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 IN OPPOSITION


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## QUESTIONS PRESENTED

1. Should the Court review the splitless, fact-bound application of the well-settled rule of reason standard to the denial of a pre-discovery motion to dismiss?

2. Should the Court review the splitless, fact-bound holding that Respondents properly pleaded antitrust standing where the complaint alleges they were directly harmed by the alleged conspiracy, does not assert a claim for pass-on damages, and where it is undisputed the issue is not case-dispositive?

## RULE 29.6 DISCLOSURE STATEMENT

Respondents Ninth Inning, Inc., d/b/a "The Mucky Ducky," and 1465 Third Avenue Restaurant Corp., d/b/a "Gael Pub," state that they have no parent corporations and that no publicly held corporation owns 10% or more of their stock.

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## INTRODUCTION

The Ninth Circuit's interlocutory decision applying well-settled legal standards to the specific allegations of this case, and remanding the case for discovery, does not warrant review. Petitioners invent circuit conflicts where none exist, overlook the Ninth Circuit's measured holding based on decades of this Court's own cases, and seek review before there is any record on the myriad factual issues that Petitioners and their *amici* raise. Neither question presented by the Petition warrants this Court's review.

On the first question presented, Petitioners disregard both the substance of Judge Ikuta's unanimous opinion for the court and the procedural posture of the case. Far from deploying a new standard of review for antitrust cases involving joint ventures, the panel expressly applied the "rule of reason" standard that Petitioners themselves agree is the right rule, and which all the cases in their non-existent split uniformly apply. The panel followed this Court's well-settled precedents, including *National Collegiate Athletic Association v. Board of Regents of University of Oklahoma*, 468 U.S. 85 (1984) ("*NCAA*"), where similar restrictions on the output of football telecasts were declared unlawful *after trial*, to conclude that the complaint stated plausible claims for relief *at the pleading stage*. The Ninth Circuit's holding was not only in line with this Court's decisions, but also consistent with the only other court of appeals decision involving the National Football League's ("NFL") telecast restrictions, which affirmed the denial of a motion to dismiss based on the very same restrictions at issue in this case, a decision that the Petition ignores. *See Shaw v. Dallas Cowboys Football Club, Ltd.*, 172 F.3d 299 (3d Cir. 1999).

Each of the cases cited by the Petition as allegedly giving rise to a conflict applied the same settled rule of reason standard as the Ninth Circuit below, but to different facts and different types of alleged anti-competitive conduct. Moreover, consistent with the fact-bound and case-specific nature of the flexible rule of reason inquiry, *each* of those decisions was made after the development of a full evidentiary record, not on the pleadings as Petitioners seek here. Not only is there no conflict, but Petitioners' own authorities reflect that there is no reason for this Court's review before any factual record is made.

The Petition also misconstrues *American Needle, Inc. v. National Football League*, 560 U.S. 183 (2010), the most recent decision from this Court addressing the application of the Sherman Act to professional sports leagues. There, this Court unanimously held that the NFL's status as a joint venture does *not* give it any unusually protected status under the antitrust laws. Rather, applying *NCAA*, the Court reaffirmed that because sports require some degree of cooperation, the rule of reason—the standard applied by the Ninth Circuit—applies to what would otherwise be deserving of *per se* treatment. *Id.* at 203. Notably, while Petitioners embrace *American Needle* before this Court, they tried to distinguish and run away from that ruling in the Ninth Circuit.

As to the second question regarding antitrust standing, there is again no conflict. As the panel majority observed, standing was properly pleaded in this case because the complaint alleged that Respondents suffered direct harm in the very market they purchased from, due to Petitioners' conspiracy to restrict and limit football telecasts. As the panel majority recognized, *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), posed no bar because Respondents never claimed the kind of indirect "pass-on damages" that that decision forecloses.

Far from giving rise to any conflict, the Ninth Circuit's ruling on antitrust standing is fully consistent with the decisions cited in the Petition. And given that none of those decisions involved, let alone addressed, the type of output-restricting conspiracy at issue in this case, there is certainly no square conflict warranting this Court's review.

But there is even less reason to reach out to address the antitrust standing question, given that even Petitioners concede it is not case-dispositive. Respondents' claims for injunctive relief are unaffected by the resolution of this question, as are claims for damages stemming from the agreement between the NFL and DirecTV.

Ultimately, Petitioners' request to review the application of well-settled law to the allegations of this dispute, in the absence of any arguable conflict of authority, and where the interlocutory decision below simply remands the case for further proceedings, should be denied.

## STATEMENT OF THE CASE

1. This case is about the NFL's, the NFL teams', and DirecTV's interlocking agreements to eliminate competition in the market for live telecasts of professional football games. Other than local-market games broadcast on network television, telecasts for Sunday afternoon NFL games are available only through DirecTV's NFL Sunday Ticket, a bundled package of all NFL games available exclusively to DirecTV Sunday Ticket subscribers. Pet. App. 5a. Respondents purchased Sunday Ticket directly from DirecTV (along with a required basic television package from DirecTV) and challenge this exclusive arrangement among the NFL's teams, the league, and DirecTV as violating §§ 1 and 2 of the Sherman Act.

The complaint alleged in detail the injury to competition caused by Petitioners' unlawful arrangement. The complaint described how the pooling of telecast rights by NFL teams, the prohibitions on individual teams' selling of telecasts, and the limitation of out-of-market Sunday afternoon games solely to DirecTV's Sunday Ticket subscribers, "allows the Defendants to restrict the output of, and raise the prices for, the live broadcast of NFL Sunday afternoon out-of-market games," Pet. App. 114a, ¶11, and drives "prices for residential subscribers . . . far higher than they would be in a competitive market," *id.* at 117a, ¶17. The complaint further alleged that these agreements "drastically curb output, reduce choice, and increase price." *Id.* at 118a, ¶20; *see also id*. at 144a–54a, ¶¶99–113. The complaint supported these allegations with facts describing the rising prices of Sunday Ticket over time, comparisons to the pricing of Sunday Ticket in Canada where the service is not offered on an exclusive basis, comparisons to the structure and pricing of similar bundles of other professional sports leagues, and the anticompetitive history of the NFL's use of broadcasting rights. *See id.* at 114a–17a, 132a–64a.

In particular, the complaint alleged that Petitioners restrained competition by reducing output. Absent the agreements in question, each NFL team would be free to compete with each other and the NFL in selling the rights to see the team's games over cable or satellite television. Moreover, teams and the league would be free to provide their content to providers other than DirecTV. As the complaint alleged, that is what happened in college football after the Court's decision in *NCAA*. *See* Pet. App. 160a–62a, ¶¶130–34. The increased competition in college football broadcasts after that decision led to many more games being accessible at lower prices. *See id.* at 12a.

The complaint also expressly alleged a "relevant product market" over which Petitioners clearly exercise power, consisting of "live video presentations of regular season NFL games" and a "submarket for 'out-of-market' games," and alleged that "[b]roadcasts of other sports or other content do not compete with broadcasts of NFL games." *Id.* at 129a, ¶53.

2. The district court granted Petitioners' motion to dismiss the complaint in its entirety, and with prejudice, before discovery in the case had been taken. Despite the lack of any factual record concerning Petitioners' untested arguments that the output-restriction conspiracy at issue had "pro-competitive benefits" or was "necessary" to Petitioners' arrangements, the district court determined that the conduct was immune from antitrust scrutiny as a matter of law, and further held that Respondents lacked antitrust standing despite allegations that Petitioners' conspiracy harmed them directly. *See id.* at 44a–99a.

3. The Ninth Circuit reversed the dismissal of the complaint and remanded for further proceedings. At the threshold, Judge Ikuta, speaking for the court, recognized the narrow scope of the decision, which solely concerned whether the complaint stated a cause of action. *Id.* at 6a (noting that, at this "preliminary stage," the complaint stated a claim for relief). In reviewing the allegations of the complaint, taken as true and construed in the Respondents' favor at this juncture, *id.* at 16a, the Ninth Circuit noted that the complaint alleged that Petitioners' "interlocking agreements work together to suppress competition for the sale of professional football game telecasts in violation of Section 1 and Section 2 of the Sherman Antitrust Act." *Id*. Specifically, the thirty-two individual NFL teams, "each of which is a separate 'independently owned, and independently managed business,'" agreed

to pool their telecasting rights and give the NFL the authority to exercise those rights. *Id*. at 14a (quoting *Am. Needle*, 560 U.S. at 196). The NFL subsequently agreed with DirecTV to limit distribution of so-called "out of market" telecasts to DirecTV subscribers that had not only purchased DirecTV's basic package but also its add-on Sunday Ticket package. *Id*. at 15a. Absent those arrangements, "the telecasts broadcast solely on Sunday Ticket would be available through other distributors," and "each NFL team could make its own arrangements for telecasts of its games, and could contract with competing distribution channels or media, including other cable, satellite or internet carriers or competing networks." *Id.* at 16a. As a result of this competition, the complaint alleged that "a greater number of telecasts of NFL games would be created, and those telecasts would be more accessible to more viewers at lower prices." *Id.*

Turning to the law, the Ninth Circuit repeatedly stated that the rule of reason applied. *Id.* at 18a ("We determine whether a particular restraint of trade is unreasonable and thus a violation of Section 1 under the so-called 'rule of reason.' "); *id*. at 18a n.5 ("[W]hen considering agreements among entities involved in league sports, such as here, a court must determine whether the restriction is unreasonable under the rule of reason."). In applying the well-settled elements of the rule of reason, the court did not absolve Respondents of the requirement to plead an injury to competition, but rather expressly held that the "allegations on their face adequately allege an injury to competition." *Id.* at 20a. In particular, Judge Ikuta stressed that the "interlocking agreements at issue" were the "exact type of arrangement . . . that the Supreme Court held caused an injury to competition in the context of college football," in *NCAA*. *Id.*

The court walked through the similarities between the facts alleged in this case and those in *NCAA* in detail. First, the panel noted that, just as in *NCAA*, the alleged agreements "limit the 'amount of televised [professional] football' that one team may televise because they restrict the number of telecasts made to a single telecast for each game." *Id.* at 21a (citing *NCAA*, 468 U.S. at 94) (alteration in original). Second, as in *NCAA*, "no individual NFL team is permitted to sell its telecasting rights independently." *Id.* (citing *NCAA*, 468 U.S. at 94 ("[n]o member [college] is permitted to make any sale of television rights except in accordance with the basic plan") (alteration in original)). Third, the complaint "likewise alleges that the interlocking agreements restrain the production and sale of telecasts in a manner that constitutes 'a naked restriction' on the number of telecasts available for broadcasters and consumers." *Id.* at 22a.

In response to Petitioners' argument that Respondents failed to allege an injury to competition "because the production of the telecasts necessarily requires joint action," and that "the agreement of all participants is necessary in order to create the telecasts at all," the Ninth Circuit held that the record did not support that contention at this preliminary stage of the case. *Id.* at 24a–25a. The panel observed that "[i]n the absence of a legal requirement that the NFL teams, NFL, and broadcasters coordinate in filming and broadcasting live games, the Los Angeles Rams (for instance) could contract for their own telecast of Rams games and then register [the copyright for] the telecasts for those games with the Rams (and perhaps the team against whom they are playing)," *id.* at 26a–27a, which the Court noted was precisely what NFL teams did before the inception of the challenged agreements and the Sports Broadcasting Act ("SBA").[1] *See id.* at 6a ("In the 1950s, the right to telecast NFL games was 'controlled by individual teams,' which independently licensed the telecasts of their games to television networks.") (quoting *U.S. Football League v. Nat'l Football League*, 842 F.2d 1335, 1346 (2d Cir. 1988)). "Only the agreements that are the subject of plaintiffs' antitrust action prevent such independent actions." *Id.* at 27a.

The panel below also noted several alleged or undisputed facts that supported its conclusion: (1) that NFL teams "already negotiate individual radio broadcasting contracts," *id.* at 28a; (2) this Court's recognition in *NCAA* that college football teams "are clearly

[1] As the court below remarked, the SBA exception to antitrust liability only applies to advertising-supported "sponsored telecasts" and does not apply to contracts with pay cable and satellite television services, such as DirecTV. *See* Pet. App. 13a. Petitioners did not argue otherwise below, *id.* at 17a, and have not done so here. In considering this question on identical facts, the Third Circuit agreed that the SBA exception does not apply to pay television services. *Shaw*, 172 F.3d at 302–03.

able to negotiate agreements with whatever broadcasters they choose," *id.* at 27a (quoting *NCAA*, 468 U.S. at 114 n.53) (quotation marks omitted); (3) that after the decision in *NCAA*, "the NCAA teams arranged telecasting on their own," *id.*; and (4) that "in comparable sports leagues, namely the National Hockey League and Major League Baseball, 'each team owns the initial right to control telecasts of its home games,'" *id.* (quoting *Laumann v. Nat'l Hockey League*, 907 F. Supp. 2d 465, 473, 485 (S.D.N.Y. 2012)).

The Ninth Circuit also directly addressed Petitioners' relevant market arguments. *Id.* at 29a. The court noted that "professional football games have no substitutes" and thus "defendants in this case have effective control over the entire market for telecasts of professional football games." *Id.* The panel further observed that Respondents "have adequately alleged that defendants have market power in the market for professional football telecasts," and that the "complaint adequately alleges that the interlocking NFL-Team and NFL-DirecTV agreements were designed to maintain market power." *Id.* at 37a. On the larger question of injury to competition, the Court noted that "[t]he complaint alleges that defendants have limited output by restricting the quantity of telecasts available for sale, and that the NFL has set a uniform quantity of telecasts of football games—one per game—with no regard to the actual consumer demand for the telecasts." *Id.* at 28a. Therefore, "defendants' interlocking agreements have the effect of limiting output to one telecast of each game, which is then broadcast in a limited manner. . . ." *Id.* at 29a–30a.

On the question of antitrust standing and *Illinois Brick*, the court recognized that the answer was not case dispositive. Petitioners did not contest that Respondents had standing to pursue damages with respect to the NFL-DirecTV agreement and to pursue injunctive relief against all Petitioners. *Id.* at 30a n.6. Underscoring the preliminary posture of the case, the court concluded only that the "plaintiffs' allegation that they were directly injured by the conspiracy among the NFL teams, the NFL, and DirecTV is sufficient to allege antitrust standing for purposes of surviving a motion to dismiss." *Id.* at 33a.

On the merits, the court observed that pass-on damages, such as those at issue in *Illinois Brick*, were not claimed in the complaint. *Id.* at 33a n.7 ("[T]o calculate the plaintiffs' damages, a court would not need to determine to what extent the NFL overcharged DirecTV; it would need to consider only the prices consumers paid compared to the prices that would have existed in a competitive market."). Judge N.R. Smith dissented solely from this part of the panel's opinion, stating that Ninth Circuit precedent would not permit standing to pursue claims for damages arising from the agreement between the NFL and the teams, which he viewed as a form of pass-on damages, in the absence of an allegation of a price-fixing conspiracy. *Id.* at 38a–43a. The majority, however, explained that the agreements were interlocking, *id.* at 32a–33a, and that there is no distinction between a price-fixing and output-restricting conspiracy, given this Court's instruction that "price-fixing conspiracies are functionally indistinguishable from output-restricting conspiracies." *Id.* at 35a (citing *Cal. Dental Ass'n v. F.T.C.*, 526 U.S. 756, 777 (1999) ("[a]n agreement on output also equates to a price-fixing agreement")).

## REASONS FOR DENYING THE PETITION

There is no conflict as to either question presented in the Petition, nor any other "compelling reason[ ]," for this Court's review. S. Ct. R. 10. As to the first question, Petitioners claim that the Ninth Circuit "refuse[d] to apply" the rule of reason. Pet. at 2. That is wrong. The panel made clear that the rule of reason applies to this case; properly identified the elements of that standard; and held that at this preliminary stage the complaint pleaded each of those elements. The Petition thus challenges only the panel's application of well-settled law to particular allegations, a case-specific question on which there is no conflict. Further, the panel's decision was plainly correct, given that this Court struck down as unlawful similar output restrictions regarding college football telecasts in *NCAA* after development of a full evidentiary record and a trial on the merits. The Ninth Circuit's decision that the complaint here stated plausible claims warranting discovery is fully consistent with *NCAA* and does not warrant review.

On the second question, Petitioners conjure a split based on the alleged "expansion" of a "co-conspirator" exception to *Illinois Brick*, but once again there is no conflict. The Ninth Circuit did not purport to apply any "exception" to *Illinois Brick*. Instead, the opinion noted that the complaint alleged direct harm arising from Petitioners' "interlocking agreements" to restrict output in the very market Respondents purchased in. The opinion also notes that the complaint does not assert pass-on damages foreclosed by *Illinois Brick*, and for these reasons, the allegations of the complaint were "sufficient to allege antitrust standing for purposes of surviving a motion to dismiss." Pet. App. 33a. Petitioners fail to address any of these aspects of the Ninth Circuit's ruling. And none of the cases allegedly conflicting with the Ninth Circuit's ruling addressed or involved the applicability of *Illinois Brick* to a conspiracy to restrict output, let alone one similar to the arrangement in this case.

Further, the *Illinois Brick* question in this case is not case-dispositive, and discovery will continue regardless, as all panel members recognized. *See id.* at 30a n.6 ("There is no dispute that the plaintiffs have standing to challenge the NFL-DirecTV Agreement because they are direct purchasers of DirecTV. Nor is there a dispute that the plaintiffs have standing to seek injunctive relief based on the Teams-NFL Agreement[.]"); *id.* at 40a n.2 (dissent acknowledging plaintiffs' standing to seek injunctive relief for "NFL Teams' horizontal [a]greement").

Finally, the procedural posture of this case renders it particularly ill-suited for review. The Court's review of either question presented may be mooted at summary judgment or trial, and in any event either question may be reviewed at the conclusion of this case. Further, this Court's review now is hampered by the lack of any factual record. This is a serious concern here given the fact-bound nature of the issues raised by the Petition, which spends pages (and even more pages added by their industry-aligned *amici*) focusing on facts, attempting to contradict the complaint about the alleged "pro-competitive benefits" of the alleged restraints and other issues. No discovery has been taken and no evidentiary record has been made on any of the relevant facts. There is no reason for the Court to reach out to address the Ninth Circuit's application of settled legal standards to these fact-specific issues ever, but certainly not before the facts are even in the record.

## I. The Ninth Circuit's Application of the Rule of Reason Standard Does Not Implicate a Conflict.

### A. The Ninth Circuit Expressly Applied the Rule of Reason Standard.

Even a cursory review of the panel's opinion shows that the court below repeatedly emphasized the applicability of the rule of reason test and applied its factors to the allegations of the complaint. *Id.* at 18a ("We determine whether a particular restraint of trade is unreasonable and thus a violation of Section 1 under the so-called 'rule of reason.'"); *id*. at 18a n.5 ("[W]hen considering agreements among entities involved in league sports, such as here, a court must determine whether the restriction is unreasonable under the rule of reason."). The Petition references "*per se* rules of illegality," Pet. at 4, but the opinion did not apply any such rules. Instead, the panel simply applied the rule of reason and permitted the case to proceed to discovery.

Petitioners say the Ninth Circuit panel "excused plaintiffs" from their burden to plead "injury to competition" or a "relevant market." *Id.* at 10. But the panel's opinion shows otherwise. The opinion undertakes a lengthy discussion of harm to competition, walking carefully through this Court's decisions, the nature of the alleged agreements and their effect on the marketplace, the history of the NFL's broadcasting arrangements, and the complaint's allegations regarding comparable sports leagues. Pet. App. 20a–29a. Rather than hold that Respondents were "excused" from pleading harm to competition, the panel reviewed these allegations and unanimously held that the "allegations on their face adequately allege an injury to competition," *id.* at 20a, noting that the "interlocking agreements at issue" were the "exact type of arrangement . . . that the Supreme Court held caused an injury to competition in the context of college football," in *NCAA*. *Id.*

As for the relevant market, the Ninth Circuit addressed that as well, stating that "professional football games have no substitutes (as fans do not consider NFL games to be comparable to other sports or forms of entertainment)," *id.* at 29a, that "defendants in this case have effective control over the entire market for telecasts of professional football games," *id.*, that the complaint "adequately alleged that defendants have market power in the market for professional football telecasts," *id.* at 37a, and that the "complaint adequately alleges that the interlocking NFL-Team and NFL-DirecTV agreements were designed to maintain market power." *Id.*

Petitioners seize on the Ninth Circuit's statement that because the complaint alleges a "naked restriction" on output, Respondents were "not required to establish a relevant market" under *NCAA*.[2] *Id.* at 22a. But, as noted above, the panel *in fact held* that market power and the relevant market had been adequately pleaded in the complaint. Indeed, the panel observed that it was precisely because "defendants in this case have effective control over the entire market for telecasts of professional football games" that the complaint "plausibly alleges a naked restraint on output: that the defendants' interlocking agreements have the effect of limiting output to one telecast of each game, which is then broadcast in a limited manner. . . ." *Id.* at 29a–30a. As the court observed, citing to this Court's decisions in *NCAA* and *California Dental Association*, "[w]hen 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,' " Pet. App. 30a (quoting *NCAA*, 468 U.S. at 109), and "an observer with even a rudimentary

[2] The terms "naked restriction" and "naked restraint" are drawn directly from *NCAA*, 468 U.S. at 109–10, and are how this Court itself characterized the similar restrictions on output at issue in that case, as the Ninth Circuit recognized.

understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets." *Id*. (quoting *Cal. Dental Ass'n*, 526 U.S. at 770) (quotation marks omitted). It was on this basis that the panel correctly concluded that an injury to competition was plausibly alleged in this case.

### B. Petitioners' Alleged Conflict is Illusory.

None of the cases cited by Petitioners as allegedly giving rise to a "split" is even arguably in conflict with the Ninth Circuit's ruling, let alone is there a square conflict on "the same important matter." S. Ct. R. 10(a). Petitioners' cited decisions simply apply the rule of reason to the facts before them, just as the Ninth Circuit did to the allegations of the complaint in this case. This does not present a valid basis for this Court's review. *Id*. (Court will "rarely" grant review where lower court has arguably misapplied "a properly stated rule of law").

When the same facts are presented, at the same stage of the case, courts of appeals are in fact in alignment. In *Shaw v. Dallas Cowboys Football Club, Ltd.*, No. 97-5184, 1998 WL 419765 (E.D. Pa. June 23, 1998), the plaintiffs similarly alleged that the NFL's Sunday Ticket package violated federal antitrust law by "restrict[ing] the options available to fans for viewing non-network broadcasts of NFL games, thereby reducing competition and artificially raising prices." 1998 WL 419765, at *1. The district court denied a motion to dismiss those claims. *Id.* at *5. The Third Circuit affirmed. *See Shaw*, 172 F.3d at 303.

Petitioners ignore *Shaw*, and instead cite decisions that involve different leagues (and one case outside the sports league context altogether) and different alleged anticompetitive activities, ranging from joint licensing of merchandise (*Major League Baseball Props., Inc. v. Salvino, Inc.*, 542 F.3d 290, 334 (2d Cir. 2008)), to tennis tour structure (*Deutscher Tennis Bund v. ATP Tour, Inc.*, 610 F.3d 820, 830–33 (3d Cir. 2010)), to Major League Soccer's centralized hiring of players (*Fraser v. Major League Soccer, L.L.C.*, 284 F.3d 47, 59 (1st Cir. 2002)), to totally irrelevant limitations imposed by health care networks (*Med. Ctr. at Elizabeth Place, LLC v. Atrium Health Sys.*, 922 F.3d 713, 724–26 (6th Cir. 2019)).

The only case even arguably in the same factual ballpark as this case, *Chicago Professional Sports Ltd. Partnership v. National Basketball Association*, 95 F.3d 593 (7th Cir. 1996) ("*Bulls II*"), involved certain limitations on cable superstations' telecasting of NBA games. But *Bulls II* did not part ways with the Ninth Circuit's decision on any question of law and did not even uphold the challenged limitations. Rather, after confirming that the rule of reason standard applied, the Court simply remanded for further consideration of the facts under that standard. *Id.* at 600–01.

More critically, all the cases cited by Petitioners evaluated the rule of reason against a developed factual record on summary judgment or after a trial on the merits. *None* of those decisions foreclosed a claim on a motion to dismiss. Petitioners' own cited authorities emphasize why this was the proper approach, because "[t]here is generally no categorical line to be drawn between restraints that give rise to an intuitively obvious inference of anticompetitive effect and those that call for more detailed treatment. *What is required, rather, is an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint*." *Deutscher Tennis Bund*, 610 F.3d at 831 (quoting *Cal. Dental Ass'n*, 526 U.S. at 780–81) (emphasis added). If anything, Petitioners' reliance on these cases underscores why the panel's unanimous decision in this case to reverse an order granting a pre-discovery motion to dismiss was in unison with how rule of reason cases have been treated for decades.

### C. The Ninth Circuit's Reliance on *NCAA* Was Correct and Does Not Give Rise to Any Conflict.

The Ninth Circuit engaged in a detailed and thorough analysis of the similarities between the allegations of this case and *NCAA*. The panel's conclusion "at this preliminary stage" that the complaint pleaded plausible claims for relief was correct and does not implicate any split of authority. Pet. App. 6a. Petitioners seem to argue that their alleged agreements to restrict NFL telecasts should be absolutely immune from antitrust scrutiny, but there is no basis for that novel proposal, which would itself conflict with decades of law from this Court, the motivating purpose behind passage of the SBA, and even the cases Petitioners rely on to manufacture a split. Those cases recognize the fact-specific nature of the rule of reason inquiry and the potential for liability, even in the context of professional sports leagues.

1. The Ninth Circuit properly concluded that the substance of the arrangements in this case and those in *NCAA* are identical in all relevant respects. *Id.* at 17a, 20a–23a. College football games require cooperation between two different teams and one or more governing bodies, just as NFL games do. The schools, the NCAA, and, in many cases, one or more conferences possess trademarks, just as in the NFL. And just as the teams of the NFL are interested in the success of the league as a whole, the Court emphasized that the NCAA plays a similar role with respect to college football, describing it as "the guardian of an important American tradition." 468 U.S. at 101 n.23.

Rather than distinguishing professional leagues from college football, *NCAA* discussed professional leagues throughout. *See* 468 U.S. at 101–02, 104 n.28, 108 n.35, 111–12. In fact, this Court noted with approval a district court decision against the NFL also involving the league's restraints on television broadcasting. *See id.* at 104 n.28 (citing *U.S. v. Nat'l Football League*, 116 F. Supp. 319 (E.D. Pa. 1953) ("*NFL I*")). In support of its determination that "the NCAA's television plan has a significant potential for anticompetitive effects," the *NCAA* Court addressed the SBA and noted that "[t]he legislative history of this exemption demonstrates Congress' recognition that agreements among league members to sell television rights in a cooperative fashion could run afoul of the Sherman Act, and in particular reflects its awareness of the decision in [*NFL I*], which held that an agreement among the teams of the National Football League that each team would not permit stations to telecast its games" in competition with other teams' broadcasts "violated § 1 of the Sherman Act." *Id.*

*American Needle* reaffirmed these standards, unanimously rejecting the NFL's argument that its status as an integrated joint venture rendered it immune from the antitrust laws. *See* 560 U.S. at 199 ("[J]oint ventures have no immunity from antitrust laws.") (quoting *NCAA*, 468 U.S. at 113). While *American Needle* does not discuss broadcasting, it cites *NCAA* repeatedly as a basis for its decision precisely because it found many of the issues resolved in *NCAA* relevant to the NFL's joint licensing of the teams' intellectual property. *See id*. at 192, 197, 199, 203.

Petitioners rely on the statement in *American Needle* that 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). That is hardly controversial. Far from marking a departure from *NCAA*, the Court quoted *NCAA* in that passage. *Id.* Just as in *American Needle*, *NCAA* likewise recognized that a "myriad of rules . . . that restrain the manner in which institutions compete," are not problematic under the antitrust laws. 468 U.S. at

101. But *NCAA* also held that telecast arrangements of the sort being challenged there—and in this case—do not fall into this category. The *NCAA* Court held that while a "certain degree of cooperation is necessary" in collegiate football, the "specific restraints on football telecasts that are challenged in this case do not, however, fit into the same mold." *Id*. at 117.[3]

Petitioners' suggestion that *American Needle* ruled, *sub silentio*, that the legal standards in *NCAA* are inapplicable to professional sports broadcasts or to joint ventures more generally finds no support in the language or logic of that opinion. Indeed, *American Needle* expressly rejected Petitioners' core argument that its status as an integrated joint venture that produces NFL football products makes its restraints presumptively reasonable: "Of course the NFL produces NFL football; but that does not mean that cooperation amongst NFL teams is immune from § 1 scrutiny. Members of any cartel could insist that their cooperation is necessary to produce the 'cartel product' and compete with other products." 560 U.S. at 199 n.7.

2. Petitioners also ignore the history of the telecast restrictions at issue. Far from demonstrating that they are presumptively lawful, *see* Pet. at 4, this

[3] Petitioners and the *amici* that support them consistently conflate the production of football games themselves with the production of the *telecasts* of those games. Playing a game and televising it are not the same thing and, even if they were, this Court has noted that "not all aspects of elaborate interleague cooperation are necessary to produce a game." *Am. Needle*, 560 U.S. at 199 n.7.

history illustrates that the restraints have been challenged and condemned repeatedly in the past. As noted in the panel's opinion, the Justice Department obtained an injunction against the NFL for several of its restrictions on television broadcasts. *See NFL I*, 116 F. Supp. at 327–30. Subsequently, the NFL's teams attempted to pool their television rights with the league to collectively sell those rights as a single package to CBS—the exact type of arrangement as in this case. *See U.S. v. Nat'l Football League*, 196 F. Supp. 445, 446–47 (E.D. Pa. 1961) ("*NFL II*"). That arrangement was also enjoined as illegal under the antitrust laws. *Id*. Only after that did Congress enact a special exception—the SBA—to provide limited protection to the NFL's ability to pool and sell the teams' television broadcasting rights.

Petitioners argue (Pet. at 25–26) that the SBA embodies implicit congressional approval of such arrangements, but there is no dispute that the SBA's carve-out from the antitrust laws does not apply in this case. *See* Pet. App. 13a, 17a. In fact, Petitioners' suggestion that the SBA somehow weighs in *their* favor contradicts the SBA's history and logic. As noted, this Court recognized in *NCAA* that the SBA reflected Congress' understanding that these practices *do* violate the antitrust laws. *See* 468 U.S. at 104 n.28. And the fact that Congress specifically limited the exemption to over-the-air broadcasts indicates that it intended for agreements that prevent competition outside of those broadcasts to remain subject to scrutiny. Even the decisions Petitioners themselves rely on in their imaginary split recognize that the SBA—which would be entirely superfluous if Petitioners' view of the law were adopted—provides no support for their position. *See*, *e.g.*, *Bulls II*, 95 F.3d at 596 ("[T]he Sports Broadcasting Act, as a special-interest exception to the antitrust laws, receives a beady-eyed reading.").[4] There is no reason why the current arrangement should be immune from antitrust scrutiny any more than the proposed arrangement found to be anticompetitive in *NFL II*, which Congress agreed to override only on the condition that NFL games be aired on free television.

This history also illustrates that the Ninth Circuit did not make an "unfounded assumption," Pet. at 26, that teams would, in the absence of the restraints at issue, market their telecasts independently. While there is no factual record at this stage, the Ninth Circuit properly reached its conclusion based on the well-pleaded allegations of the complaint, which alleged that until the SBA, "NFL teams routinely licensed telecasts of their games"; to this day, NFL teams independently negotiate radio broadcasting deals; and college teams, Major League Baseball, and National Hockey League teams all independently license their games in some way. Pet. App. 27a–28a. The Petition renews the league's false narrative that joint action is necessary to produce game broadcasts despite overwhelming evidence—including the NFL's own

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[4] As the Third Circuit noted in *Shaw*, Congress and the NFL itself, through the testimony of its commissioner, understood that the statute "does not cover pay T.V." 172 F.3d at 302 (quotation marks omitted).

history—showing that the NFL teams are entirely capable of doing what the league now says is impossible.

3. Petitioners go even further and suggest that the Second Circuit in *Salvino* and the Seventh Circuit in *Bulls II* have rejected the applicability of *NCAA* to professional sports leagues. Pet. at 21–22. That is untrue. In *Salvino*, far from rejecting *NCAA* as a matter of law, the Court simply held that the record in that case did not have any resemblance to the facts in *NCAA*. *See* 542 F.3d at 319 ("[T]he record in this case does not show any reduction in the licensing of the Clubs' intellectual property. . . ."). The *Salvino* court went so far as to emphasize that it expressed "no view as to what the outcome would be of a case in which a plaintiff challenging the Clubs' centralization of licensing functions in MLBP as their exclusive licensing agent adduced admissible evidence as to the reasonableness of that practice." *Id.* at 334. Nothing in the Second Circuit's opinion suggests that *NCAA* has no bearing on cases involving professional sports leagues.

Similarly, the court in *Bulls II* did not dismiss the applicability of *NCAA* to professional leagues. On the contrary, it simply held that the showing of market power that had been made in *NCAA* required, in the case of the National Basketball Association, further analysis than had been done by the district court there. *See* 95 F.3d at 600. While the Court in *NCAA* had "satisfied itself that the NCAA possesses market power" because "there is a market in college football telecasts on Saturday afternoon in the fall," the *Bulls II* court observed that "there is no time slot when NBA basketball predominates." *Id.* As the "Sunday Ticket" name demonstrates, and as the Ninth Circuit held based on Respondents' allegations, there is a market for NFL games on Sunday afternoons. *See* Pet. App. at 28a–30a. Moreover, insofar as the *Bulls II* court analyzed the relevance of the NBA's structure as such, its analysis was based on the erroneous belief that the NBA and its teams could be viewed as a single entity, a view that was subsequently rejected by this Court in *American Needle*. Simply put, the claim that there is any split with the Seventh Circuit or any other circuit on this issue is a fiction.[5]

[5] The Petition also attempts to distinguish *NCAA* on the basis that, at the time that case was decided, there was no single league or tournament for college teams. *See* Pet. at 10 (quoting *NCAA*, 468 U.S. at 118). The Court's reference to a "single league or tournament" in *NCAA*, however, related to whether the NCAA's television plan was intended to equalize on-the-field competitiveness within a league. *See NCAA*, 468 U.S. at 117–18. The Court noted that not only did the NCAA not make such a claim, the restraints did not even appear "arguably tailored to serve such an interest." *Id.* at 117–19. Contrary to Petitioners' argument, the Court did not hold that similar restraints within a single league would be immune from antitrust scrutiny. In fact, it indicated the opposite, *id.* at 104 n.28, and subsequently so held in *American Needle*. In any event, to the extent Petitioners claim that the restraints here are necessary to achieve competitive balance, it would be premature to address the merits of such a fact-based claim at this preliminary stage.

### D. The Ninth Circuit's Fact-Specific Application of the Rule of Reason, and Remand for Discovery, Does Not Warrant Review.

Ultimately, Petitioners' argument boils down to a disagreement with how the court below applied the rule of reason standard to the factual allegations of this case. Not only is the Ninth Circuit's decision correct, but this Court "rarely grant[s] review where the thrust of the claim is that a lower court simply erred in applying a settled rule of law to the facts of a particular case." *Salazar-Limon v. City of Houston*, 137 S. Ct. 1277, 1278 (2017) (Alito, J., concurring in the denial of certiorari). That instruction is particularly appropriate here, given the panel's unanimous and comprehensive opinion walking step-by-step through the reasons why the complaint was improperly dismissed, and why a remand for further proceedings was warranted.

## II. The Ninth Circuit's Antitrust Standing Ruling Was Correct and Does Not Implicate a Conflict.

The Ninth Circuit's decision that Respondents had antitrust standing to assert claims for damages against the NFL defendants does not give rise to any split. The panel majority rightly concluded that (1) the complaint alleged direct, not indirect, harm arising from Petitioners' agreements to restrict the output of NFL telecasts; (2) the complaint did not assert pass-on damages precluded by *Illinois Brick*; and (3) prior cases recognized the inapplicability of *Illinois Brick* to price-fixing conspiracies where a conspirator directly sold products to the plaintiffs, and under decades of Supreme Court caselaw, output-restricting and price-fixing conspiracies are deemed equivalent.

Petitioners' claim of a split of authority is based on an erroneous characterization of Judge Ikuta's opinion. For example, while Petitioners claim that Respondents were "admittedly indirect purchasers with respect to the NFL and its member clubs," Pet. at 10, the Ninth Circuit explained that the complaint alleged Respondents were *directly* injured. Pet. App. 33a ("[T]he plaintiffs' allegation that they were directly injured by the conspiracy among the NFL teams, the NFL, and DirecTV is sufficient to allege antitrust standing for purposes of surviving a motion to dismiss."). Further, Petitioners themselves recognize that the reason *Illinois Brick* bars claims asserted by indirect purchasers is because they "generally rely on pass-on theories of harm." Pet. at 30. But again, the Ninth Circuit here noted that the complaint did not seek pass-on damages. Pet. App. 33a n.7 ("Thus, to calculate the plaintiffs' damages, a court would not need to determine to what extent the NFL overcharged DirecTV; it would need to consider only the prices consumers paid compared to the prices that would have existed in a competitive market."). Petitioners do not even address this aspect of the Ninth Circuit's opinion. *See also Apple Inc. v. Pepper*, 139 S. Ct. 1514, 1525 (2019) ("If the iPhone owners prevail, they will be entitled to the *full* *amount* of the unlawful overcharge that they paid to Apple. The overcharge has not been passed on by anyone to anyone. Unlike in *Illinois Brick*, there will be no need to 'trace the effect of the overcharge through each step in the distribution chain.'") (emphasis in original).

And whether it is termed an "exception" or not, Petitioners acknowledge that lower courts universally recognize that *Illinois Brick* has been held inapplicable where plaintiffs directly purchase from one of the conspirators in the context of horizontal or vertical price fixing, even in the decisions that they claim are on "the other side" of the illusory divide, *Dickson v. Microsoft Corp.*, 309 F.3d 193, 214 (4th Cir. 2002), and *Lowell v. Am. Cyanamid Co.*, 177 F.3d 1228, 1232 (11th Cir. 1999).[6] Neither *Dickson* nor *Lowell* addresses whether this "exception" to *Illinois Brick* would similarly apply to an output-restricting conspiracy such as that alleged in this case. And as the Ninth Circuit below observed, "the Supreme Court has concluded that price-fixing conspiracies are functionally indistinguishable from output-restricting conspiracies." Pet. App. 35a. This Court has made clear that "[a]n agreement on output also equates to a price-fixing agreement"

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[6] While Petitioners rely on *Lowell* as part of their supposed "conflict," the Eleventh Circuit held there that the plaintiffs' claims were *not* barred by *Illinois Brick*. *See* 177 F.3d at 1233. Petitioners rely instead on *dicta* referring to the hypothetical context of a "vertical conspiracy on top of a horizontal conspiracy." *Id.* at 1232. Even then, the Eleventh Circuit only stated that, in that context, *Illinois Brick* "might" apply. That statement, not part of the court's holding and referring to a hypothetical situation, hardly creates a "conflict" warranting this Court's attention.

because "[i]f firms raise price, the market's demand for their product will fall, so the amount supplied will fall too—in other words, output will be restricted." *Cal. Dental Ass'n*, 526 U.S. at 777 (quoting *Gen. Leaseways, Inc. v. Nat'l Truck Leasing Ass'n*, 744 F.2d 588, 594–95 (7th Cir. 1984)).

For precisely the same reasons as in the price-fixing context pointed to by Petitioners, the damages sought by Respondents are not "pass-on" damages precluded by *Illinois Brick*, but instead simply the difference between the price they paid to DirecTV and the price that would have been charged in a market untainted by Petitioners' output restriction. All the decisions cited by the Petition make precisely the same point: if there is no pass-on theory of damages asserted, then *Illinois Brick* does not apply. *See*, *e.g.*, *Dickson*, 309 F.3d at 215 (noting applicability of *Illinois Brick* "grounded on the damages theory underlying the alleged conspiracy"); *Lowell*, 177 F.3d at 1233 (*Illinois Brick* is "inapplicable to the present case where the complaint alleges a vertical conspiracy with no pass-on").

The Ninth Circuit's opinion is also consistent with that court's own prior cases, including *In re ATM Fee Antitrust Litigation*, 686 F.3d 741, 750 (9th Cir. 2012), a ruling which even Petitioners appear to grudgingly concede is consistent with *Dickson* and *Lowell*, and which in fact itself relies on *Dickson*. *See* Pet. at 36 n.3; *see also In re ATM Fee*, 686 F.3d at 752 (noting *Illinois Brick* is inapplicable in a price-fixing context because the "theory of recovery does not depend on pass-on of damages"). As the panel majority observed, "[a]lthough

*ATM Antitrust Fee Litigation* focused on an alleged price fixing conspiracy, its reasoning is equally applicable to an output-restriction conspiracy, such as the situation here: if the direct purchaser conspires to limit the output that will ultimately be available to the plaintiffs, then the plaintiffs are directly impacted by the output limitation and have standing to sue." Pet. App. 34a.

In short, there is no inconsistency among the cases relied on by Petitioners. At most, Petitioners simply point to decisions applying or not applying *Illinois Brick* to different kinds of alleged anticompetitive conduct, arising in different factual contexts. That does not raise any conflict, and certainly not a conflict on a "pure question of law," especially given that none of the cases relied on by Petitioners involve an output-restricting conspiracy like the one at issue here.

Even if the Ninth Circuit's decision weren't correct, and even if there were arguably some "conflict" to speak of, this case would be a poor vehicle for the Court to address any potential question concerning antitrust standing, given that it is not disputed that resolution of the question has no bearing on Respondents' claims for injunctive relief against all of the Petitioners, and is not even dispositive of all of Respondents' claims for damages. *See* Pet. App. 30a n.6 ("There is no dispute that the plaintiffs have standing to challenge the NFL-DirecTV Agreement because they are direct purchasers of DirecTV. Nor is there a dispute that the plaintiffs have standing to seek injunctive relief based on the Teams-NFL Agreement. . . ."); *id.* at 40a n.2 (dissent acknowledging that Plaintiffs have standing to seek injunctive relief for "NFL Teams' horizontal [a]greement").

### III. The Denial of a Pre-Discovery Motion to Dismiss Does Not Warrant Review.

Finally, the procedural posture of this case poses a serious vehicle issue for the Court's review of either of the questions presented. This Court does not ordinarily review non-final dispositions of cases, especially where an order granting a pre-discovery motion to dismiss has been reversed and the case has been remanded for further proceedings. This interlocutory character "itself alone furnishe[s] sufficient ground for the denial" of the Petition. *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); *see also Bhd. of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) ("[B]ecause the Court of Appeals remanded the case, it is not yet ripe for review by this Court."); *Mount Soledad Mem'l Ass'n v. Trunk*, 567 U.S. 944, 944 (2012) (Alito, J., concurring) (denial of certiorari appropriate where "no final judgment has been rendered and it remains unclear precisely what action [Petitioner] will be required to take.").

No special circumstance warrants premature intervention here. Instead, every factor counsels denial. First, review on all issues may be mooted if Petitioners prevail after discovery, and in any event, these questions—along with any others that arise in this case—

would be available for review on a full factual record developed on summary judgment or trial. *See* Stephen M. Shapiro & Kenneth S. Geller et al., *Supreme Court Practice* § 4.18, at 4-55 (11th ed. 2019).

Second, not only is the Court's review of the questions presented possible at a later juncture in this case, but the Court's review now is hampered precisely because there is no factual record. Petitioners, and even more so their *amici*, spend pages focusing on factual issues that will undoubtedly be the subject of discovery, concerning the NFL's history as a "joint venture," the alleged "pro-competitive benefits" of the alleged restraints, their alleged "necessity" to the "core" purposes of the NFL, the relative "impacts to competition," the definition of the "relevant market," the nature and extent of damages sought by Respondents, and so on.

The proper juncture for the Court to review these questions, if ever, is after this factual record has been developed. The decision below did not declare Petitioners' practices illegal, but simply remanded for discovery based on the application of the very rule Petitioners now advocate. The Ninth Circuit's application of well-settled standards raises no question of importance even for the licensing of professional sports telecasts, much less does it cast any shadow over joint ventures as useful business arrangements in any other economic sector. There is no reason to make this case the exception to the rule.

Petitioners barely address the procedural posture of the case, despite their overwhelming focus on facts on which there is no record. Petitioners refer in one paragraph to avoiding the "costs of discovery." Pet. at 29. As this Court has recognized, though, the costs to be borne by a particular party to a litigation—a cost universal to all cases—is not a basis for this Court's review, in the absence of a question of compelling importance that must be addressed now. For all the reasons stated above, there is no such question presented by the Ninth Circuit's correct application of well-settled law, which did nothing more than remand the case for discovery.

## CONCLUSION

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

Respectfully submitted,

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