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IN THE SUPREME COURT OF THE UNITED STATES

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AMERICAN NEEDLE, INC., :

Petitioner :

v. : No. 08-661

NATIONAL FOOTBALL :

LEAGUE, ET AL. :

- - - - - x

Washington, D.C.

Wednesday, January 13, 2010

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:08 a.m.

APPEARANCES:

GLEN D. NAGER, ESQ., Washington, D.C.; on behalf of Petitioner.

MALCOLM L. STEWART, ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States, as amicus curiae, supporting neither party.

GREGG H. LEVY ESQ., Washington, D.C.; on behalf of Respondents.

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P R O C E E D I N G S

(10:08 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument first this morning in Case 08-661, American Needle v. The National Football League.

Mr. Nager.

ORAL ARGUMENT OF GLEN D. NAGER
ON BEHALF OF THE PETITIONER

MR. NAGER: Thank you, Mr. Chief Justice, and may it please the Court:

In this case, the Court of Appeals for the Seventh Circuit held that an agreement of the 32 teams of the National Football League was immune from any scrutiny under Section 1 of the Sherman Act on the ground that the agreement allegedly fails the plurality of actor requirement of this Court's jurisprudence.

The 32 teams of the National Football League are separately owned and controlled profit-making enterprises. Under this Court's decision in NCAA, as well as the Court's more general joint venture jurisprudence, those clubs are entities whose distinct agreements are, indeed, subject to Section 1 scrutiny.

The fact of the matter is there is a longstanding consensus, judicial and legislative, that agreements among sports teams about whether and how they

1 will participate in the marketplace is subject to
2 scrutiny under the Sherman Act, Section 1.

3 The Court's decision in NCAA is most
4 directly on point. In that case, the Court held that a
5 policy of the NCAA that restricted the ability of member
6 institutions of the NCAA to sell TV rights violated
7 Section 1. Just as with the NFL, the decisions of the
8 NCAA were ultimately controlled by the vote of its
9 members, and for that reason, the Court held that the
10 NCAA policy was a horizontal restraint.

11 JUSTICE SOTOMAYOR: But there was no joint
12 venture with respect to the television rights, meaning
13 there was no separate activity, other than the
14 televising of the shows at issue. Here, the Solicitor
15 General is saying there is a joint venture, and it has
16 to do with the licensing of trademarks, with their
17 quality control, et cetera.

18 Isn't that a substantial difference?

19 MR. NAGER: No, I don't -- I don't think so,
20 because what we are asking about here is -- is the
21 question of whether or not the agreement of the teams
22 involves a plurality of actors. And just as in NCAA,
23 the members' institutions -- because they control the
24 operation of the NCAA and the policy that it was
25 promulgating, there was a plurality of actors.

1 So, too, here, the 32 teams of The National
2 Football League have entered into an agreement and
3 control the use, collectively, of the trademarks and
4 logos of the individual teams. And for that reason,
5 there is concerted activity that is involved.

6 Justice Sotomayor, the point that you raise
7 might be of -- a point of difference that the NFL could
8 argue in the context of an ancillary restraint analysis
9 and the context of a rule of reason analysis, but it is
10 not a point of distinction that they can argue properly
11 in the context of the concerted conduct inquiry.

12 The NCAA case simply applies the consistent
13 teachings of this Court in cases like Sealy, BMI, and
14 Copperweld, that separately owned and controlled
15 entities entering into agreements, those agreements
16 constitute concerted conduct subject to scrutiny under
17 the antitrust laws.

18 JUSTICE GINSBURG: Did that cover everything
19 that the NFLA does? Because everything is subject to
20 agreement, it's all concerted action, so is everything
21 under the Sherman Act, and then it goes to rule of
22 reason analysis? Or are there some things that escape,
23 entirely, antitrust analysis?

24 MR. NAGER: Certainly everything in the --
25 that is challenged in this case, because this involves a

1 restriction on the activities of the venturers
2 themselves. But more generally, I would -- I would
3 answer your question, Justice Ginsburg, to say that yes,
4 that everything that these 32 separately owned and
5 controlled teams joined together to do by -- in concert,
6 by agreement, by consent, is a contract.

7 JUSTICE KENNEDY: Changes in the -- in the
8 rule apply? They make a change to make it -- give the
9 passer more protection, but there's -- this really hurts
10 certain teams, which mostly run, and so -- rule of
11 reason?

12 MR. NAGER: Yes, it is concerted activity.
13 I don't think it would be a plausible rule of reason
14 claim.

15 JUSTICE KENNEDY: Well, how -- you know the
16 litigation system. How do we know?

17 MR. NAGER: Well, I think we know the
18 following, Justice Kennedy: That under this Court's
19 rule of reason's jurisprudence, a plaintiff has to be
20 able to plead an identifiable anticompetitive effect in
21 a market in which the defendant plausibly has market
22 power, and the -- the plaintiff also has to be one who
23 can --

24 JUSTICE KENNEDY: Well, my -- my
25 hypothetical: Two or three teams which aren't

1 particularly popular in the league are hurt by the rule
2 change. And notice -- notice, the owners sit around the
3 room, they are liable for a conspiracy. I mean, this is
4 serious stuff. Triple damages.

5 I don't -- and my question, really, was the
6 same as Justice Ginsburg. Can you give us a zone where
7 we are sure a rule of reason inquiry will be -- would be
8 inappropriate? We can take care of it on summary
9 judgment. Because if you don't have some sort of
10 Section 1 carveout for joint action, then -- then
11 everything is under the rule of reason.

12 MR. NAGER: Well, Justice Kennedy, let me
13 answer your question in two parts. First of all, to the
14 extent that the Court is looking for a zone, the
15 concerted conduct doctrine is the wrong place to do it,
16 because remember, if something is deemed not to be
17 concerted conduct, it is a per -- then it's per se, not
18 subject to section 1 and per se legal. And I think for
19 the Court's jurisprudence over the last 30 years, the
20 Court has been trying to get out of per se rules and
21 have a more focused inquiry into what the
22 anticompetitive effects and procompetitive effects of a
23 particular restraint are. The concerted conduct doctrine
24 would be a very blunt tool to use for that purpose.

25 Now, that is not to say -- and I appreciate

1 your question -- in the NCAA case itself, where
2 conditions of competition and the like were raised,
3 Justice Stevens' opinion for the Court says that in
4 contrast to the TV restraint, these other types of rules
5 and regulations of the sports league are presumptively
6 competitive, procompetitive, presumptively favorable to
7 consumers, because they are integral and bound up with
8 the creation of the football venture itself.

9 JUSTICE ALITO: Well, let me give you
10 another example that you mention in your brief. The NFL
11 teams agree among themselves regarding scheduling: They
12 will play 16 games a year and they will have a playoff
13 schedule and they won't play any other games. Now,
14 would that be a clear case under the rule of reason?
15 You mention and some of your amici mention that, for
16 example, the English football leagues operate very
17 differently.

18 MR. NAGER: Justice Alito, if I -- I may not
19 have gotten all of your question, but let me answer it
20 in two parts. The antitrust laws do not require joint
21 ventures to maximize output. They don't require joint
22 ventures to maximize competition. They simply prohibit
23 people entering into contracts from unreasonably
24 restraining trade.

25 So a mere agreement among the team owners

1 that they would have a 14-game schedule rather than a
2 16-game schedule is not a prima facie showing of an
3 anticompetitive impact, because all it's showing us is
4 what the joint venturers have done with their own
5 output. They have -- you haven't alleged a market-wide
6 reduction in output. Now, if by your question you were
7 saying in addition --

8 JUSTICE ALITO: Well, what if one of the
9 team wants -- one of the teams wants to play additional
10 games --

11 MR. NAGER: Well --

12 JUSTICE ALITO: -- against a rival team
13 where they will get more money?

14 MR. NAGER: What I -- what I was going to
15 jump right to is: If in addition to changing the league
16 schedule, the team owners in concert agreed to prohibit
17 the teams of the National Football League from -- from
18 playing any other games -- doing an exhibition game in
19 Japan, the Redskins and the Giants playing another game
20 -- that might show a market-wide reduction in output.
21 And the Court's decision in NCAA says very specifically
22 that the most important condition of ensuring the
23 competitiveness of joint ventures is ensuring the
24 freedom of the individual venturers to produce output,
25 increase output.

1 Now, that doesn't mean that a league rule of
2 that type would be unlawful. All I'm trying to suggest
3 is if in addition to changing the schedule of games for
4 the league, they also imposed a restriction on the
5 individual venturers from producing additional games on
6 their own, we might have something that looked more like
7 a plausible rule of restraint --

8 JUSTICE SOTOMAYOR: They couldn't -- they
9 couldn't stop that team from joining another league?
10 Let's assume -- and I -- you know, I don't know enough
11 about football, but let's assume there are two leagues
12 playing. One of them plays on Saturday and the other
13 plays on Sunday. You are suggesting that the joint
14 venture couldn't stop their members from joining that
15 other league? What's the purpose of being in a venture
16 if -- if you are free to reject it and go to somewhere
17 else?

18 MR. NAGER: What I'm saying is, first of
19 all, it would plainly be concerted activity on the part
20 of the team owners because they would have entered into
21 a horizontal restraint on the activity of the venturers.
22 Whether or not that horizontal restraint violated the
23 antitrust laws, one would have to go through the
24 following analysis, Justice Sotomayor: First, we would
25 have to ask whether that restriction is an ancillary --

1 was an ancillary restraint.

2 And an ancillary restraint, starting with
3 Judge Taft, later Chief Justice Taft's, opinion in the
4 Addison Pipe case, is: Is that restraint reasonably
5 necessary to achieve the efficiency-enhancing purposes
6 of the joint venture and is it no broader than
7 necessary? And if it is, then we would analyze that
8 restraint by reference to its own procompetitive
9 benefits and anticompetitive effects; we would analyze
10 it by reference to the benefits of the joint venture as
11 a whole.

12 CHIEF JUSTICE ROBERTS: Counsel, it seems to
13 me -- your last few answers seem to me to beg the
14 question. You start out by saying: Well, obviously
15 it's a horizontal agreement among the teams, and then
16 you explain how you are going to analyze it.

17 I thought that was the very question before
18 us: Whether these sorts of rules and regulations are
19 horizontal agreements between the teams or whether they
20 are part of a particular -- a single entities'
21 articulation of rules.

22 MR. NAGER: Well, Mr. Chief Justice, you are
23 exactly right, and the real --

24 CHIEF JUSTICE ROBERTS: That you have been
25 begging the question? Is that -- it's that part?

1 (Laughter.)

2 MR. NAGER: Well, let me try to address
3 Justice Sotomayor's subsequent question in the context
4 of the way you are posing the question,
5 Mr. Chief Justice.

6 The reason it's a horizontal restraint is
7 because these -- under the Court's doctrine, consistent
8 teachings, whether it be Sealy, BMI, Copperweld, these
9 teams are separately owned. They are separate
10 decision-makers joining together, and they are making a
11 decision about how they are going to jointly produce
12 something or not produce something. And that's what
13 makes it concerted activity under this Court's
14 consistent teachings. The distinction between
15 unilateral activity under section 1 and concerted
16 activity under section 1 has consistently been the
17 distinction between ownership integration of assets and
18 contract integration of assets.

19 JUSTICE STEVENS: Can I interrupt with this
20 question? Is it not part of your burden not only to
21 argue there are multiple actors, but also that their
22 agreement has an adverse effect on competition?

23 MR. NAGER: It -- absolutely, as the
24 plaintiff in the case, Justice Stevens, that -- we do.
25 That is not the ground of decision on the court below.

1 JUSTICE STEVENS: I understand it isn't, but
2 it is part of your burden to say this is not a
3 procompetitive agreement.

4 MR. NAGER: Absolutely. And I'm not --

5 JUSTICE SCALIA: But not -- not here.

6 MR. NAGER: In the -- I'm sorry, Justice?

7 JUSTICE SCALIA: Not here.

8 MR. NAGER: I -- I don't have to argue -- I
9 mean, I don't think I have to argue in this Court. I
10 just have to answer your questions, but --

11 JUSTICE SCALIA: If -- if we find for you
12 and it goes back, then you would -- you would bear that
13 burden.

14 MR. NAGER: That's correct. And in fact, in
15 this case, Justice Stevens, I would point out that the
16 NFL initially moved to dismiss the -- the rule of reason
17 count on the ground that it didn't state a cognizable,
18 plausible rule of reason, and the district court judge
19 denied that motion.

20 He found the complaint alleged a market in
21 which he could not say as a matter of law that the NFL
22 defendants did not have market power, and he recognized
23 that the -- that the teams had agreed together to
24 prohibit competition in an aspect of their licensing
25 activity and in an aspect of their merchandising

1 activity.

2 JUSTICE SCALIA: How does it work?

3 JUSTICE STEVENS: But what if he -- what if
4 he further concluded that the agreement had the overall
5 effect of stimulating additional -- it was
6 procompetitive in that it would equalize the economic
7 strength of the teams, and therefore made them all
8 better competitors on the playing field? Would that
9 have been a defense?

10 MR. NAGER: I'm sorry, Justice Stevens, I'm
11 not quite sure. But you are saying if in the response
12 to a motion to dismiss he had -- he had held --

13 JUSTICE STEVENS: Right. He said: Sure,
14 there is an agreement here, but the burden is on the
15 plaintiff to show that the agreement has an adverse
16 effect on competition. And that the -- as I understand
17 the facts, you've -- there is revenue sharing here,
18 isn't there? That they -- they all share in the product
19 of the sales of the joint product?

20 MR. NAGER: Well, let me explain what
21 they've done, and I will then explain why it does have a
22 -- identifiable anticompetitive effects, which certainly
23 satisfy the pleading standards for a rule of reason
24 claim.

25 What the teams did here was they got

1 together and they agreed that they would not,
2 themselves, individually license their trademarks or
3 logos. They agreed that they -- under -- the current
4 market system included the issuance of market blanket
5 licenses. They would eliminate all but one of those
6 blanket licenses from the market and they would give it
7 in the exclusive control of Reebok, and they would limit
8 the circumstances in which they competed against each
9 other and with Reebok, and said --

10 JUSTICE BREYER: But I thought -- I thought
11 -- as I read your complaint, almost every word of it had
12 to do with pro -- per se violations. So I forget those
13 here, right?

14 MR. NAGER: The per se violation was
15 dismissed and --

16 JUSTICE BREYER: You forget -- just yes or
17 no. I forget it? Okay.

18 MR. NAGER: -- is not before the Court.

19 JUSTICE BREYER: Now, I've suddenly heard
20 you talk -- the only thing left I could see was where
21 you say by their agreement to grant an exclusive license
22 to Reebok, they unreasonably restrained trade in the
23 markets. That's what I'm supposed to focus on?

24 MR. NAGER: No, no. What I would say --

25 JUSTICE BREYER: What other paragraph do you

1 want me to focus on?

2 MR. NAGER: Well, what I would point you to
3 is the statement -- I mean, if --

4 JUSTICE BREYER: No, I'm interested in the
5 complaint at the moment.

6 MR. NAGER: What the complaint talks about
7 is the granting of an exclusive license here.

8 JUSTICE BREYER: Yes. Okay. So I'm looking
9 at the complaint.

10 MR. NAGER: But the exclusivity as to --

11 JUSTICE BREYER: Fine. I get the point.
12 I'm asking a question. And I just heard you say that
13 you want, for example, were it -- you want the Patriots
14 to sell T-shirts in competition with the Saints, or
15 whoever. The Red Sox. All right. You see the point?
16 The Red Sox -- I know baseball better. You want the Red
17 Sox to compete in selling T-shirts with the Yankees; is
18 that right?

19 MR. NAGER: The ability to compete. Yes.

20 JUSTICE BREYER: Yes. Okay. I don't know a
21 Red Sox fan who would take a Yankees sweatshirt if you
22 gave it away.

23 I mean, I don't know where you are going to
24 get your expert from who's going to say there is
25 competition between those two products. I think they

1 would rather -- they would rather wear a baseball, a
2 football, a hockey shirt.

3 MR. NAGER: I understand the -- the point.

4 JUSTICE BREYER: But you are going to go
5 back and prove that actually there is competition
6 between the --

7 MR. NAGER: I understand the point you are
8 making. I would also make the point that --

9 JUSTICE BREYER: Yes. Is that what this
10 case is about?

11 MR. NAGER: In part. But you've got to
12 recognize what the competition is for. The competition
13 is for fans. And the fact of the matter is, you're
14 right that someone who has lived in New York City for a
15 long time is unlikely to be a Red Sox fan and be easily
16 be persuaded to be a Red Sox fan, but the person who is
17 three years old can easily be persuaded.

18 JUSTICE BREYER: They have very small
19 allowances at three years old.

20 (Laughter.)

21 JUSTICE BREYER: Why you think -- I guess
22 you have a right to that. I'm not -- you have a right,
23 but that's what you were going to try to have to prove:
24 That they're --

25 MR. NAGER: Well, but the other point I

1 would make is --

2 JUSTICE BREYER: Yes.

3 Mr. NAGER: -- that's just showing that each
4 team has substantial market power.

5 JUSTICE BREYER: Yes.

6 Mr. NAGER: And again, they --

7 JUSTICE BREYER: But I'm trying to look --
8 what I'm trying to get in my mind is what specific
9 restraint you are focusing on.

10 You listed three or four, and one of them is
11 you want, in effect -- I'm joking about it, but it's
12 true -- you are arguing that the Yankees should compete
13 with the Red Sox in selling shirts.

14 Another thing you are complaining about,
15 which is the one I understand less, is that these teams
16 got together and they agreed that they would just have
17 one person sell all this stuff together. And what you
18 think is that they individually should have decided
19 whether to choose that one person, or maybe to choose
20 two people, or three; is that right?

21 MR. NAGER: Not quite.

22 JUSTICE SCALIA: Mr. Nager, do I have to
23 figure this out here? Is --

24 MR. NAGER: No.

25 JUSTICE SCALIA: Is this issue before us

1 here? Or is it just the issue of whether the lower
2 court was wrong to dismiss your suit on the basis that
3 this is a unitary operation? I think that was the only
4 issue.

5 MR. NAGER: You're -- that is the only
6 issue, Justice Scalia.

7 JUSTICE SCALIA: Well, why am I worrying
8 about this other stuff?

9 MR. NAGER: Because Counsel has an
10 obligation to respond to questions.

11 (Laughter.)

12 JUSTICE BREYER: I find --

13 MR. NAGER: I appreciate Your Honor --

14 JUSTICE BREYER: I find it easier --

15 Mr. NAGER: You'd be a good blocker.

16 JUSTICE BREYER: -- to think about the case
17 if I know what's going on. And I'm not certain this is
18 irrelevant, but given Justice Scalia's persuasive
19 remark, I will withdraw my question.

20 (Laughter.)

21 MR. NAGER: Thank you, Justice Breyer.

22 JUSTICE KENNEDY: Well, but it seems to me
23 what we are doing is exploring the consequences of
24 completely discarding the unitary theory.

25 MR. NAGER: Well, we're not --

1 JUSTICE KENNEDY: And so -- and the earlier
2 questions, it seemed to me, were helpful. The
3 Saturday/Sunday scheduling issue, it seems to me, pretty
4 clearly on its face does limit competition. You -- you
5 have one day instead of two days.

6 Then Justice Stevens said: Suppose it makes
7 them better players because they are rested and so they
8 can perform better. I take it that was the purpose of
9 the question. And I -- I still don't get any answers.
10 I don't know where we are with this.

11 MR. NAGER: The answer to --

12 JUSTICE KENNEDY: And -- and it's a
13 difficult area, but I would like -- and -- but I would
14 like some guidance.

15 MR. NAGER: Well, the guidance I would give
16 you, Justice Kennedy, is that as Justice Scalia says,
17 the only question before the Court is whether or not
18 these agreements constitute concerted activity. They
19 plainly do, because they are agreements between
20 separately owned and controlled competing businesses.

21 JUSTICE GINSBURG: Mr. Nager, I think you
22 answered my question originally: Yes, everything.
23 Because they are separate entities, they agree on
24 everything. There is agreement in every case, so there
25 was nothing you would take outside, and you would put

1 everything under the rule of reason analysis.

2 MR. NAGER: That -- that is correct. But
3 that doesn't mean that the rule of reason is some
4 unstructured, indeterminate --

5 JUSTICE GINSBURG: One -- one concern in the
6 litigation is, you know, if it doesn't come under the
7 Sherman Act at all, they go home after the case is
8 dismissed on the -- on the pleadings.

9 But once you say no, it's got to be a rule
10 of reason analysis, then you have discovery, which can
11 be costly. And I thought that that was a feature of
12 this case, that the -- that the plaintiff wanted more
13 discovery, and the court said: You've had enough.

14 MR. NAGER: Well, no. The -- the judge only
15 allowed discovery on the single entity issue. He did
16 not allow discovery on -- on the rule of reason
17 question. So there's been -- not been -- discovery on
18 the substance of the case has not been conducted.

19 So in that regard, the question of how the
20 case would be managed going forward is something that
21 would be in the hands of the district court on remand
22 from this Court and the court of appeals, after this
23 erroneous conclusion that the agreements don't
24 constitute concerted conduct is put to the test.

25 CHIEF JUSTICE ROBERTS: Counsel, could you

1 articulate for me as succinctly as possible the extent
2 to which your position departs from the position of the
3 Solicitor General?

4 MR. NAGER: The Solicitor General's position
5 is correct insofar as it criticizes the Seventh
6 Circuit's reasoning.

7 The test that the Solicitor General proposes
8 is conceptually and doctrinally unsound, and it will
9 create a lack of clarity where there presently exists
10 clarity in the cases, and it will produce inefficiency
11 and waste in the conduct of litigation that does not
12 presently exist.

13 CHIEF JUSTICE ROBERTS: Well, I would have
14 thought it is just the transfer of the inefficiency and
15 lack of clarity from the -- the first question to the
16 rule of reason. I mean, I'm not quite sure it -- you
17 don't have the same problem. It's just a question of
18 where you want to rest the inefficiency and confusion.

19 MR. NAGER: Well, I understand your point,
20 Mr. Chief Justice: That to the extent that rule of
21 reason inquiries are not as refined as they need to be,
22 since the Solicitor General's concerted conduct inquiry
23 includes rule of reason inquiries -- indeed, on its
24 effective merger standard, it says it has to survive a
25 rule of reason analysis or somehow be waived, or you

1 would have to do it as part of the concerted conduct
2 inquiry -- so that there is no doubt to the extent that
3 -- that the rule of reason is a continuing project of
4 this Court, we would be transferring some of that
5 project into the concerted conduct inquiry.

6 With all respect, Mr. Chief Justice, I don't
7 think that would be a healthy development in the law.
8 The courts actually understand the concerted conduct
9 doctrine as it presently exists.

10 CHIEF JUSTICE ROBERTS: Well, I -- I thought
11 the purpose of their submission was to respond to some
12 of the questions we've seen, like scheduling, like what
13 the rules are going to be about -- about the game.
14 There are some things that it just seems odd to subject
15 to a rule of reason analysis. And you yourself have
16 said: Well, that is going to be an easy case under the
17 rule of reason. Why doesn't it make sense to sort of
18 carve those out at the outset, rather than at the end of
19 the case?

20 MR. NAGER: Well, I think the answer is, you
21 should -- you should use English language and doctrine
22 to address the issue that you are actually trying to
23 address, rather than call it something else.

24 Right now we have an antitrust doctrine that
25 says you've got to have concerted conduct and you have

1 to have an unreasonable restraint of trade. We have
2 courts that understand how to apply this Court's cases
3 on concerted conduct. This Court is -- for
4 understandable reasons, is sensitive to the fact that
5 the rule of reason is not quite as well understood and
6 is an evolutionary doctrine, perfectly well understood
7 by me.

8 There are certain issues that this Court has
9 said come up in a rule of reason analysis, and to quote
10 the Court from *Cal Dental*, "can be dealt with in the
11 twinkling of an eye"; that is, some claims, as the NCAA
12 Court said, are not going to be serious rule of reason
13 claims and can be dismissed on the pleadings. The Court
14 said that in *Twombly* as well.

15 JUSTICE STEVENS: And as I understand your
16 position, that could be the result in this case. We
17 don't know whether the district court was right or wrong
18 in what he did on the -- on the rule of reason issue.

19 MR. NAGER: In terms of what this Court --
20 obviously, on my client's behalf, I have to vigorously
21 state to the Court we think we have a bona fide, serious
22 rule of reason claim -- but yes, Justice Stevens --

23 JUSTICE STEVENS: And one thing I wondered
24 about the record: There is discussion in the briefs
25 about the fact that the teams share the revenues from

1 these -- these sales. Is that -- how did that get in
2 the record, the revenue sharing aspect of their -- of
3 the different teams' participation?

4 MR. NAGER: Well, I -- I didn't handle the
5 case below, so I don't quite know how it got into the
6 record. It is my -- certainly my understanding that
7 there is an affidavit in the record that says that the
8 revenues that the NFLP entity receives are distributed
9 to the teams in equal shares, so that that --

10 JUSTICE STEVENS: Would -- wouldn't that --
11 that affidavit support the conclusion that this is
12 basically a procompetitive agreement because it tends to
13 make competition stronger on the playing field, and
14 therefore, that's a sufficient defense under the rule of
15 reason, and that's the end of the ball game?

16 MR. NAGER: I -- I think not. You have to
17 remember that that agreement to not compete and have
18 only one entity --

19 JUSTICE STEVENS: Yes, but you are not just
20 competing.

21 MR. NAGER: That is the very thing the case
22 challenges.

23 JUSTICE STEVENS: But with regard to sales
24 of the paraphernalia and so forth that you have here,
25 you are not just competing among the members of the

1 League; you are competing in a market that includes all
2 sports paraphernalia.

3 MR. NAGER: No, our market was alleged and
4 held not to be legally invalid by the district court, to
5 be NFL-logoed hats and apparel.

6 JUSTICE STEVENS: That assumes there is no
7 competition between the sales of those logos and the
8 sales of other sports logos.

9 MR. NAGER: Well, that -- that's correct.
10 And the district court judge held that that was a --
11 based upon this Court's decision in NCAA and the
12 International Boxing case -- was a plausible market to
13 allege in which the NFL teams had market power. And so
14 it would be a question for the district court managing
15 the case going forward to determine whether or not that
16 was a factually supportable market.

17 JUSTICE SOTOMAYOR: Counsel, you -- the
18 Solicitor General is asking us to remand under his new
19 test to find out whether you are challenging the joint
20 venture or challenging simply the licensing to one
21 individual or one entity. What are you doing? Do you
22 have an answer to that?

23 MR. NAGER: Well, the -- the answer is --

24 JUSTICE SOTOMAYOR: Meaning -- I don't --

25 MR. NAGER: -- I understood -- that the

1 American Needle said in the court below that what it was
2 challenging was the grant of an exclusive license to
3 NFLP that prohibited the individual team competition and
4 it limited all competition in the market in blanket
5 licenses.

6 When the case came to this Court, on page 2
7 of the orange brief, the NFL said they understood
8 exactly what our case was -- this is on page 2, the
9 second sentence: "American Needle alleged that the
10 decades-old agreement among the member clubs to
11 collectively market such intellectual property was
12 unlawful under Sections 1 and 2 of the Sherman Act, at
13 least after the 2001 decision to collectively license
14 the marks to a single headwear manufacturer."

15 The NFL stood -- understood exactly what we
16 were arguing, and they have understood it throughout
17 this case, as did the lower courts. I'm not quite sure
18 why the Solicitor General doesn't understand it.

19 JUSTICE GINSBURG: Is your point that your
20 client wasn't hurt until they dealt exclusively with one
21 manufacturer?

22 MR. NAGER: That's correct,
23 Justice Ginsburg.

24 JUSTICE GINSBURG: So you have nothing --
25 you had no damages before?

1 MR. NAGER: Before.

2 CHIEF JUSTICE ROBERTS: Thank you,
3 Mr. Nager.

4 Mr. Stewart.

5 ORAL ARGUMENT OF MALCOLM L. STEWART

6 ON BEHALF OF THE UNITED STATES

7 AS AMICUS CURIAE, SUPPORTING NEITHER PARTY

8 MR. STEWART: Mr. Chief Justice, and may it
9 please the Court:

10 I think that by focusing on a rather mundane
11 aspect of the NFL commissioner's powers, this may help
12 to explain why the United States is not four-square in
13 support of either party's theory in this case. Among
14 the powers that is vested in the commissioner by the
15 NFL -- by the NFL constitution is the power to incur
16 expenses to carry on the ordinary business of the
17 League, and this includes renting office space, hiring
18 employees, and procuring supplies.

19 And if the commissioner, pursuant to that
20 delegation of authority, decides from which company he's
21 going to -- to acquire paper for the League's offices or
22 decides what the weight scale for secretaries in the
23 League offices should be, our view is that that's the
24 conduct of a single entity. It may be that the
25 commissioner's power to do those things is ultimately

1 derived from the consent of the individual teams within
2 the League, but once that consent has been given, once
3 that authority has been centralized, then the
4 commissioner's decision about a paper supplier or wages
5 for employees --

6 JUSTICE BREYER: And then the question I
7 have -- I now understand this much better in light of
8 that. And -- but I don't -- and -- and I see your
9 point. What I'm not certain about is: Is it better to
10 characterize it as a single entity, in which case we get
11 into the kind of confusion that I think exists in this
12 case? Or just say: Look, it's a joint venture.

13 If Panagra creates a joint venture, of
14 course they are going to buy things like office space
15 and employees, so it's reasonable by definition. We
16 don't even look into it. Those things that are close
17 enough. See, take your criteria from 17, page 17, which
18 are excellent criteria in my mind, and you say these are
19 the criteria by which we decide whether those ancillary
20 parts of a joint venture that is itself reasonable are
21 also reasonable.

22 MR. STEWART: I guess we would say two
23 things. The first is, up until now there has been no
24 such thing in the law as concerted action that is per se
25 legal, or per se reasonable.

1 JUSTICE BREYER: No, we wouldn't say per se.
2 We are saying that the justification here: They are
3 reasonable. Why are they reasonable? Because there is
4 a legitimate joint venture, and this is an ancillary
5 part of that legitimate joint venture.

6 People can attack it, but it's going to be
7 no easier to attack than if they tried to attack what
8 you call a single entity.

9 MR. STEWART: I guess my point is that if,
10 for instance, a disappointed bidder for the paper supply
11 conduct -- contract challenged this as a Section 1
12 violation and said the commissioner's decision to go to
13 Staples rather than Office Depot was unreasonable
14 because Office Depot was offering a better product at a
15 lower price -- there are certainly decisions that the
16 commissioner could make with respect to procurement of
17 supplies or the setting of wage levels that would be
18 unreasonable in a business judgment sense, in that they
19 wouldn't effectively carry on the mission of the
20 organization, but they wouldn't be unreasonable in
21 the -- the Section 1 sense.

22 And the other thing I would say is that line
23 of argument could have been made in Copperweld; that is,
24 the Court could have concluded that --

25 JUSTICE BREYER: Well, look, your second

1 criteria opens it up to attack in precisely the same way
2 that my use of rule of reason does, because they are
3 going to have to show it doesn't significantly affect
4 actual or potential competition. Therefore, they file
5 their claim, they say they win under the second
6 criteria, and it's precisely the same as a person filing
7 his claim and saying it's unreasonable.

8 We are only talking terminology, but what
9 worries me about this is the terminology, because I
10 think that the lower courts have taken Copperweld
11 terminology and transferred it to a place where it does,
12 I think, perhaps not belong.

13 MR. STEWART: Well -- well, in Dagher, for
14 instance, the Court was dealing with a situation that's
15 in some ways analogous to the one that you have here;
16 that is, a joint venture in which entities that were
17 economic competitors in some aspects of their businesses
18 joined forces with respect to other aspects. And the
19 Court in Dagher didn't squarely resolve these questions,
20 whether Section 1 applied, but it said that in pricing
21 its products, Equilon, the joint venture, was acting as
22 a single firm, a single entity.

23 The other point I would like to make about
24 my -- my paper and employee example is that, in our
25 view, the NFL commissioner, when carrying out those

1 functions on behalf of the League, would be acting as a
2 single entity, even though his power was derived from
3 the consent of the teams. But if the Jets and the Giants
4 agreed among themselves as to what wages they would pay
5 their secretaries or from whom they would buy paper,
6 that would be an entirely different thing. The fact
7 that those teams are for some purposes part of a --

8 JUSTICE STEVENS: May I ask you this
9 question, Mr. Stewart? Would the antitrust issue before
10 us be any different if instead of giving an exclusive
11 contract to one purveyor of the product, the
12 commissioner had entered into a multitude of different
13 contracts, but specified a minimum price in every one he
14 specified?

15 MR. STEWART: I think the Section -- the
16 question of whether Section 1 applied would not be any
17 different; that is, the central Section 1 --

18 JUSTICE STEVENS: So the fact that this is
19 an exclusive agreement is kind of a red herring in this
20 case, isn't it?

21 MR. STEWART: It -- it may not be a red
22 herring with respect to the ultimate resolution of the
23 case; that is, if the court on -- the lower court, on
24 remand, if the case were remanded, applied rule of
25 reason analysis, the -- the precise nature of the

1 contract might bear on whether the restraint was
2 reasonable, but it wouldn't bear on the question of
3 whether concerted activity was involved; that is,
4 what --

5 CHIEF JUSTICE ROBERTS: I don't -- I'm
6 sorry. I didn't mean to interrupt your answer.

7 MR. STEWART: I guess my point was, once --
8 once the teams decided that they would -- rather than
9 each negotiating individually, either with a single
10 licensee or with multiple licensees, once they decided
11 they would negotiate as a collective and that any
12 potential licensee had to go to the collective rather
13 than to the individual teams, that's the central
14 Section 1 issue. And if the -- the collective had
15 decided, we will give contracts to a multitude of
16 potential bidders, that would not have affected the fact
17 that concerted action was involved.

18 CHIEF JUSTICE ROBERTS: So under your --
19 following of your paper case, are you saying that if the
20 teams delegated to the commissioner the authority to
21 decide whether we are going to enter -- whether the
22 League is going to enter into one contract on logo
23 products or let each team decide, that would be all
24 right?

25 MR. STEWART: That would -- that initial

1 delegation of authority would be subject to a Section 1
2 challenge, because that would be concerted action in the
3 same way that the Court in Dagher said --

4 CHIEF JUSTICE ROBERTS: Well, why isn't the
5 decision to order paper from one company rather than
6 another subject to Section 1 challenge?

7 MR. STEWART: Because that -- that occurs
8 after the point at which the commissioner has been
9 vested with that authority.

10 If -- if somehow a plaintiff wanted to say
11 there was an -- there was illicit concerted action when
12 the teams agreed to give the commissioner this general
13 power, that would be subject to Section 1 review. It
14 seems -- because that would be concerted action. It
15 seems highly unlikely that such a challenge would
16 prevail. But if --

17 CHIEF JUSTICE ROBERTS: Why is that? I
18 mean, if I'm Office Depot and I'm selling paper to
19 the -- to the Giants -- or does this only apply to the
20 commissioner's office?

21 MR. STEWART: This only applies to carrying
22 out the ordinary business of the League. It -- it would
23 only apply to the commissioner's running of -- of the
24 League office, not the running of the individual teams.
25 And as I say, our central point is that --

1 JUSTICE SOTOMAYOR: Could it -- using your
2 example, could you tell me what the different questions
3 would be under the single control theory you are
4 proposing and a rule of reason application in its normal
5 course? So what are the questions you would ask under
6 your theory, and how do they differ from what would
7 happen under a rule of reason analysis?

8 MR. STEWART: I guess under our theory, we
9 would first ask, as to an entity like this, which is
10 entity that is compete in some respects --

11 JUSTICE SOTOMAYOR: Let's not go into this
12 case. Let's -- let's stay with your single
13 commissioner.

14 MR. STEWART: I think we would ask first:
15 Is -- is the commissioner acting as a single entity when
16 he exercises delegated authority in making a business
17 judgment about which supplier to buy paper or what the
18 wages should be?

19 If the answer is yes, then the
20 Section 1 inquiry is over, then the case is no different
21 from a challenge to --

22 JUSTICE SOTOMAYOR: Well, how does that stop
23 any group of competitors from coming in and saying:
24 Gee, I want to sell my gas; I'm going to let this single
25 commissioner decide how much my gas will sell for, and

1 if he chooses to sell it at the same price to everybody,
2 both gas products, that's okay? How do you get to that?

3 MR. STEWART: Well, if you get -- if a
4 single business is deciding whether to buy paper from
5 one supplier or from several, that wouldn't be subject
6 to Section 1 review, because the decision of the single
7 business might affect the welfare of the competitors,
8 but it wouldn't be concerted action.

9 And our point is that when -- I think the
10 way in which our position differs from that of the two
11 parties is that on the one hand, I think it is the
12 logical implication of Petitioner's position that
13 because the commissioner's authority to buy supplies for
14 the League or hire referees for the League is ultimately
15 derived from the consent of the individual teams who are
16 independently owned. The logic of Petitioner's position
17 suggests that that would be subject to Section 1
18 scrutiny.

19 On the other hand, the logic of the NFL's
20 position suggests that because the commissioner can set
21 price, can decide from whom to buy paper on behalf of
22 the League, the Jets and the Giants could reach a
23 similar agreement, and the -- or the Jets and the Giants
24 could agree on the prices they will pay secretaries --

25 CHIEF JUSTICE ROBERTS: No, no, no, no,

1 because they are not part of the broader concerted
2 entity. There's no separate -- you are saying, well,
3 just because all 32 teams can act as -- as an individual
4 entity, any group of those teams can act as an
5 individual entity.

6 MR. STEWART: I think that follows logically
7 from the position that this is one entity. Because in
8 Copperweld, for instance, the Court noted that
9 coordination between different divisions of a single
10 company would not be subject to Section 1 scrutiny, and
11 that implies not just that all the divisions could get
12 together, but that any two could confer among themselves
13 without raising Section 1 concerns.

14 CHIEF JUSTICE ROBERTS: Thank you, Counsel.
15 Mr. Levy.

16 ORAL ARGUMENT OF GREGG H. LEVY
17 ON BEHALF OF THE RESPONDENTS

18 MR. LEVY: Good morning, Mr. Chief Justice,
19 and may it please the Court:

20 The formation of a professional sports
21 league, like the formation of any joint venture, may be
22 subject to Section 1 scrutiny. Were it not for an act
23 of Congress, the merger of the National Football League
24 and the American Football League in 1970 would be one
25 such example. But there is no challenge to venture

1 formation here.

2 There is no dispute that the NFL, including
3 its licensing arm, NFL Properties, is a lawful venture.
4 If venture formation is not an issue, then decisions by
5 the venture about the venture's product are unilateral
6 venture decisions, unilateral venture actions. They are
7 not concerted actions of the -- of the venture's
8 members.

9 JUSTICE KENNEDY: Well, do we have to ask
10 what was the intent at the beginning, as kind of an
11 originalism thing? Everybody sits around and says:
12 Let's have a football league. And 20 years later, they
13 say: You know, the sale of hats and shirts is a pretty
14 good thing; let's get into that business, too. That
15 would -- that would -- that's case one.

16 Case two is, when they formed the league
17 initially, 30 years ago, they said: And be sure we will
18 sell hats, and -- I don't understand the base point from
19 which I find that this is a single entity.

20 MR. LEVY: Your Honor, we know here that at
21 least as of 1963, when NFL Properties was formed, that
22 there was a single entity formed, a single entity to
23 produce and promote NFL Football.

24 Now, I take issue with your suggestion --
25 your implication that there was a decision made here:

1 Let's set up a separate line of business; we are going
2 to sell hats also. That's not what happened, and the
3 record on that is unambiguously clear here. It's
4 undisputed. Plus --

5 JUSTICE KENNEDY: Well, do you take issue
6 with my question that this is a relevant inquiry? Is it
7 part of the original agreement or isn't it, and why is
8 it that the original agreement is somehow sacrosanct? I
9 don't understand.

10 MR. LEVY: I'm not suggesting that the
11 original agreement is sacrosanct. That's why I
12 suggested that by 1963 -- or the mid-1960s, when NFL
13 Properties was formed, there was venture formation at
14 that point.

15 At that point, what was the question? The
16 question was: How should the League, how should the
17 venture members, best promote the venture product? And
18 the decision was made to use the licenses of their
19 intellectual property as a promotional tool.

20 On that issue, the discovery and the record
21 below was undisputed. There is documentary evidence
22 from the NFL Properties' articles of incorporation.
23 There is testimony from an NFL executive, Mr. Herzog.
24 And the best proof, if there were any question about
25 that, is reflected in the -- the organic documents of

1 NFL Properties, which at the outset said that, if there
2 were any revenues from the licensing activities, they
3 would be donated to charitable and educational causes.

4 Now, you know, Dagher confirmed the general
5 principle, but if the venture is lawfully formed, the
6 venture's decisions about how best to produce and
7 promote its product are venture decisions, not the
8 decisions of the venture members.

9 But Copperweld provides the framework that
10 decides the issue here, and neither Mr. Stewart nor Mr.
11 Nager mention Copperweld, except in passing. Copperweld
12 is the case by which this Court turned the page, if you
13 will, on the formalism of prior cases, including Sealy,
14 which Mr. Nager --

15 JUSTICE GINSBURG: May -- may I ask you to
16 go back just one step? Because you seem to treat this
17 as though the NFLP was formed in 1963 and that was the
18 end of it, but another description is: Well, it was
19 formed, but then there were some teams that were not in
20 it until later, and there were some other parts; that it
21 has expanded. What it does has expanded since 1963.

22 So it wasn't one point in time where there
23 was formation, and then if you didn't -- if you are not
24 challenging that, everything else is okay.

25 MR. LEVY: Well, I -- I don't disagree with

1 that, Your Honor. I think that in 1970, the League
2 expanded. There was a merger. That merger of the
3 National Football League and the American Football
4 League would have been subject to Section 1 challenge
5 because it involved venture formation, but an act of
6 Congress said that that wasn't necessary.

7 After 1970, there have been six teams, I
8 believe, that have been added, essentially created, if
9 you will, like Adam's rib. They have been created from
10 the other NFL clubs, but it's essentially the same
11 venture. The venture has expanded its production
12 capability by adding new teams. It's expanded its
13 output by adding new teams.

14 And the role of licensing of intellectual
15 property throughout that process has remained the same.
16 The role has been to promote the venture's product.
17 It's not --

18 JUSTICE SOTOMAYOR: Excuse me. Did the
19 teams -- did the NFL Properties or some centralized
20 entity always exploit the trademarks of all the
21 franchises, or was there a long period of time in which
22 they each individually franchised their products?

23 MR. LEVY: The record, Your Honor, says --
24 reflects that there was very little exploitation of
25 intellectual property of the franchises prior to the

1 creation of NFL Properties.

2 JUSTICE SOTOMAYOR: But there was some, and
3 that was done by the individual teams?

4 MR. LEVY: It was done, and it was done -- I
5 mean, that's sort of an historic artifact. It was done,
6 I believe collectively, through Roy Rogers Enterprises.
7 But the -- but the teams continued to own their
8 intellectual property. That's right.

9 JUSTICE BREYER: The problem, as I see, for
10 you in this case is that the basic conclusion is in the
11 court of appeals, where it says: "Viewed in this light,
12 the NFL teams are best described as a single source of
13 economic power when promoting NFL football through
14 licensing."

15 Well, how do we know that? Their allegation
16 is that that isn't true. And I have -- and Copperweld
17 just seems to me to be very confusing on this, since --
18 since my hornbook knowledge of it was, we have
19 Copperweld to deal with the case that we don't make
20 booths in department stores compete in price against
21 each other. All right?

22 Normally, however, we say independent
23 vendors can't get together and say they fix prices.
24 That's per se. And joint ventures are in the middle, so
25 we apply a rule of reason.

1 Now, very simple, I thought that has been
2 the law since Panagra. I don't know what, in fact,
3 Copperweld has to do with it. And they are saying that
4 this basic joint venture for promoting is not a
5 reasonable agreement. So why shouldn't they have their
6 shot? You might well win, but they want to make that
7 claim.

8 MR. LEVY: The reason we know that this is
9 not your typical joint venture is because Copperweld
10 established a standard that said that what Section 1 is
11 intended to regulate is not matters of form, not general
12 market conditions, but rather the sudden joining
13 together of independent sources of economic power.
14 That's --

15 JUSTICE BREYER: Fine, but that's the
16 conclusion here. That's not the -- that's the
17 conclusion. You're -- the question is: Should they be
18 permitted to join their centers of economic power into
19 one when they promote and sell their T-shirts,
20 sweatshirts, et cetera?

21 Now, you can't answer that question by
22 announcing the conclusion.

23 MR. LEVY: But, Your Honor, we know that
24 they are not independent sources of economic power,
25 because none of them can produce the product of the

1 venture on their own. No NFL club can produce a single
2 unit of production, a single game or --

3 JUSTICE BREYER: Well, can't it ask someone
4 to do that.

5 Oh. Oh, you are saying the game.

6 MR. LEVY: That's right.

7 JUSTICE BREYER: What does the game have to
8 do with this? I thought we were talking about T-shirts
9 and helmets, and I -- I thought it's the simplest thing
10 in the world. You pick up the phone and say: "Hello,
11 Shanghai, do you have a helmet?"

12 (Laughter.)

13 MR. LEVY: Your Honor, if -- if this were a
14 venture designed to go out and license or manufacture or
15 distribute caps, you would be right. But this is
16 different, and we -- the undisputed evidence in the
17 record below demonstrates it's different.

18 It's different because the purpose of the
19 licensing here is to promote the product. It's to
20 promote the game. And the NFL member clubs are not
21 independent sources of economic power in generating that
22 game.

23 JUSTICE BREYER: Was this a summary judgment
24 motion?

25 MR. LEVY: Yes. It was a summary judgment.

1 JUSTICE SCALIA: Well, the stated purpose is
2 to promote the game. The purpose is to make money. I
3 don't think that they care whether the sale of the
4 helmet or the T-shirt promotes the game. They -- they
5 sell it to make money from the sale.

6 MR. LEVY: I --

7 JUSTICE SCALIA: Now, it promotes the game
8 if the money from the sale goes to the whole group, I
9 suppose. But -- but don't tell me that there is not --
10 absent this agreement, there would not be an
11 independent, individual incentive for each of the teams
12 to sell as many of its own -- of its own shirts and
13 helmets as possible.

14 MR. LEVY: Your Honor, I would agree with
15 you 100 percent that the purpose of the licensing is to
16 make money, but not necessarily to make money through
17 the royalties. The purpose of the licensing is to
18 improve and promote the attractiveness of the game
19 product, to get more people interested in watching the
20 games on television, to get more people interested in
21 buying tickets to the game.

22 JUSTICE SCALIA: Well, I suppose that --
23 that could -- that issue could be tried.

24 MR. LEVY: And --

25 JUSTICE SCALIA: But I don't -- I don't

1 think so. And I suppose that's a triable issue, as to
2 whether the purpose of -- of selling these things is to
3 promote the whole NFL or to promote the particular team.
4 It wants its own adherents and wants to sell its own
5 product.

6 MR. LEVY: In the abstract that's a triable
7 issue, Your Honor, but not here. Here, the record was
8 undisputed. There is evidence in the record on that
9 point. The record -- there was evidentiary, there was
10 documentary evidence. There is evidence that goes back
11 to the organic documents of NFL Properties. And as I
12 mentioned before, in the early days, the -- the net
13 revenues, if any, the net royalties of the licensing
14 operations, went to charity. So there is no -- there is
15 no question here. Discovery was allowed on this issue,
16 and the record is undisputed.

17 So we have a classic case, a perfect, clean
18 opportunity for this Court to apply the principles of
19 Copperweld and the principles of Dagher to an area of
20 the law that has been troubled for many years. Since
21 1984, the courts have wrestled with the question of how
22 to deal with professional sports leagues and Section 1
23 claims against professional sports leagues.

24 And the cases the courts have been -- have
25 -- and with the exception of this case and the Bulls II

1 case, the courts have been guided principally by
2 pre-Copperweld precedent that rests on an era of
3 formalism, an era when even an agreement between a
4 parent and its subsidiary --

5 JUSTICE SOTOMAYOR: What decision could the
6 sports teams make that would be subject to the antitrust
7 scrutiny under your definition of the permissible range
8 of the joint venture activities? It seems to me that if
9 the venture wanted to make sure all the teams hired
10 secretaries at the same \$1,000-a-year salary, that under
11 your theory, that's okay, because it's a joint venture.

12 MR. LEVY: Your Honor, my view is that the
13 -- the NFL clubs are not separate sources of independent
14 power. As a result, they are a unit. They are a single
15 entity and it's --

16 JUSTICE SOTOMAYOR: So the answer to my
17 question is, there is -- you are seeking through this
18 ruling what you haven't gotten from Congress: An
19 absolute bar to an antitrust claim.

20 MR. LEVY: No, Your Honor, that's not right.

21 JUSTICE SOTOMAYOR: So -- so answer my
22 question. What decision --

23 MR. LEVY: The answer to your question is
24 this: With regard to Section 1 claims -- let's put
25 aside Section 2 claims. Let's put aside claims between

1 the NFL and other leagues. Let's put aside claims that
2 relate to nonventure conduct, like the example of
3 creating a trucking company that is reflected in our
4 brief.

5 The -- I can understand an argument, and we
6 suggested as much in our brief below, that if the League
7 engages in a practice of representing itself, going to
8 the market -- the clubs go to market as independent
9 entities. I can see an argument that would basically
10 say, based on estoppel principles, that they should not
11 be able to agree on -- on uniform prices or uniform
12 wages for secretaries, for example.

13 We did -- we made the point in our brief in
14 the context of -- of coaches. But even -- even in the
15 context of coaches, put aside for a moment, Section 2
16 remains available to the coaches if in fact they can
17 demonstrate that there has been monopolization or
18 attempted monopolization of a market.

19 But the line that I draw is the line between
20 production and promotion of the game. Coaches are
21 closer to production and promotion of the game than
22 secretaries, but I -- you know, there may be some --
23 some gap there. But -- but as long as the NFL clubs are
24 -- are members of a unit; if they compete as a unit in
25 the entertainment marketplace, as -- to use the language

1 that Justice Rehnquist used -- they should be deemed a
2 single entity and not subject to Section 1 --

3 JUSTICE BREYER: But now the question is:
4 Are you basing that on economic-related data about the
5 pros and the cons of, you know, the economic harms of
6 stopping them from competing, versus the economic
7 benefits of allowing them to act as a separate -- as a
8 single entity? Or are you basing it on a pure legal
9 word called "single entity"?

10 And what worried -- I thought when I read
11 the opinion, first, of the district court, that he's
12 just following what I think started in the Seventh
13 Circuit, unfortunately, of taking this word "single
14 entity" and throwing around -- throwing it around all
15 over the place and stopping the economic analysis.

16 But then when I read the last paragraphs of
17 his opinion, he seems to be saying that when I go back
18 to the record, which you want me to do, I will discover
19 that there is lots of information showing economic
20 benefit to this venture of promoting together. There's
21 nothing to suggest they could compete, and so it's
22 clear, to the point where they don't get to trial, that
23 this is a reasonable agreement.

24 All right. Now, is -- have I -- am I right
25 in thinking what you are thinking?

1 MR. LEVY: That's not my position, Your
2 Honor.

3 JUSTICE BREYER: All right. Good. Then I
4 want to know what your position is.

5 MR. LEVY: My position is based on the
6 intended scope of the Sherman Act, Section 1 of the
7 Sherman Act, which this Court, in Copperweld, made
8 clear. The principle is articulated five or six
9 separate times in the Copperweld opinion that Section 1
10 of the Sherman Act is intended to regulate the sudden
11 joining together of separate sources of economic power.

12 JUSTICE BREYER: That's --

13 MR. LEVY: That's not this case.

14 JUSTICE BREYER: Well, I wouldn't read --
15 can you read Copperweld as follows? Copperweld is
16 ratifying a decision by an entrepreneur or several to
17 organize his entrepreneurial entity as one where there
18 are obvious efficiencies in doing that, such as it would
19 obviously be inefficient to have the sales people behind
20 counters in a single department store competing with
21 each other in price.

22 A joint venture is a situation where it's
23 debatable whether or not there is that kind of
24 efficiency in organization, and therefore, we apply a
25 rule of reason. That's Panagra. I don't see anything

1 in Copperweld that is intended to overrule Panagra. And
2 as long as Panagra is not overruled, we would apply, at
3 least to major decisions by joint ventures, a rule of
4 reason.

5 Now, what is wrong with -- and you might
6 still win on the rule of reason. But why isn't that
7 analysis correct? I am putting it forward as a
8 hypothesis for you to discuss.

9 MR. LEVY: The analysis is not correct
10 because there has been no challenge to venture formation
11 here. I don't disagree that if there had been a
12 challenge to venture formation here, that the
13 considerations that you identify with regard to Panagra
14 would apply. But that's not the case here. There is
15 really no ambiguity about what has been challenged.

16 JUSTICE BREYER: There is a -- very
17 definitely a joint venture here to play football, but
18 there isn't a joint venture to build houses and there
19 isn't a joint venture obviously in sight to promote.

20 So they are saying that this is such a
21 different activity, the playing of football versus the
22 promotion of a logo, that we ought to go and look under
23 a rule of reason as to whether a joint venture in
24 promoting a logo is justified in terms of competition's
25 harms and economic benefits.

1 MR. LEVY: Justice Breyer, I agree with you
2 that there is a difference, an important difference,
3 between venture and nonventure activity. If the NFL
4 clubs were to create a trucking company or in your
5 example, would go off and build houses, that's not a
6 venture activity.

7 JUSTICE BREYER: Well, it would be if they
8 tried to do it, but there, they would be attacked on the
9 ground that under the rule of reason, they do not have
10 the justification such that the antitrust law would
11 allow them to do it.

12 MR. LEVY: Well --

13 JUSTICE BREYER: And they are saying: And
14 promoting is precisely the same. That's why it seems to
15 me to be something that you can't decide in theory.
16 It's a matter of going back to economic facts with
17 witnesses and so forth.

18 MR. LEVY: Your Honor, the ancillary
19 restraints doctrine would enable the court, in the
20 circumstance that you describe, to categorize the
21 decision to build housing as a non-venture activity -- a
22 non-venture decision, and therefore, it would be
23 evaluated independently of the considerations that apply
24 to the venturers' objectives.

25 But, here, you cannot separate the venture

1 activity of -- of -- for both football --

2 JUSTICE STEVENS: Well, you -- you certainly
3 could -- they certainly could, theoretically, each club
4 could sell it's own logo.

5 MR. LEVY: Each -- of course, each club
6 could sell it's own logo, Your Honor, but the clubs have
7 decided that the most effective --

8 JUSTICE STEVENS: They have decided not to
9 do it that way, but it could be done.

10 MR. LEVY: Forgive me. I shouldn't speak
11 over you.

12 The clubs have decided that the most
13 effective way to promote their product -- to promote NFL
14 football is to do so collectively, to ensure that the
15 marks of all 32 clubs are -- are out there, in --

16 JUSTICE STEVENS: Yes, but maybe they also
17 collectively decide the best way to make money and
18 finance -- attendance and so forth, all agree on a
19 housing program that they all jointly sponsor.

20 MR. LEVY: Well, Your Honor, that -- I
21 respectfully suggest that doesn't --

22 JUSTICE STEVENS: It would be the most
23 effective way to -- to raise the money to pay these
24 players who make so much money.

25 MR. LEVY: Well, that doesn't -- there is a

1 plausibility standard that really has to be applied in
2 terms of the arguments at issue.

3 CHIEF JUSTICE ROBERTS: Well, if it's a
4 plausibility standard at the threshold inquiry, there is
5 a range of things, and I guess your -- your friend on
6 the other side is just saying selling logos is closer to
7 selling houses than it is to playing football.

8 MR. LEVY: Well, but there is a difference
9 here, Your Honor, because there is a record. This --
10 this wasn't decided on a motion to dismiss. It was
11 decided on summary judgment. There was undisputed
12 evidence that the purpose of the licensing, going back
13 40 years -- 45 years, at this point, was to promote the
14 game, and that's not an implausible determination to be
15 made, but the -- but the evidence was undisputed.

16 The case was decided on summary judgment,
17 and so -- you know, this is not a situation where --
18 where there is the type of -- you know, the range of
19 issues that needs to be -- you know, that needs to be
20 resolved, of the kind that you described.

21 You know, this is a situation --

22 CHIEF JUSTICE ROBERTS: So if there is a
23 factual -- if there is a factual dispute about whether a
24 particular activity of the League is designed to promote
25 the game or is designed simply to make more money, than

1 that is the sort of thing that goes to trial?

2 MR. LEVY: Well, I wouldn't -- I wouldn't
3 put it in terms of make more money because I have agreed
4 with Justice Scalia --

5 CHIEF JUSTICE ROBERTS: Or do something
6 else, do something other than promote the game.

7 MR. LEVY: If -- Your Honor, just as in
8 Dagher -- in Dagher, the issue was how to price the
9 product. It's a fundamental decision that any venture
10 has to make. This is a decision -- the undisputed
11 evidence shows that this is a decision about how to
12 promote the product, and that is no different from
13 pricing a product in terms of the -- you know, the
14 operations of a venture.

15 You can't -- you can't hope to market a
16 product, unless you have decided on how to promote it,
17 and the antitrust laws in the Sherman Act encourage
18 promotion. They encourage -- Copperweld encourages
19 business people to make the judgment about how best to
20 produce and to promote their product and how best to
21 compete in the marketplace.

22 They made, very clearly, that they don't
23 want this judgments cabined or inhibited or chilled by
24 -- by decisions by the Court or decisions by a jury.
25 But, here, Judge Moran did what we thought was -- the --

1 and we continue to think, is the most appropriate way to
2 serve the interests of both the Sherman Act and the
3 considerations that this Court has recognized in Twombly
4 and other cases, and that is to provide an early
5 opportunity for a determination of whether or not the
6 venture -- the venture conduct, the venture decision
7 that is at issue, is a venture decision of a single
8 entity or whether it's a collective decision of the --
9 of the venture participants.

10 He allowed discovery limited to the
11 single -- single entity issue. The -- the -- there is
12 no challenge to the scope of discovery here. We have a
13 complete record on this point that confirms and
14 addresses the question that you presented, that the
15 purpose of licensing here is to promote the product.

16 But even if it weren't -- even if it
17 weren't, I would suggest that -- that -- that the -- the
18 evidence shows that fans identify with the logos, and we
19 are talking about the logos and the marks here, not
20 because they have some sort of intrinsic value, not
21 because they -- you know, derive -- they derive some
22 value from their attractiveness or appeal, independently
23 in the marketplace, they derive their value from their
24 identification with an NFL club that competes on the
25 football field.

1 And even -- even American Needle's president
2 so confirmed in the declaration that he submitted in the
3 case. So we have here a record that makes this -- this
4 judgment for the Court relatively straightforward. It
5 provides a straightforward opportunity for this -- this
6 Court to confirm the principles established in --
7 established in Copperweld and to -- and to extend the
8 principles that this Court noted in Dagher.

9 JUSTICE SOTOMAYOR: The -- if the
10 reasonableness of this decision, that T-shirts promotes
11 the game, is so self-evident, then why wouldn't the rule
12 of reason control completely?

13 MR. LEVY: Well, Your Honor, I don't have --

14 JUSTICE SOTOMAYOR: Why do we need to even
15 go to the single-entity question when, by your own
16 answer, it is undisputed, so abundantly clear, so
17 reasonable --

18 MR. LEVY: The answer --

19 JUSTICE SOTOMAYOR: -- what's the need to --
20 to label it single entity, as opposed to label it what
21 it is, reasonable?

22 MR. LEVY: The answer, Your Honor, is
23 inherent in the rule of reason. In the modern era,
24 defending a claim like this on the merits involves an
25 investment of tens of millions of dollars, thousands of

1 hours of executive time, hours and hours of court time.
2 In the Salvino case, there were three years of discovery
3 spent on rule of reason issues --

4 JUSTICE SOTOMAYOR: But it's a single
5 purpose -- and I certainly sympathize with that
6 argument. But isn't the proposition of antitrust law
7 that we have a reason for worrying about concerted
8 activity? We have a genuine concern as -- or Congress
9 does -- about independent entities joining together and
10 fixing prices.

11 And we permit them to do so, as Justice
12 Breyer indicated, when the venture has a purpose that is
13 independent than -- from the individual interest, but we
14 say, when it doesn't, we have to ensure, under the rule
15 of reason, that what they are doing is reasonable.

16 I'm -- I am very swayed by your arguments,
17 but I can very much see a counterargument that promoting
18 T-shirts is only to make money. It doesn't really
19 promote the game. It promotes the making of money. And
20 once you fix prices for making money, that's a Sherman
21 Act violation.

22 MR. LEVY: But, Your Honor, I would agree
23 with almost everything that you said, but we are not
24 dealing here with independent sources of economic power.
25 These clubs are not independent. None could produce

1 their product on their own.

2 JUSTICE SOTOMAYOR: But they own the
3 trademarks, so they could.

4 MR. LEVY: They do, but the trademarks don't
5 have any value. They don't have any purpose independent
6 of the game. The trademarks are invented to identify
7 the clubs on the field. They are -- they are promoted
8 and distributed to -- to encourage loyalty among fans of
9 the clubs. The -- the trademarks are simply a tool that
10 the clubs use to --

11 JUSTICE BREYER: So let's call it an NFL
12 supermarket. Red Sox supermarket, Patriots automobile
13 shop, Patriots tractor store, everything becomes
14 Patriots. Everything -- no competition anywhere. Now,
15 you say that's ridiculous, and once you say that's
16 ridiculous, you are now into the business of deciding
17 whether this aspect of the undeniable legal joint
18 venture to play baseball or football, whether this
19 aspect is properly the subject of merger.

20 And once you are into that, you are into
21 your \$7 million, and I can't really think of anything
22 that's going to help you there. And the SG in its
23 brief, you see on that key, 16 and 17, seem to me,
24 simply reproduces in precisely somewhat different
25 language, but precisely the argument you are now having,

1 is this the kind of thing that should be merged?

2 We know by applying the rule of reason. And
3 second, if it is merged, is this particular aspect of it
4 something where there could be competition, and there
5 isn't much justification, that's their rule, too.
6 Again, we are back to the rule of reason. So how do I
7 save you the \$7 million?

8 MR. LEVY: But, Your Honor, this case is the
9 perfect example. We were able to resolve this case on
10 summary judgment without incurring the burden of rule of
11 reason discovery, and your reference to the Patriots
12 tractor store drives home a distinction that I think is
13 worth leaving with the Court at this point.

14 This is not a situation, like the situation
15 to which we referred in our brief, where John Deere and
16 International Harvester get together and fix the prices
17 of their logos for sale to cap manufacturers.

18 John Deere and International Harvester, for
19 many years -- I mean, early on, they gave away the hats
20 throughout the Midwest, to encourage farmers to buy
21 their farm equipment. They are independent sources of
22 economic power.

23 JUSTICE SCALIA: Well, you -- you say that
24 the -- that the trademarks have no value apart from
25 the -- from the game. I guess you could say the same

1 thing for each individual franchise of each of the 32
2 clubs. They are worthless, if NFL Football disappears.
3 So does that mean they -- that they -- they can agree to
4 fix the price at which their -- their -- their
5 franchises will be sold, by concerted agreement, because
6 after all, they are worthless apart from the NFL?

7 MR. LEVY: Well, I -- I certainly agree with
8 your -- your premise, Your Honor, that they are
9 worthless apart from -- except there is some residual
10 value, I don't -- I don't --

11 JUSTICE SCALIA: Yeah.

12 MR. LEVY: -- I don't dispute -- dispute
13 that. Could they agree on prices for their franchises to
14 be sold? Yes, I assume they could agree because they
15 are not independent sources of economic power.

16 JUSTICE SCALIA: Oh, okay, you --

17 JUSTICE BREYER: So we don't even ask the
18 question whether under the rule of reason such a thing
19 is reasonable or justified?

20 MR. LEVY: Your Honor --

21 JUSTICE SCALIA: I thought I was reducing it
22 to the absurd.

23 (Laughter.)

24 MR. LEVY: You know, I -- I -- I could bring
25 the basic point that I -- I want to leave you with, back

1 to our example that's a little bit closer to home.

2 In 1999 -- 1919, when Judge Covington and
3 Mr. Burling went to joint forces, they formed a law firm
4 eventually. Ninety years later that venture decides on
5 the prices, the rates that Mr. Ludwin and I will -- will
6 decide for our -- will charge for our services.

7 Sometimes that venture, the firm decides that we won't
8 do business with a particular client or that we will
9 limit our business to a particular client in a
10 particular industry.

11 Nobody suggests that that decision of the
12 venture, a lawful venture, is subject to Section 1
13 scrutiny as a violation of the Sherman Act constitutes a
14 concerted refusal to deal.

15 But if Mr. Ludwin and I leave the -- leave
16 the firm and we set up solo practices and then decide on
17 what our rates are going to be, or then decide on what
18 our clients -- what clients we will serve and not serve,
19 that is an agreement between independent competitors.
20 That's the fundamental difference.

21 That is a fundamentally different situation
22 between -- compared to the situation of the firm setting
23 our rates. And it reflects the intersection of
24 Copperweld and Dagher. It shows how Dagher and
25 Copperweld fit together hand in glove to demonstrate

1 purposes as how the NFL, for purposes of promoting its
2 product, is a single entity.

3 CHIEF JUSTICE ROBERTS: Thank you, counsel.

4 Mr. Nager, you have 3 minutes remaining.

5 REBUTTAL ARGUMENT OF GLEN D. NAGER

6 ON BEHALF OF THE PETITIONER

7 MR. NAGER: Thank you, Mr. Chief Justice.

8 I'd just like to pick up on a question that
9 Chief Justice Roberts asked me with a point that Justice
10 Breyer made, which is that both the Solicitor General's
11 position and the NFL's position are taking rule of
12 reason concepts and trying to push them into the
13 concerted conduct inquiry, which will have the effect,
14 of course, of confusing courts that presently understand
15 the inquiry. That's Justice Breyer's point about
16 terminology.

17 It also has substantive impact because of
18 the way litigation gets conducted. As Mr. Levy has
19 said, this case was litigated below at of the district
20 court judge's direction only on the concerted conduct
21 question, not on the -- the rule of reason questions.
22 So, American Needle didn't have the opportunity to
23 conduct discovery and make proof about anticompetitive
24 effects and to try to rebut the arguments that the NFL
25 was making about procompetitive justifications.

1 The NFL's argument is asking -- they are
2 asking for a per se rule of legality for everything that
3 the NFL does that is related to football. That can't
4 be --

5 CHIEF JUSTICE ROBERTS: What's the answer to
6 the -- what's the answer to the hypothetical Mr. Levy
7 ended with, the law firm?

8 MR. NAGER: On the -- the partnership
9 example. Well, the partnership is -- is as follows:

10 As -- as to the extent that there is case
11 law on the subject, as with all joint ventures, the case
12 law treats law firm partnerships as joint ventures and
13 subjects them to the rule of reason, and every
14 commentator whether it be Judge Bork or anyone else, has
15 said, but, of course, law firms don't have market power
16 so they couldn't possibly have anticompetitive effects
17 on the market, and the rule of reason claim trying to
18 challenge the rates at which a law firm sets its
19 partnership rates wouldn't pass -- survive a motion to
20 dismiss.

21 With respect to his analogy to Dagher, the
22 difference between the Dagher effects -- of course this
23 Court didn't in Dagher didn't accept the argument that I
24 made on behalf of Texaco and Shell that they should be
25 treated as a single entity if, in fact, their formation

1 was lawful. This Court only ruled on the -- on the
2 price fixing issue.

3 But the argument that was made in Dagher was
4 if you had a wholly integrated joint venture, one in
5 which there had been a complete pooling of relevant
6 capital, a complete sharing of profits and losses and an
7 enforceable non-compete agreement, in those
8 circumstances the -- the owners of that joint venture
9 were not like typical joint venturers, they, in fact,
10 were like the share holders in a publicly held company,
11 because their only interest at that point is in their
12 investment. They have no other economic interests that
13 are affected by their ownership and control of that
14 entity. And at that point they could be treated as one.

15 In Justice Thomas's opinion for the Court
16 has some residence of that in it, but it specifically
17 says it is only addressing it in terms of the per se
18 rule.

19 CHIEF JUSTICE ROBERTS: Thank you, counsel.
20 The case is submitted.

21 (Whereupon, at 11:19 a.m., the case in the
22 above-entitled matter was submitted.)

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