

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 FOR ELECTRONIC ARTS INC.
AS *AMICUS CURIAE* SUPPORTING
THE NFL RESPONDENTS**

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QUESTION PRESENTED

Section 1 of the Sherman Act applies only to a “contract, combination ... or conspiracy’ between *separate* entities” to restrain trade. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768 (1984) (quoting 15 U.S.C. § 1). In *Copperweld*, the Court held that because their coordinated activities do not “deprive[] the marketplace of ... independent centers of decisionmaking” or “represent a sudden joining of two independent sources of economic power previously pursuing separate interests,” a parent company and its separately incorporated subsidiary constitute a single entity for Section 1 purposes. *Id.* at 769, 771. The question presented is:

Whether, consistent with the principles articulated in *Copperweld*, a professional sports league and its separately owned member clubs, which exist to produce collectively an entertainment product that no member club could produce on its own, function as a single entity for Section 1 purposes in promoting that product.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
INTEREST OF <i>AMICUS CURIAE</i>	1
SUMMARY OF ARGUMENT	4
ARGUMENT	6
I. A Joint Venture Acts As A Single Entity When Its Members Go To Market Through The Venture, Pooling Capital And Sharing The Risk Of Profit And Loss.....	6
II. A Joint Venture’s Production Of A Good That Can Be Produced Only Through Collective Action Is Inherently Procompetitive.	7
III. Licensees Of League Products Need The Efficiency And Certainty That Single- Entity Treatment Provides.....	14
CONCLUSION	17

TABLE OF AUTHORITIES

	<i>Page</i>
CASES	
<i>Broad. Music, Inc. v. Columbia Broad. Sys., Inc.</i> , 441 U.S. 1 (1978)	passim
<i>Brown v. Pro Football, Inc.</i> , 518 U.S. 231 (1996)	8
<i>Chicago Prof'l Sports Ltd. P'ship v. NBA</i> , 95 F.3d 593 (7th Cir. 1996)	passim
<i>Copperweld Corp. v. Independence Tube Corp.</i> , 467 U.S. 752 (1984)	passim
<i>NFL v. N. Am. Soccer League</i> , 459 U.S. 1074 (1982)	8, 9
<i>NCAA v. Bd. Regents of Univ. of Okla.</i> , 468 U.S. 85 (1984)	8
<i>Texaco, Inc. v. Dagher</i> , 547 U.S. 1 (2005)	passim

STATUTES

15 U.S.C. § 1	6
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OTHER AUTHORITIES

7 Phillip E. Areeda & Herbert Hovenkamp, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION (2d ed. 2003)	16
Gregory J. Werden, <i>Antitrust Analysis of Joint Ventures: An Overview</i> , 66 ANTITRUST L.J. 701 (1998)	16

Oliver E. Williamson, <i>The Economics of Antitrust: Transaction Cost Considerations</i> , 122 U. PA. L. REV. 1439 (1974)	10
Oliver E. Williamson, <i>The Vertical Integration of Production: Market Failure Considerations</i> , 61 AM. ECON. REV. 112 (1971).....	10
U.S. Dep't of Justice & Fed. Trade Comm'n, <i>Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition</i> (2007)	10

INTEREST OF *AMICUS CURIAE*¹

Electronic Arts Inc. (“EA”) is a leading global entertainment software company. It develops, publishes, and distributes interactive software worldwide for video game systems, personal computers, wireless devices, and the Internet.

One of EA’s most important product lines is sports video games, which it markets under the brand label “EA Sports.” These games provide authentic, interactive sports experiences to consumers. They are enormously successful despite an intensely competitive video game market. EA’s offerings include *Madden NFL Football*, one of the highest-revenue producing video game titles of all time.

EA produces high-quality sports video games such as *Madden NFL Football* under intellectual property licenses from sports leagues such as Respondent National Football League (“NFL”). In 2004 EA competed for and won licenses from the NFL’s licensing arm, Respondent National Football League Properties, Inc. (“NFL Properties”), and the licensing arm of the National Football League Players’ Association, PLAYERS INC, in certain categories. These licenses allow EA to use the marks, colors, and logos of all 32 NFL member clubs, as well as the names and likenesses of nearly all NFL players.

¹ Pursuant to the Court’s Rule 37.6, Electronic Arts Inc. states that no counsel for any party authored this Brief in whole or in part, and no person or entity other than Electronic Arts Inc. made a monetary contribution to fund or intended to fund the preparation or submission of this Brief. Counsel of Record for all parties have consented to the filing of this Brief, and letters of consent have been filed with the Clerk.

EA relies on these licenses to create lifelike, interactive simulations of the NFL experience. The *Madden* titles are successful in part because they allow consumers to simulate play involving any of the 32 NFL teams, using real NFL players and real NFL coaches. The simulations capture the nuances of NFL contests to the fullest extent technology allows, including not only on-field play but also the teams' logos and colors, the players' uniforms, the teams' tendencies and capabilities, and even the players' celebrations and the crowds' chants.

The success of *Madden NFL Football* vividly demonstrates how associating game play with attractive intellectual property can create and satisfy consumer demand and allow one to succeed in an intensely competitive industry. The degree of authentic sports experience helps differentiate sports simulations in much the same way that a license to *Harry Potter* or *Spiderman* intellectual property helps differentiate video games built around fantasy themes. Authentic simulation is an important part of competition in the video game market.

EA licenses many trademarks and other intellectual property rights for its video games, typically from a single licensor. In most cases the licensor is formally a single entity—for example, Warner Bros. Entertainment Inc. has licensed EA certain rights to *Harry Potter*. To be able to license the intellectual property necessary to bring sports league simulations to market, EA similarly needs to deal with the leagues as single sources. Accordingly, EA is submitting this Brief to provide the Court with a licensee's perspective on the procompetitive justifications for treating sports leagues in

appropriate circumstances as a single entity for antitrust purposes, consistent with economic reality.

A sports league's use of a single licensing vehicle to bundle its members' intellectual property creates obvious efficiencies. Through the league, a licensee such as EA can negotiate and contract with one entity rather than many, lowering transaction costs and allowing the licensee to pass those savings along to consumers. By lowering transaction costs, moreover, the league creates opportunities to produce a unique and desirable product. Just as the NFL could not produce a season without cooperation among each of its clubs on matters such as scheduling, locations, and rules, EA could not produce a realistic, full-league NFL simulation without the cooperation of all the NFL clubs. Housing the league's intellectual property in a single entity allows the league to grant licensees such as EA a true license insusceptible to holdouts or defections by individual teams, which in turn allows EA to produce a complete, league-based product.

A single-entity rule that is overly restrictive or that reduces certainty would have highly undesirable effects on producers of products built on licenses. An overly-restrictive single-entity test that does not comport with economic reality could bar cooperative conduct that is actually procompetitive. And a single-entity test that is unclear or that remains unsettled over time would leave licensees unsure when entering into transactions whether they are dealing with single entities—which may unilaterally choose to license exclusively, non-exclusively, or not at all—or whether they are buying an antitrust lawsuit. As neither of these outcomes is desirable, EA has an

interest in the adoption of a rule that is clear, reliable, and economically sound.

SUMMARY OF ARGUMENT

Section 1 of the Sherman Act draws a fundamental distinction between concerted conduct and unilateral conduct: Concerted action among separate entities is subject to scrutiny under the Act, while unilateral action by a single entity is not. The decisions of the Court, most recently *Texaco, Inc. v. Dagher*, 547 U.S. 1 (2005), confirm that joint ventures may act as a single entity with respect to at least some of their activities. The same is true of a sports league such as the NFL, which is essentially a joint venture composed of 32 member clubs and the league itself. Few would dispute that the NFL acts as a single entity at least for some purposes, such as when it makes decisions regarding league play by setting schedules and on-field rules.

The principles that render the NFL a single entity for purposes of regulating league play also apply to NFL Properties and the licensees that develop league products. Without collaboration, transaction costs and opportunistic behavior by hold-out clubs could preclude licensors such as the NFL from creating and developing the league brand, and licensees such as EA from creating league products. In the intellectual property context in particular, concerted action to develop and manage a trademark or brand is critical to the creation of a product and demand for that product. A joint venture that facilitates the creation of a new product is inherently procompetitive, and not anticompetitive. The venture does not “reduc[e] the diverse directions in which economic power is aimed,” *Copperweld Corp. v. Independence Tube*

Corp., 467 U.S. 752, 769 (1984), but rather adds economic power in a new direction by making markets for new products.

The test proposed by the Solicitor General is too restrictive in this regard, as it requires an effective merger within the operation in question rather than mere integration, even where collective action is the only practical means of creating a product. Single-entity treatment should be available to collaborations that create new products and that do not raise the dangers that antitrust law is designed to police.

For licensees, single-entity treatment for a league that licenses intellectual property provides essential efficiency and certainty. As to efficiency, a licensee can negotiate and contract with one entity rather than many, thereby lowering transaction costs and allowing the licensee to pass those savings along to consumers. See, e.g., *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 22–23 (1978). And as to certainty, single-entity treatment allows licensees to negotiate with a joint venture just as with any other counterparty, without fear that the resulting license will lead to an antitrust suit. See *Dagher*, 547 U.S. at 5. After formation, a venture should be able to sell its products under the same conditions characteristically enjoyed by a unitary firm—including in setting pricing, in issuing exclusive or non-exclusive licenses, and in other ordinary market conduct. And the venture’s licensees should be able to deal with the venture free of Sherman Act concerns.

ARGUMENT

I. **A Joint Venture Acts As A Single Entity When Its Members Go To Market Through The Venture, Pooling Capital And Sharing The Risk Of Profit And Loss.**

“The Sherman Act contains a basic distinction between concerted and independent action,” which “is necessary for a proper understanding of the terms ‘contract, combination ... or conspiracy’ in [Section] 1” of the Act. *Copperweld*, 467 U.S. at 767, 769 (quoting 15 U.S.C. § 1). Specifically, Section 1 prohibits only *concerted* action to restrain trade. As a result, Section 1 is violated only when “separate entities” enter into a “contract, combination ... or conspiracy” in restraint of trade. *Id.* at 769. In contrast, the independent “conduct of a single firm is governed by [Section] 2 alone and is unlawful only when it threatens actual monopolization.” *Id.* at 767.

Single-entity treatment is not limited to unitary firms. For example, although technically separate entities, corporate parents and subsidiaries are “single entities” in the eyes of the antitrust laws because parent-subsidiary agreements do not exhibit the anticompetitive dangers ordinarily attributed to concerted conduct. In particular, such agreements do not “represent a sudden joining of two independent sources of economic power previously pursuing separate interests.” See *id.* at 770–71. An agreement between a parent and its subsidiary, like “an internal ‘agreement’ to implement a single, unitary firm’s policies[, thus] does not raise the antitrust dangers that [Section] 1 was designed to police.” *Id.* at 769. For this reason, the Court has held that “the

coordinated activity of a parent and its wholly owned subsidiary must be viewed as that of a single enterprise for purposes of [Section] 1 of the Sherman Act.” *Id.* at 771. Other agreements under the corporate umbrella, including agreements among “officers of a single firm” and between “a corporation and one of its unincorporated divisions,” likewise do not implicate “antitrust dangers” and are immune from antitrust scrutiny. *Id.* at 769–70.

Joint ventures may constitute “single entities” in certain circumstances. Among other situations, “joint ventures [are] regarded as a single firm competing with other sellers in the market” when “persons who would otherwise be competitors pool their capital and share the risks of loss as well as the opportunities for profit.” *Dagher*, 547 U.S. at 6 (internal quotation omitted). Where joint venturers go to market through the venture rather than individually, pooling capital and sharing the risk of loss, the resulting enterprise acts as its own center of decisionmaking power distinct from its constituent parts, and is properly treated as its own entity for antitrust purposes. As the Solicitor General has recognized, this “reasoning and result generally reflect a natural extension of *Copperweld*.” *Br. United States as Am. Cur. Supp. Pet.* 10 n.4.

II. A Joint Venture’s Production Of A Good That Can Be Produced Only Through Collective Action Is Inherently Procompetitive.

The procompetitive benefits of joint ventures are especially evident in the case of collective goods. A joint venture that pools the resources of its constituent members to create a collective good is

inherently procompetitive and does not raise the antitrust dangers of concern under Section 1. The Court has long recognized that horizontal agreements among even competitors and potential competitors to create new products are highly likely to be procompetitive. See, e.g., *Broad. Music, Inc.*, 441 U.S. at 19–24 (identifying the procompetitive features of blanket copyright licenses in the music industry). Where the product produced is a collective good, such horizontal agreements “are essential if the product is to be available at all.” *NCAA v. Bd. Regents of Univ. of Okla.*, 468 U.S. 85, 101 (1984).

This is certainly true in the context of sports leagues consisting of multiple teams, which may not be off-the-field competitors at all. “[T]he 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.” *Brown v. Pro Football, Inc.*, 518 U.S. 231, 248 (1996). For example, “[i]f the teams were entirely independent, there could be no consistency of staffing, rules, equipment, or training. All of these are at least arguably necessary to permit the league to create an appealing product in the entertainment market.” *NFL v. N. Am. Soccer League*, 459 U.S. 1074, 1077 (1982) (Rehnquist, J., dissenting from denial of certiorari). See also *Chicago Prof'l Sports Ltd. P'ship v. NBA*, 95 F.3d 593 (7th Cir. 1996) (“*Bulls II*”). In certain contexts, therefore, a league such as the NFL is “not really a joint sales agency offering the individual goods of many sellers, but is a separate seller offering its [product] of which the individual [teams] are raw material.” *N. Am. Soccer League*, at 1077. In these contexts, the league acts as a single entity.

NFL league play is not the only product that a joint venture comprising the NFL and the 32 member clubs permits. The creation of NFL Properties by the league and its clubs permits the production of new products using the brands and marks of all of the 32 member teams. As a practical matter, such products can only be created by the participation in a joint venture of the league and all of its clubs. League branding differentiates products such as *Madden NFL Football* and allows them to compete with other football games, sports games, and sources of video game entertainment. In the absence of a joint venture, transaction costs and opportunistic behavior by hold-outs would substantially hinder or even prohibit the production of this unique collective good.

For example, to create a league simulation like *Madden NFL Football* in the absence of a joint venture such as NFL Properties, EA would have to negotiate with each individual club for the use of its intellectual property, including logos, names, uniforms, and trademarks. The transaction costs—and associated opportunity for holdout by a club seeking to extract exorbitant fees—could prevent EA from ever producing its product. See, e.g., *Broad. Music, Inc.*, 441 U.S. at 20 (“A middleman with a blanket license was an obvious necessity if the thousands of individual negotiations, a virtual impossibility, were to be avoided.”). See also *id.* at 21 (observing that “integration [was] necessary to achieve [the] efficiencies” of bulk licensing, which resulted in a “substantial lowering of costs” that “is of course potentially beneficial to both sellers and buyer”).

NFL Properties’ authority to act on behalf of the league and its clubs eliminates these inefficiencies.

As the holder of all of the clubs' intellectual property and the authority to issue a blanket license, NFL Properties provides a single negotiating partner and acts as an independent source of economic power. This eliminates the transaction costs of multiple negotiations, as well as the blocking power of those who—if left to their own devices—might hold out. Scholars have noted that the elimination of such transaction costs is a fundamental reason why entities integrate into a single firm. See, e.g., Oliver E. Williamson, *The Economics of Antitrust: Transaction Cost Considerations*, 122 U. PA. L. REV. 1439, 1442 (1974) (“[W]hether a set of transactions ought to be executed between firms (across markets) or within a firm depends on the relative efficiency of each mode.”); Oliver E. Williamson, *The Vertical Integration of Production: Market Failure Considerations*, 61 AM. ECON. REV. 112, 113, 117 (1971) (“the most distinctive advantage of the firm ... is the wider variety and greater sensitivity of control instruments that are available for enforcing intrafirm in comparison with interfirm activities,” including reduction of the risk that “the divergent interests between the parties will predictably lead to individually opportunistic behavior and joint losses”). Cf. U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, *Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition* 54 (2007) (noting the procompetitive benefits of “joint activities that mitigate hold up”).²

The Court has recognized that joint-licensing agreements may be procompetitive where the

² Available at <http://www.ftc.gov/reports/innovation/P040101PromotingInnovationandCompetitionrpt0704.pdf>.

licensed good could not be produced in the absence of collective action. Specifically, in *Broadcast Music* the Court observed that the blanket licensing of copyrighted music—that is, the bundling of individual intellectual property rights—as a practical matter was the only way that copyright holders could license their products. See *Broad. Music, Inc.*, 441 U.S. at 21. Licensing through a single vehicle thus was procompetitive because the blanket license was “truly greater than the sum of its parts; *it [was], to some extent, a different product.*” *Id.* at 21–22 (emphasis added). The joint venture had “made a market in which individual composers are inherently unable to compete fully effectively,” enhancing competition. *Id.* at 23. And as an independent source of economic decisionmaking and power, the joint venture acted as “a separate seller” in that market. *Ibid.*³

The same principles hold true in the context of NFL Properties’ licensing of products using the intellectual property of all of the NFL member clubs. These are entirely different products from those that individual clubs could create on their own. The NFL league products compete nationally and internationally against “other ... leagues ..., other sports ..., and other entertainment such as plays, movies, opera, TV shows, Disneyland, and Las Vegas.” *Bulls II*, 95 F.3d at 597. NFL Properties

³ The Court in *Broadcast Music* applied a rule-of-reason analysis because it involved an agreement among competitors in the same product market, and thus raised the possibility that the “practice threaten[ed] ... competitive pricing as the free market’s means of allocating resources.” 441 U.S. at 23. In the context of an agreement within a league that permits the creation of a new product, by contrast, single entity treatment is appropriate.

thus produces *new, more competitive* product lines that would not exist outside of the joint venture, and thus acts as a “separate seller” in those product markets. See *Broad. Music, Inc.*, 441 U.S. at 23.

NFL Properties’ licensing of league products cannot reasonably be viewed as anticompetitive. Generally speaking, the creation of a joint venture to produce a good that would not otherwise exist “does not raise the antitrust dangers that [Section] 1 was designed to police.” *Copperweld*, 467 U.S. at 769. In the context of the marketing of intellectual property such as the NFL brand, concerted action is necessary to invest in brand quality and to control and enhance the image of the brand—which are procompetitive activities. Concerted action is problematic under Section 1 only where it “reduces the diverse directions in which economic power is aimed” or “suddenly increases the economic power moving in one particular direction.” *Ibid.* Neither of these dangers is present when a joint venture is formed to bring a new product to market. The creation of new markets *increases* “the diverse directions in which economic power is aimed”—here, by focusing efforts on the enhancement of a single league brand—and thus does not “increas[e] the economic power moving” in a *pre-existing* direction. *Ibid.* For these reasons, NFL Properties should be viewed as a “single enterprise” when it licenses league goods. *Id.* at 771.⁴

⁴ Although a collectively-produced good might incidentally affect the output of an existing product, this result is no different from other intrafirm conflicts that do not give rise to concerns regarding antitrust conspiracy. See, e.g., *Bulls II*, 95 F.3d at 598 (“*Copperweld* does not hold that only conflict-free enterprises may be treated as single entities”; “[e]ven a single firm contains many competing interests.”). It is well-established

The Solicitor General rightly acknowledges that joint venture participants need not consolidate ownership and control for all purposes to qualify as a single entity for particular purposes. However, the single-entity test proffered by the United States is too restrictive. Specifically, the Solicitor General asks the Court to adopt a single-entity test under which “the teams and the league must have effectively merged the relevant aspect of their operations, thereby eliminating actual and potential competition among the teams and between the teams and the league in that operational sphere.” Br. United States as Am. Cur. Supp. Pet. 17.

Requiring joint venturers wholly to “eliminat[e] actual and potential competition among the [collaborators] ... in [their] operational sphere” would exclude collaboration that does not “raise the antitrust dangers that [Section] 1 was designed to police,” *Copperweld*, 467 U.S. at 769, providing no antitrust benefit and disadvantaging joint ventures that compete with single corporate entities. A joint venture established to create and market a product that otherwise would not exist—for example, a full service law firm—would be denied single-entity status if its constituent members did not abandon activities that compete with the joint product—for example, the provision of *pro bono* legal services

that a single firm may control brand output in order to manage the quality of and create demand for that brand. See *ibid.* (“To say that participants in an organization may cooperate is to say that they may control what they make and how they sell it: the producers of *Star Trek* may decide to release two episodes a week and grant exclusive licenses to show them, even though this reduces the number of times episodes appear on TV in a given market.”).

outside of the firm. A less restrictive test, providing single-entity status where joint venturers integrate for the purpose of creating and marketing a new product, would have a stronger economic basis and would avoid imposing inefficient restrictions where antitrust dangers do not exist.

III. Licensees Of League Products Need The Efficiency And Certainty That Single-Entity Treatment Provides.

For licensees like EA, single-entity treatment of NFL Properties provides essential efficiency and certainty. As to efficiency, by negotiating with NFL Properties a licensee such as EA may negotiate and contract with one entity rather than many, thereby lowering transaction costs and allowing the licensee to pass those savings along to consumers. See, *e.g.*, *Broad. Music, Inc.*, 441 U.S. at 21 (observing that “integration [was] necessary to achieve [the] efficiencies” of bulk licensing, which resulted in a “substantial lowering of costs” that “is of course potentially beneficial to both sellers and buyer”). And as to certainty, treating licensors as single entities allows licensees to negotiate just as they would with any corporate entity, without fear that a unilateral license would lead to an antitrust challenge.

Licensees such as EA have always viewed NFL Properties as an efficient, “one-stop-shop” for NFL League intellectual property licenses. As a licensor of league-branded products, “[f]rom the perspective of fans and advertisers,” as well as licensees such as EA, the NFL (through NFL Properties) offers “one product from a single source.” *Bulls II*, 95 F.3d at 599. This is true “even though [the individual NFL teams] are highly distinguishable, just as General

Motors is a single firm even though a Corvette differs from a Chevrolet.” *Ibid.* Among other reasons, this is because NFL Properties has acted as the exclusive licensing vehicle of NFL league products for nearly a half century. The league and its teams created NFL Properties for this very purpose; that is, to centralize the licensing of their intellectual property, and “to conduct and engage in advertising campaigns and promotional ventures on behalf of the NFL and the member teams.” Pet. App. 18a (brackets omitted).

Equally important is certainty. When EA is considering whether to contract with a joint venture like NFL Properties, EA needs to know whether it is buying a license or an antitrust lawsuit. This is not a hypothetical concern, as the presence of the licensee Reebok as a defendant in this matter demonstrates. Accordingly, licensees would benefit from a rule that determines a joint venture’s status with respect to a particular operation once and for all at the point of formation, and thereafter permits the venturer to function as a unified corporation.

The Court in *Dagher* recognized a distinction for Section 1 purposes between the initial agreement to form the venture, which is concerted action, and subsequent agreements among the venturers regarding the venture’s business, which are unilateral action. See 547 U.S. 1 at 6. Under *Dagher*, the venturers’ initial agreement to form the venture is concerted action subject to scrutiny. See *id.* at 6 n.1 (“Had respondents challenged [the joint venture] itself, they would have been required to show that its creation was anticompetitive under the rule of reason.”). Once the prerequisites for joint-venture treatment are established, however, subsequent agreements regarding the venture’s

business are the unilateral action of the venture. See *id.* at 4. See also 7 Phillip E. Areeda & Herbert Hovenkamp, *ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION* ¶ 1478c (2d ed. 2003) (“Once a venture is judged to have been lawful at its inception and currently, decisions that do not affect the behavior of the participants in their nonventure business should generally be regarded as those of a single entity rather than the parents’ daily conspiracy.”).

With single-entity status determined at the time of formation, a joint venture can operate with respect to its product as any other unitary seller. For example, the joint venture can unilaterally set pricing. *Dagher*, 547 U.S. at 6 (“[T]he pricing policy challenged here amounts to little more than price setting by a single entity—albeit within the context of a joint venture—and not a pricing agreement between competing entities with respect to their competing products.”). And the venture can choose to issue licenses—including exclusive licenses such as that between NFL Properties and EA. See *Bulls II*, 95 F.3d at 598 (“To say that participants in an organization may cooperate is to say that they may control what they make and how they sell it.”); Gregory J. Werden, *Antitrust Analysis of Joint Ventures: An Overview*, 66 *ANTITRUST L.J.* 701, 730–31 (1998) (“An antitrust claim based solely on a single firm’s denial of a license to a trademark would readily be dismissed.”). Housing the league’s intellectual property in a single entity for the purpose of trademark licensing is particularly appropriate, as it enables the league to grant licensees such as EA a true license insusceptible to defections or holdouts, and incentivizes licensees such as EA to develop and

invest in league-based products. In short, the league as a single entity should be free to engage in all of the ordinary market conduct in which any other competitor can engage, and its counterparties should be confident that a cloud of antitrust uncertainty will not hang over the transactions that result.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted.

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