No. 08-661

In The Supreme Court of the United States

AMERICAN NEEDLE, INC.,

Petitioner,

v.

NATIONAL FOOTBALL LEAGUE, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF *AMICI CURIAE* MERCHANT TRADE ASSOCIATIONS IN SUPPORT OF PETITIONER AMERICAN NEEDLE, INC. AND FOR REVERSAL OF THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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INTEREST OF *AMICI CURIAE*[1]

Amici are merchant trade associations that represent hundreds of thousands of merchants that are forced to pay supracompetitive fees that are imposed on them by the Visa and MasterCard payment-card networks, which traditionally have operated as joint ventures of nearly every large bank in the United States. Acting through the auspices of the Visa and MasterCard networks, the banks impose supracompetitive fees on the merchants that accept their cards and have enacted rules that prevent merchants from protecting themselves against these supracompetitive fees by steering consumers to lower-cost forms of payment.

Amicus National Association of Convenience Stores ("NACS") is a non-profit international trade association that represents more than 2,000 convenience store companies. It operates in more than 146,000 locations in the United States and more than 250,000 locations worldwide.

Amicus NATSO, Inc. ("NATSO") is a non-profit trade association that represents more than 1,000 travel plaza and truck stop owners and operators,

[1] The parties provided blanket consents to the filing of all *Amicus* briefs. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amici*, their members, or their counsel made a monetary contribution to its preparation or submission.

owned by more than 260 corporate entities. NATSO's mission is to advance this diverse industry by serving as the official source of information on travel plazas, acting as the voice of the industry with government, and conducting the industry's only national convention and exposition.

Amicus National Community Pharmacists Association ("NCPA") is a non-profit trade association that represents pharmacist owners, managers, and employees of nearly 25,000 independent community pharmacies across the United States.

Amicus National Cooperative Grocers Association ("NCGA") is a trade association and national purchasing cooperative for consumer-owned grocery stores representing the interests of 112 member-owned cooperatives that operate over 140 storefronts in 32 states across the nation. NCGA's mission is to provide the vision, leadership, and systems necessary to support a nationwide network of cooperatives.

Amicus National Grocers Association ("N.G.A.") is a non-profit national trade association that represents and serves the retail grocery/food companies and wholesale distributors that comprise the independent sector of the food-distribution industry. N.G.A.'s 1,500 members include retail-grocery/food companies and wholesale distributors, affiliated associations, as well as manufacturers, service suppliers, and other entrepreneurial companies.

Amicus National Restaurant Association ("NRA") is a non-profit trade association for the restaurant

industry, which is comprised of about 945,000 restaurant and foodservice outlets. Its mission is to advocate and represent its members, educate the industry on emerging trends, and provide leadership for the restaurant industry to inspire community involvement and impact.

Most if not all of the merchant-members of the *Amici* trade associations accept payment by Visa and/or MasterCard credit and debit cards. Accordingly, *Amici* represent merchants that have been directly harmed by the conduct of the payment-card networks, which traditionally operated as joint ventures of banks. *Amici* merchant trade associations respectfully submit this brief to address the broader implications that this case may have on antitrust scrutiny of competitor collaborations.

Amici are some of the lead class representatives in *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation*, a multi-district class action that challenges several of the rules that the banks collectively adopted for the Visa and MasterCard networks. *Amici* and other plaintiffs challenge the rules of both Visa and MasterCard that require the payment of a fee – known as the "interchange fee" – from the merchant to the card-issuing bank on every transaction conducted over the Visa and MasterCard networks. *See* Second Consol. Am. Class Action Compl. ¶¶ 149-52, *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litig.*, MDL No. 1720 (E.D.N.Y. Jan. 29, 2009). Each network's board of directors – which until

recently consisted entirely of bank representatives[2] – established uniform schedules of default interchange fees for that network's transactions. *Id*. ¶¶ 163-65. The plaintiffs allege that the banks used their control over the networks to collectively enact rules that prevent merchants from attempting to reduce their card-acceptance costs by steering cardholders from Visa and MasterCard-branded payment cards to lower-cost forms of payment. *Id*. ¶¶ 189-90.

The interchange fee is essentially a tax on all payment-card purchases, paid from the merchant to the issuing bank. This tax imposes a substantial burden on merchants; publicly-available reports estimate that U.S. merchants pay tens of billions of dollars annually to Visa and MasterCard issuing banks. For many merchants, payment-card-acceptance costs are one of their largest line-item expenses. The Home Depot, Inc., for example, has stated that card-acceptance costs are its third-largest cost, behind only rent and payroll, and exceed the cost of providing health care to its employees. *Rivals Continue Interchange Debate*, ISO & Agent Weekly, May 21, 2009, at 2, *available at* http://www.cardforum.com/

[2] MasterCard and Visa conducted initial public offerings on, respectively, May 25, 2006 and March 18, 2008. After these IPOs, bank representatives now occupy only minority positions on each network's board. MasterCard, Inc., Prospectus (Form 424B4), at 6, 7, 9 (May 25, 2006); Visa, Inc., Prospectus (Form 424B4), at 7 (Mar. 19, 2008). Even after the IPOs, the Visa and MasterCard banks continue to abide by the rules that the pre-IPO boards set.

attachments/20090520L5U9U67U-1-May%2021,%202009.pdf (last visited Sept. 21, 2009).

The decision below – that horizontal, concerted action between independently owned NFL teams that compete for the sale of merchandise and the licensing of intellectual property can be completely immune from scrutiny under Section One of the Sherman Act – is seriously flawed. If affirmed by this Court, the decision below could have a wide ranging and deleterious effect on both public and private antitrust enforcement in the United States. Importantly for *Amici*, the decision may allow banks – which through their participation in the Visa and MasterCard networks have a near monopoly in payment-card issuance in the United States – to argue that horizontal agreements among them are completely immune from Section One. If this argument were available in prior cases, it would have allowed joint ventures whose conduct this Court and lower courts condemned after "quick look" or full "rule of reason" analyses – in landmark cases such as *National Collegiate Athletic Association v. Board of Regents of the University of Oklahoma*, 468 U.S. 85, 104 S. Ct. 2948 (1984), *Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 102 S. Ct. 2466 (1982), and *United States v. Visa U.S.A., Inc.,* 344 F.3d 229 (2d Cir. 2003) – to evade scrutiny under Section One without any inquiry into the harms caused by or potential merit of their conduct. And even in those cases in which this Court and other courts found joint-venture conduct to be permissible after examining the benefits and alleged

harms of various conduct, the ruling below may have prevented any inquiry whatsoever into the effects of the defendants' conduct. *See Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 99 S. Ct. 1551 (1979) (remanding challenge to music-industry blanket license for examination under full rule of reason). *Amici* have benefited from antitrust enforcement against joint-venture conduct in the past and submit this brief to respectfully request the Court to preserve their ability to seek remedies against joint exercises of market power by similar joint ventures in the future.

SUMMARY OF ARGUMENT

Antitrust enforcement in the area of joint ventures is essential to maintaining competition in the U.S. economy. The effect of joint-venture enforcement is visible in the payment-card industry, in which several successful enforcement actions in the United States and abroad delivered tangible benefits to merchants and consumers. Many of these enforcement actions – including the United States Department of Justice's suit against Visa and MasterCard and private class actions that challenge the networks' fees and rules – are based on the premise that agreements among competitors have the potential to harm competition, even if they are undertaken in the context of a "joint venture" that may be efficiency-enhancing overall. The decision below may allow the Visa and MasterCard networks –

and the banks that owned and operated them for four decades – to attempt to argue that their horizontal agreements are immune from scrutiny under Section One of the Sherman Act. The decision below should be reversed so that the banks and payment-card networks do not gain an opportunity to attempt to stall further benefits to competition arising from antitrust enforcement.

The Seventh Circuit's decision is fundamentally flawed. As an initial matter, the court's analysis first misinterprets the scope of this Court's narrow holding in *Copperweld*. This Court has never held that horizontal concerted action between or among independently owned joint venturers with divergent economic interests (like the NFL teams here), regardless of the precise form the horizontal concerted action takes, can be considered wholly unilateral conduct completely immune from antitrust scrutiny under Section One of the Sherman Act. Moreover, by failing to conduct any analysis into the effect of the NFL's exclusive licensing arrangement, the court contradicts its and other courts' history of analyzing all facets of restraints among joint-venture participants.

ARGUMENT

A. Antitrust Enforcement Against Joint Ventures Plays An Important Role In Preserving The Competitiveness Of Payment-Card Markets.

The payment-card industry presents a prime example of the importance of antitrust enforcement to preserving competition. The industry consists essentially of four networks: Visa, MasterCard, American Express, and Discover. But the market has long been dominated by the Visa and MasterCard networks, which until recently were collectively owned and governed as joint ventures of nearly every payment-card-issuing bank in the United States. In 2008, Visa and MasterCard collectively accounted for 71 percent of the credit-card-transaction volume and 100 percent of signature-debit-card volume in the United States. 924 The Nilson Report 9 (April 2009). In the last decade, both networks have been found to possess market power by courts and regulatory bodies in the United States, European Union, United Kingdom, and Australia. *See United States v. Visa U.S.A., Inc.*, 344 F.3d 229, 240 (2d Cir. 2003); European Commission, Commission Decision of Dec. 19, 2007, Relating to a Proceeding Under Article 81 of the EC Treaty and Article 53 of the EEA Agreement, MasterCard Europe S.p.r.l. (COMP/34.579) (hereinafter "E.C. Decision"); Decision of the Office of Fair Trading of September 5, 2005: Investigation of the Multilateral Interchange Fees Provided for in the UK Domestic Rules of MasterCard UK Members Forum

Limited (formerly known as MasterCard/Europay UK Limited) (No. CA98/05/05). By virtue of their ownership interests in the networks, the banks elected Visa and MasterCard's boards of directors – which were filled entirely by bank representatives – who in turn enacted rules that they required each of the networks' member banks to abide by. *See* Second Supp. Class Action Compl. ¶ 39 & First Am. Supp. Class Action Compl. ¶ 48, *In re Payment Card Interchange Fee & Merchant Discount Antitrust Litig.*, MDL No. 1720 (E.D.N.Y. Jan. 29, 2009) (quoting Visa U.S.A. and MasterCard bylaws, respectively) (hereinafter "*In re Payment Card*").

Because the Visa and MasterCard networks historically have been operated as collaborations of competitors, agreements among the Visa and MasterCard banks have been subject to scrutiny under Section One of the Sherman Act and analogous laws of foreign jurisdictions. *See, e.g.*, *United States v. Visa*, 344 F.3d at 242; E.C. Decision at 99-102. As the networks gained market power, the agreements among their members were increasingly found to violate U.S. and foreign antitrust laws.

For example, in 1998, the Department of Justice sued Visa and MasterCard over the networks' "Exclusionary" rules that prohibited Visa and MasterCard issuing banks from also issuing cards over the Discover or American Express networks. After a 34-day bench trial, Judge Jones of the United States District Court for the Southern District of New York concluded that the networks' rules violated Section

One of the Sherman Act. *United States v. Visa U.S.A., Inc.*, 163 F. Supp. 2d 322, 379 (S.D.N.Y. 2001). To reach this conclusion, Judge Jones crafted an exhaustive analysis under the rule of reason that defined the relevant market, concluded that the defendants possessed market power in that market, evaluated the competitive harms that the government posited, and scrutinized the defendants' proffered justifications for their conduct. *Id*. at 405-06. The Second Circuit affirmed Judge Jones's "comprehensive and careful" opinion, and rejected the defendants' attempt to argue that horizontal agreements among Visa and MasterCard's member banks should be analyzed as single-entity conduct, noting that "the restrictive provision [was] a horizontal restraint adopted by 20,000 competitors." *United States v. Visa*, 343 F.3d at 234, 242. As a result of this case, Visa and MasterCard were forced to repeal their exclusionary rules. Thus, the government's successful enforcement action improved competition for issuers' business by allowing Visa and MasterCard issuing banks to also issue cards over other networks.

While the government was conducting its investigation of Visa and MasterCard, a nationwide class of merchants filed an action against the networks that challenged Visa and MasterCard rules that required all merchants that accepted the networks' ubiquitous credit cards to also accept their debit cards. *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 131 (2d Cir. 2001). The plaintiffs presented evidence that these rules – known as the

"Honor All Cards" rules – had the effect of eliminating competition in the market for the acceptance of debit cards, which in turn drastically increased the costs that merchants paid to accept debit cards for purchases. *Id*. (reciting Plaintiffs' allegations); *In re Visa Check/MasterMoney Antitrust Litig.*, No. 96-CV-5238 (JG), 2003 WL 1712568, at *7 (E.D.N.Y. Apr. 1, 2003). The record also contained evidence that the challenged practices of Visa and MasterCard were devised by the same member banks that sat on the boards of directors and important competitive committees of both networks. *See In re Visa Check/MasterMoney Antitrust Litig.*, 297 F. Supp. 2d 503, 513-14 (E.D.N.Y. 2003). The district court certified a class, which the Second Circuit affirmed. *In re Visa Check*, 280 F.3d at 147 (Sotomayor, J.). The United States District Court for the Eastern District of New York denied summary judgment for the defendants and granted parts of the plaintiffs' summary judgment motion. *In re Visa Check*, 2003 WL 1712568, at *8. Although the court did not assess the networks' conduct under a joint-venture analysis, the plaintiffs alleged that the networks' practices were the product of collective action among the member banks and the court recognized that these inter-bank agreements were a component of the plaintiffs' case. *In re Visa Check*, 297 F. Supp. 2d at 513-14. The settlement resulted in a three-billion-dollar payment to the merchant class, the majority of which was funded by the networks' member banks. *See Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 103 (2d Cir. 2005). Like the government's

victory, the settlement of the "Honor-All-Cards" class action also secured important injunctive relief, which reduced the networks' debit-card interchange fees and allowed merchants to selectively accept only Visa and MasterCard credit or debit cards. *Id*. at 101. The settlement also required the networks to visibly differentiate their credit-card products from their debit-card products. *Id.* at 103. In upholding the settlement, the district court estimated that the interchange-fee reduction was worth 846 million dollars. *Id*. at 103 n.6.

Competition authorities outside of the United States also have been able to obtain meaningful benefits to competition by challenging agreements among Visa and MasterCard's member banks under analogous laws to Section One of the Sherman Act. While foreign decisions are not binding on U.S. courts, these actions against payment-card networks illustrate how competition and consumers can benefit from antitrust enforcement against unreasonable exercises of market power by joint ventures.

In 2000 for example, the Australian Competition and Consumer Commission ("ACCC"), Australia's antitrust authority, concluded that the collective setting of interchange fees by Visa and MasterCard's member banks constituted a breach of the Australian Trade Practices Act, which forbids unreasonable agreements among competitors. Press Release, Reserve Bank of Australia, Designation of Credit Card Schemes in Australia (Apr. 12, 2001), *available at* http://www.rba.gov.au/MediaReleases/2001/mr_01_09.

html (last visited Sept. 21, 2009). Following this conclusion, the ACCC recommended that Australia's central bank, the Reserve Bank of Australia, regulate the networks. *Id.* In 2003, the Reserve Bank accepted this invitation and mandated that the card networks decrease their average interchange fees from a high of 0.95 percent that existed in 2003 to 0.55, and in 2006 mandated further reductions to 0.50 percent. Payment System Board, Reserve Bank of Australia, Annual Report at 19 (2007). It also required the networks to abandon their rules that prohibited merchants from steering consumers to lower-cost forms of payment by surcharging Visa or MasterCard purchases. *Id*. MasterCard predicted that the reforms would lead to a "death spiral," in which payment-card issuance and acceptance would both collapse. MasterCard, Inc., Submission to Reserve Bank of Australia at 10-11, Jun. 8, 2001 (as revised Jul. 20, 2001). But in fact, experience demonstrated that the Reserve Bank's reforms led to decreases in the cost to merchants of accepting payment cards, an expansion in the number of merchant outlets that accepted cards, and increases in the number of outstanding card accounts. Reserve Bank of Australia, *Additional Credit Card Statistics*, *available at* http://www.rba.gov.au/PaymentsSystem/PaymentsStatistics/payments_data.html; Robert Stillman, et al., *Regulatory intervention in the payment card industry by the Reserve Bank of Australia, Analysis of the evidence*, CRA International (Apr. 28, 2008) at 26. Moreover, the bulk of the decrease in merchant fees was passed on to consumers. Payment Systems Board, Reserve Bank

of Australia, *Reform of Australia's Payments System: Preliminary Conclusions of the 2007/08 Review* § 5.2.6 (Apr. 2008). And even at these decreased interchange-fee levels, evidence from Australia demonstrated that banks still found it in their interests to issue cards and provide acceptance services to merchants even after the reforms. Thus, regardless of whether one measures competitive benefit by prices (fees charged to merchants) or output (number of card accounts and merchant locations), the Reserve Bank's reduction in interchange fees indisputably benefited competition and consumers.

Similarly, in 2003 the European Commission issued "Statements of Objections," which initiated investigations of MasterCard's interchange-fee-setting practices.[3] E.C. Decision at 13. The Statements of Objections alleged that horizontal agreements among MasterCard member banks constituted unlawful agreements among competitors, in violation of Article 81(1) of the EU Treaty, Europe's analog to Section One of the Sherman Act. *See* E.C. Decision at 4-6. In December 2007, the Commission issued a 241-page decision that applied an analysis that resembled the rule of reason and concluded that MasterCard's

[3] The Commission issued a Statement of Objections against Visa in 2000, which led to a settlement whereby Visa agreed to reduce by half its cross-border interchange fees. Press Release, European Commission, Commission Plans to Clear Certain Visa Provisions, Challenge Others (Oct. 16, 2000), *available at* http://europa.eu/rapid/pressReleasesAction.do?reference=IP/00/1164&format=HTML&aged=0&language=EN&guiLanguage=en.

default interchange fee constituted an unlawful agreement among competitors. *See* E.C. Decision at 114-45, 182. After the Commission ordered MasterCard to eliminate its cross-border default interchange fees, MasterCard agreed to a "provisional settlement" pending its appeal of the Commission's decision, whereby it agreed to reduce its cross-border fees to 0.3 percent for credit cards and 0.2 percent for debit cards. *MasterCard to Trim Fees in Europe Under a Settlement*, Am. Banker (Apr. 2, 2009).

The history of antitrust enforcement in the payment-card industry demonstrates two things: First, the member banks that originally owned and governed the Visa and MasterCard joint ventures have abused their market power to the detriment of competition across the globe. Second, when agreements within joint ventures do harm competition, antitrust enforcement can deliver tangible benefits for competition and consumers. Without the ability to scrutinize agreements among the member banks, the antitrust laws could not have provided these benefits. In each of the cases above, the courts and regulatory bodies did not condemn the Visa and MasterCard joint ventures themselves. Rather, they struck down or modified isolated agreements among the joint venture participants – the banks – only after defining relevant markets, assessing the networks' market power, and then carefully weighing the harm to competition caused by the restraints against the purported procompetitive benefits. In fact, even when

courts have upheld restraints among the networks' member banks, they have done so after conducting full rule of reason analyses.

In contrast to the fulsome assessments of inter-bank agreements, under which courts and regulatory authorities concluded that certain agreements harmed competition and which undergirded the remedies that they created to ameliorate those harms (while preserving the underlying joint ventures), the ruling below introduces an analytical shortcut that is blind to the actual effect of the conduct that is being challenged. Without analyzing the level of integration among NFL teams, the extent of competition among them on the licensing and sale of merchandise, or the relation of that competition to the overall efficiency-enhancing aspects of the NFL, the court below declared that the NFL teams acted as a single entity when they decided to collectively license their merchandise through NFL Properties. *Am. Needle, Inc. v. NFL*, 538 F.3d 736, 743 (7th Cir. 2008). Rather, the Seventh Circuit simply assumed that because cooperation among teams was necessary to produce NFL football, any restraint among NFL members must *ipso facto* be legal. *Id*. at 743. In making this inferential leap, the court disregarded the holding of this Court in *NCAA* that restraints within a joint-venture may be struck down under a "quick look" rule of reason if they are not reasonably related to the purpose of the joint venture. 468 U.S. at 101; 104 S. Ct. at 2960.

And because the Seventh Circuit determined that the NFL was a single entity as a matter of law, the court foreclosed any inquiry into whether collective licensing promotes or harms competition. Thus, even if American Needle could demonstrate that the NFL's collective licensing arrangement harmed competition, as the government did in *United States v. Visa* and the class did in *In re Visa Check*, the Seventh Circuit's single-entity determination still has the effect of closing the courthouse doors to it.

Amici respectfully ask this Court to reject the Seventh Circuit's expansion of the *Copperweld* single-entity doctrine so that joint-venture participants, such as the Visa and MasterCard member banks, do not gain an opportunity to prevent courts from examining the competitive effects of agreements among them. If this Court adopts the Seventh Circuit's reasoning, the banks may attempt to argue that courts should not examine the actual effects of their collective setting of interchange fees and establishment of anticompetitive merchant restraints. If the banks could successfully make this argument, they may deprive the U.S. marketplace of the benefits that antitrust enforcement against payment-card interchange fees has brought to Europe, Australia, and other countries.

B. This Court Should Not Extend "Single-Entity" Protection From Challenge Under Section One of the Sherman Act To Joint Venture Participants That Have Divergent Economic Interests.

In *Copperweld Corporation v. Independence Tube Corporation*, this Court rejected the intra-enterprise conspiracy doctrine and held that a parent corporation and its wholly-owned subsidiary constituted a single economic entity and were "incapable of conspiring with each other" to violate Section One of the Sherman Act, at least when the initial combination or affiliation between the parent corporation and its wholly-owned subsidiary was not unlawful. *See* 467 U.S. 752, 764, 777, 104 S. Ct. 2731, 2738, 2745 (1984). The Court in *Copperweld* stressed that it had rejected the intra-enterprise-conspiracy doctrine because Section One of the Sherman Act does not reach wholly unilateral conduct. *See* 467 U.S. at 768, 770-71, 104 S. Ct. at 2740-41. The Court reasoned that Section One scrutiny of agreements between a parent and its wholly-owned subsidiary is improper and not an activity that warrants scrutiny under Section One "[b]ecause coordination between a corporation and its division does not represent a sudden joining of two independent sources of economic power previously pursuing separate interests." *Id.* at 770-71, 2741. Lower courts interpreted the "theme" of *Copperweld* to be "economic unity," such that when "there is substantial common ownership, a fiduciary obligation to act for another entity's benefit

or an agreement to divide profits and losses, individual firms function as an economic unit and are generally treated as a single entity." *See, e.g.*, *Freeman v. San Diego Ass'n of Realtors*, 322 F.3d 1133, 1148 (9th Cir. 2003).

But *Copperweld* represents only a limited exception to the reach of Section One, and this Court has never extended *Copperweld* beyond its narrow facts, much less to facts where independently owned joint venturers with divergent economic interests engage in horizontal concerted action.[4] The federal

[4] *E.g.*, *Texaco Inc. v. Dagher*, 547 U.S. 1, 3, 8, 126 S. Ct. 1276, 1278, 1280, 1281 (2006) (holding that it was not *per se* illegal for a "lawful, economically integrated joint venture to set the prices at which the joint venture sells its products"; instead, "respondents should have challenged [the joint venture] pursuant to the rule of reason"); *Brown v. Pro Football, Inc.*, 518 U.S. 231, 248, 116 S. Ct. 2116, 2126 (1996) (conceding "that the clubs that make up a professional sports league are not completely independent economic competitors, as they depend upon a degree of cooperation for economic survival" but not suggesting that member clubs were a single economic entity immune from antitrust scrutiny (citation omitted)); *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Oklahoma*, 468 U.S. 85, 113, 104 S. Ct. 2948, 2966 (1984) (reiterating that "joint ventures have no immunity from the antitrust laws," and concluding that a horizontal agreement by NCAA member institutions to vest in the NCAA the right to control the frequency of, and set the price for, television broadcasts of college football games, and to require dissenting member institutions to comply with the same rules, was not a *per se* violation of Section One of the Sherman Act; instead, the horizontal concerted action by the NCAA member institutions had to be evaluated under the rule of reason); *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 24-25, 99 S. Ct. 1551,

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courts that have applied this Court's precedents in this area have concluded, with only a few exceptions, that various forms of horizontal concerted action between the teams in the National Football League,[5]

1565 (1979) (horizontal agreement by holders of copyrighted works to vest in a cooperative body the right to issue all-or-nothing exclusive licenses of the holders' copyrighted works at a standard, pre-established fee was not a *per se* violation of Section One of the Sherman Act; instead, the horizontal arrangement had to be evaluated under the rule of reason); *Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 598, 71 S. Ct. 971, 975 (1951) (rejecting the argument that "agreements between legally separate persons and companies to suppress competition among themselves and others can be justified by labeling the project as a 'joint venture.' Perhaps every agreement and combination in restraint of trade could be so labeled."), *overruled on other grounds*, *Copperweld Corp. v. Independence Tube Corp.,* 467 U.S. 752, 764, 104 S. Ct. 2731, 2738 (1984); *see also Major League Baseball Props., Inc. v. Salvino, Inc.*, 542 F.3d 290, 309, 336 (2d Cir. 2008) (Sotomayor, J., concurring in the judgment) ("A and B cannot simply get around [the *per se* rule] by agreeing to set the price of X through a third-party intermediary or 'joint venture' if the purpose or effect of that agreement is to raise prices, depress, fix, peg, or stabilize the price of X." (citation omitted)); *Fraser v. Major League Soccer, L.L.C.*, 284 F.3d 47, 56 (1st Cir. 2002) ("But what the Supreme Court has never decided is how far *Copperweld* applies to more complex entities and arrangements that involve a high degree of corporate and economic integration but less than that existing in *Copperweld* itself."); *cf.* Br. for the United States as *Amicus Curiae* (Certiorari) at 8 (stating that "the Court in *Copperweld* extended single-entity treatment *only* to a parent and its wholly owned subsidiary" (second emphasis added)).

[5] *St. Louis Convention & Visitors Comm'n v. Nat'l Football League*, 154 F.3d 851, 861 (8th Cir. 1998) (analyzing under the rule of reason the revised NFL rule prohibiting a team from

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relocating its franchise without prior approval of three-fourths of the teams, and noting that the parties did not challenge the district court's conclusion that the *per se* rule of illegality did not apply to the restriction); *Sullivan v. Nat'l Football League*, 34 F.3d 1091, 1102-03 (1st Cir. 1994) (evaluating under the rule of reason a NFL rule prohibiting owners from selling shares in their teams to the public); *U.S. Football League v. Nat'l Football League*, 842 F.2d 1335, 1360, 1372 (2d Cir. 1988) (noting that "sports leagues raise numerous difficult antitrust questions involving horizontal restraints and group boycotts" but upholding district court's jury instructions on evaluation of the NFL's horizontal concerted action under the rule of reason); *Los Angeles Mem. Coliseum Comm'n v. Nat'l Football League*, 726 F.2d 1381, 1385, 1389-91 (9th Cir. 1984) (applying rule-of-reason analysis to NFL rule prohibiting a member team from relocating its franchise without prior approval of three-fourths of the member teams); *Mid-South Grizzlies v. Nat'l Football League*, 720 F.2d 772, 783, 785-87 (3d Cir. 1983) (noting that "there is no dispute about the requisite concert of action among the defendants" and analyzing NFL's rule allowing member teams to deny application of football team to join the league under the rule of reason); *N. Am. Soccer League v. Nat'l Football League*, 670 F.2d 1249, 1252, 1259, 1261 (2d Cir. 1982) (noting that "NFL teams are separate economic entities engaged in a joint venture," applying the rule of reason to the NFL's cross-ownership ban, and holding that the ban was an unreasonable restraint of trade); *Smith v. Pro Football, Inc.*, 593 F.2d 1173, 1178-79, 1184-85 (D.C. Cir. 1978) (noting that "the NFL clubs which have 'combined' to implement the draft are not competitors in any economic sense [and] operate basically as a joint venture in producing an entertainment product football games and telecasts" but concluding that that NFL draft as it existed in 1968 was an unreasonable restraint of trade); *Mackey v. Nat'l Football League*, 543 F.2d 606, 619-20, 622 (8th Cir. 1976) (observing that "the NFL assumes *some* of the characteristics of a joint venture in that each member club has a stake in the success of other teams," and that "the unique nature of the business of professional football renders it inappropriate to mechanically apply per se illegality rules," but

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National Basketball Association,[6] National Hockey League,[7] Major League Baseball,[8] Major League Soccer,[9] and the Men's International Professional Tennis Council[10] are not completely immune from scrutiny under the antitrust laws.

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nonetheless holding that the "Rozelle Rule" governing players' contracts was an unreasonable restraint of trade (emphasis in original)).

[6] *Chicago Prof'l Sports Ltd. P'ship v. Nat'l Basketball Ass'n*, 95 F.3d 593, 600 (7th Cir. 1996) (holding that "the NBA is sufficiently integrated that its superstation rules may not be condemned without analysis under the full Rule of Reason").

[7] *Nat'l Hockey League Players Ass'n v. Plymouth Whalers Hockey Club*, 419 F.3d 462, 469-70 (6th Cir. 2005) (holding that the hockey teams of the Ontario Hockey League were "multiple actors who act in concert" when "they adopt eligibility rules," and evaluating those rules under the rule of reason).

[8] *See Salvino*, 542 F.3d at 309, 315-34 (analyzing Major League Baseball's centralization of the licensing of intellectual property in Major League Baseball Properties under the rule of reason).

[9] *Fraser*, 284 F.3d at 56, 59-60 (rejecting single-entity status for professional soccer association and applying the rule of reason to its activities but speculating that if "ordinary investors decided to set up a company that would own and manage all of the teams in a league, it is hard to see why the arrangement would fall outside *Copperweld*'s safe harbor").

[10] *Volvo N. Am. Corp. v. Men's Int'l Prof'l Tennis Council*, 857 F.2d 55, 70, 72 (2d Cir. 1988) (evaluating horizontal concerted action by the Men's International Professional Tennis Council and its constituent members but expressing no opinion regarding whether the challenged activities should be evaluated under the *per se* rule or rule of reason).

The overarching theme of these decisions is that, although independently owned professional sports teams legitimately can act collectively to produce or provide the professional sport itself (*i.e.*, the "product" of professional sports), the teams frequently pursue otherwise divergent economic interests in other league-related activities, which precludes them from being deemed single economic entities for all purposes. *See, e.g.*, *Freeman*, 322 F.3d at 1148 (noting that the Ninth Circuit's decision in *Los Angeles Memorial Coliseum* was premised on the finding that the NFL teams were independently owned and did not share profits or losses and that "'NFL clubs do compete with one another off the field as well as on to acquire players, coaches, and management personnel'"); *Sullivan v. Nat'l Football League*, 34 F.3d 1091, 1099 (1st Cir. 1994) (holding that "NFL member clubs compete in several ways off the field, which itself tends to show that the teams pursue diverse interests and thus are not a single enterprise under § 1").

There is good reason why neither this Court nor any other federal court has extended *Copperweld*'s promise of Section One immunity to horizontal concerted action by independently owned joint venturers with divergent economic interests. The *Copperweld* Court itself discussed the myriad dangers horizontal concerted action outside of the confines of a single firm can pose to competition:

> Concerted activity inherently is fraught with anticompetitive risk. It deprives the marketplace of the independent centers of decision-making that competition assumes and demands. In any conspiracy, two or more entities that previously pursued their own interests separately are combining to act as one for their common benefit. This not only reduces the diverse directions in which economic power is aimed but suddenly increases the economic power moving in one particular direction. Of course, such mergings of resources may well lead to efficiencies that benefit consumers, but their anticompetitive potential is sufficient to warrant scrutiny even in the absence of incipient monopoly.

467 U.S. at 768-69, 104 S. Ct. at 2740; *see also Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 459, 113 S. Ct. 884, 892 (1993). Commentators agree with the Court's language in *Copperweld* that "the most significant competitive threats arise when joint venture participants are actual or potential competitors" because the venture necessarily eliminates competition that existed among participants in the relevant market. 7 Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 1478a, at 318 (2d ed. 2002); *see also* Joseph F. Brodley, *Joint Ventures & Antitrust Policy*, 95 Harv. L. Rev. 1521, 1552 (1982).

Because of the risk that is "inherent" in collaborations among horizontal competitors, this Court should establish a rule of law that independently

owned joint venturers cannot be deemed a "single economic entity" if those competitors have divergent economic interests. This rule would provide certainty to this growing area of antitrust law – horizontal joint ventures and other horizontal competitor collaborations – in a way that is consistent with this Court's well-established view that exceptions to the antitrust laws should be limited and narrow, even where a broader interpretation of an exception may be possible. *See Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 231, 99 S. Ct. 1067, 1083 (1979); *Abbott Labs. v. Portland Retail Druggists Ass'n*, 425 U.S. 1, 11-12, 96 S. Ct. 1305, 1313-14 (1976); *Federal Maritime Comm'n v. Seatrain Lines, Inc.*, 411 U.S. 726, 732-33, 93 S. Ct. 1773, 1778-79 (1973); *United States v. McKesson & Robbins, Inc.*, 351 U.S. 305, 315-16, 76 S. Ct. 937, 943-44 (1956).

This rule would not mean that horizontal joint ventures and other horizontal competitor collaborations would be *per se* illegal. *See Dagher*, 547 U.S. at 3, 8, 126 S.Ct. at 1278, 1281. Rather, they would be analyzed under some form of the rule of reason, in which the factfinder considers the defendants' market power, the extent of the alleged harm to competition, and the relationship of the restraint to the overall efficiency-enhancing aspects of the joint venture. *See* Br. for the United States as *Amicus Curiae* (Certiorari) at 12 (pointing out that the purported efficiencies resulting from collective licensing that allow the NFL to compete with other forms of

entertainment "would be considered as part of a rule-of-reason inquiry" (citation omitted)).

Moreover, as Judge Cudahy cogently pointed out in his concurring opinion in *Chicago Professional Sports*, subjecting horizontal concerted action to at least some scrutiny under the antitrust laws ensures that the joint activity is not merely a subterfuge for anticompetitive collusion between the participants in the activity:

> At one end [of the spectrum] are loose alliances of economic actors having independent concerns (like the NCAA), the anticompetitive nature of whose agreements is obvious from a 'quick look.' At the other end are fully-integrated entities in which the economic interests of the participants are so completely aligned that antitrust scrutiny of their policies is unnecessary except where § 2 of the Sherman Act is violated. In the center is the broad range of organizations (generally like the NBA) whose separate constituents are individually owned but are closely but not completely tied economically to their organizations. These entities are capable of anticompetitive agreements, *but a full Rule of Reason analysis is necessary to ensure that productive cooperation is not mistaken for anticompetitive conduct*.

Chicago Prof'l Sports Ltd. P'ship v. NBA, 95 F.3d 593, 601-02 (7th Cir. 1996) (Cudahy, J., concurring) (emphasis added).

In summary, to remain faithful to the underlying economic justifications for the Court's decision in *Copperweld*, this Court should adopt a bright-line rule that independently owned joint venturers with divergent economic interests (like the teams of the NFL) that engage in horizontal concerted action should never be deemed a "single economic entity" completely immune from antitrust scrutiny. *See Freeman*, 322 F.3d at 1149 (stating that where firms "are at least potential competitors, they are usually not a single entity for antitrust purposes. This rough guideline fairly captures the holdings of the [single economic entity] cases"); *Fraser v. Major League Soccer, L.L.C.*, 284 F.3d 47, 56, 57 (1st Cir. 2002) (finding no single-entity status, in part, where "there is a diversity of entrepreneurial interests that goes well beyond the ordinary company," which differs from *Copperweld* where there was a "complete unity of interests" (quotation omitted)).

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CONCLUSION

Antitrust enforcement in the area of joint ventures plays a central role in preserving the competitiveness of several industries, including the payment-card industry and, for purposes of the present case, professional sports. This Court and lower courts have developed an analytical method for assessing restraints that joint venture participants impose, which takes into account the harm to competition caused by the restraints and the necessity of the restraints to achieving the overall efficiency-enhancing purpose of the venture. The decision below risks shortcutting or eliminating this framework.

This Court should reverse the decision below and create a bright-line rule that independently owned joint venturers cannot be considered a "single economic entity" if they have divergent economic interests. There is little doubt that the independently owned NFL teams were and continue to be fully capable of individual licensing of their intellectual property and marketing their team merchandise through one or more vendors without coordinating that particular economic activity with their sister teams. Because the formation of NFL Properties eliminates competition among the NFL clubs for the sale of merchandise and licensing of teams' trademarks, it deprived the marketplace of independent sources of decisionmaking and therefore is not properly evaluated as single-firm conduct. *Amici* therefore respectfully request that this Court reverse the

Seventh Circuit's decision and remand for a full analysis of the NFL's conduct.

Respectfully submitted,

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