Establishing a violation of Section 1 of the Sherman Act, 15 U.S.C. 1, requires proof of collective action involving "*separate* entities." *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752, 768 (1984). For several decades, the National Football League (NFL) and its member teams have agreed to license their trademarks and logos to manufacturers (such as petitioner) exclusively through National Football League Proper-

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Cases:

# In the Supreme Court of the United States

No. 08-661

internal quotation marks omitted). The Court in *Copperweld* held that a parent corporation and its wholly owned subsidiary were not separate entities for anti-

licensee for ten years. Pet. App. 3a. NFLP later declined to renew petitioner's headwear license. *Id*. at 3a-4a.

2. Petitioner brought suit, alleging that the agreement among NFLP, the NFL, the teams, and Reebok (collectively, respondents) to enter into an exclusive headwear license violated Sections 1 and 2 of the Sherman Act, 15 U.S.C. 1 and 2. Pet. App. 1a. In their answer, NFLP, the NFL, and the teams (collectively, the NFL respondents) contended that they were incapable of conspiring "with one another within the meaning of the antitrust laws because they are a single economic enterprise, at least with respect to the conduct challenged in the complaint." J.A. 99.

After permitting limited discovery on whether the NFL respondents functioned as a "single entity" in licensing marks and logos, the district court granted summary judgment for respondents on petitioner's Section 1 claim. Pet. App. 22a-28a. The court held that, "with regard to the facet of their operations respecting exploitation of intellectual property rights, the NFL and its 32 teams are, in the jargon of antitrust law, acting as a single entity." *Id*. at 24a. "That determination," the court explained, "is essentially a conclusion that in that facet of their operations they have so integrated their operations that they should be deemed to be a single entity rather than joint venture[rs] cooperating for a common purpose." *Ibid*.[1]

3. The court of appeals affirmed. Pet. App. 1a-19a. Respondents invoked *Copperweld* to argue that the NFL respondents functioned as a single entity under Sec-

[1] For related reasons, the court also rejected petitioner's Section 2 claims. Pet. App. 20a-21a, 24a.

tion 1. In addressing that argument, the court of appeals stated that "in some contexts, a league seems more aptly described as a single entity immune from antitrust scrutiny, while in others a league appears to be a joint venture between independently owned teams that is

[2]

This Court's decisions make clear that concerted action occurs when separately owned teams form a league, or cede to the league authority over an aspect of their operations. Similarly, there is concerted action when teams decide collectively to constrain "the way in which they will compete with one another" in the marketplace. *NCAA* v. *Board of Regents*, 468 U.S. 85, 99 (1984). Because such agreements restrict actual or potential competition among the teams, they are subject to Section 1, though they may ultimately be found procompetitive and lawful.

The reasoning of *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752 (1984), and *Texaco Inc.* v. *Dagher*, 547 U.S. 1 (2006), however, supports a more nuanced analysis to the extent that teams (or other joint venturers) have effectively merged an aspect of their operations, completely eliminating competition among themselves in that respect. In *Copperweld*, the Court held that, because a parent and its subsidiary are not actual or potential competitors, collaboration between the two does not "raise the antitrust dangers that [Section] 1 was designed to police." 467 U.S. at 769. *Dagher* illustrates that similar considerations are relevant when competitors have entered into a joint venture.

The functional analysis of the enterprises in *Copperweld* and *Dagher* can be extended to the NFL, which is a legitimate joint venture among competitors. Single-entity treatment for the teams and the league is appropriate if, but only if, two conditions are satisfied. First, 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. Second, the challenged restraint must not

concept could affect antitrust enforcement far beyond the sports-league context.

The judgment below should be vacated, and the case remanded. Although the court of appeals was correct that each "facet" of the league's operation must be considered separately, its analysis of the particular facet at issue here—licensing of marks and logos—was flawed and incomplete. On remand, the lower courts should clarify the scope of petitioner's Section 1 claim, perhaps allow appropriate additional discovery, and then apply the principles from this Court's decision.

"The Sherman Act contains a 'basic distinction between concerted and independent action.'" *Copperweld*, 467 U.S. at 767 (quoting *Monsanto Co.* v. *Spray-Rite Serv. Corp.*, 465 U.S. 752, 761 (1984)). "The conduct of a single firm is governed by [Section] 2 alone and is unlawful only when it threatens actual monopolization." *Ibid*. "It is not enough that a single firm appears to 'restrain trade' unreasonably, for even a vigorous competitor may leave that impression." *Ibid*.

Section 1 concerns only concerted action, which "is judged more sternly than unilateral activity under [Section] 2." *Copperweld*, 467 U.S. at 768. Unlike Section 2, Section 1 does not require proof that the concerted activity "threatens monopolization." *Ibid*. "Congress treated concerted behavior more strictly than unilateral behavior" because "[c]oncerted activity inherently is fraught with anticompetitive risk" and "deprives the marketplace of the independent centers of decisionmak-

ing that competition assumes and demands." *Id*. at 768-769. "[S]uch mergings of resources may well lead to efficiencies that benefit consumers, but their anticompetitive potential is sufficient to warrant scrutiny even in the absence of incipient monopoly." *Id*. at 769.

Consistent with this fundamental distinction, the Court in *Copperweld* held that "an internal 'agreement' to implement a single, unitary firm's policies" between a parent and a wholly owned subsidiary is not concerted action under Section 1 because it "does not raise the antitrust dangers that [Section] 1 was designed to police." 467 U.S. at 769. The Court explained:

> A parent and its wholly owned subsidiary have a complete unity of interest. * * * With or without a formal 'agreement,' the subsidiary acts for the benefit of the parent, its sole shareholder. If a parent and a wholly owned subsidiary do 'agree' to a course of action, there is no sudden joining of economic resources that had previously served different interests, and there is no justification for [Section] 1 scrutiny.

*Id*. at 771. For that reason, "the logic underlying Congress' decision to exempt unilateral conduct from [Section] 1 scrutiny * * * similarly excludes the conduct of a parent and its wholly owned subsidiary." *Id*. at 776.

In *Dagher*, this Court applied a similar approach to price-setting by a joint venture formed by two oil companies that had "end[ed] competition between [them] in the domestic refining and marketing of gasoline." 547 U.S. at 4. The Court explained that the formation of the venture was tantamount to a merger in those aspects of operations, see *ibid*.

son, *id.* at 6 n.1 (citing *Copperweld*, 467 U.S. at 768). Once the venture was formed, however, the venturers acted "in their role as investors, not competitors" in pricing the venture's products and thus operated in that aspect of operations "as a single firm." *Id.* at 6.[3] Significantly, the venturers no longer participated independently in the pertinent market, *id.* at 5, and thus as in *Copperweld*, the agreements between them did not "raise the antitrust dangers that [Section] 1 was designed to police." *Copperweld*, 467 U.S. at 769.[4]

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[3] This Court explained that conclusion by observing that "[w]hen 'persons who would otherwise be competitors pool their capital and share the risks of loss as well as the opportunities for profit . . . such joint ventures [are] regarded as a single firm competing with other sellers in the market.'" *Dagher*, 547 U.S. at 6 (quoting *Arizona* v. *Maricopa County Med. Soc'y*, 457 U.S. 332, 356 (1982) (second set of brackets in original)). That dictum from *Maricopa* was an apt description of the joint venture in *Dagher*, and pointed to the correct result. But the Court in *Maricopa* (which preceded *Copperweld*) did not purport to supply a test for single-entity conduct.

It would not be sensible to treat capital pooling and risk sharing as a complete test for single-entity treatment. For example, venturers could contribute capital to a venture and share its profits and losses, yet remain in competition with it (or among themselves). Moreover, if sharing profits and losses were the test, cartelists "could evade the antitrust law simply by creating a 'joint venture' to serve as the exclusive seller of their competing products. So long as no agreement explicitly listed the prices to be charged, the companies could act as monopolists through the 'joint venture,' setting prices together for their competing products." *Major League Baseball Props., Inc.* v. *Salvino, Inc.*, 542 F.3d 290, 335 (2d Cir. 2008) (Sotomayor, J., concurring).

[4] Strictly speaking, this Court in *Dagher* held only that it would be error "to condemn the internal pricing decisions of a legitimate joint venture as *per se* unlawful," and found it unnecessary to "address petitioners' alternative argument that [Section] 1 of the Sherman Act is inapplicable to joint ventures." 547 U.S. at 7 & n.2. But *Dagher*'s reasoning and result generally reflect a natural extension of *Copperweld*.

This Court, however, has consistently applied Section 1 to agreements affecting the type or degree of ongoing competition between participants in an established joint venture. In *NCAA* v. *Board of Regents*, 468 U.S. 85 (1984), decided eight days after *Copperweld*, the Court considered a Section 1 challenge to the NCAA's restrictions on member institutions' ability to enter into separate contracts to televise their football games (ostensibly part of a plan to minimize the effect of televised games on stadium attendance). The Court acknowledged that "a certain degree of cooperation is necessary" to preserve the "type of competition that [the NCAA] and its member institutions seek to market." *Id.* at 117. The Court nonetheless concluded that because the plan "prevent[ed] member institutions from competing against each other," the member institutions had "created a horizontal restraint—an agreement among competitors on the way in which they will compete with one another." *Id.* at 99; see William F. Baxter, *Antitrust: A Policy in Search of Itself*, 54 Antitrust L.J. 15, 16-17 (1985) ("An agreement that was unambiguously horizontal was involved [in *NCAA*

tice restrains trade in violation of [Section] 1."). That standard considers, as appropriate, "specific information about the relevant business," "the restraint's history, nature, and effect," and the participants' market power. *Id.* at 885-886 (citation omitted).

Courts applying Section 1 have recognized the procompetitive potential of joint ventures in a number of circumstances. See *Broadcast Music, Inc.* v. *CBS*, 441 U.S. 1, 23 (1979) (*BMI*). Courts also have applied rule-of-reason analysis to "ancillary" restraints, which are concerted action, and which are analyzed as part of a joint venture because they are "subordinate and collateral" to the joint venture—that is, reasonably necessary to "make the [venture] more effective [or efficient] in accomplishing its purpose." *Rothery Storage & Van Co.* v. *Atlas Van Lines, Inc.*, 792 F.2d 210, 224 (D.C. Cir. 1986), cert. denied, 479 U.S. 1033 (1987); see also *Dagher*, 547 U.S. at 7; *Major League Baseball Props., Inc.* v. *Salvino, Inc.*, 542 F.3d 290, 338-339 (2d Cir. 2008) (Sotomayor, J., concurring); *United States* v. *Addyston Pipe & Steel Co.*, 85 F. 271, 281 (6th Cir. 1898) (Taft, J.), aff'd, 175 U.S. 211 (1899).

Judge Bork's decision in *Rothery Storage* is particularly instructive. There, moving companies had formed a joint venture to offer a nationwide van line and had adopted a policy prohibiting participants from interstate carriage on their own account. 792 F.2d at 211-213. The venturers argued that the policy was exempt from Section 1 scrutiny under *Copperweld* because they were part of a single enterprise. *Id.* at 214. The court rejected that argument because the venturers were "actual or potential competitors" of the venture when the challenged policy went into effect and had "agreed to a policy that restricted competition." *Ibid.* (citing *NCAA*,

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(2002). The 32 individually owned teams compete with one another in many ways, including for fans and players. See, *e.g.*, *Brown* v. *Pro Football, Inc.*, 518 U.S. 231, 249 (1996) (noting that professional football players "often negotiate their pay individually with their employers," NFL teams); *Sullivan* v. *NFL*, 34 F.3d 1091, 1098 (1st Cir. 1994) (the NFL teams "compete with each other, both on and off the field, for things like fan support, players, coaches, ticket sales, local broadcast revenues, and the sale of team paraphernalia"), cert. denied, 513 U.S. 1190 (1995); cf. *NCAA*, 468 U.S. at 99 ("The NCAA is an association of schools which compete against each other to attrac

collaboration is suspect, and totally integrated enterprises subject only to [Section] 2."). As the court of appeals concluded, Pet. App. 13a, the proper approach to such arrangements is to "focus on the particular [conduct] under antitrust scrutiny," 7 Areeda & Hovenkamp ¶ 1478d, at 332, and whether it "raise[s] the antitrust dangers that [Section] 1 was designed to police," *Copperweld*, 467 U.S. at 769.

***1. Formation of a league by independent teams, and further steps to limit competition among the teams, are concerted actions***

The coming together of co

the agreement is nonetheless concerted action subject

[6] In a proper case, collective decisions about formation of a joint venture or the centralization of additional functions in it could—like the merger of previously independent firms—be challenged well after the fact, once anticompetitive effects occur or are discovered.

parent-subsidiary structure,

[7] This analysis applies to joint ventures in which the venturers are (or were) actual or potential competitors of one another or of the venture. Different issues are presented when the venturers neither competed with each other before formation nor compete with one another or their venture after formation.

*Dagher*, the oil companies there conceivably could have used their joint venture's pricing agreement "to manipulate the value of the companies' trademarks or to facilitate price fixing in markets where the two continued to compete." U.S. Br. at 15 n.9, *Dagher*, *supra* (No. 04-805) (U.S. *Dagher* Br.). Or, "if a joint venture is a sup-

[9] The test also would properly classify cartel decisions as concerted action. Cartels are not legitimate joint ventures. By definition, cartels do not involve an effective merger, and their agreements affect actual or potential competition among participants.

decisions. So long as decisions in this sphere do not affect actual or potential competition among the teams in other areas, then conduct establishing the "rules defining the conditions of the contest," *NCAA*, 468 U.S. at 117, is reasonably viewed as that of a single entity. Similarly, the league and the teams may act as a single entity when hiring referees or establishing the structure of the central administrative staff.

By contrast, a rule forbidding teams from poaching one another's coaching talent—an aspect in which they surely compete—would properly be classified as concerted action. See *Law* v. *NCAA*, 134 F.3d 1010, 1019 (10th Cir.) (rule restricting coaches' salary was concerted action under Section 1), cert. denied, 525 U.S. 822 (1998). Such a rule would be an agreement by the teams on "the way in which they will compete with one another" in the marketplace, and therefore is concerted action under Section 1. *NCAA*, 468 U.S. at 99.[10] In short, collaboration among the teams is subject to Section 1 scrutiny except in those situations where actual or

[10] Leading commentators offer other examples:

> [T]he NFL's decision to have a schedule consisting of 12 one-hour games per year is clearly an "output limitation," because it could have more or longer games, but it is also an essentially unilateral act because it affects nothing but the output of the NFL as an entity. By contrast, a rule stating that the NFL schedule consists of 12 games *and* that the individual team owners are forbidden from organizing additional games among NFL teams or between NFL and non-NFL teams should be regarded as collaborative, because it affects the individual members' nonventure conduct.

7 Areeda & Hovenkamp ¶ 1478d, at 329. "Of course, such a rule might be 'reasonable,' and thus lawful." *Ibid.* The scope and substance of that inquiry would depend on factors such as the rule's relationship to the venture, the rationale for its adoption, and the nature of its effect on competition.

potential competition among the teams, and between the teams and the league, is clearly absent.

***3. The approaches advocated by petitioner and the NFL respondents are inconsistent with the functional analysis of , , and***

a. Petitioner contends (at 14-15, 17-21, 39-42, 55) that single-entity treatment is never appropriate for the NFL because the teams are separately owned and controlled. That argument is inconsistent with the reasoning of *Copperweld* and *Dagher*. As explained above, the functional approach the Court adopted in those cases—focusing on the absence of competition in the relevant sphere and the consequent inability of the challenged restraint to raise Section 1 concerns—can appropriately be applied to the league on a "facet by facet" basis. See Pet. App. 13a. The distinction between unilateral and concerted conduct under the Sherman Act does not

rights—for example, the companies retained ownership of their respective trademark rights, see *Dagher* v. *Saudi Refining, Inc.*, 369 F.3d 1108, 1112 (9th Cir. 2004). Nevertheless, because the two companies no longer competed in the pertinent market, their agreement on the prices for gasoline sold under their trademarks did not eliminate competition. And while a vote may be concerted action by independent entities deciding "the way in which they will compete with one another," *NCAA*, 468 U.S. at 99, it may also be the mechanism by which the governing body of a single entity makes its decisions, see *Dagher*, 547 U.S. at 6 (joint venturers acted "in their role as investors" in approving pricing strategy). Under the functional approach of *Copperweld* and *Dagher*, the critical inquiry is not how the league's owners make decisions, but whether those decisions restrain actual or potential competition among the teams.

b. The NFL respondents contend that single-entity treatment applies in virtually every Section 1 suit against the league.[11] See NFL Cert. Br. 4. That approach is also inconsistent with the Court's functional approach in *Copperweld*, *Dagher*, and *NCAA*, and could significantly harm antitrust enforcement.

[11] The NFL respondents suggest that single-entity treatment could be limited to "core venture functions." NFL Cert. Br. 4. But the broad range of disputes in which the NFL respondents suggest that a single-entity defense might be viable—including disputes about "where to locate its clubs," "where to seek new capital," "how to present its integrated entertainment product to viewers on a national basis," "rules governing the equipment that may be used by players in games," "terms and conditions of player employment," and "the trademark licensing activities that are the subject of this lawsuit," *id.* at 10-11—indicates that the NFL respondents consider virtually all of their activities to be "core venture functions."

Such longstanding assumptions about the reach of existing law strongly suggest that only Congress has the prerogative to grant the sweeping exemption from Section 1 the NFL respondents seek.

Even if the NFL respondents' single-entity argument were not subject to those substantial objections, this case is a particularly unsuitable vehicle for considering such a wide-ranging limitation on the application of Section 1. On the record here, there is no way to know whether the swath of conduct the NFL seeks to carve out from Section 1 "raise[s] the antitrust dangers that [Section] 1 was designed to police," *Copperweld*, 467 U.S. at 769. The lower courts limited their analyses to the conduct of the teams and league in licensing marks, Pet. App. 13a, and the district court rejected petitioner's request for discovery that the court deemed irrelevant to the legality of that conduct, *id*. at 28a. To adopt the broad rule the NFL respondents seek, this Court would have to assume

[12] The Department of Justice and Federal Trade Commission have brought several enforcement actions against realtors' adoption of anti-competitive restraints not unlike these within joint ventures offering multiple listing services. See, *e.g.*, *United States* v. *Consolidated Multiple Listing Serv., Inc.*, No. 3:08-CV-1786-SB (D.S.C. May 2, 2008); *United States* v. *National Ass'n of Realtors*, No. 05C-5140 (N.D. Ill. Oct. 4, 2005); *In re West Penn Multi-List*, No. C-4247 (F.T.C. Feb. 20, 2009); *In re MiRealSource, Inc.*, No. 9321 (F.T.C. Oct. 12, 2006).

[13] See U.S. Br. in Opp. at 21-22, *Visa, U.S.A., Inc.* v. *United States*, 543 U.S. 811 (2004) (No. 03-1521). In *Visa*, the Second Circuit affirmed the district court's finding of a Section 1 violation. *United States* v. *Visa, U.S.A., Inc.*, 344 F.3d 229, 234, 244 (2003), cert. denied, 543 U.S. 811 (2004).

[14] "[T]he inquiry into whether separate economic interests are maintained by the participants in a joint enterprise is likely to be no easier than a full Rule of Reason analysis." *Bulls II*, 95 F.3d at 605 (Cudahy, J., concurring). Conversely, applying the rule of reason need not be unduly burdensome. In analyzing the reasonableness of a restraint, courts engage in an "enquiry meet for the case." *California Dental Ass'n*0.0002 Tw(811r-yeOw-1.8072 -109Tc-0.001 Tw( v. )Tj/TT8 1 Tf1. Tw7€€C01 Tc0 Tw(Ass/TT8 1 Tf1.1€7 0

mining whether a particular joint venture is "highly integrated," which presumably would require analysis of the venture as a whole, may be more difficult than determining whether the venturers have merged their operations in a particular sphere. In any event, Section 1's rule of reason necessarily entails litigation over some practices that are ultimately upheld. Conduct that has the effect of restricting competition among NFL teams may be found lawful—perhaps as an ancillary restraint—but it should not escape Section 1 scrutiny altogether. See *Salvino,*

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of a restriction will follow from a quick (or at least quicker) look, in place of a more sedulous one." *Ibid.*

The court of appeals viewed promotion of NFL football as the purpose of licensing team marks and logos. Pet. App. 16a-18a. The court then reasoned that, because individual teams cannot independently *produce* football games, the NFL respondents function as a single entity in "the *promotion* of NFL football." *Id.* at 16a-17a (emphasis added). Emphasizing that the NFL teams had collectively licensed their intellectual property for decades and that "antitrust law encourages cooperation inside a business organization" to "foster competition between that organization and its competitors," the court concluded that the NFL respondents function as a single entity "when promoting NFL football through licensing [their] intellectual property." *Id.* at 17a-18a. This reasoning is flawed in several respects.

- the decision to offer only a blanket license for all marks and logos rather than also offering licenses for select teams, see Gertzog Dep. 167
- the decision to have a single headwear licensee rather than multiple licensees, see Pet. App. 3a[15]

Identifying which of those actions petitioner challenges is critical to determining whether this case involves concerted action subject to Section 1. The first two actions were concerted action subject to Section 1 scrutiny because they changed the way the teams com-

[15] The record is not entirely clear on the relationship between the NFLP/Reebok contract and the team/NFLP licensing agreements. The NFLP/Reebok contract lasts for ten years—beyond the original term of the team/NFLP licensing agreements, which were scheduled to expire in 2004. J.A. 209; Pet. App. 3a. The team/NFLP licensing agreements were extended in 2004, see Gertzog Dep. 83-87, 108-113, but it is unclear what effect the existence of the Reebok contract had on that extension.

### *2. The court of appeals' analysis of the purpose of the licensing activities was deficient*

In discussing the purposes served by licensing team marks and logos, the court of appeals referred solely to the promotion of NFL football. See Pet. App. 16a-18a. If the court viewed the promotion of NFL football as the *sole* purpose of the relevant licensing activities, its assessment was surely wrong. The sale of merchandise bearing team marks and logos is a source of revenue, and the merchandise serves to promote the individual teams as well as the NFL. See Pet. Br. 3-4.

The court of appeals may have meant only that the promotion of NFL football is *a* purpose of the licensing activities. But even assuming that sales of team apparel serve in part to increase public awareness of, and interest in, the league as a whole, that fact would not itself justify treating the teams and league as a single entity with respect to the conduct challenged here. Nor, for that matter, would that fact alone support a finding that the challenged licensing arrangements are lawful concerted action under Section 1 rule of reason analysis. The restraints here might be upheld as permissible ancillary restraints if they were reasonably necessary to realizing the efficiencies of the league. See, *e.g.*, *Rothery Storage*, 792 F.2d at 224; *Salvino*, 542 F.3d at 338-339 (Sotomayor, J., concurring). But the court of appeals was not called upon to apply that standard to the record in this case because the NFL respondents sought summary judgment only on the single-entity issue.

[16] For example, in *Dallas Cowboys Football Club, Ltd.* v. *NFL Trust*, No. 95-civ-9426 (S.D.N.Y. Jan. 11, 1996), the Dallas Cowboys challenged the teams' agreement allowing NFLP control over their marks. J.A. 407-408, 437-438. That suit alleged that "[t]he marks of the member clubs are not of equal, or even comparable, value," J.A. 419; that "[t]he marks of a relative handful of clubs generally account for the bulk of the revenues in any given year," *ibid.*; and that "[m]any licensees would

competitive effects. In *BMI*, for instance, this Court noted that the availability of a blanket license for copyrighted music may enhance competition. 441 U.S. at 20. The Court nevertheless observed that the creation and issuance of the blanket license "involve[d] concerted action," *id*. at 10, and stated that the efficiencies of a blanket license could be considered under the rule of reason, *id*. at 24.

#### *4. The absence of competition could be the result of an agreement not to compete*

The court of appeals emphasized that the NFL teams have collectively licensed their intellectual property for decades. Pet. App. 17a. But Section 1 is concerned with both actual and potential competition, and the mere absence of competition does not demonstrate its infeasibility. Rather, the lack of competition could be the result of an agreement not to compete. See, *e.g.*, *Freeman* v. *San Diego Ass'n of Realtors*, 322 F.3d 1133, 1149 (9th Cir.) (Kozinski, J.) ("Absence of actual competition may simply be a manifestation of the anticompetitive agreement itself, as where firms conspire to divide the market."), cert. denied, 540 U.S. 940 (2003). Such an agreement is concerted activity within the meaning of the antitrust laws, rather than the action of a single entity.

The court of appeals' reasoning in this case is problematic, but its judgment may be correct. The case should be remanded for the lower courts to clarify the scope of petitioner's Section 1 claim, perhaps allow appropriate additional discovery, and then apply the principles from this Court's decision.

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Those inquiries probably call for further development of the record, and possibly more discovery than the district court permitted, see Pet. App. 28a. This Court should instruct the lower courts to conduct proceedings for this purpose and to apply the appropriate legal standard in the first instance.