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

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF

The Opposition leaves no doubt that there is a circuit split on the antitrust standard applicable to core activities of joint ventures. The Ninth Circuit held that antitrust challenges to agreements among joint venture members on how to distribute the venture's jointly-created product may proceed without pleading harm to competition in a properly defined antitrust market. Other circuits, by contrast, require antitrust plaintiffs to make such showings under a full rule-of-reason standard.

Rather than seriously dispute this conflict, plaintiffs assert that because the Ninth Circuit incanted the words "rule of reason," the standard that it applied must be in accord with that of other circuits. But that label cannot mask the fundamental difference between (i) the Ninth Circuit's treatment of core venture activity as a "naked restriction" that may be condemned in abbreviated fashion, and (ii) the full rule-of-reason analysis applied by other circuits.

In highlighting "the Ninth Circuit's reliance on *NCAA* [*v. Board of Regents*, 468 U.S. 85 (1984)]" (Opp. 19), plaintiffs concede the split. The Second and Seventh Circuits expressly *refused* to extend *NCAA*'s truncated analysis to professional baseball and professional basketball, demanding instead "an inquiry into market power and structure and the actual effects of any restraints on trade." *Major League Baseball Props., Inc. v. Salvino, Inc.*, 542 F.3d 290, 337 (2d Cir. 2008) (Sotomayor, J., concurring); *Chicago Prof'l Sports Ltd. P'ship v. Nat'l Basketball Ass'n*, 95 F.3d 593, 600 (7th Cir. 1996) (*"Bulls II"*) (requiring

"an inquiry into market power and, if there is power, proceeding to an evaluation of competitive effects"). The Ninth Circuit *did the opposite*, invoking *NCAA* to excuse plaintiffs from needing to meet these requirements.

The dramatic difference in the circuits' treatment of antitrust challenges to activities of professional sports leagues only illustrates the split; the problem is much broader. Respected antitrust scholars and economists confirm that the Ninth Circuit's rule marks a "stark departure from existing joint-venture law," Professors Br. 2, and, if allowed to stand, would be "a significant deterrent on investment and innovation" and a "recipe for false positives in litigation outcomes," Economists Br. 4. The Chamber of Commerce likewise highlights how the ruling will "deter utilization of an increasingly important and prevalent mechanism of innovation, particularly involving shared intellectual property rights." Chamber Br. 3, 9-11. Without review, this aberrational decision will turn the Ninth Circuit, "home to many high-tech and other joint ventures," into the "*de facto* national regulator of such ventures." *Id.* at 11.

Plaintiffs fare no better in attempting to harmonize the circuit split over the scope of *Illinois Brick*'s co-conspirator exception. Their response—that output restrictions should be treated like price-fixing for purposes of *Illinois Brick*—is nothing more than an argument in favor of one side of the split.

I. THE COURT SHOULD GRANT REVIEW TO RESOLVE A CIRCUIT SPLIT OVER THE ANTITRUST STANDARD APPLICABLE TO JOINT VENTURES.

1. The circuits are squarely divided over whether *NCAA* excuses an antitrust plaintiff seeking to challenge the core activities of a joint venture from pleading and proving *all* aspects of a rule-of-reason claim—in particular, a viable antitrust market and harm to competition. Pet. 14-19. Plaintiffs assert that the Ninth Circuit's *statement* that "the rule of reason applies" aligns this case with *holdings* of other appellate courts that have considered antitrust challenges to joint venture conduct. Opp. 12, 14, 17. But reciting the words "rule of reason" did not change the substantive standard that the Ninth Circuit *actually* applied—a truncated analysis, drawn from *NCAA*, that *excused* plaintiffs from their "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).

As plaintiffs concede, the Ninth Circuit relied on *NCAA* to *assume* that an agreement among a professional sports league and its members about how to distribute its core product is a "naked restriction" that may be deemed anticompetitive without "elaborate industry analysis." Opp. 16 (citations omitted). That assumption led to the appellate court's holding that "plaintiffs were not required to establish a relevant market," App. 22a, and "[i]t was on this basis that the panel . . . concluded that an injury to competition was plausibly alleged," Opp. 17.

That is precisely the approach that other circuits have rejected. Decisions from at least five circuits align with this Court's holding that where, as here, "restraints on competition are essential if the product is to be available at all," the full rule of reason—not a truncated analysis—applies. *Am. Needle, Inc. v. Nat'l Football League*, 560 U.S. 183, 202 (2010) (quoting *NCAA,* 468 U.S. at 101); *see* Pet. 14-19. Plaintiffs assert that the resulting circuit split is "illusory," Opp. 17, but their putative "distinctions" cannot obscure the plain conflict.

Plaintiffs contend, for example, that the Seventh Circuit's decision in *Bulls II* "did not part ways with the Ninth Circuit's decision on any question of law." Opp. 18. But *Bulls II* held that the challenged conduct "may not be condemned without analysis under the full Rule of Reason" and that "plaintiffs cannot prevail without establishing that the NBA possesses power in a relevant market, and that its exercise of this power has injured consumers." 95 F.3d at 600.

Plaintiffs alternatively assert—without citation—that *Bulls II* relied on "the erroneous belief that the NBA" was "a single entity" rather than a joint venture. Opp. 26. But *Bulls II* did not address that question; the court was "satisfied that the NBA is sufficiently integrated that its [challenged] rules may not be condemned without analysis under the full Rule of Reason." 95 F.3d at 600. Had this case been brought in the Seventh Circuit, *Bulls II* would have foreclosed the truncated review that the Ninth Circuit embraced.

Plaintiffs similarly contend that nothing in the Second Circuit's decision in *Salvino* creates a conflict. Opp. 25. But *Salvino* rejected efforts to characterize MLB's collective licensing as a "naked" restraint; it held plaintiff to the full rule-of-reason standard, 542 F.3d at 332-34, and the antitrust plaintiff's claims failed in the absence of "an actual adverse effect on competition as a whole in the relevant market," *id.* at 341 (Sotomayor, J., concurring) (citation omitted).

Salvino's conflict with the Ninth Circuit's holding is confirmed by the two opinions' dueling treatments of *NCAA*. The Ninth Circuit treated this joint venture case and *NCAA* (which is not a joint venture case) as "identical in all relevant respects." Opp. 20. In contrast, *Salvino* held joint licensing among the teams of a professional sports league "to be different" from the NCAA "in every meaningful respect." 542 F.3d at 323-24. Among other differences, "the NCAA did not act as a selling agent," whereas MLB did, *id.* at 325, and, perhaps more important, "unlike . . . *NCAA*," MLB is "an integrated professional sports league in which the competitors are not independent but interdependent," *id.* at 331.

This case is exactly like *Salvino*, not *NCAA*. Had this case been brought in the Second Circuit, *Salvino* would have "plainly foreclose[d]" application of the truncated review applied by the Ninth Circuit. *Id.* at 323.

In insisting that the Ninth Circuit decision follows ineluctably from *NCAA*, plaintiffs effectively concede the circuit split. The Ninth Circuit certainly thought *NCAA* "control[led]," App. 21a, whereas the Second

Circuit just as plainly found *NCAA* inapplicable "in every meaningful respect," 542 F.3d at 324; *see also Bulls II*, 95 F.3d at 599-601. These are strikingly similar cases on opposite sides of an undeniable split, with appellate courts disagreeing on not only the dispositive legal principle but also how to read one of this Court's long-standing precedents.

Plaintiffs also claim that the decision below is "in alignment" with the Third Circuit's decision in *Shaw v. Dallas Cowboys Football Club, Ltd.*, 172 F.3d 299 (3d Cir. 1999), because that case affirmed a decision declining to dismiss antitrust challenges to NFL telecasting agreements. Opp. 17. But *Shaw* did not address the legal standard at issue here. *Shaw* considered only whether the Sports Broadcasting Act exempted the NFL's telecasting agreements from antitrust scrutiny altogether. *See* 172 F.3d at 299-300. The Third Circuit had no occasion to consider the standard for adequately pleading or proving a claim, and *Shaw* never mentioned *NCAA*. And even if *Shaw* could be grouped with the decision below, that would only deepen the split.

Plaintiffs protest that the cases applying full-blown rule-of-reason analysis were decided at later stages of litigation, Opp. 19, but that misses the point. The claims in *Bulls II*, *Salvino*, and other cases were dismissed because the plaintiffs failed to prove the elements of a full rule-of-reason claim—*i.e.*, to prove what the decision below excuses plaintiffs from even pleading. *See* Pet. 14-19. Plaintiffs' argument demonstrates that the Ninth Circuit *assumed* what other circuits require plaintiffs to *allege and then prove*.

2. Plaintiffs' fallback argument is that the Ninth Circuit *did* apply the full rule of reason. Opp. 15-17. That assertion cannot be squared with the panel's opinion.

According to plaintiffs, the panel "concluded that an injury to competition was plausibly alleged." Opp. 17. Yet, as plaintiffs concede, the *basis* for this "conclusion" was the panel's assumption that "'no elaborate industry analysis is required to demonstrate the anticompetitive character of" the challenged agreements. *Id.* at 16 (quoting App. 30a). Tellingly, the portion of the Ninth Circuit's decision that plaintiffs highlight cites *NCAA* repeatedly and the complaint not once. This was a decision that anticompetitive effects could be *presumed* rather than pleaded.

Plaintiffs further claim that the Ninth Circuit "in fact held that market power and the relevant market had been adequately pleaded." Opp. 16 (emphasis omitted). That is also incorrect. The court held that "plaintiffs *were not required to establish a relevant market*." App. 22a (emphasis added). Plaintiffs cannot cherry-pick a single later mention of the "market for telecasts of professional football games" as a gratuitous alternative holding. Opp. 15 (quoting App. 29a). Immediately after that reference, the court reiterated its reason for concluding that plaintiffs had not "failed to allege market power"—"[b]ecause" the challenged agreements were "'a naked restriction' on output." App. 30a (quoting *NCAA*, 468 U.S. at 109). And because it thought *NCAA* controlled, the panel never even addressed plaintiffs' alleged market for "out-of-market" game broadcasts, the only market

that plaintiffs could conceivably claim had been restrained.[1] The Ninth Circuit simply excused plaintiffs from any pleading requirement with respect to "market power and structure." *Salvino*, 542 F.3d at 337 (Sotomayor, J., concurring).

3. While claiming that the Ninth Circuit held them to a full rule-of-reason standard, plaintiffs simultaneously argue (echoing the Ninth Circuit) that this case and *NCAA* "are identical in all relevant respects." Opp. 20. They thus assert that the panel was correct to hold that the NFL's joint licensing was the kind of "naked restriction" for which "no elaborate industry analysis is required." App. 22a, 29a-30a. That argument reinforces the need for review; as explained above, the circuits are divided over this very issue. The argument is also incorrect.

As other circuits have recognized, this Court has made clear that the type of truncated analysis applied in *NCAA* only "governs the validity of restrictions imposed by a . . . joint venture[] *on nonventure activities*." *Texaco Inc. v. Dagher*, 547 U.S. 1, 7 (2006) (emphasis added); *see also Salvino*, 542 F.3d at 339 n.8 (Sotomayor, J., concurring).

Such principles "ha[ve] no application here, where the business practice being challenged involves the core activity of the joint venture itself." *Dagher*, 541 U.S. at 7. For the NFL, that core activity is the "produc[tion] [of] an entertainment product—football

[1] Plaintiffs could not plausibly claim that defendants had restrained a market for *all* NFL game broadcasts because the NFL offers multiple, *free* options within that market to every consumer. *See* App. 92a.

games *and telecasts.* No NFL club can produce *this product* without agreement and joint action with every other team." *Smith v. Pro Football, Inc.*, 593 F.2d 1173, 1179 (D.C. Cir. 1978) (emphases added); *see also, e.g.*, *Salvino*, 542 F.3d at 296 (The "MLB 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.").

Plaintiffs do not mention *Dagher*, much less address its holding that *NCAA's* truncated antitrust analysis does not extend to restrictions involving a joint venture's core product.

And plaintiffs offer only a makeweight argument that their lawsuit does not challenge the joint venture's core activity. Plaintiffs assert that the NFL is advancing a "false narrative that joint action is necessary to *produce* game broadcasts." Opp. 22 n.3, 24. But plaintiffs admit that NFL games "require cooperation between two different teams and one or more governing bodies [*i.e.*, the NFL]." Opp. 20. Moreover, *Dagher* itself refutes plaintiffs' effort to sever the venture's joint production of NFL games from its joint marketing of that jointly-produced product. *See* 547 U.S. at 6-8 (refusing to draw a distinction between venture's joint production of gasoline and its joint pricing of that gasoline for distribution).[2]

[2] This required collaboration distinguishes the NFL from the NCAA, which played no role in either producing or licensing college football telecasts. *See Salvino*, 542 F.3d at 328; *Bulls II*, 95 F.3d at 601 (Cudahy, J., concurring) (*NCAA* "involv[ed] a loose

Indeed, the notion that antitrust law could compel the Packers and Patriots separately to license competing telecasts of a game that can be produced only jointly through the collective efforts of both teams and the NFL is nonsensical. As the Economists' amicus brief highlights, the notion that a single team could create a "game broadcast" of a jointly-produced game defies logic. *See* Economists Br. 3-4, 16-19. Plaintiffs similarly ignore the reality that the competing teams and the NFL—like many joint venture participants—must cooperate to share intellectual property rights. *See* Chamber Br. 9-11; Pet. 24 & n.2.

Plaintiffs assert that other leagues permit individual team licensing, Opp. 24-25, but those arrangements "are necessarily made at the venture level." Economists Br. 9-10 & n.5, 18. The fact that other leagues and their members *agree* to alternative distribution models does not eliminate the need for an agreement to create and distribute the games in the first place. Nor is it relevant that the NFL teams agreed to assign licensing rights differently in the 1950s, Opp. 9, or that a joint-licensing agreement was struck down by a district court in 1953, applying the since-overturned antitrust standards of that era, Opp. 20-21. *See* Chamber Br. 12-14.

4. Finally, plaintiffs submit that this case presents no "question of compelling importance" because the petition is interlocutory and the only certain consequence of the Ninth Circuit's error is "the 'costs of discovery.'" Opp. 34 (quoting Pet. 29). This Court has

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alliance of colleges" and its "framework should not be extended to the more highly integrated and economically unitary NBA.").

not hesitated to grant petitions in an interlocutory posture to resolve important conflicts over whether defendants may be subjected to the "potentially enormous expense of discovery" that antitrust litigation entails. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558-59 (2007).

More fundamentally, and as a wide array of amici attest, the Ninth Circuit's ruling will have grave repercussions extending far beyond this case. Left unreviewed, it would "deter utilization of an increasingly important and prevalent mechanism of innovation, particularly involving shared intellectual property rights, in sectors spanning health care, entertainment, and technology." Chamber Br. 3. Indeed, it likely would have discouraged development of Sunday Ticket, which *expanded* consumer choice and *enhanced* consumer access to broadcasts of NFL games. And it would turn the Ninth Circuit—"home to many high-tech and other joint ventures"—into the "*de facto* national regulator of such ventures." *Id.* at 11; *see* Economists Br. 20-22.

II. THE COURT SHOULD GRANT REVIEW TO RESOLVE A CIRCUIT SPLIT OVER THE PURPORTED "CO-CONSPIRATOR" EXCEPTION TO *ILLINOIS BRICK.*

Plaintiffs contend that because price-fixing conspiracies are not subject to *Illinois Brick*, and because price-fixing and output restrictions are purportedly comparable, there is no circuit split on the scope of the co-conspirator exception. Opp. 29-30. This syllogism elides the very disagreement with which lower courts have grappled: whether price-fixing and other forms

of anticompetitive activity are equivalent for purposes of *Illinois Brick*'s indirect-purchaser rule. Pet. 31-36.

The Seventh Circuit's recent decision in *Marion Healthcare, LLC v. Becton Dickinson & Co.*, 952 F.3d 832 (7th Cir. 2020), illustrates and deepens that split. Like the Fourth Circuit in *Dickson v. Microsoft Corp.*, 309 F.3d 193, 213-16 (4th Cir. 2002), the *Marion* district court determined that "the conspiracy exception applies only to vertical price-fixing conspiracies" and does not "encompass[] other types of conspiracies." *Marion Diagnostic Ctr., LLC v. Becton, Dickinson, & Co.*, 2018 WL 6266751, at *4 (S.D. Ill. Nov. 30, 2018). The Seventh Circuit vacated and remanded, holding that the co-conspirator exception is *not* limited to price-fixing conspiracies. *See Marion*, 952 F.3d at 840. That disagreement cannot be explained away as reflecting mere differences in "factual contexts." Opp. 31. Rather, the *Marion* district court followed the Fourth Circuit's approach in *Dickson*, and the Seventh Circuit concluded that doing so was an "error of law." *Marion*, 952 F.3d at 837.

Contrary to plaintiffs' suggestion, Opp. 31, this case is an excellent vehicle for resolving this square split. Plaintiffs dismiss *Illinois Brick*'s applicability here, relying on their allegations challenging the NFL's exclusive-distribution agreement with DirecTV. But those allegations would carry no weight standing alone; they could not state a claim given this Court's recognition of the procompetitive benefits of such vertical agreements. *See Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 51-57 (1977); *see also, e.g.*, *E&L Consulting, Ltd. v. Doman Indus. Ltd.*,

472 F.3d 23, 30 (2d Cir. 2006) ("[E]xclusive distributorship arrangements are presumptively legal." (citation omitted)). And as plaintiffs' argument illustrates, the Ninth Circuit's rule invites plaintiffs to tack on allegations of vertical agreements to allegations of horizontal conspiracy, undermining the objectives of *Illinois Brick*.

CONCLUSION

The Court should grant the petition.

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