be applied in the twinkling of an eye.'" *Id.* (quoting *NCAA*, 468 U.S. at 110 n.39).

The "twinkling of an eye" approach discussed in *American Needle* is not the same quick-look test applied by the Ninth Circuit. Whereas the Ninth Circuit presumed that the joint venture here

resulted in unlawful anticompetitive effects because it ostensibly placed restraints on output, *American Needle* suggests that where joint ventures place restrictions on how their core products are marketed, such restrictions may be close to presumptively lawful. *See also* Babette Boliek, *Antitrust, Regulation, and the "New" Rules of Sports Telecasts*, 65 Hastings L. Rev. 501, 524 (2014) ("Here the inquiry would . . . [result in] an almost rebuttable presumption that the restraint was reasonably ancillary to the 'core activity'" and hence lawful.).

Although few courts have applied the procompetitive quick-look test discussed in *American Needle*, applying the test to a joint venture's decision about how to distribute its core products would best balance the twin goals of imposing antitrust liability where appropriate without chilling procompetitive conduct.

For instance, in *Spinelli v. NFL*, the district court upheld a joint-licensing arrangement for pictures of NFL games because "the photographs at issue contain intellectual property owned by the NFL and at least one NFL Club." 96 F. Supp. 3d at 114. In holding that plaintiffs failed to state a claim for relief, the court noted that the challenged restraint was "[a]t a minimum, under *American Needle* . . . reasonable as a matter of law because collective licensing is 'essential if the product is to be available at all.'" *Id.* at 114 n.14 (quoting *Am. Needle*, 560 U.S. at 203). In doing so, the court acknowledged and applied the procompetitive quick-look test. *Id.* ("In such cases, 'the Rule of Reason may not require a detailed analysis; it can sometimes be applied in

the twinkling of an eye.'") (quoting *Am. Needle*, 560 U.S. at 203).

A distribution scheme for a joint venture's product is "essential if the product is to be available." *Id.* In order to distribute its product, a joint venture must make decisions including how much output to distribute and the most efficient means of distribution. *See, e.g.*, *Dagher*, 547 U.S. at 6–7 (finding no reason to treat joint venture "differently just because it chose to sell [products] under two distinct brands" rather than "under a single brand"); Babette Boliek, *Antitrust, Regulation, and the "New" Rules of Sports Telecasts*, 65 Hastings L. Rev. 501, 522–23 (2014) ("Indeed, given the overwhelming importance of broadcast revenue to the NFL, it is fairly easy to assert that the centralized sale of broadcast rights is central to the 'economic reality' of providing competitive football . . . .").

The Ninth Circuit's decision ignores these realities and instead focuses on Petitioners' supposed limitation on output. *NFL Sunday Ticket*, 933 F.3d at 1155. But even if Petitioners somehow limited output (an issue not addressed in this brief), output agreements in the joint venture context are "not inherently suspect." Phillip Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 2131 (4th ed. 2018) ("[M]any express restrictions on joint venture output are governed by the rule of reason. The most general rationale is clear: many if not most joint ventures must agree on the output of the venture itself."). Indeed, "the essence of joint ventures is joint production, and joint production entails that

participants make at least some decisions about joint output inside the venture." *Id.*

It appears impossible to square the Ninth Circuit's decision to apply an anticompetitive quick-look test to condemn Petitioners' conduct with the decision in cases like *Spinelli* to adopt a procompetitive quick-look test. Both cases involve a collective license to use the intellectual property of the NFL and its multiple teams. Yet the Ninth Circuit's decision likely would condemn the same conduct held procompetitive as a matter of law in *Spinelli*.

Nor does it appear possible to reconcile the Ninth Circuit's decision with this Court's repeated recognition that joint ventures are generally lawful, and thus should not be subject to review under standards presuming their illegality (whether *per se* or anticompetitive quick look). *E.g.*, *Dagher*, 547 U.S. at 7 n.3; *BMI*, 441 U.S. at 23.

A procompetitive quick-look test is most appropriate here. Without cooperation from NFL teams, NFL football could not exist. And without cooperation among NFL teams and the NFL itself, television broadcasts of NFL football games could not exist, as the broadcasts necessarily require contributions of intellectual property rights owned by multiple entities, including the NFL teams' and the NFL players' names, images, and likenesses. Like the agreement among composers in *BMI*, the agreement among the NFL teams here is necessary to create the relevant product, a license to broadcast out-of-market games. *See BMI*, 441 U.S. at 23 ("Joint ventures and other cooperative arrangements are also not usually unlawful, at least not as price-

fixing schemes, where the agreement on price is necessary to market the product at all."). Thus, the agreements at issue include nothing more than common restrictions on a joint venture's core product that should be analyzed under the procompetitive quick-look standard.

CONCLUSION

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

Respectfully submitted,

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