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ANTITRUST IMPLICATIONS OF AMERICAN NEEDLE v. NFL

HEARING

BEFORE THE

SUBCOMMITTEE ON COURTS AND COMPETITION POLICY

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

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ANTITRUST IMPLICATIONS OF AMERICAN NEEDLE v. NFL

WEDNESDAY, JANUARY 20, 2010

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COURTS AND
COMPETITION POLICY
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 2:01 p.m., in room 2141, Rayburn House Office Building, the Honorable Henry C. "Hank" Johnson, Jr. (Chairman of the Subcommittee) presiding.

Present: Representatives Johnson, Conyers, Jackson Lee, Watt, and Coble.

Also present: Representatives Smith and Gohmert.

Staff present: (Majority) Christal Sheppard, Subcommittee Chief Counsel; Anant Rant, Counsel; Rosalind Jackson, Professional Staff Member; (Minority) Stewart Jeffries, Counsel; and Tim Cook, Professional Staff Member.

Mr. JOHNSON. This hearing of the Committee on the Judiciary, Subcommittee on Courts and Competition Policy will now come to order.

Without objection, the Chair is authorized to declare a recess.

Last week, the NFL went before the Supreme Court seeking immunity under the antitrust laws.

It is a simple question. When the NFL and its 32 teams get together and make business decisions like apparel licensing, are they a group of competitors subject to the antitrust laws, or are they more like a board of directors incapable of illegally conspiring with themselves?

Single-entity protection established by the *Copperweld* case would protect many of the business decisions made by the league and its 32 teams from challenges as illegal anticompetitive contracts and conspiracies.

The NFL argues that it deserves this immunity because it acts as a single entity in promoting the "NFL product."

What is less clear is where the NFL product ends. What are the boundaries of single-entity status? As a single entity, could the NFL eliminate free agency?

Could they impose a salary structure on coaches and personnel? Could they move teams whenever they did not get more local tax breaks? Would they be able to charge $400 for a jersey?

Would they be able to move all of their games to the NFL network and turn playoff games into pay-per-view? Co-brand credit

cards and set rates and fees associated with those cards? And the list of possibilities is endless.

Last week in front of the Supreme Court the NFL said that the league should be able to determine the price tag for each team. And this kind of unlimited control would not stop at the NFL, ladies and gentlemen. In the event of a pro-NFL decision by the U.S. Supreme Court, other sports leagues are likely to follow.

Antitrust experts have also predicted a spillover effect into other markets. Credit card networks and real estate listing services, among others, might start claiming immunity from parts of the antitrust laws.

What I want to know is why does the NFL need special antitrust immunity? The NFL has sought antitrust immunity from Congress multiple times over the past few decades. Time and time again, Congress has said no. The NFL is seeking indirectly from the courts what it could not get from Congress.

The only thing that immunity would do would be to eliminate so-called "frivolous" antitrust litigation. Well just about everybody thinks that litigation is frivolous when they are the defendant.

In recent years, the Supreme Court's decision in Twombly, Credit Suisse and Trinko have raised the bar for plaintiff litigants in antitrust cases. A pro-NFL decision could raise that bar even higher.

As a former judge, I can assure you there is no way to write a law that preserves only good cases and weeds out the bad ones. I look forward to what I am sure will be a lively debate on these issues.

With that, I now recognize my colleague, Ranking Member Howard Coble, the distinguished Ranking Member of the Subcommittee, for his opening remarks.

But before I do that, I would like to point out that votes are pending, or votes are soon to be announced. And at the appropriate point, we will recess the hearing to go take those votes. I think there is four of them. And then we shall come back and resume.

Mr. Coble?

Mr. COBLE. Thank you, Mr. Chairman. Thank you for calling the hearing.

Thank you all for being in attendance today. When it comes to protecting jobs, Mr. Chairman, particularly in the textile industry in my congressional district, pardon my modesty, but I will take a back seat to no one.

The V.F. Corporation is located in Greensboro, North Carolina, which is in my district, and has a very significant interest in its business with NFL Properties, manufacturing NFL jerseys. As you can imagine, we are very interested in today's hearing.

It seems relatively clear to me that any sports league must act as a single entity in order to produce the sport. Without a schedule, rules, basic equipment or other guidelines, the sport would have no value. There would be chaos if the Carolina Panthers, for example, had to negotiate who they were playing and the rules for each game.

The question of when it is rational for the NFL to act as a single entity for antitrust purposes gets a little murky beyond its product of games on the field.

However, to my mind, the question presented by the *American Needle* case, whether the NFL acts as a single economic entity for marketing purposes, is also pretty clear.

The NFL would not function as a marketing entity if some or all of its teams refused to license their marks collectively. Fans would be damaged because they would not be able to get merchandise with their favorite team's logo or could only purchase it at the price that their team was willing to sell its license.

Manufacturers would be damaged because they would have to negotiate with individual teams for different products over different lengths of time, thereby dramatically raising their costs of production.

And the league's value would be diminished because not all the teams would be well marketed and because some teams might choose to license their products for goods that do not represent the best interest of the league and its brand.

Finally, Mr. Chairman, the revenues and profits are shared equally throughout the league. Indeed, the plaintiff in this case, American Needle, seemed to enjoy contracting with the NFL and receiving all 32 team logos when it was an official licensee.

But once the league opted to go with different—with a different hat manufacturer, American Needle decided to sue the league over its collective bargaining practices.

It is apparent that the antitrust laws exist to protect competition, not competitors. The district court of the Court of Appeals felt that the NFL's licensing practice was valid. I am inclined to agree.

Having lost the benefit of that bargain, it appears that American Needle had a case of manufacturer's remorse and attempted to obtain through litigation that which it could not obtain through normal negotiation.

I recognize that the Supreme Court's decision in this matter could have an impact beyond the instant set of facts. However, without the decision in hand, it is too early, it seems to me, to tell what Congress needs to be concerned about here, if anything.

I am interested in ensuring that the NFL—or any other professional sports league, for that matter—does not abuse its power, but I am also concerned that stakeholders use today's forum—hearing as a forum to speculate and draw conclusions about the NFL before the Supreme Court's decision.

That being said, I encourage all the witnesses to proceed with the requisite amount of caution, because there is clearly more at stake than the case at hand.

I yield back the balance of my time, Mr. Chairman.

Mr. JOHNSON. Thank you, Ranking Member Coble.

We have about 7 minutes and 35 seconds left on this first vote, and I think what I would like to do, if it is okay——

Mr. COBLE. Sure.

Mr. JOHNSON [continuing]. Is to just introduce the witnesses, and thereafter we can depart.

Mr. COBLE. That would be fine.

Mr. JOHNSON. All right. Thank you.

I am now pleased to introduce the witnesses for today's hearing. Our first witness is Mr. Gary Gertzog, senior vice president for

business affairs and general counsel to the National Football League.

Mr. Gertzog oversees the league's commercial operations and—including media broadcasting, consumer product licensing and intellectual property.

Welcome, Mr. Gertzog.

Our second witness is Mr. Kevin Mawae, and—actually, Mawae—starting center for the Tennessee Titans and current president of the National Football League Players Association.

A 16-year veteran, this LSU grad was just named to his eighth pro bowl after helping running back Chris Johnson set the NFL record for yards from scrimmage this past season.

Welcome, Mr. Mawae. And congratulations on how your team snapped back after so many disappointments prior to this season, a testament to the human spirit collectively as a team.

Next we have Mr. Bill Daly, deputy commissioner of the National Hockey League. Mr. Daly worked previously at the law firm of Skadden Arps in New York before joining the National Hockey League as chief counsel.

Welcome, Deputy Commissioner Daly.

And finally, we have Professor Stephen Ross from Penn State. Professor Ross is one of the Nation's most renowned and most accomplished sports antitrust experts.

Mr. Ross worked previously as an antitrust attorney at the Federal Trade Commission and the Antitrust Division of the Department of Justice. He has also served as counsel to the Senate Judiciary Committee under Senator Metzenbaum. Mr. Ross—so that tells you about how—or gives you idea to date for this fine gentleman here.

Mr. Ross serves as pro bono counsel to the American Antitrust Institute and the Consumer Federation of America on issues relating to sports antitrust.

Welcome, Professor Ross.

And I want to thank each one of you for your willingness to come and participate at today's hearing. Without objection, your written statements will be placed into the record, and we would ask that you give us about 5 minutes before we come back.

Actually, it is going to be a little longer than that, but about 20 to 30 minutes. And when we come back we will begin with your—with testimony. Thank you very much. This hearing is recessed.

[Recess.]

Mr. JOHNSON. Ladies and gentlemen, we are waiting on one other very distinguished gentleman to arrive on our Subcommittee, so it shouldn't be much longer. Thank you.

This hearing is back in session, and before I turn it over to the witnesses for their opening statements, I want to extend the invitation to the Ranking Member of the full Committee, Mr. Lamar Smith of the great state of Texas, for his opening remarks.

Mr. SMITH. Okay. Thank you, Mr. Chairman. I also want to thank you for your courtesies.

When the vote came at 2 o'clock and that was the beginning of the hearing, I went to go vote, never thinking that you all would act so quickly. And I know you had the opening statements prior

to the votes, and I appreciate your, therefore, letting me add my opening statement after the votes.

Mr. Chairman, the *American Needle* case involves a dispute involving an apparel manufacturer that lost a hot contract with the NFL because the NFL had entered into an exclusive apparel rights contract with Reebok.

However, depending on how the Supreme Court rules on this case, the NFL may be able to claim that it acts as a single entity and not 32 individual teams for antitrust purposes in a broad variety of transactions.

Granting the league single-entity status means that it would be immune from antitrust scrutiny with respect to internal business decisions, not just negotiations with apparel manufacturers but potentially also labor disputes or the negotiation for television rights.

With respect to television rights, the NFL currently makes use of the Sports Broadcasting Act, which gives a limited antitrust immunity to sports leagues for the purposes of negotiating television packages.

However, if the NFL is viewed as a single entity for all negotiation purposes, then the Sports Broadcasting Act could be rendered superfluous. A favorable ruling for the NFL could eliminate one tool, antitrust suits against the team owners, which the NFL Players Association has used to extract favorable terms from the league.

Excuse me, Mr. Chairman.

However, given that the NFL Players Association and other professional sports unions are the wealthiest labor unions around, one wonders whether they need any extra leverage.

One particularly wonders this when other unions such as the United Auto Workers cannot sue fully integrated companies like General Motors under the antitrust laws to obtain relief that they cannot get from the collective bargaining system.

This case could significantly impact the other sports leagues, including the National Basketball Association, the National Hockey League and, to a lesser extent, Major League Baseball.

As various amicus briefs have argued, the case could also implicate all joint ventures. This outcome could have dramatic effects on antitrust law generally and might well merit congressional response. This case was argued just last week, and the court's decision is not likely to come out for several months.

This is the third hearing in 3 months that the House Judiciary Committee has held on matters relating to the NFL. The first two hearings were on the legal implications of head injuries suffered while playing professional football. That will also be the topic of another field briefing in Houston on February 1st.

While these are important issues, they are not the only important issues that the Committee should consider. We should hold hearings on the attempted Christmas Day terrorist attack on a Northwest Airlines flight bound for Detroit, the Department of Justice's decision to drop charges against New Black Panther Party members for voter intimidation, and the question of whether to close the Guantanamo Bay detention facility. All these are full Committee jurisdiction issues.

But the NFL and NFLPA are literally and figuratively big boys. They do not need Congress' help to referee every business dispute. That is what the courts and the labor negotiation process are for.

Mr. Chairman, again, thank you for your courtesies, letting me make an opening statement slightly late, and I will yield back the balance of my time.

Mr. JOHNSON. You are quite welcome, my friend.

And what I would like to do now is open it up for the written—excuse me, for the oral statements of the witnesses. You will each have 5 minutes. Okay.

Well, I will tell you what. Before we go down that road, I would like to fulfill my duty and my obligation, which is to give my Chairman an opportunity to make a opening statement.

Mr. Chairman?

Mr. CONYERS. Thank you. I am happy to be here with you, and I always like to comment after the Ranking Member of the full Committee and listen to his instructions as to which hearings ought be given priority, because that is an important way that we keep comity in the Committee. So I will take his recommendations under consideration.

But these hearings on sports I think are pretty important because, first of all, this is more than just who is going to make the caps for the football players' league.

The question here may get into antitrust considerations, and this is what we are here to learn more about today—is that this—the case that is pending—and I did a lot of work, Lamar—I didn't do a lot of work, but my staff did the work.

But I asked this question, how many cases—how many hearings have we had in which there was an anticipated ruling from the court that would have a profound effect on whatever the subject matter was, because I hadn't been thinking that much along those lines.

And I found out that there were plenty—namely, the civil rights cases, the Voter Rights Act, the—what were some of the others? Which? Oh, yes, the Jefferson case in Louisiana, in which the former Chairman of the Committee was active in getting into the court.

And so what I am more worried about, rather than who makes caps, is—oh, affirmative action cases, voter rights cases—oh, is this the whole sheet? Why don't I just put it in the record instead of reading it all? There is one, two, three, four, five—six cases.

So this is what we do. As a matter of fact, that is why the Committee has its name, Judiciary Committee. There is a connection here. We are not the court, but we look—we oversee the court.

Now, how will the players be affected by the ruling that is pending? Well, for one thing, the league could impose a uniform salary structure on players, coaches and other non-player personnel. I don't say that that would automatically happen, but that is a direction that it might be going in.

It could affect the free agency concept, as the only option would be a player strike. As we all know, those things are sometimes limited. As a matter of fact, one may be looming up now. I hope to get some insight from the witnesses on this.

And it is not apparent what actions would be preserved under the labor exemption itself if the Supreme Court happens to rule in favor of the league.

And then what should the role of the legislature be if this single-entity concept prevails in the court? This will depend on the breadth or narrowness of the Supreme Court decision itself.

But it seems to me that we must ensure the rights of the players to protect players as well as just look out for fans. And then we can have some unintended consequences applying joint ventures outside of the sports context.

And I close with this observation, that both the Department of Justice and the Trade Commission have expressed reservations about treating integrated entities with less favor than single entities, the concern that such a decision might have far-reaching implications for joint ventures among, for example, credit card networks, health care agencies, and thus impairing those two—the DOJ and the Trade Commission's ability to enforce antitrust laws.

And so, witnesses, I look forward for your clarification and points of view on these several issues.

I thank the Chairman for his indulgence.

Mr. JOHNSON. Thank you, Mr. Chairman.

And without further ado, each of you all will have 5 minutes to make your opening statements. You will notice the lighting system down there. It is green when you start. At the end of 4 minutes, it turns yellow. And then at the end of the 5 minutes, it turns red, and—so keep a close eye on that.

Anything that you don't say will be in your written remarks, and those will be submitted for the record.

And you will note that we will have—after each witness has presented his or her testimony, Subcommittee Members will be permitted to ask questions, subject to the 5-minute limit.

Mr. Gertzog, please begin.

TESTIMONY OF GARY GERTZOG, SENIOR VICE PRESIDENT, NATIONAL FOOTBALL LEAGUE, NEW YORK, NY

Mr. GERTZOG. Good afternoon, Mr. Chairman, Ranking Member Coble——

Mr. JOHNSON. You may want to hit that microphone——

Mr. GERTZOG. Good afternoon, Mr. Chairman, Ranking Member Coble, Members of the Subcommittee. My name is Gary Gertzog. I am senior vice president, business affairs and general counsel of the National Football League.

I appreciate the opportunity to testify before you this afternoon on the antitrust implications of *American Needle v. NFL.*

Last week, the nine justices of the United States Supreme Court heard oral argument in a lawsuit brought by a former NFL headwear licensee challenging the NFL's decision to grant an exclusive license to another company.

The question in this case is whether the NFL, NFL Properties and the NFL's 32 member clubs function as a single business entity when deciding how to promote NFL football through licensing of league and club trademarks on headwear products.

The district court and the Seventh Circuit Court of Appeals each agreed with our long-held position that the NFL is a single business entity for these purposes.

In a previous case, the Seventh Circuit held that the question of whether a professional sports league acts as a single entity should be decided on a league-by-league, aspect-by-aspect basis. We believe that approach is the correct way to analyze the case before the Supreme Court.

American Needle petitioned the court to review the Seventh Circuit ruling. The NFL chose to support the petition not because we agreed with American Needle's position on the merits but, rather, in an attempt to obtain a national and uniform rule confirming that the Seventh Circuit's decision was correct.

The NFL should be treated like any other business in making decisions about how to best promote its product and how best to respond to consumer demand. This case is not about any other aspect of the NFL's business.

It is not about labor relations, franchise relocation or our broadcast policies. Indeed, our collective bargaining relationship with the NFL players is governed by Federal labor law, not by the antitrust laws.

The *American Needle* case is simply about the NFL's ability to license its trademarks like any other business. There are no other issues before the Supreme Court.

The NFL's mission is to produce a premier entertainment product that appeals to the broadest possible audience. As part of that effort, we encourage fans and potential fans to identify with the NFL and their favorite team in a variety of ways.

Those efforts include ensuring that fans of all teams have access to a broad variety of high-quality, appealing consumer products that bear NFL and team marks and logos. Those promotional efforts have been successful. We are America's most popular sport, with over 180 million fans.

The NFL produces an annual integrated series of more than 250 football games leading to the playoffs and culminating in the Super Bowl. Each team is inherently incapable of generating on its own a single NFL game.

Every member club is dependent upon every other member club to create what we know as NFL football. The league controls all aspects of the production of NFL football. It determines when and where the games are played, the rules of the game, the playing schedule and rules relating to how the entertainment product is produced and presented to fans.

While the NFL clubs compete on the field, they are partners in a business enterprise. In fact, approximately 80 percent of all league and club revenues are shared among the member clubs. They engage in extensive revenue-and cost-sharing. Revenues from licensing marks and logos are shared equally among the member clubs.

Such economic integration has led to competitive balance on the football field and made it possible for small market teams such as Green Bay and New Orleans to compete effectively with large market teams.

This very much serves consumers' interest. The NFL has more clubs that play in more communities than any other sports league in this country. Because of the league's extensive revenue-sharing and promotion of all of its members, all clubs have a comparable chance at success on the playing field.

For example, of the four teams that remain in the playoffs this year, three represent smaller markets. Fans in New Orleans, Indianapolis and Minnesota continue to root for their favorite teams this year.

Mr. Chairman, antitrust lawsuits are complex, time-consuming and extremely costly. The NFL has spent millions of dollars defending suits like the one American Needle brought. Even the threat of such costly lawsuits is anticompetitive and inconsistent with consumer welfare because it chills competitive zeal to the detriment of consumers.

Our business partners are entitled to know when they are doing business with us whether they are buying a license or whether they are buying a lawsuit. Since 1963 when NFL intellectual property was first marketed on a collective basis, NFL Properties has increased exponentially the volume, variety and quality of NFL-licensed products available to consumers.

The centralized licensing and marketing structure of NFL Properties has served the interests of consumers and contributed to the success, popularity and growth of NFL football.

Thank you, and I look forward to your questions.

[The prepared statement of Mr. Gertzog follows:]

PREPARED STATEMENT OF GARY GERTZOG

TESTIMONY OF GARY GERTZOG

SENIOR VICE PRESIDENT, NATIONAL FOOTBALL LEAGUE

BEFORE THE

SUBCOMMITTEE ON COURTS AND COMPETITION POLICY

OF THE

COMMITTEE ON THE JUDICIARY

UNITED STATES HOUSE OF REPRESENTATIVES

JANUARY 20, 2010

Mr. Chairman, Ranking Member Coble, Members of the Subcommittee:

My name is Gary Gertzog. I am Senior Vice President Business Affairs and General Counsel of the National Football League. I appreciate the opportunity to testify before you this afternoon on the "Antitrust Implications of American Needle v. NFL."

Last week, the nine Justices of the United States Supreme Court heard oral argument in a lawsuit brought in 2004 by a former NFL headwear licensee challenging the NFL's decision in late 2000 to grant an exclusive license to another company. The question in the case is whether, for purposes of the antitrust laws, the National Football League, NFL Properties and the NFL's 32 member clubs function as a single business entity when deciding how to promote NFL Football through licensing of League and Club trademarks on headwear. The District Court and the Seventh Circuit Court of Appeals each agreed with our long-held position that the NFL is a single business entity for these purposes. In a previous case, the Seventh Circuit held that the question of whether a professional sports league acts as a single entity should be decided on a league by league, aspect by aspect basis. We believe that approach, which we encouraged the Supreme Court to adopt, is the correct way to analyze the case before us.

The National Football League's mission is to produce a premier entertainment product that appeals to the broadest possible audience. As part of that effort, we encourage fans and potential fans to identify with the NFL and their favorite team in a variety of ways. Those efforts include ensuring that fans of all teams have access to a broad variety of high quality, appealing consumer products that bear NFL and team marks and logos. Those promotional efforts have been successful: We are America's most popular sport, with over 180 million fans.

The NFL supported American Needle's request for Supreme Court review to secure a national, uniform rule of law that a sports league should be treated like every other business in making decisions about how best to promote its product and how best to respond to consumer demand. The result that we seek is one that would enhance the ability of the NFL, as well as the ability of other professional sports leagues, to compete effectively in the broader entertainment market, and thereby better serve the interests of fans and consumers across the country.

The National Football League

The National Football League produces an annual, integrated series of more than 250 football games played by 32 teams, leading to the playoffs and culminating in the Super Bowl championship game. Each of these individual teams is inherently incapable of generating on its own a single NFL game. Every NFL member club is integrally and inherently dependent upon every other member club to create what we know as NFL Football.

The League controls all aspects of the production of NFL Football. It determines when and where the games are played, the rules of the game, the playing schedule, and rules relating to how the NFL entertainment product is produced and presented to its fans. While the NFL clubs compete on the field, they are partners in a business enterprise. They do not jockey among themselves for market share in the production of NFL Football. To the contrary, they engage in extensive revenue and cost sharing. In fact, approximately 80% of all league and club revenues are shared among the member clubs. Revenues from licensing marks and logos are shared equally among the member clubs.

Such economic integration and interdependence has led to competitive balance on the football field and made it possible for small-market teams to compete effectively with those in large markets. This very much serves consumers' interests. The NFL has more clubs that play in more communities than any other major sports league in this country. Those clubs represent markets as large as New York and Chicago and as small as Green Bay and Buffalo. And because of the League's extensive revenue sharing and promotion of all of its members, all clubs have a comparable chance at success on the playing field. For example, of the four teams that remain in the playoffs this year, only one step removed from the Super Bowl, three represent smaller markets. Fans in New Orleans, Indianapolis and Minnesota continue to root for their favorite team this year.

The Lawsuit Brought by American Needle

For nearly 50 years, NFL Properties has promoted NFL Football by serving as the exclusive licensor of League and Club marks for use on headwear and apparel products. For decades, American Needle held – and benefited from – such licenses. In late 2000, the League decided that it could better satisfy consumer demand and better promote its entertainment product if it licensed a single company to produce certain categories of apparel and headwear.

American Needle bid for that license, but Reebok won the license in the marketplace. (The NFL awarded licenses to companies other than Reebok for t-shirts, sweatshirts, outerwear and other apparel products).

After its license expired, American Needle sued the NFL, NFL Properties and 30 of the NFL's member clubs under Section 1 of the Sherman Act, which prohibits "conspiracies" among business competitors in restraint of trade. American Needle argued that NFL Properties' decision to grant an exclusive license to Reebok was such a conspiracy.

The NFL defended the claims on the ground that the League and its member clubs are incapable of "conspiring" in an antitrust sense when the League makes decisions about the production and promotion of its integrated product, NFL Football. The League pointed out that the NFL and its member clubs are not business competitors, but rather generate a joint product. On this basis, under the Supreme Court's governing precedents, our lawyers argued that although the NFL and its member clubs may in some circumstances be subject to other provisions of the antitrust laws, decisions involving the licensing of League and Club trademarks are not subject to scrutiny under the Sherman Act's "conspiracy" provisions.

The United States District Court in Chicago and the United States Court of Appeals for the Seventh Circuit both agreed with the League's position. Both courts recognized that the League goes to market with a single product (NFL Football), that the challenged licensing activities are intended to promote that product, and that the League and its clubs compete as a unit against other entertainment providers. The courts therefore deemed the League and its member clubs a "single entity," rather than separate businesses, under Section 1 of the Sherman Act. In prior cases, other courts in other Circuits had disagreed with the premise underlying the Seventh Circuit's decision, and there was a conflict among the Circuits on that basis.

American Needle petitioned the Supreme Court to review the Seventh Circuit's ruling. The NFL chose to support the petition not because we agreed with American Needle's position on the merits, but rather in an effort to obtain a national and uniform rule confirming that the Seventh Circuit's decision – that the NFL is a single entity for purposes of promoting its unitary product, NFL Football – was correct.

Antitrust lawsuits are complex, time-consuming, and extremely costly, even in circumstances when the defendant ultimately prevails. The NFL and the other major sports

leagues have spent tens of millions of dollars defending suits like the one American Needle brought. Even the threat of such costly suits is anti-competitive and inconsistent with consumer welfare because it chills competitive zeal to the detriment of consumers.

The NFL's Structure as a Single Entity Benefits Consumers

Since its creation in 1963, NFL Properties' mission has been to enhance the image and promote the popularity of NFL Football through licensing of high quality consumer products bearing NFL marks. Prior to the creation of NFL Properties, there was little effort by the NFL clubs to develop or to promote their entertainment product in this way. NFL Properties controls almost every aspect of League and club operations relating to intellectual property.

Licensing of NFL intellectual property is an integral part of the collective efforts of the League and its member clubs to promote their collective entertainment product, NFL Football. Products bearing NFL intellectual property, including apparel, are an important expression of the image of the NFL and its brand. They offer NFL fans an opportunity to demonstrate their interest in NFL Football generally and their allegiance to a particular team, and they serve to promote NFL Football by communicating that interest and allegiance to others. By increasing the visibility of NFL Football, promoting loyalties, and fostering rivalries, these licensing activities enhance the NFL's ability to compete with other entertainment providers. Control over the licensing of NFL intellectual property and the quality of NFL-licensed products is thus integral to the success of NFL Football.

Rather than focusing on the performance of marks associated with a single club in any given year, NFL Properties seeks to enhance the performance of the entire collection of marks identifying the 32 member clubs. To that end, NFL Properties requires each apparel licensee to manufacture, distribute and sell on a national basis product lines bearing, in the aggregate, the marks identifying all member clubs. This ensures that fans of all teams are offered high quality products. And any net royalties resulting from the sale of any product are divided equally among the 32 clubs regardless of which club's mark appears on the product.

Centralizing the promotion, marketing, and licensing of NFL intellectual property provides extensive benefits for licensees and ultimately for consumers. For example, NFL Properties can promote and license a complete package of all NFL intellectual property. One-stop shopping for this package of rights is desirable and highly efficient for licensees, some of

whom might not otherwise be able to justify the expense of acquiring the right to use the marks associated with all NFL clubs. For many years, American Needle availed itself of this benefit, as well as the efficiencies and reduced transaction costs that collective licensing affords, through licenses from NFL Properties.

Consumer product licensees also benefit directly from NFL Properties' extensive marketing efforts and relationships with major retailers. NFL Properties uses its national-level relationships, as well as its promotion and marketing programs, to assist in the introduction of new product lines and to drive sales in smaller markets. Crucial to the success of these programs is NFL Properties' ability to offer retailers and other major market participants centralized support of the complete line of NFL-licensed goods. For example, to meet consumer demand, NFL Properties has entered into an agreement pursuant to which thousands of NFL products are available to fans through the NFLShop.com website and nationally distributed catalogs. The availability of this merchandise and the website are advertised extensively on NFL game broadcasts.

NFL Properties has also used the resources of its major national sponsors to expand, through cross-promotions, the reach and distribution of NFL-licensed products. For example, over many years, many national sponsors have distributed NFL-licensed apparel as part of the sponsor's own nationwide campaigns to market their products.

Through these national-level relationships, NFL Properties ensures that all member clubs benefit from its promotional activities. These efforts help to enhance overall fan interest in NFL Football across the nation. Moreover, NFL Properties-arranged distribution and promotional vehicles facilitate fans' ability to purchase products that they may not be able to find in retail stores in their local markets.

NFL Properties also engages in market research activities to monitor developments, spot trends, and to stay abreast of new products bearing the marks of other sports entities, entertainment companies, and fashion concerns with which NFL Properties competes in marketing NFL intellectual property. Individual clubs would not be able efficiently, if at all, to undertake such activities.

The efficiencies of centralized promotion, marketing, and licensing of NFL intellectual property extend to trademark registration and enforcement, development of new logos, and

quality control, all of which are handled by experienced NFL Properties employees. As one measure of these efficiencies, NFL Properties manages a worldwide trademark portfolio of over 12,000 registrations and applications in over 160 countries.

NFL Properties works with trademark investigators and local and federal law enforcement to assist in their investigation and seizure of counterfeit merchandise. To support these anti-counterfeiting activities, NFL Properties commits significant resources including the development and administration of a hologram-based authentication program for all products bearing NFL intellectual property.

NFL Properties is also responsible for administration of the selection, design and development of new names, marks, logos, uniforms and other identifying indicia for the member clubs. These issues are regulated by the NFL Constitution & Bylaws and related resolutions approved by the member clubs.

In circumstances where the NFL decides to expand the number of its member clubs, as it has several times over the years, it does so by creating the new club from the assets of the existing member clubs. In these circumstances, NFL Properties plays a substantial role. NFL Properties takes the lead in developing an identity and creating unique identifying marks for the new member club, protecting those marks through appropriate registrations and other legal action, and implementing a marketing strategy to ensure the successful promotion of the expanded NFL Football product. When it joins the League, a new member club acquires, along with the right to participate in the production of NFL Football, a pro rata ownership interest in NFL Properties.

NFL Properties also has a separate quality control department that reviews thousands of product submissions to ensure that the NFL intellectual property is used in an appropriate manner on licensed products and to ensure that licensed products reflect the branding goals associated with NFL Football. All licensed products are reviewed not only by NFL Properties licensing managers, who confirm consistency with the license agreement, but also by NFL Properties quality control managers, who review for trademark adherence and consistency with the NFL's quality standards.

NFL Properties' centralized licensing structure – and its efficiencies – create a national brand that includes the full range of marks that identify the NFL and its member clubs; that

structure also facilitates the use and development of NFL intellectual property in connection with, and successful promotion of, broadcasts of NFL games, NFL Network programming, staging of special events (such as the NFL Kickoff), and operation of the "NFL.com" website.

* * * *

The centralized licensing and marketing structure of NFL Properties has contributed to the success, popularity, and growth of NFL Football for almost 50 years. Since 1963, when NFL intellectual property was first marketed on a collective basis, NFL Properties has increased exponentially the volume, variety, and quality of NFL-licensed products available to consumers, including a wide array of apparel, fashion accessories, and "hardlines" consumer goods such as trading cards and video games. The equal sharing of revenues from these commercial activities allows executives of NFL Properties to focus on promoting and growing the overall business of NFL Football for the collective benefit of all of the member clubs and our fans.

Thank you, Mr. Chairman. I look forward to your questions.

Mr. JOHNSON. Thank you, Mr. Gertzog.
Mr. Mawae? What—Mawoo? What is it, sir?
Mr. MAWAE. It is Mawae.
Mr. JOHNSON. Mawae.
Mr. MAWAE. Yes, sir.
Mr. JOHNSON. All right. Thank you.

TESTIMONY OF KEVIN JAMES MAWAE, PRESIDENT, NATIONAL FOOTBALL LEAGUE PLAYERS ASSOCIATION, WASHINGTON, DC

Mr. MAWAE. Thank you. Good afternoon, Chairman Johnson, Ranking Member Coble and other Members of the Committee for inviting me here today to take part in this important hearing.

My name is Kevin Mawae, and I am the president of National Football League Players Association. I have played professional football for the last 16 years. I am the—currently the starting center for the Tennessee Titans. I have played for the New York Jets and for the Seattle Seahawks, where I was the 36th pick overall in the 1994 draft.

I have had the privilege of being a seven-time Pro Bowl selection and just recently named to my eighth pro bowl, and I am a three-time All-Pro player.

More importantly, my career has enabled me to focus on charitable endeavors with Children's Cup, Feed the Children and Building Blocks for Kids. And twice with the New York Jets I was named Community Man of the Year.

When I began my professional career, just 1 year had passed since the landmark settlement of the Reggie White case that led to the significant gains of players, giving me a unique perspective on an era of labor peace built upon the ability of players to bring and win antitrust claims.

One of the greatest honors in my career is serving as president of the NFLPA, a position that I was elected to by players of all 32 teams. As president of the NFLPA, I am tasked with ensuring the welfare of my peers, a job that I take extremely seriously, and one that brings me before you today. And some of our members are in this room and around the halls of Congress.

American Needle v. NFL is a case that could change the sports world as we know it. There have been claims by some that this case has been over-hyped. There are those who say that this case is simply a small licensing dispute without broader ramifications.

Put simply, this is an effort to deceive the Supreme Court, Congress and the general public. Why else would the NFL seek to review a case that it has already won not once but twice?

Just last week, during the oral arguments at the Supreme Court, the NFL finally confirmed just how broad this case really is. In response to a question from Justice Scalia, the NFL stated that it should be allowed to unilaterally set the price for each team, prompting Justice Scalia to remark that his question was meant to be taken into the absurd.

After hearing from the NFL, Justice Sotomayor stated the obvious. The NFL is seeking through this ruling what it has not gotten from Congress, an absolute bar to the antitrust claim.

Indeed, Congress has repeatedly refused to grant the NFL a broad antitrust exemption. Even the exceptions only to prove this rule. The Sports Broadcasting Act, for example, only grants a limited antitrust exemption with certain requirements imposed upon the league.

The NFL's ideal post-*American Needle* world is indeed chilling. Sports leagues could set ticket prices and prevent teams in the same or adjacent markets from competing for fans; owners could force—could end free agency by restricting player movement from

team to team and imposing a salary schedule for coaches and players; leagues could transfer all television and radio rights of their games, including local rights, to their own, wholly-owned subscription cable and satellite networks; leagues could even require any stadium to be built be completely subsidized by local taxpayers.

I think it is important to note that the NFL has unsuccessfully sought this blanket exemption for decades. It is the holy grail of would-be antitrust defendants.

Recognizing the once-in-a-generation chance to find success through *American Needle*, the other three major professional sports joined the NFL by filing friends-of-the-courts briefs.

It is clear that *American Needle* is just the latest attempt by sports leagues to find their vaunted holy grail. The case may be their best chance at success yet, due to the wolf-in-sheep's-clothing approach of an apparel license case.

Recognizing the imminent danger *American Needle* presents, it has sparked great interest from outside the sports world, with the Department of Justice, Federal Trade Commission, Merchant Trade Association, the American Antitrust Institute and an independent group of 20 prominent economists weighing in against the NFL.

Despite the nuanced approach that the NFL is using in *American Needle*, an antitrust exemption must be resoundingly rejected. As I mentioned before, I have been a professional football player for 16 years, starting the year after the 1993 collective bargaining agreement brought unrestricted free agency to players in the NFL for the first time in its history.

In the past, players were subject to systems severely limiting their rights to market their services to other clubs when their contracts expired. It was a successful antitrust lawsuit that ended those restrictions.

As a two-time free agent, and now one for the third time, I can personally attest to the fact that the 32 teams of the NFL do compete vigorously for players, coaches and fans.

I am proud to be the president of an organization whose success has been built upon the likes of players like Bill Radovich, Freeman McNeil and Reggie White, who had the courage to sue their teams in order to secure rights for all players.

Over the course of my career, I have seen firsthand how that antitrust lawsuit catapulted the league to unprecedented popularity by bringing parity to the league, free agency to the players, and a year-round football season where there is always hope for the season for the fans.

It is not only fans and players that have benefited during the 17 years. The league itself has experienced significant economic growth. NFL franchise values have increased by 550 percent since 1993.

Again, that is 550 percent, during this era of free agency and parity, built upon a foundation of labor peace. As I sit here today, I am not sure why anyone would want to tamper with such a profitable economic model.

The league has also experienced unmatched growth in the past couple of seasons, even while the world's worst economic crisis since the Great Depression raged.

In 2008, the NFL experienced its third most profitable year. Revenues rose to $7.6 billion, more than any other league. Average team profits increased 31 percent, and while labor costs increased only 4 percent.

While regular folks and companies are cutting costs wherever they can, the NFL continues to renew lucrative agreements that guarantee revenue beyond the 2011 season, whether football is played or not.

This year, fans watched NFL games in their largest number since 1990, with regular-season games being the highest-rated local program 89 percent of the time, up from 55 percent in 2001.

Viewers did not come to the expense of ticket sales. League attendance declined a negligible percent—1 percent when the commissioner himself estimated that they would be over 100 percent—no, he was off by 100 percent.

The NFL teams played in front of less-than-full stadiums less than 9 percent of the time in 2009. To be sure, this era of labor peace has benefited the league, owners and players alike.

Our labor peace, which is secured by the antitrust laws, has also benefitted the hundreds of thousands of stadium workers, small business owners and their employees that derive significant revenue from my beloved sport—revenue and paychecks—this is the last one—and that means a great deal to many families in this current economic climate.

And, sir, I am not a product. I am a person, and I am a player in the NFL. Thank you.

[The prepared statement of Mr. Mawae follows:]

Prepared Statement of Kevin Mawae

TESTIMONY OF KEVIN MAWAE, PRESIDENT NATIONAL FOOTBALL LEAGUE PLAYERS ASSOCIACIATION

BEFORE THE COMMITTEE ON THE JUDICIARY, SUBCOMMITTEE ON COURTS AND COMPETITION POLICY

UNITED STATES HOUSE OF REPRESENTATIVES

JANUARY 20, 2010

Good Morning Chairman Johnson and Ranking Member Coble and members of the Committee, thank you for inviting me here today to take part in this important hearing. My name is Kevin Mawae, and I am the President of the NFL Players Association. I have played professional football for 16 years and I am currently the starting center for the Tennessee Titans, where I've played since 2006. Before that, I played in New York for the Jets as well as in Seattle, which selected me with the #36 pick in the 1994 NFL Draft. I have had the privilege of being a seven-time Pro Bowl selection and three-time All-Pro over the course of my career. More importantly, my career has enabled me to focus on charitable endeavors, such as Building Blocks for Kids and Feed the Children, with the Jets recognizing my work by twice awarding me the Marty Lyons Award for Community Service and the Man of the Year Award.

When I began my professional career, just one year had passed since the landmark settlement of the Reggie White case that led to significant gains for players, giving me a unique perspective on an era of labor peace built upon the ability of players to bring and win antitrust claims. One of the greatest honors in my professional career is serving as the President of the NFLPA, a position that I was elected to by players of all 32 teams. As President of the NFLPA, I am tasked with ensuring the welfare of my peers, a job that I take very seriously, and one that brings me before you today.

American Needle v. NFL is a case that could change the sports world as we know it. There have been claims by some that this case has been "over-hyped." There are those who say that this case is simply a small licensing dispute without broader ramifications. Put simply, this is an effort to deceive the Supreme Court, Congress, and the general public. Why else would the NFL seek review of a case it

has already won – *twice*. Just last week, during oral arguments at the Supreme Court, the NFL finally confirmed just how broad this case really is: in response to a question from Justice Scalia, the NFL stated that it should be allowed to unilaterally set the price for each team, prompting Justice Scalia to remark that his question was "meant to take it to the absurd." After hearing from the NFL, Justice Sotomayor stated the obvious: the NFL is "seeking through this ruling what it hasn't gotten from Congress: an absolute bar to the antitrust claim." Indeed, Congress has repeatedly refused to grant the NFL a broad antitrust exemption. Even the exceptions only serve to prove this rule: the Sports Broadcasting Act, for example, only grants a limited antitrust exemption with certain requirements imposed upon the league.

As you know, after the NFL's 2001 deal with Reebok, American Needle was excluded from the NFL-branded hat market, so it sued the NFL and Reebok for allegedly violating the antitrust laws. Antitrust laws protect a fundamental philosophy of our economic system – competition – and have protected consumers for more than 100 years. Viewing the NFL as exempt from the antitrust laws is at odds with virtually every other decision of other federal courts. It also runs contrary to the clear intent of this governing body, as demonstrated by legislation such as the Sports Broadcasting Act. A ruling in the NFL's favor would open the door to sweeping changes in the basic way the NFL – and all sports leagues – does business. There is simply no good reason to allow the NFL to be above these laws.

NFL teams separately earn and keep billions of dollars each year. Of the $7.6 billion in revenue generated in 2008, about $4.5 billion came from team-specific revenue sources. For example, each NFL team sets its own prices for items like tickets, concessions, parking, local advertising and promotion, signage, and sales of programs and novelties, among other items. All fans know that the NFL owners compete fiercely in the player, coach, and football personnel markets. Such revenue-generation and competition would be impaired should the Supreme Court side with the league.

The NFL's ideal post-*American Needle* world is indeed chilling: Sports leagues could set ticket prices and prevent teams in the same or adjacent markets from competing for fans; owners could end

free agency by restricting player movement from team to team and imposing a salary schedule for coaches and players; leagues could transfer all television and radio broadcasts of their games, including local rights, to their own, wholly owned subscription cable and satellite networks; leagues could even require any stadium built be completely subsidized by local taxpayers.

I think it is important to note that the NFL has unsuccessfully sought this blanket exemption for decades. It is the "holy grail" of would-be antitrust defendants. Recognizing the once-in-a-generation chance to find success through *American Needle*, the other three major professional sports joined the NFL by filing friend-of-the-court briefs. It is clear that *American Needle* is just the latest attempt by sports leagues to find their vaunted holy grail. The case may be their best chance at success yet, due to the wolf-in-sheep's-clothing approach of an apparel license case. Recognizing the imminent danger *American Needle* presents, it has sparked great interest from outside the sports world, with the Department of Justice, Federal Trade Commission, Merchant Trade Association, American Antitrust Institute and an independent group of 20 prominent economists all weighing in against the NFL. Despite the nuanced approach the NFL is using in *American Needle*, any antitrust exemption must be resoundingly rejected.

As I mentioned before, I have been a professional football player for 16 years, starting the year after the 1993 Collective Bargaining Agreement brought unrestricted free agency to NFL players for the first time in history. In the past, players were subject to systems severely limiting their right to market their services to other clubs when their contracts expired. It was a successful antitrust lawsuit that ended those restrictions. As a two-time free agent, I can personally attest to the fact that the 32 teams of the NFL compete vigorously for players, coaches and fans. I am proud to be the President of an organization whose success has been built upon the likes of players like Bill Radovich, Freeman McNeil, and Reggie White, who had the courage to sue their teams in order to secure rights for all players. Over the course of my career, I have seen first-hand how that antitrust lawsuit catapulted the league to

unprecedented popularity by bringing parity to the league, free agency to the players, and a year-round football season where there's always hope for next season to the fans. It is not only fans and players that have benefited during the past 17 years – the League itself has experienced significant economic growth. NFL franchise values have increased by 550 percent since 1993 – please allow me to say that again: a 550 percent increase during this era of free agency and parity, built upon a foundation of labor peace. As I sit here today, I am not sure why anyone would want to tamper with such a profitable economic model.

The League has also experienced unmatched growth in the past couple of seasons, even while the world's worst economic crisis since the Great Depression raged. In 2008, the NFL experienced its third most profitable year ever. Total revenue rose seven percent to $7.6 billion, more than any other league. Average team profits increased by 31 percent, while labor costs increased only four percent. While regular folks and companies are cutting costs wherever they can, the NFL continues to renew lucrative agreements that guarantee revenue beyond the 2011 season, whether football is played or not. This year, fans watched NFL games in their largest number since 1990, with regular-season games being the highest-rated local program 89 percent of the time, up from 55 percent in 2001. Viewers did not come at the expense of ticket sales; league attendance declined a negligible one percent in 2009. Prior to the 2009 season, Roger Goodell predicted that 20 percent of games would not sell out and, as a result, be blacked out of local markets. When the final numbers were tallied, the Commissioner was off by over 100 percent; NFL teams played in front of less-than-full stadiums less than nine percent of the time in 2009. To be sure, this era of labor peace has benefited the League, owners and players alike. Our labor peace, which is secured by the antitrust laws, has also benefitted the hundreds of thousands of stadium workers, small business owners and their employees that derive significant revenue from my beloved sport – revenue and paychecks that mean a great deal to many families in this current economic climate.

This past season underscored the greatness of our game, and I am both thankful for its past and optimistic for its future, as currently structured. Professional football has become America's favorite sport over the past 50 years, all the while having to the follow the same laws that all other business must respect and obey. Allowing the NFL to ignore the antitrust laws would throw this supremely successful system out of whack. Let us not forget that it is a system achieved after decades of labor strife and, yes, successful antitrust lawsuits brought by the Players Association. I am hopeful that the Supreme Court will see through the clever ruse constructed by the NFL in the *American Needle* case and prevent what Justice Sotomayor recognized as the NFL seeking what Congress would not provide. I trust in the continued wisdom of this body to keep the laws applicable to all.

Mr. JOHNSON. Mr. Daly, please proceed.

TESTIMONY OF WILLIAM L. DALY, III, DEPUTY COMMISSIONER, NATIONAL HOCKEY LEAGUE, NEW YORK, NY

Mr. DALY. Chairman Johnson, Ranking Member Coble and other Members of the Subcommittee, thank you for the opportunity to ap-

pear before the Subcommittee today to testify on the antitrust implications of *American Needle v. The National Football League.*

My name is Bill Daly, and I am the deputy commissioner of the National Hockey League. Like the NFL, the NHL is structured as a legitimate joint venture created by its members to produce, promote and sell the fundamental league product, professional hockey games, and its constituent products, including league and team intellectual property, in competition with other sports leagues and entertainment providers.

Significantly, professional sports leagues such as the NHL and NFL compete against a large multitude of single firm entertainment providers. However, these leagues often cannot compete with one another and against other entertainment providers as vigorously as they otherwise would because of the threat of litigation under Section 1 of the Sherman Act, which prohibits agreements among competitors that unreasonably restrain trade.

All league decisions on how best to produce, promote and sell the league's products are inherently pro-competitive because none of the league's output would exist but for the league and the collaboration among the teams.

As with the NFL, the economic value of an individual NHL member club as well as its intellectual property derives solely from its joint participation in the league and its role in producing, collectively with the other 29 member clubs, NHL hockey.

If a particular club were not a member of the NHL venture, its team, as well as its team-related intellectual property and products, would have no meaningful economic value.

Because of this economic interdependence, the collective efforts to market and sell NHL hockey and the venture's output are part of the very essence of the NHL enterprise.

Under the NHL constitution and by-laws, the affairs of the NHL are governed by the NHL Board of Governors, which is comprised of one representative from each of the thirty member clubs.

Over time, the Board of Governors has made the business judgment that NHL hockey and its constituent output are best promoted and sold through a combination of, one, collective economic activity taken on behalf of all NHL member clubs by the league; and two, decentralized, individual economic operation by each club in its exclusive home territory, which rights are granted under the NHL constitution.

It must be emphasized that every decision regarding the structure and organization of the NHL venture, including the delegation of certain economic operations to individual clubs, emanates exclusively from the organic documents of the league—the NHL constitution and by-laws—which can only be modified by appropriate vote of the NHL Board of Governors.

The legitimate scope of the NHL joint venture necessarily includes the collective production and, at times, independent promotion and sale of NHL hockey and its constituent products, all of which derive their value from the league venture as a whole.

Consequently, it defies economic reality for the courts to view an agreement among the teams of a professional sports league such as the NHL as "representing a sudden joining of two independent

sources of economic power previously pursuing separate interests," the standard articulated by the Supreme Court in *Copperweld.*

NHL seeks to promote demand for, and fan interest in, its product, NHL hockey, and to create, market and sell NHL hockey and its constituent products in competition with other producers and marketers of sports and entertainment products.

To effectively compete in the broad entertainment marketplace, the NHL member clubs must have the ability to jointly decide how best to market NHL hockey, including when to centralize and when to decentralize their economic activities.

The specter of treble damages exposure, significant litigation costs and burdensome discovery from rule of reason scrutiny under Section 1 of the Sherman Act has the potential to create a chilling effect on the structural and innovative decision-making of legitimate professional sports league joint ventures such as the NHL.

This risk looms in connection with literally every internal disagreement regarding how best to make, promote and sell the league venture's product. Consequently, rather than serving the marketplace and responding to consumer demand and competition from a vast array of other entertainment providers, as would any single-firm entertainment provider, professional sports leagues are forced to calibrate their innovation and competitive vigor to account for the risk of protracted and costly rule of reason litigation.

Indeed, the NHL just spent more than a year in the midst of such litigation in the MSG case that is described in my written statement. The effects of this case on the NHL's business were significant.

The broad-ranging litigation results in an enormous expenditure of both monetary and human resources, a disruption to normal business operations, uncertainty for transactions with existing and potential business partners, and adverse effects on the league's relationship with its fans.

The litigation sought to have a Federal court insert itself into the NHL boardroom in order to review virtually every one of the clubs' output-related business decisions, the vast majority of which are decades old now.

We don't believe such scrutiny is warranted. And as a result, we believe the *American Needle* case was correctly decided by the Seventh Circuit.

I will be happy to answer any questions you have at the appropriate time.

[The prepared statement of Mr. Daly follows:]

PREPARED STATEMENT OF WILLIAM L. DALY, III

Statement before the Judiciary Committee

Subcommittee on Courts and Competition Policy

Ou the Antitrust Implicatious of *American Needle v. NFL*

William L. Daly III

Deputy Commissioner

National Hockey League

January 20, 2010

U.S. House of Representatives

House Judiciary Subcommittee on Courts and Competition Policy

2141 Rayburn House Office Building

Washington, DC

Chairman Johnson, Ranking Member Coble and Members of the Subcommittee:

Thank you for the opportunity to appear before the Subcommittee today to testify on the antitrust implications of *American Needle v. NFL*, which has been argued and submitted to the Supreme Court of the United States. My name is William L. Daly III, and I am the Deputy Commissioner of the National Hockey League ("NHL" or "League"). The NHL filed Amicus Briefs – at the petition stage and on the merits – in support of the NFL Respondents, which more fully address much of what I will discuss today. My testimony will cover three main topics: (1) the nature and scope of the NHL joint venture; (2) the broad entertainment marketplace in which the NHL competes; and (3) the inhibitive effect of scrutiny under Section 1 of the Sherman Act on the ability of professional sports leagues to compete in this market.

While the *American Needle* case involves specifically a dispute between NFL Properties and one of its licensees, the antitrust implications of any decision would affect the NHL and other professional sports leagues, many of which are similar to the NFL in structure, scope and business operation. Like the NFL, the NHL is structured as a legitimate joint venture created by its members to produce, promote and sell the fundamental League product, professional hockey games, and its constituent products, including League and team intellectual property, in competition with other sports leagues and entertainment providers. Significantly, professional sports leagues such as the NHL and NFL compete against a large multitude of "single firm" entertainment providers. However, these leagues often cannot compete with one another and against other entertainment providers as vigorously as they otherwise would because of the threat of litigation under Section 1, which prohibits agreements among competitors that unreasonably restrain trade. While courts have routinely found that the ongoing, internal business decisions of professional sports leagues are procompetitive, these leagues – as well as the federal courts –

have had to endure costly and time-consuming litigation under the rule of reason to reach this obvious conclusion. This should not be the law applicable to legitimate professional sports leagues with respect to the collective decisions of their governing boards, which are comprised of the teams to which the league has granted the right to operate a franchise to play and to vote on the manner in which league products are produced, promoted and sold. All of these decisions are inherently procompetitive because none of the league's output would exist but for the league and the collaboration among the teams.

The Nature and Scope of the NHL Joint Venture

The NHL is an unincorporated association organized as a joint venture among thirty Member Clubs that operates a professional hockey league. Founded in 1917 as a five-team league, the NHL has since expanded (and contracted) to its current membership. Each Club operates a professional hockey team in one of a diverse group of cities throughout the United States and Canada.

Significantly, no Member Club alone can produce NHL hockey or any of its constituent products. The NHL venture collectively creates the games, promotes the League and the sport, and seeks to maximize value for all of the Clubs collectively by marketing and selling constituent venture output such as intellectual property, broadcasting rights, sponsorships, advertising and merchandise.

As with the NFL, the economic value of an individual NHL Member Club as well as its intellectual property derives solely from its joint participation in the League and its role in producing – collectively with the twenty-nine other Clubs – NHL hockey. If a particular Club were not a Member of the NHL venture, its team, as well as its team-related intellectual property and products, would have no meaningful economic value. Consequently, it is not in the interest

of any Member Club for the NHL venture or other Clubs to fail, or to have any Club so financially weakened that it cannot effectively compete on the ice. Because of this economic interdependence, the collective efforts to market and sell NHL hockey and the venture's output are part of the very essence of the NHL enterprise.

Under the NHL Constitution and By-Laws, the affairs of the NHL are governed by the NHL Board of Governors, which is comprised of one representative from each of the thirty Member Clubs. The Board of Governors is charged with upholding and enforcing the NHL Constitution, By-Laws and other NHL rules and procedures. Pursuant to the NHL Constitution, the Board of Governors from time to time passes resolutions addressing various aspects of the League's business, including the licensing of League and team intellectual property and other activities related to League output. Over time, the Board of Governors has made the business judgment that NHL hockey and its constituent output are best promoted and sold through a combination of collective economic activity taken on behalf of all NHL Member Clubs and decentralized, individual economic operation by each Club in its exclusive home territory, which rights are granted under the NHL Constitution. It must be emphasized that every decision regarding the structure and organization of the NHL venture, including the delegation of certain economic operations to the individual Clubs, emanates from the organic documents of the League, the NHL Constitution and By-Laws, which can only be modified by appropriate vote of the NHL Board of Governors.

There can be no dispute that the NHL is a lawful joint venture created to produce NHL hockey. More importantly, the NHL – like the NFL – is also unquestionably a legitimate, all-encompassing venture created to maximize economic value among its members, and not simply for the scheduling, rules-setting and playing of professional hockey games. The legitimate scope

of the NHL joint venture necessarily includes the collective production, (and at times, independent) promotion and sale of NHL hockey and its constituent products – including League and team intellectual property and related merchandise – all of which derive their value from the League venture as a whole. Simply stated, there would be no NHL product – or licensing of NHL team intellectual property – without the ongoing cooperation of the Member Clubs.

The NHL Member Clubs are necessarily and inescapably, economically interdependent, and not independent. The economic significance of each Club derives singularly from its membership in the NHL. This interdependence and the production decisions of the Member Clubs acting through the Board of Governors create a competitively balanced professional sport on the ice, which generates fan, sponsor and intellectual property licensee interest in the NHL and economic value in the Member Clubs. It is impossible to separate the value of the demand for Club merchandise and other products from the NHL brand or from the joint venture among the Member Clubs. Nor, in economic reality, can the League venture itself be viewed as separate from the inherent, requisite coordination among the Member Clubs with respect to the production, promotion and sale of NHL hockey and all of the output encompassed within the venture. Consequently, it defies economic reality for the courts to view an agreement among the teams of a professional sports league such as the NHL as "represent[ing] a sudden joining of two independent sources of economic power previously pursuing separate interests." *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 771 (1984).

The Broad Entertainment Marketplace

The NHL seeks to promote demand for, and fan interest in, its product – NHL hockey – and to create, market and sell NHL hockey and its constituent products in competition with other producers and marketers of sports and entertainment products – e.g., NFL, NBA, MLB,

NASCAR, PGA Tour, MLS, professional wrestling and mixed martial arts, rodeo, circus, movies, television, etc. Indeed, that competition frames one of the core objectives of the League as set forth in Article 2.1(a) of the NHL Constitution: "To perpetuate hockey as one of the national games of the United States and Canada."

The thirty Member Clubs share a common interest in promoting the NHL, and each Club competes with other local sports teams and entertainment events for ticket sales, broadcast rights, merchandise sales, advertisers and sponsors. In this competitive marketplace, the NHL and its Member Clubs collectively possess very little, if any, market power; consumers, sponsors, advertisers, broadcasters and other suppliers and vendors have many substitute products from which to choose when spending their discretionary dollar across the broad scope of these products. Thus, with respect to internal League decisions regarding the League products, the Member Clubs are not competitors in the antitrust sense, and any allocation of decision-making authority between the League and individual teams poses no economic threat to competition or the consumer. In other words, to effectively compete in the broad entertainment market, the NHL Member Clubs must have the ability to jointly decide how best to market NHL hockey, including when to centralize and when to decentralize their economic activities.

Scrutiny Under Section 1 of the Sherman Act Inhibits the Ability of Professional Sports League Ventures to Compete in the Entertainment Market

The specter of treble damages exposure, significant litigation costs and burdensome discovery from rule of reason scrutiny under Section 1 of the Sherman Act has the potential to create a chilling effect on the structural and innovative decision-making of legitimate professional sports league joint ventures such as the NHL. This risk looms in connection with literally every internal disagreement regarding how best to make, promote and sell the League

venture's products, including its intellectual property. Consequently, rather than serving the marketplace and responding to consumer demand and competition from the vast array of other entertainment providers, as would any single firm entertainment provider, professional sports leagues are forced to calibrate their innovation and competitive vigor to account for the risk of protracted and costly rule of reason litigation.

Indeed, the NHL just spent more than a year in the midst of such litigation. In *Madison Square Garden, L.P. v. National Hockey League*, No. 07 Civ. 8455 (S.D.N.Y.), Madison Square Garden ("MSG"), the owner of the New York Rangers, initiated litigation against the League alleging violations of Section 1 regarding the allocation of certain venture rights collectively shared among the teams, as compared to those reserved to an individual team within its local territory. While MSG admitted that the NHL was a legitimate joint venture, the plaintiff nonetheless sought injunctive relief against a broad array of the NHL's basic business operations – all of which were the result of internal NHL Board of Governors' decisions – including with respect to the licensing of League and team intellectual property, national and local broadcasting arrangements, merchandising and marketing of League and team products, advertising and sponsorship regulations, and all new media activities. In the end, the case was resolved without decision from the court on the NHL's argument that the NHL Member Clubs are incapable of conspiring under Section 1 with respect to the alleged "restraints" at issue.

But, the effects of this case on the NHL's business were significant. The broad-ranging litigation resulted in an enormous expenditure of both monetary and human resources, a disruption to normal business operations, uncertainty for transactions with existing and potential business partners, and adverse effects on the League's relationship with its fans. The litigation sought to have a federal court insert itself into the NHL boardroom in order to review virtually

every one of the Clubs' output-related business decisions, the vast majority of which are decades old. If professional sports leagues are to be treated like the single firms against which they compete in the entertainment market, then Section 1 jurisprudence cannot grant teams that disagree with duly enacted business decisions of the league's governing board (such as MSG), licensees that had the ability to compete for an exclusive license (such as American Needle), or other customers, suppliers or vendors of a professional sports league a license that essentially mandates the intervention of federal courts to oversee and potentially second-guess every one of the league venture's basic business decisions as to how best to market and promote its products.

But, in the absence of clarification by the Supreme Court, federal courts will continue to assess these antitrust challenges to the fundamental business decisions of legitimate professional sports league ventures under the "full" rule of reason, typically resulting in massive and protracted fact discovery and expert testimony prior to summary adjudication or trial. And, while the vast majority of courts and cases have recognized these internal league decisions regarding the production, promotion and sale of the league products to be inevitably procompetitive and efficiency enhancing, so long as the allure of Section 1 treble damages and the potential antitrust hammer of injunctive relief remain available to disgruntled venture members and disappointed third parties, disruptive litigations will persist. In short, these league decisions should be left to the corporate boardroom and the competitive marketplace rather than the federal courts.

Conclusion

Section 1 of the Sherman Act should not be utilized to second-guess the ongoing, internal business decisions of a legitimate professional sports league joint venture whose products, including league and team intellectual property, would not even exist but for the venture's

formation. As legitimate joint ventures, professional sports leagues should be on a level playing field with other single firm entertainment providers when deciding how to produce, promote and sell the output created by and encompassed within the venture.

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Mr. JOHNSON. Thank you, Mr. Daly.
Last but not least, Professor Ross?

TESTIMONY OF STEPHEN F. ROSS, LEWIS H. VOVAKIS DISTINGUISHED FACULTY SCHOLAR, PROFESSOR OF LAW AND DIRECTOR FOR SPORTS LAW, POLICY AND RESEARCH, PENNSYLVANIA STATE UNIVERSITY, UNIVERSITY PARK, PA

Mr. ROSS. Mr. Chairman and Members of the Committee, I appreciate the invitation to speak to you today about the appropriate standards by which to judge antitrust claims against sports leagues controlled by club owners who operate the leagues in their own parochial self-interest, without any economic incentive or legal obligation to set league policy in the interests of the sport as a whole.

Four key points dominate policy considerations regarding this issue. One, fans suffer from inefficiencies resulting from the control of sports leagues by club owners guided by their own selfish, parochial interests.

Two, single-entity status would result in a significant shift of games to more expensive pay and cable media and would increase the risk of labor strife.

Three, contrary to league claims, antitrust scrutiny of dominant sports leagues under the rule of reason has worked relatively well in protecting the public interest.

Four, unless a pro-defendant Supreme Court decision is limited on an unprincipled and sui generis basis to sports leagues, it will likely create huge problems for antitrust treatment of competitor collaborations generally.

Now, in a recent book called "Fans of the World, Unite!" a prominent British sports economist and I detailed numerous areas where the club-run structure of dominant North American sports leagues has harmed fans.

Most prominent are policies that serve neither consumers nor the best interests of the league as a whole. These include anticompetitive franchise relocation policies, TV blackouts that actually reduce overall ratings, inefficient labor market rules, and a systemic lack of oversight of individual club mismanagement.

My co-author and I conclude that sports leagues would be better off if they actually were single entities, where policies were adopted by a single economic driver.

If Commissioners Selig, Goodell, Stern and Bettman worked for boards of directors with a fiduciary duty to the league as a whole, many of these inefficiencies would disappear. To answer Chairman Johnson's question, the owners are not like a corporate board of directors.

Now, the notion that sports leagues would benefit if leagues were controlled by a true single entity is not something we simply invented. Rather, in organizing NASCAR, founder Bill France recognized that "it would require a central racing organization whose authority outranked all drivers, car owners and track owners."

In contrast, pundit Bob Costas has acridly observed that baseball owners "couldn't even agree on what to order for lunch."

Our study concluded that Bill France's efforts on behalf of NASCAR to change engineering rules to attract auto company investment, develop a business model where clubs relied extensively on sponsorship income, expand the appeal of the sport from the south to the entire Nation, and increase national television appeal through the Chase for the Cup would all have been inhibited or

blocked if the sport were controlled by participating racing teams or racetrack owners.

Around the world, the modern trend has been to keep league operations separate from control of self-interested club owners. If the NFL were considered a single entity, however, the Sports Broadcasting Act would be rendered a complete nullity and NFL need no longer abide by its limits.

As a result, an NFL scheme to place most of their games on their own NFL network and then significantly increase the fees charged to watch the games would be perfectly lawful.

By way of comparison, in 1992 the English Premier League signed a new contract assigning TV rights previously awarded to free-to-air networks to the Sky Sports cable network. Viewership declined from 7 million to 1 million a game, although clubs profited substantially from higher rights fees.

Some of the sharp questioning at last week's oral argument signaled concerns that some justices believe our basic structure of antitrust enforcement is flawed, and that defendants should not have to defend under the rule of reason legitimate agreements against meritless complaints.

It is true that under our system of antitrust laws any agreement among competitors is subject to Section 1, and any decision by collaborating competitors is the potential target of a lawsuit.

But it is also true, as many cases recent cases demonstrate, that these suits can be and are summarily dismissed when the plaintiff is unable to demonstrate any anticompetitive effect.

And I add that the bipartisan Antitrust Modernization Commission appointed by President Bush, with a clear majority with unimpeachable Republican and pro-business credentials, rejected claims that our treble damage system of private litigation should be scrapped.

Although surgical repairs on private antitrust litigation might be appropriate, the clumsy device of an unprincipled expansion of *Copperweld* to label self-interested, inefficient joint ventures as single entities is terrible competition policy.

Ranking Member Coble is correct to want to protect legitimate ventures, but to protect against abuse. Calling leagues a single entity takes away any possibility that abusive actions can be remedied under the antitrust laws. If the Supreme Court so rules, Congress should overrule.

Mr. Chairman, transforming a duck into a goose, I suggest, would be better for consumers. Simply calling a duck a goose, as the NFL wants, would not. Thank you for inviting me to testify.

[The prepared statement of Mr. Ross follows:]

PREPARED STATEMENT OF STEPHEN F. ROSS

If it Walks Like a Duck and Quacks Like a Duck, It's Not a Goose:

Why North American Sports Leagues Should Be Single Entities, But They Are Not Now

Stephen F. Ross[1]
Professor of Law and Director, Institute for Sports Law, Policy and Research
The Pennsylvania State University

Mr. Chairman and Members of the Committee:

I appreciate the invitation to speak to you today about the appropriate standards to judge antitrust claims against sports leagues controlled by club owners who operate the leagues in their own parochial self-interest, without any economic incentive or legal obligation to set league policy in the interests of the sport as a whole. Congressional attention is properly focused on the serious public policy questions that would arise from a judicial determination, in the pending Supreme Court judgment in *American Needle, Inc. v. National Football League,* that club-run sports leagues are "single entities" whose decisions are not subject to the Rule of Reason that typically governs antitrust law under §1 of the Sherman Act.

Summary

Four key points dominate the policy considerations regarding this issue:

1. Fans suffer from inefficiencies resulting from the control of sports leagues by club owners guided by their own selfish, parochial interests.

2. Single-entity status would result in a significant shift of games to more expensive pay and cable media and would increase the risk of labor strife.

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[1] My appearance today is purely in my individual capacity as a law professor. I am the co-author of an *amicus curiae* brief in the *American Needle* case on behalf of the American Antitrust Institute and the Consumer Federation of America; however, views expressed today do not necessarily reflect the opinions of those organizations.

3. Contrary to league claims, antitrust scrutiny of dominant sports leagues has worked relatively well in protecting the public interest.

4. Unless a pro-defendant Supreme Court decision is limited on an unprincipled and *sui generis* basis to sports leagues, it will likely create huge problems for antitrust treatment of competitor collaborations generally.

I. Fans Suffer from the Current Structure of Club-run Leagues

In a recent book, a prominent British sports economist and I detailed numerous areas where the club-run structure of dominant North American sports leagues has harmed fans. Stephen F. Ross & Stefan Szymanski, *Fans of the World, Unite! A (Capitalist) Manifesto for Sports Consumers* (Stanford University Press 2008). Most prominent are policies that serve neither consumers nor the best interests of the league as a whole. These include anti-competitive franchise relocation policies, TV blackouts that actually reduce overall ratings, inefficient labor market rules, and a systemic lack of oversight of individual club mismanagement.

(a) Self-protecting franchise relocation decisions

Anyone who has lived in the Nation's capital for more than 5 years is quite familiar with the saga over the relocation of a failing Montreal Expos franchise to one of the country's largest metropolitan areas and media markets. Despite a ready market and the many non-economic benefits to having the National Pastime represented in our capital city, it took over 6 ½ years to work out stadium and broadcast details because of opposition from the Baltimore Orioles' owner. If, in the words of the leading Supreme Court decision, *Copperweld Corp. v. Independence Tube Corp.*, MLB policies were set by a "single economic driver," there is no

economically sensible explanation for why such a "driver" would have waited so long, and required such a complex arrangement to assuage the Orioles.

Why would the rest of the league suffer by permitting the Expos, which were bought out by the rest of the owners, to continue to endure nine-figure losses while the Washington metro market was unserved? The higher principle of self-preservation explains this superficially inexplicable economic behavior. Many owners realized that they too could be in Peter Angelos' shoes. Today it might be good for Major League Baseball to move a team within 40 miles of the Orioles, but tomorrow it might be good to put a third team in New York, Chicago, or Los Angeles, or to let the Oakland A's move to Santa Clara, or to add another Texas franchise. This was reason enough for these owners to vote their own selfish interests instead of what is good for both MLB and baseball fans.

(b) Ratings-reducing TV blackouts

Anyone old enough to remember the exciting Chicago Bulls dynasty may remember how many Bulls' contests were available to cable subscribers throughout the United States via the WGN Superstation. In spite of a complete lack of concrete evidence that these telecasts had any significant impact on ratings for other NBA games, the other club owners voted to strictly limit Bulls' games shown in their local markets. (In the context of lengthy litigation, the Bulls had offered to share all revenues attributed to out-of-market fans with the rest of the league.)

In all likelihood, the dispute was due to a lack of information as well as bargaining problems. Other owners feared the impact of Bulls' games on their audiences, despite evidence showing minimal impact. Jealous of the Bulls' success, other owners also wanted a greater share of the pie than the Bulls' owner was willing to offer. A single economic driver would not have reduced overall ratings for NBA games in this manner.

(c) Revenue-lessening labor market rules

Fans have a two-fold interest in sports labor negotiations. Most important is that industrial strife not ruin a season. Secondarily, fans benefit when the rules are designed to allow teams to develop exciting teams, without so much competitive imbalance that fans lose interest. In the last round of NFL negotiations, reports documented how union chief Eugene Upshaw and NFL Commissioner Paul Tagliabue found it easier to reach an agreement between themselves than it was for Tagliabue to shepherd an agreement among diverse and contentious owners. From 1977-83, MLB saw its attendance increase 57% in the immediate wake of free agency, as the then-dominant teams lost talented players to others. *See* Stephen F. Ross, *Monopoly Sports Leagues,* 73 Minn. L. Rev. 643 (1989). Club owners, who faced a tripling in player salaries, preferred rules that created a smaller "pie" of fan support, because club profits would be higher. It is not a coincidence that in the one league <u>not</u> controlled by the salary-paying club owners, NASCAR, there are no significant labor market rules other than the law of contract.

(d) Fan-aggravating tolerance of mismanagement

In most businesses, stewardship of local franchises is critical. General Motors or McDonald's could not afford persistent mediocre performance by key local franchisees. Yet local mismanagement is legendary in professional sports, from the Red Sox 'curse' (quickly cured when dynamic ownership came to town), to the Blackhawks' mediocrity (amazingly on the rebound when the owner died and management passed to a son), to the years of litigation that was required to get rid of incompetent Patriots' ownership, to the infamous L.A. Clippers' owner Donald Stirling, operating in one of the NBA's biggest markets. Why won't brilliant business-oriented league commissioners get rid of these owners? Because the commissioners are not the

"single economic driver," but work for the committee of horses!

Questioning the claim that the NBA was a single entity, Judge Richard Cudahy astutely drew a metaphor to a company that allowed its salespeople to vote on their own bonuses. They could own stock and try to maximize the value of the company by rewarding the most productive sales efforts, or they could simply maximize their own share of the pie. He concluded that "a group of team owners who do not share all revenues from all games might well make decisions that do not maximize the profit of the league as a whole." *Chicago Prof. Sports Ltd. Partnership v. NBA*, 95 F.3d 593, 604-05 (7th Circ. 1996) (concurring op.).

Baseball Commissioner Bud Selig acknowledged that the commissioner's job in club-run leagues is to "lead by suasion" and to understand that "there were 26 owners with sometimes 26 different agendas." Andrew Zimbalist, *In the Best Interests of Baseball? The Revolutionary Reign of Bud Selig* (Hoboken, N.J.: Wiley, 2006), at 136. New England Patriots' owner Robert Kraft observed "We now have 32 owners, and everyone has their own agenda." Stefan Fatsis, "The Battle for the NFL's Future," *Wall St. J.* Aug. 29, 2005, at R1, 3.

(e) Revenue-maximizing, fan-benefitting single entity sports leagues

In *Fans of the World, Unite!*, my co-author and I conclude that sports leagues <u>would</u> be better off if they actually <u>were</u> single entities, where policies were adopted by a single economic driver. We proposed that leagues be restructured to actually make them single entities, where ownership of the league was vested in stockholders or other investors, rather than club owners. If Commissioners Selig, Goodell, Stern and Bettman worked for Boards of Directors with a fiduciary duty to the league as a whole, many of these inefficiencies would disappear.

Such a restructuring would significantly simplify a sports league's antitrust liability.

Decisions which are necessarily decided at the league level (franchise entry and relocation, rules about the structure of club ownership, labor rules if league-wide bargaining is chosen, scheduling, rules of the game) would be immune from §1 scrutiny. There are other economic activities where clubs would otherwise compete with each other, but-for an agreement not to: inter-club competition could potentially exist (and has in the past, and does now in other countries) with regard to the sale of television rights to games not selected for a national package and sale or licensing of merchandise. Under the Rule of Reason, courts would determine whether the *initial agreements* allocating these rights to the league were pro- or anti-competitive. As with every other industry, in some cases the sports league lacks market power, or centralized marketing results in efficiencies. In other cases, the effect of centralized marketing would be to raise prices or distort output. Unless this initial agreement was illegal, however, any subsequent decision by the league would be immune under §1.

Economic logic suggests that a restructured league (for example, NFL, Inc.) would have probably avoided many of the controversies that previously resulted in litigation. Consider *Los Angeles Memorial Coliseum Comm'n v. NFL,* 746 F.2d 1381 (9th Cir. 1984), challenging the NFL's decision to block the Oakland Raiders relocation to Los Angeles. The trial determined that (a) the move would not adversely affect league operations; (b) the NFL had no consistent policy of keeping teams in place if the owner got a better stadium offer; and (c) the principal effect was to protect the L.A. Rams from competition. If we accept these factual assertions (and in hindsight it is clear that the NFL has no problem allowing teams to relocate if their locality isn't sufficiently generous with stadium subsidies, and it difficult to see why the league as a whole is worse off with two teams in L.A. and one team in the San Francisco Bay Area than the

reverse[2]), it is difficult to see why an independent Board of Directors of NFL, Inc. would have rejected the move.

Another significant NFL case was *Mackey v. NFL*, 543 F.2d 606 (8th Cir. 1976), challenging the "Rozelle Rule" that imposed huge costs on any team signing a player from another team. Although some restraints on an entirely free labor market may be necessary to promote the level of competitive balance that will maximize fan appeal, the Rozelle Rule was vastly overbroad (in one instance, a Pro Bowl player from the contending San Francisco 49ers was signed by the bottom-dwelling New Orleans Saints and Commissioner Rozelle required the Saints to forfeit two first-round draft picks). The principal reason that club owners prefer overly restrictive labor restraints is not to promote competitive balance, but to limit their costs. Independent directors of NFL, Inc., like NASCAR, would not care about limiting costs, unless it significantly threatened the willingness of anyone to be a club owner. Keep in mind that when labor markets are too rigid, as they were back then, competitive balance is actually harmed because lousy teams can't get better by signing free agents.

American Needle's complaint alleges that competition and consumers are harmed by the centralized licensing of intellectual property. NFL clubs did not have any cooperative licensing scheme until the 1960s, and only the most recent scheme is mandatory for all clubs. The second most successful sports league in the world, the English Premier League (soccer), has no

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[2] Sports pundits have frequently suggested that the real motivation for the denial of the Raiders' relocation was animosity between NFL Commissioner Pete Rozelle and Raiders' managing general partner Al Davis. If this went beyond personal malice, an independent Board would have arranged for Davis to be replaced if they believed he was an unreliable steward of an NFL franchise. Only in a club-run league would fellow owners put up with someone like Davis, for fear that some later group of owners might turn on them!

centralized marketing. Perhaps centralized marketing does not harm consumers at all. From one perspective, NFL merchandise competes with many other products, so the owners have no power over price. From the opposite view, each club's merchandise is so distinct that clubs do not compete with each other for fans' patronage, so restricting inter-club competition has no effect. Even if American Needle is correct that competition between clubs for logos and merchandise would benefit consumers to some degree, perhaps the benefit of centralized licensing outweighs any harm from reduced competition. To prevail, the plaintiff would have to thread the needle (pun intended) to show (a) that the relevant market is NFL merchandise, not a broader or a narrower market *and* (b) centralized marketing efficiencies are not sufficient to outweigh harms.[3] If this were the case, then the initial assignment of exclusive intellectual property rights to NFL, Inc. would be barred. However, the league would have greater certainty. Significantly, if American Needle could not make this difficult showing, then any subsequent decision by NFL, Inc. as to how to re-license rights would be immune from §1 challenge.

The notion that sports fans would benefit if leagues were controlled by a true single entity is not something that an American law professor and a British sports economist simply invented out of whole cloth. Rather, in organizing NASCAR, founder Bill France recognized

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[3] Sports leagues often justify restrictions on inter-club competition by claiming that these are necessary to prevent individual clubs from "free riding" on the benefits of participating in the league as a whole, and to prevent currently popular teams from dominating. As even Judge Easterbrook recognized in the first *Bulls* decision, when revenue sharing is possible neither of these justifications is valid. *Chicago Professional Sports Ltd. Partnership v. NBA*, 961 F.2d 667, 675 (7th Cir. 1992). Although the Dallas Cowboys (currently the biggest seller) owe a significant portion of their popularity to their membership in the NFL, the investments by the rest of the clubs in their popularity can be reflected in a requirement that, for example, 70% of licensing revenue be shared with the league as a whole. Likewise, the NFL could adopt a revenue sharing scheme like baseball's where the richest and successful teams must share locally-generated income with their poorer cousins.

that "it would require a central racing organization whose authority outranked all drivers, car owners, and track owners." Robert G. Hagstrom, *The NASCAR Way: The Business That Drives the Sport* (Wiley, 1998), at 28. As CBS reporter Harry Reasoner observed some years ago during a *60 Minutes* profile on Richard Petty, "If the aim of a professional sport, as is so often said, is to operate as a successful business, the most successful business in American sports is stock car racing." (Quoted in Mark D. Howell, *From Moonshine to Madison Avenue: A Cultural History of the NASCAR Winston Cup Series* (Bowling Green Univ. Press, 1997), at 96.) In contrast, pundit Bob Costas has acridly observed that baseball owners "couldn't even agree on what to order for lunch." *Fair Ball: A Fan's Case for Baseball* (Broadway, 2000), at 27.

Unlike most other professional sports competitions in this country, NASCAR is structured so that a private company sets the rules under which independent racing teams participate. In Chapter Four of *Fans of the World, Unite!*, we detail how NASCAR continues to evolve and develop rules and policies that have made the sport so commercially successful, and how many of these rules would have been delayed or defeated if approval of a majority or super-majority of the competing racing teams had been required.

A review of NASCAR's success reveals an important truth about sports league governance: sports leagues operate in a dynamic world, and an effective response requires policy changes that always result in winners and losers. A good policy change is where the winners gain more than the losers lose, and in part the losses can be mitigated. This is far easier to do when leagues are controlled by an independent entity. Our study concluded that Bill France's efforts on behalf of NASCAR to change engineering rules to attract auto company investment, develop a business model where clubs relied extensively on sponsorship income, expand the

appeal of the sport from the South to the entire nation, and increase national television appeal through a playoff-like "Chase for the Cup" would all have been inhibited or blocked if the sport were controlled by participating racing teams or racetrack owners.

Around the world, the modern trend has been to keep league operations separate from control of self-interested club owners. In Australia, the clubs that ruled the Australian (Rules) Football League accepted a consultant's advice over a decade ago and voted to cede control to an independent commission whose members, albeit elected by clubs, serve staggered fixed terms. The current sentiment Down Under is to restructure the National Rugby League to ensure an independent commission. The most successful new league in the world is the Indian Premier (Cricket) League. Founded just a few months after authorized by India's governing cricket board, a franchise in a league playing an 8-week competition, under regulations determined by an independent Board of Directors selected by the national governing board, attracted bids averaging $100 million. Reports are that current plans to expand from eight to ten teams will see the new franchises going for more than double that amount.

As this analysis demonstrates, consumers would in fact be better off if sports leagues were single entities. But the way to benefit consumers would be for leagues to restructure (voluntarily or, if Congress really wanted to get involved, under threat of legislation). Simply labeling parochial, self-interested league governance by club owners a "single entity" will perpetuate the existing inefficiencies that occur in sports leagues and, as noted in the next section, make things worse.

II. Immunizing sports league policies from §1 will likely result in significant increases in the cost of watching sports and increased labor strife

I appreciate that for busy legislators and their sports fan constituents, academic ideas on how to improve sports take a back seat to how an *American Needle* decision favoring the NFL would directly harm consumers. There are two principal markets where the ability of NFL clubs to agree to lessen competition among themselves will likely have an adverse effect: broadcast and labor markets.

Currently, sports fans enjoy virtually all NFL games on free-to-air television (the two exceptions are a special Monday night game on ESPN, which is widely available on the basic premium cable or satellite package that a majority of American homes purchase, and a special Thursday night game on the NFL Network, which is higher priced in some areas). This contrasts sharply with European soccer, where almost all games are available only on expensive sports packages requiring cable or satellite transmission.

Paradoxically, I believe that a significant reason for this is the partial antitrust exemption that the NFL enjoys due to the Sports Broadcasting Act of 1961. The Act provides that the antitrust laws do not apply to agreements among football owners to transfer the rights in the "sponsored telecasting" of their games. Courts have adopted the interpretation of that phrase first articulated by former NFL Commissioner Pete Rozelle before this committee: this applies to free TV and not pay or cable. *Telecasting of Professional Sports Contests: Hearings on H.R. 8757 Before the Subcomm. on Antitrust (Subcomm. No. 5) of the House Comm. on the Judiciary*, 87th Cong., 1st Sess. 36 (1961). The effect of this legislation is to provide an immunity if NFL

clubs assign their rights to Fox and CBS, but any collective sale to a cable network would be subject to antitrust challenge.[4]

If the NFL were considered a single entity, however, the Sports Broadcasting Act would be rendered a complete nullity and the NFL need no longer abide by its limits.[5] As a result, an NFL scheme to place most of their games on their own NFL Network -- and then significantly increase the fees charged to watch these games – would be perfectly lawful. By way of comparison, in 1992 the English Premier League signed a new contract assigning TV rights previously awarded to free-to-air networks to the Sky Sports cable network. Viewership declined from 7 million per game to 1 million per game, although clubs profited from substantially higher rights fees.

The threat of antitrust scrutiny has also led the NFL to avoid (per 15 USC §1292) televising games on Friday night or Saturday during the high school and college football season, and to informally agree to show games locally if the games are sold out within 72 hours of kickoff. If the NFL were a single entity, there would be no need for the league to continue to

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[4] For an analysis of how antitrust law would analyze an agreement to sell rights to cable, see Stephen F. Ross, *An Antitrust Analysis of Sports League Contracts with Cable Networks,* 39 Emory L.J. 463 (1990). In my judgment, the agreement to sell the rights to one game to ESPN for Monday Night Football is lawful, and indeed it has not been challenged. The applicable test, from *NCAA v. Board of Regents,* 468 U.S. 85, 107 (1984), is whether an agreement raises price, reduces output, or renders output unresponsive to consumer demand. Adding an extra game on Monday night likely increases output compared to "what would otherwise be" (i.e. all games on Sunday). The overall ratings for NFL games, including Monday Night Football on ESPN, is probably significantly higher than the NFL ratings would be without Monday night football, especially because of the NFL's policy of re-licensing the rights to local free-to-air channels in the home markets of the two clubs participating in the game.

[5] Indeed, American Needle and its *amici curiae* have argued in the Supreme Court that the limitations of the Sports Broadcasting Act demonstrate that Congress did NOT intend that agreements among club owners be generally immunized from §1.

abide by these constraints.

The other area where sports fans are likely to suffer is a bit more nuanced, relating to labor market rules. Sports leagues already enjoy an exemption for agreements restraining competition among member clubs for the services of their players, as long as they are engaged in collective bargaining with a players' union under the National Labor Relations Act. *Brown v. Pro-Football, Inc.*, 518 U.S. 231 (1996). However, the players retain the right, which the football players have exercised, to decertify as a union; in this case individual players can challenge club agreements not to compete. If the leagues were a labeled as "single entities," however, the players lose this option.

The results would not only be bad for players, but for fans as well. First, losing the decertify-and-sue option makes strikes or lockouts more likely. Recall that when the NFLPA used this tactic in the 1990s, resulting in a jury verdict in their favor and an eventual settlement ushering in over a decade of labor peace, they continued to play during the pendency of the litigation. The biggest concern for sports fans, of course, is that the season not be interrupted. Second, the result is likely to be less efficient rules. Either the owners will adopt competition-lessening rules that do not "grow the pie" but simply reduce their own costs, or the owners impose rules designed to protect a minority of clubs from revenue sharing that is necessary to make a harmonious labor deal work. As a result, competitive imbalance could grow, or innovating team initiatives could be stifled. (As noted above, this would be less likely to occur if labor market rules were set by an independent Board of Directors.)

III. Antitrust scrutiny of sports owners' agreements have largely been in the public interest

The NFL's owners seek from the Supreme Court a result that they have never been able to achieve from the bicameral national legislature. In 1952, this Subcommittee's jurisdictional predecessor held extensive hearings on the question whether sports should be subject to antitrust laws, and concluded that a wholesale exemption was not appropriate. In 1957, this Committee reported legislation to overturn the judicially created antitrust exemption for baseball, and to subject all professional sports to the antitrust laws. However, in light of legitimate concerns that the contemporary state of antitrust law was overly formalistic, the Committee recommended that agreements related to a variety of topics would be exempt if "reasonably necessary" to achieve legitimate goals. *See* H.R. Rep. No. 85-1720, 85th Cong., 2d Sess. (1958). This language foreshadowed the Rule of Reason established for sports leagues by the Supreme Court in its 1984 *NCAA v. Board of Regents* decision.

Sports owners opposed the legislation. Although the ancillary restraints doctrine that permits reasonably necessary restraints of trade was inherited from the common law and incorporated into Sherman Act jurisprudence by William Howard Taft in the landmark *Addyston Pipe* decision in 1898, 85 F. 271 (6th Cir.), sports owners claimed that having to litigate whether their restraints were reasonable and not overly restrictive was too burdensome. Chairman Celler stated "I have never seen more pressure exerted upon Members than during the last week, pressure directed from the headquarters of the high commissioner of baseball and his counsel." 104 Cong. Rec. 12081 (1958). In the face of this lobbying, the House approved a substitute amendment removing the need to demonstrate reasonable necessity, and passed the bill, which

was killed in the Senate.

The 111th Congress is certainly entitled, whether under pressure or not, to reach the same conclusion today. However, the record of antitrust litigation suggests that courts have actually promoted the public interest and sound public policy in applying the antitrust laws to sport. Rather than repeat what I have previously written, I attach to this testimony an article I wrote analyzing ten leading antitrust cases and concluding that intervention was in the public interest. Stephen F. Ross, *Antitrust, Professional Sports, and the Public Interest*, 4 J. Sports Econ. 318 (2003).

Since that article was published in 2003, there have been four major sports antitrust decisions, none of which contradict my conclusions. In *Clarett v. NFL*, 369 F.3d 124 (2d Cir. 2004), Judge Sonia Sotomayor (as she then was) held that the NFL's policy barring college athletes from turning pro until three years after high school graduation was immunized by the labor exemption. In three other cases, the courts applied the Rule of Reason and found that plaintiffs were unable to establish an adverse effect on competition or reduced output, and thus ruled in favor of the leagues. *See Madison Square Garden, L.P. v. NHL*, 2008-1 Trade Cas. (CCH) ¶ 76,079 (2d Cir. 2008); *NHL Players Ass'n v. Plymouth Whalers Hockey Club*, 419 F.3d 462 (6th Cir. 2005); *MLB Properties, Inc. v. Salvino, Inc.*, 542 F.3d 290 (2d Cir. 2008).

Of course, like any business, professional sports leagues would prefer to avoid the hassle of litigation and would prefer to be exempt from any potential legal liability. In terms of adverse judgments, the record does not support the fears raised 52 years ago that antitrust laws are inappropriately applied to sports leagues.

IV. Unless limited in an unprincipled way, an expansion of *Copperweld*'s "single entity" doctrine in *American Needle* will create problems for effective antitrust review of non-sports competitor collaborations

In passing the National Cooperative Research Act in1984 and expanding it to include production joint ventures in 1993, Congress recognized that consumers and the national economy can prosper if rivals are allowed to combine their efforts to innovate as well as produce products that would be difficult to invent or produce by individual firms. The legislative response was not to exempt these legitimate business activities from the antitrust laws, but rather to enact a structured Rule of Reason and a limited exemption from treble damages. This reflects the Congressional view, which has been followed by judicial doctrine since *Copperweld*, that firms that work closely together are not "single entities." Rather, their conduct is subject to the antitrust laws, and should be analyzed under the Rule of Reason.

Some of the sharp questioning at last week's oral argument signaled concerns that some Justices believe that our basic structure of antitrust enforcement is flawed, and that defendants should not have to defend, under the Rule of Reason, legitimate agreements against meritless complaints. It is true that under our system of antitrust laws any agreement among competitors is subject to §1, and any decision by collaborating competitors is the potential target of a lawsuit. But it is also true, as many cases recent cases demonstrate, that these suits can be and are summarily dismissed when the plaintiff is unable to demonstrate any anticompetitive effect.

There is no principled basis to confine the Justices' stated concerns to sports league collaborations. *Copperweld* involved an agreement between a parent and a wholly-owned

subsidiary. *Texaco Inc. v. Dagher,* 547 U.S. 1 (2006), where the court ducked the single-entity issue, involved a joint venture where the parties explicitly shared profits from the entity as a whole. If these principled limits are eviscerated, in addition to the already significant burdens of the Rule of Reason in antitrust litigation,[6] the ability to check overly restrictive agreements that harm consumers in a myriad number of industries will be significantly lessened.

Private plaintiffs, although motivated by their own self-interest, serve the public interest when they prevail in an antitrust suit by demonstrating that the defendants have agreed to restrain trade in a manner that raises price, reduces output, or renders output unresponsive to consumer demand. Although surgical repairs on private antitrust litigation might be appropriate, the clumsy device of an unprincipled expansion of *Copperweld* to label self-interested, inefficient joint ventures as "single entities" is terrible competition policy. If the Supreme Court so rules, Congress should overrule.

*****

Mr. Chairman, transforming a duck into a goose, I suggest, would be better for consumers; simply calling a duck a goose, as the NFL wants, would not. Thank you again for inviting me to testify.

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[6] One scholar and former antitrust enforcers has appropriate called the Rule of Reason "a defendant's paradise." Stephen Calkins, California Dental Association: *Not a Quick Look But Not the Full Monty,* 67 Antitrust L.J. 495, 521 (2000).

ATTACHMENT

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Antitrust, Professional Sports, and the Public Interest

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In a number of important cases, antitrust tribunals have intervened in ways that have significantly affected how professional sports are conducted in the United States. This article focuses on 10 important decisions where the courts ruled against sports leagues and will consider whether the public would have been better off with or without antitrust intervention. It is concluded that, in each of these cases, the private ordering challenged by antitrust litigation was not in the public interest. Although in many of the cases an optimal result would be some middle ground between the status quo and the demands of the antitrust plaintiff, in all cases, an optimal result was encouraged or facilitated by intervention.

Keywords: *antitrust; professional sports; public interest; court cases*

Over the decades, professional sports leagues have felt the looming omnipresence of federal antitrust law. Major League Baseball (MLB) has fought long and hard to maintain an exemption for as many of its activities as possible.[1] The National Football League (NFL) has secured two narrower exemptions: one to permit the collective selling of television rights and one to permit it to merge with its only successful rival, the American Football League. Crafty league attorneys have presented legal arguments that owners' agreements were exempt from careful antitrust scrutiny because sports leagues were single entities with owners akin to division heads within a corporation not subject to the prohibition on conspiracies in restraint of trade contained in the Sherman Act and that any agreements involving players' unions were exempt under judicially created labor exemptions. Some sports leagues have gone so far as to reorganize as single entities or to force players to *join* a union precisely in hopes of minimizing antitrust liability.[2]

Yet antitrust remains omnipresent. Although leagues have often prevailed, either by asserting exemptions or on the merits, in a number of important cases, antitrust tribunals have intervened in ways that have significantly affected how professional sports are conducted in the United States. Elsewhere in this issue, Gary Roberts (2003) argues that the application of antitrust doctrine by these tribunals is

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ad hoc, lacks coherence, and ultimately harms the public interest. Here I focus on 10 important decisions where the courts ruled against sports leagues and consider whether the rulings were in the public interest. Using the *It's-a-Wonderful-Life* test, I inquire whether the public would have been better off with or without antitrust intervention. I conclude that in each of these cases, intervention was in the public interest.

The top-10 cases in chronological order are: (a) *United States v. National Football League* (1953), which held that exclusive broadcast territories are lawful where necessary to protect live gate but unreasonable when designed simply to enhance value-of-rights sales; (b) *Radovich v. National Football League* (1957), which found sports other than baseball subject to the antitrust laws and prohibited the blacklisting of players for participating in a rival league; (c) *Denver Rockets v. All-Pro Management, Inc.* (1971), in which the National Basketball Association (NBA) agreement not to draft players until their collegiate eligibility expires was held unreasonable; (d) *Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc.* (1972), which concluded that the National Hockey League (NHL) standard player agreements that tied up all major and minor league players for 3 years unreasonably excluded a new rival league; (e) *Mackey v. National Football League* (1976), which found the Rozelle Rule's imposition of punitive compensation for any player signed from another team to be unreasonable; (f) *Los Angeles Memorial Coliseum Commission and Oakland Raiders v. National Football League* (1984), which upheld a jury verdict that the NFL's refusal to allow the Raiders to relocate to Los Angeles was unreasonable; (g) *McNeil v. National Football League* (1992), which upheld a jury verdict that the NFL's *Plan B*—permitting free agency for marginal players but precluding competition for the best 37 players on each team's roster—was unreasonable; (h) *Chicago Professional Sports Ltd. v. National Basketball Association* (1992), which held that the NBA's limit on the number of Bulls games that could be shown on the WGN superstation was unreasonable; (i) *Sullivan v. National Football League* (1994), which held unreasonable the NFL's rule precluding sale of equity or ownership of clubs to publicly traded or nonprofit corporations; and (j) *Butterworth v. National League* (1994), which determined that the National League's refusal to allow the San Francisco Giants to move to Tampa was not exempt under the antitrust laws.

What constitutes the public interest is the source of an endless and rich philosophical debate. I define it here in utilitarian terms: maximizing aggregate welfare for most Americans. The article approaches the public interest determination in two ways. First, imagine that American antitrust law were to adopt the provision of the Australian Trade Practices Act that allows a government agency to authorize otherwise anticompetitive agreements as not contrary to the public interest. The leagues would have the burden, under this regime, of demonstrating that their agreements meet the public interest test. My thesis is that none of the agreements in the 10 cases listed would qualify for authorization.

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The second approach asks what actually would be the best way to resolve each particular dispute *in the public interest*. In most cases, the public interest lies somewhere between the plaintiff's position and the league's. Even so, analysis suggests that, if forced to choose one side or the other, a ruling against the league would be more likely to facilitate the optimal result.

COULD THE CHALLENGED LEAGUE RULES BE AUTHORIZED IN THE PUBLIC INTEREST?

(a) Exclusive broadcast territories. In addition to the collective sale of broadcast rights by the league (which raises issues beyond the scope of this article), all major leagues except the NFL engage in a horizontal market division between clubs, each retaining their rights to their own games. Arguably, a fledgling league would want to grant territorial exclusivity to encourage local franchises to build the sport as well as the franchise; exclusivity discourages free riding. But the major sports are well established, and the principal effect is to reduce competition and output and raise price. Specific concerns that dominant teams would ruin competitive balance could be addressed by revenue sharing or, in extreme cases (New York Yankees, Toronto Maple Leafs in western Canada), by specific limits on actually dominant teams.

(b) Blacklisting players for participating in rival leagues. This conduct is blatantly exclusionary. Even if the public interest was best served by one dominant league (see (d) below), sound public policy would promote competition on the merits to be the monopolist, not monopoly maintenance by intimidating players to keep them from new rivals.

The agreement is somewhat less blatant if limited to players who participated in a rival league in breach of a contract with a team in the incumbent league, but, even here, the agreement is contrary to the public interest. The putatively breached contract may not be enforceable. There is ample precedent that courts will not enjoin a breach of certain sports contracts by common law monopolies presented to players with no option to sign different terms and that have an exclusionary effect. If courts will not enforce these contracts, private parties should not be able to do so by agreement. Second, as noted in (d) below, these contracts may not be in the public interest themselves. Third, even if the contracts were valid, general legal principles suggest that a party injured by breach of contract should sue and not enlist his competitors in an effort to boycott the breacher. It is difficult to envision a policy reason why it would not be in the public interest to apply this general principle of law to sports clubs.[3]

(c) Ban on drafting college players with eligibility. It is difficult to see how professional teams have any legitimate reason for agreeing not to draft college players:

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The rule does not protect professional teams' interests in players in whom they have invested time and effort. One could, with some creativity, craft a weak competitive balance argument—that good teams could afford to take a chance on drafting college players currently lacking the skills to significantly contribute at the professional level and park them on the bench until they develop, whereas weak teams could not afford to waste a valuable draft pick on a potential star. However, most players leaving college ball are likely to be prepared, and this competitive balance concern can be addressed more directly by specific rules (e.g., providing that the team is penalized if an underage player does not play a certain number of minutes).

The rule's supporters may argue that the rule serves the public interest by facilitating the graduation of top athletes from colleges and universities. This argument is a sham. First, consider football: The typical pattern among major college programs is to redshirt players during their freshmen year so that these players can complete 4 years (and some receive their degrees) with 1 remaining year of collegiate eligibility. Yet many of these players take graduate courses so that they can complete their senior season to enhance their professional prospects. Second, the rule is laden with false positives and false negatives: Some players will return to campus to get their degrees during or after their professional careers (and, thus, are not hurt by this rule), whereas many others are not going to graduate whether required to stay eligible for four seasons or not (and, thus, are not helped by the rule). Third, defining the public interest to include this means and end seems somewhat peculiar in that there appears little societal concern about students other than football and men's basketball players leaving college for a professional career. No one expressed any significant concern when John McEnroe left Stanford after 1 year or Tiger Woods left after 3, nor were there outcries when Bruce Willis left the drama department at Montclair State after 1 year to try his hand at professional acting.

Of course, the real reason why average fans (as opposed to a commission charged with articulating a public interest justification for a rule) might favor this rule is that it will keep their favorite players at the college level longer. This is an unjustified redistribution of wealth and economic utility from the player and professional fans who will pay to watch the player at the professional level to college athletic programs (who do not have to pay more than the cost of tuition) and, because of significant consumer surplus, to fans who are entertained by the players' talents.

Colleges could not only protect themselves against players leaving early by paying them their market value, but even within the concept of amateurism, they could protect themselves by contractual arrangements that would require players to remain at the school for 4 years; a reasonable liquidated damages clause could well be prohibitive. The National Collegiate Athletic Association (NCAA) chooses not to allow colleges to do this, however; to secure such a promise, the college would, of course, have to guarantee the athlete a 4-year scholarship. The NCAA bars this, however, probably because of legal advice that such an arrangement would make it

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more likely that colleges would be subject to workers' compensation liability for injured athletes pursuant to multiyear agreements. This seems insufficient to justify a pro boycott.

It appears, then, from an analysis of the self-interest of the professional league, that there are two potential explanations for why leagues adopt these rules. One is to prevent competition in terms of scouting and player development for unfinished players—clubs would rather let the colleges present them with fully trained athletes. The other is to curry favor with, and avoid retribution from, NCAA college programs. Neither purpose justifies an authorization of this rule as being in the public interest.

(d) Precluding a rival league's entry through multiyear contracts with all players. Whatever the merits of an agreement between clubs within a league to limit competition between themselves for players (see (e) and (g) below), contracts that give the club a right to renew for 3 years, when signed with almost all potential players with major league talent, precludes the possibility of entry by a new league. Even assuming that the full economic benefits to the incumbent league (in terms of efficiencies or monopoly rents from exclusion) are fairly shared with the players, whatever benefits ensue from a uniform 3-year option to renew, in terms of incentives to invest in player development or efficient ability to plan, must be weighed against the exclusionary effects.

The only public interest justification for such a rule is that sports leagues are natural monopolies and, thus, there is no benefit to permitting rival leagues to enter the market. The natural monopoly claim has never been successfully demonstrated, and the best argument for it—that we have never seen an equilibrium with rival leagues—has been rebutted by evidence that prior efforts to engage in interleague rivalry have almost always ended because of either predatory conduct, poor business judgment by new entrants, or government-sanctioned, competition-lessening mergers.

Even if sports leagues were natural monopolies, there are benefits to encouraging new entrants and proscribing entry-deterring agreements between incumbents. Historically, entry has resulted in innovation (the American Basketball Association's 3-point shot) and expansion to viable markets (all four major leagues significantly expanded after actual or threatened entry).

(e) Teams signing free agents must pay compensation to the former club, either agreed upon or at complete discretion of the commissioner. The current success of the NFL under free agency (subject to other restraints like revenue sharing and salary caps) and the significant success of MLB with unfettered veteran free agency demonstrate that a blanket restraint on all free agents was grossly overbroad. The rule deprived back-up players of the opportunity to move to more valued teams (often because of transaction-cost problems inherent in the need to agree on a trade). As to star players, as applied by then-Commissioner Rozelle, the compensa-

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tion awarded to teams losing players was grossly punitive and unrelated to the pretextual goal of protecting competitive balance.

(f) Franchise relocation subject to approval by three quarters of owners. Professional sports leagues operate in a number of markets. In many situations, they operate as a joint venture for the sale of services or intellectual property rights, which can often produce efficient results. A league is not necessary for this function, however. Although the NFL collectively sells all television and licensing rights, the clubs could achieve the same effect by jointly agreeing to have an independent organization or venture provide these services. The essential core of what a league does is to organize an annual sporting competition. To do so, the league must identify those clubs that will participate in the competition, specify the location of the games, and create a schedule.

The vertical integration between the league's services in organizing an annual competition and the operation of individual clubs that participate in the competition is neither inherent nor necessary. For years, the major Australian rugby league competition was organized by an entity with overlapping but distinct interests and governance structures than participating clubs whose right to participate was a matter of contract. Even where a league is simply a venture between participating clubs, decisions about core issues can be made by a board of directors structured in a manner to ensure that the decisions maximize the interests of the league as a whole.

There are many situations where an individual owner's interest in relocating a team conflicts with the interests of the league as a whole as well as the public interest. An owner with great personal wealth might seek to relocate a team to a small city, even though the most efficient allocation of franchises would preserve the team in a larger city where many more fans can attend the games or closely follow the team on television. An owner might seek a relocation that will disrupt effective team travel (a team in Tokyo); a relocation could affect traditional rivalries; it could prop up an inefficient owner when the best result would be to force a sale to new management who can operate the club profitably in its existing location; for newer leagues, the relocation could reflect free-riding on efforts by a franchise in another city to promote the entire sport; and a relocation could be inconsistent with a clear, long-term strategy of building credible commitments with localities that encourage local investment in return for assurances that the club will not move absent extraordinary circumstances.

On the other hand, fellow owners might disapprove of welfare-enhancing relocations, even when a nonintegrated competition organizer or an independent board of directors might see the move as in the league's overall interest. Two prominent examples come to mind. A club might find itself in a nonviable situation that requires relocation, but the owner is a maverick who is aggressive and innovative thus annoying his fellow owners. Relocation might be refused that owner and then permitted when the franchise is sold. The other scenario would be where a league

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would be better off with multiple teams in a large media market or a new team in a market proximate to an existing club's home, but the owners reject the relocation to protect the existing franchise. Because there is a significant risk that owners will act in ways contrary to the public interest, a rule that requires supermajority approval for franchise relocations would not be in the public interest.

(g) Agreement not to compete for service of 37 restricted players on each team. Although the so-called Plan B rule of the NFL was less restrictive than the agreement previously condemned (see (c) above), it was likewise overbroad, and the agreement was likewise contrary to the public interest. The NFL asserted two principal justifications for the restriction: to promote competitive balance between teams and to allow clubs to recover their investment in player training and development (see *McNeil v. National Football League*, 1992). Both of these goals are legitimate and, arguably, in the public interest, but Plan B was quite overbroad in obtaining them. Like other *blanket restraints*, Plan B not only prohibited the Super Bowl champion from signing a top player from a poor team but the reverse, too. Promoting competitive balance cannot justify restraining the ability of below-average teams to quickly improve by signing star free agents from above-average rivals.

Agreements not to compete as a means of allowing employers to recover their investment in training employees have never been recognized by the common law as legitimate and are not tolerated elsewhere. Individual clubs with training programs that enhance player skills may, of course, individually negotiate on multiyear contracts or even limited postcontractual noncompete clauses.

(h) League limits on high-tech evasion of exclusive broadcast territories. Curiously, although a 1953 federal district court decision declared illegal the NFL's rule prohibiting the licensing of broadcast rights in another team's home market (*United States v. National Football League*, 1953), every other major sports league continues 50 years later to divide markets in this manner. The most grievous example occurred when the NBA sought to prohibit the Chicago Bulls, featuring Michael Jordan, from being shown on a superstation, despite evidence that the broadcast had a minimal effect on other teams' attendance or ratings.

The insistence on exclusive territories appears to be the work of a monopoly venture prevented by transaction costs from achieving an efficient result. The marginal cost of out-of-market licensing of the rights to a game being shown in a club's home territory is *de minimis*. Absent a concern that out-of-market media penetration will have so significant an adverse effect on a club's attendance and television viewing as to affect its viability, out-of-market licensing would seem to be Pareto optimal: The viewer pays a fee for the game and the fee is divided between the clubs with the home club receiving revenues sufficient to cover any lost revenues from in-market rights sales and with any positive revenues for the out-of-market club serving as pure profit. Allowing a joint venture with monopoly power to reduce output

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simply because the parties cannot agree on how to divide a profitable sale is not in the public interest.

(i) Ban on club ownership by publicly traded corporations, not-for-profit organizations, or government agencies. The owners or managers of professional sports teams are particularly dependent on the integrity, ability, and efficiency of those who run other teams in their league. Externalities can result from unilateral action by an individual club that can impose significant costs or severely harm revenue opportunities of the remaining clubs in the league. Scandalous behavior can affect overall league popularity. An owner who fails to exercise quality stewardship for a franchise, especially one that is located in a major market, can harm her fellow owners who may share revenue from television and licensing rights in that area and also through suboptimal revenues from live gate if the team is an unattractive visitor. At the same time, owners who breach or evade league rules designed to promote competitive balance may enhance their own opportunities but at the expense of the greater attractiveness of the game for most fans. The choice of individuals to make executive decisions for clubs is even more significant when (as noted in (f) above) club owners not only compete but also participate as coventurers in the organization of the league competition. Thus, having owners who establish suboptimal rules of competition, either because of their lack of skill, foresight, and efficiency or because of their emphasis on maximizing the opportunities for their own teams, directly harms the league.

For these reasons, all sports leagues have a legitimate interest in subjecting to league approval the transfer of ownership or control of any clubs within their league to new owners. In addition to case-by-case review of the talent and financial viability of any proposed ownership structure, however, the major leagues all have rules that absolutely prohibit certain types of ownership. Most leagues bar (absent special and temporary situations or a grandfather clause) ownership by public entities or not-for-profit corporations. The NFL, in addition, prohibits ownership by publicly traded corporations. It is difficult to see why these prohibitions per se would be in the public interest.

In the first place, the claim that leagues need top-flight stewards for their franchises that are not impeded by short-term or non-economic goals is undermined in the real world by owners' actual practices regarding approval of a sale—usually to the highest bidder—that is sought by a fellow owner. Although putative owners have been rejected because of conflicts of interest, integrity issues, or lack of financial viability, there appear to be no cases of owners rejected because their focus may not be on profit-maximization, or (especially if the purchase is heavily leveraged) they may be too keen on short-term profits to escape debt.

Second, the rules harm the public interest in two different ways. They preclude an efficient means by which stadiums and public infrastructure can be constructed at public expense with compensation via equity. They also protect existing owners who are not efficiently running their franchises from competition—either from

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unflattering comparisons to more efficiently run corporate-owned clubs or competition within a market for corporate control for continued stewardship of their team.

(j) MLB's refusal to expand or permit a relocation to Tampa Bay absent two thirds approval of the National League and majority approval in the American League. A monopoly league confident that it operates free from a credible threat of entry will artificially suppress the number of franchises that participates in its competition. By so doing, the league can exploit local communities for monopoly rents in the stadium market. Moreover, where, as in North American sports leagues, the organizers of the annual competition are the club owners themselves, the number of franchises will be set even below the reduced number that would be established by an efficient monopolist independently providing competition-organizing services. First, as noted in (f) above, individual owners may oppose specific expansion or relocation plans that would be welfare-enhancing and profit-maximizing for the league as a whole but might harm their own club's interest and may (through a series of tacit or explicit quid pro quos) secure agreement with fellow owners to preclude the intramarket entry. Second, because clubs in leagues share significant revenues, a league controlled by owners will only expand when net marginal revenue from expansion exceeds current average revenue; in plainer terms, owners would rather have a large piece of a smaller pie than a smaller piece of a larger pie.

The efforts by civic officials and entrepreneurs in the Tampa Bay area to secure a MLB franchise illustrates this phenomenon (*Butterworth v. National League*, 1994). Accepting that a stadium would have to be built at public expense and provided to a team on favorable lease terms, Tampa was the bride left at the altar for at least five teams whose credible threat to relocate to Tampa secured favorable subsidies from their incumbent locations. Significantly, MLB owners voted to contract after expansion deprived existing teams of highly credible relocation sites.

Just as in (f) above, there are not only legitimate reasons for a league to prohibit a particular relocation but also to prohibit unlimited expansion. At some point, the marginal benefit to a new team's fans is outweighed by the loss of attractiveness to fans of existing teams as talent is diluted and the chance to see storied and talented teams decreases. However, given the significant risks of welfare-reducing decisions by league owners, supermajority approval by the league plus majority approval of the other league would not seem to be in the public interest.

The specific case of baseball, though, raises another public policy question: Is it in the public interest to exempt our national pastime from case-by-case public interest review by our hypothetical public interest commission?

In recent years, baseball executives have defended their antitrust exemption in policy terms, principally by citing MLB's unique relationship with its 180+ minor league teams (Loverro, 1995).[4] This claim warrants careful analysis. Whether the myriad agreements between major and minor clubs, or among minor clubs themselves, are in the public interest is a consideration beyond the scope of this article. (No court has ever invalidated any aspect of these agreements.) At times, baseball

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advocates make the distinctive argument that effectively concedes that MLB enjoys monopoly rents and currently spends those rents on subsidizing an inefficient minor league system of player development that MLB would scrap if they no longer enjoyed this protection. This argument assumes that such a subsidy is in the public interest. In light of the business and entertainment success of clubs in independent minor leagues, it is not clear that fans would suffer were the subsidy to disappear, although a restructuring of baseball's system of player development might entail windfall losses for current minor league team owners. Moreover, even if maintenance of the current structure of minor league baseball is in the public interest, there are surely better policy instruments to effectuate this result than granting unregulated monopoly power to major league baseball owners. A tax on all baseball fans (including a tax on broadcast rights sales) could generate funds for subsidizing minor league baseball. Even direct grants from tax revenue would be preferable for the nonfan taxpayer than having to provide tax-supported relief to enrich wealthy baseball owners in hopes that some of these profits may trickle down to minor league operations.

In 10 major cases over the past half-century, courts acting pursuant to the antitrust laws have ruled against professional sports leagues thereby intervening in the sports market. The foregoing analysis demonstrates that, in every single case, the challenged rules were not in the public interest. Antitrust intervention has served a salutary purpose.

WAS ANTITRUST INTERVENTION IN THE PUBLIC INTEREST IN THE PARTICULARS OF EACH CASE?

The nature of antitrust litigation requires a plaintiff to prove that a particular agreement between sports league owners unreasonably restrains trade. The court's response is usually binary: It either invalidates the league action, often accompanied by substantial monetary compensation to the plaintiff, or it upholds the league action vindicating the status quo. Usually, the socially optimal result that would be ordered by an omnipotent sports czar would be some other alternative. Indeed, in all cases except (b) (blacklisting players), (c) (ban on signing players with collegiate eligibility), and (d) (standardized multiyear renewal rights for clubs), an intermediate alternative would be optimal. However, a summary analysis of these restraints suggests that, without the benefit of a sports czar, antitrust intervention remains in the public interest, as it usually moves us closer to the optimal result than would a policy of nonintervention.

(a)/(h) Exclusive broadcast territories/limits on out-of-market telecasts. The optimal result would permit restrictions on out-of-market broadcasts only where necessary to (a) ensure the viability of franchises or (b) facilitate the sale of output-enhancing national broadcast rights fees. Clubs would also pay an optimal fee to

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prevent free riding as well as to promote competitive balance. Leagues would have the correct incentive to adopt such policies if blanket exclusive territories were struck down.

(e)/(g) Restraints on competition for veteran players. An optimal result would include revenue sharing necessary to minimize disparities between clubs based on exogenous factors such as media market size, but not so great as to distort incentives to improve club quality, and would perhaps feature asymmetric limits on the movement of out-of-contract players to promote competitive balance by limiting or inhibiting the ability of successful teams to bid for the services of players on less successful teams. Left alone, owners would want to adopt inefficient rules primarily designed to monopsonize the market. Faced with the prospect of completely unfettered competition, owners' incentives would be in the direction of the optimal result.

(f) Franchise relocation. The optimal result would be a change in the fundamental structure of the industry to deprive owners of monopsony power in the stadium market by requiring competing leagues or open entry (preferably through a system of promotion and relegation). Within the confines of the existing structure, the optimal result would facilitate expansion as the principal means by which civic and business officials and fans in unserved markets could persuade the league to bring a team to its market while allowing leagues to protect the goodwill in home communities by prohibiting relocations unless the current market is no longer capable of supporting a viable contending team. However, to minimize the exploitation of the stadium market, the economic benefits of tax subsidies or below-market stadium rental should be shared by all league clubs. Thus, a team in a market unable to support it (the Quebec Nordiques, for example) could be relocated—likewise with the refusal to provide even minimal public support when an existing stadium is inadequate (New York City's refusal to even use eminent domain power to allow the Dodgers to build a private stadium in Brooklyn was, arguably, an example). However, relocation based principally on local refusal to subsidize a new stadium that is only necessary because a club's rivals are all benefiting from tax subsidies would not be permitted.

A judgment preventing the Oakland Raiders from relocating to Los Angeles might not have facilitated this optimal result (*Los Angeles Memorial Coliseum Commission v. National Football League*, 1984). The NFL may well have preferred to allow the relocation rather than deprive owners of the opportunity to use relocation to exploit localities. However, the NFL's principal-merits justification for refusing the Raiders's relocation to Los Angeles[5] was that relocation was contrary to its policy of loyalty to fans—a policy selectively followed in light of its (arguably distinguishable) authorization for the Cowboys and Rams to move to different cities within their metropolitan areas to exploit tax subsidies (Harris, 1986, p. 31) and its (indistinguishable) threat to move the hugely successful and popular Minnesota

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Vikings if state officials did not fund a domed stadium (Harris, 1986, pp. 370-371). The decision thus encourages owners to adopt a consistent policy toward fan loyalty.

(i) Corporate ownership limits. The optimal result would permit a market for corporate control and an efficient means for recouping public investment in stadium subsidies through equity holdings in a club by allowing corporate, governmental, and not-for-profit ownership. As to concerns that some owners would not support league rules that promote long-term development, it would appear (although this conclusion is tentative and beyond the scope of this article) that the optimal result would be to separate the functions of club operation and league governance by committing the latter to a separate group of independent commissioners.[6]

To be sure, an optimal result would not require the league to allow an incompetent owner to solve self-created financial problems by selling a minority ownership in the club to investors who, for sentimental reasons, might be persuaded to pay a premium for such ownership but, rather, to require a sale of the team as a means of disciplining mismanagement. Absent mismanagement of scandalous proportions, no league currently actively intervenes to ensure that its franchises are operated by proper stewards. Active league oversight of mismanagement would minimize the opportunities for entry by corporate owners or those without the sort of long-term interest in the game that characterizes family-owned clubs. The threat of corporate takeover would facilitate sales by mismanagers. Thus, even on the unsympathetic facts of the *Sullivan* (1994) case, intervention was in the public interest.

(j) MLB expansion and relocation. In this case (*Butterworth v. National League*, 1994), a welfare-enhancing, if not optimal, result seems to have been achieved from antitrust intervention. Because the San Francisco Giants were not allowed to relocate to Tampa Bay, owner Robert Lurie was required to sell the team for $10 million less to a local corporate executive who was able to construct a new stadium in San Francisco with relatively minimal public investment. Meanwhile, Tampa Bay received an expansion franchise thus removing a major credible relocation threat for other teams.

CONCLUSIONS

I have analyzed whether antitrust intervention in the business arrangements of professional sports leagues promotes the public interest. In 10 major cases, courts have invoked the antitrust laws to justify such intervention. In each of those cases, analysis suggests that the private ordering challenged by antitrust litigation was not in the public interest. Although in many of the cases an optimal result would be some middle ground between the status quo and the demands of the antitrust plaintiff, in all cases an optimal result was encouraged or facilitated by intervention. This analysis should inhibit demands for further exemptions, result-based claims in sup-

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port of formal antitrust theories that would deprive courts of the opportunity to review antitrust claims on the merits, and encourage an agenda of stepped-up antitrust enforcement against anticompetitive restraints among professional sports team.

NOTES

1. In 1922, the Supreme Court first held that the business of baseball was not subject to antitrust scrutiny (*Federal Baseball Club v. National League*, 1922). In 1972, the Court held that Congress's "positive inaction" in failing to legislate continued to immunize baseball's labor restraints from antitrust challenge (*Flood v Kuhn*, 1972). In 1995, Congress overruled *Flood's* precise holding with legislation providing that the antitrust laws did apply to restraints on competition for the services of major league players, although Congress carefully decreed that this narrow legislation would not affect the application of antitrust to other aspects of baseball (Curt Flood Act, 1998). Lower courts continue to wrestle with the scope of the exemption. Some have held that restraints not relevant to baseball's unique characteristics and needs were nonexempt. Others have narrowly construed the exemption. Many have found baseball practices exempt.

2. The initial structure of Major League Soccer (MLS) was motivated by a desire to avoid antitrust scrutiny. Franchises were owned by the league, and players were employed by the league. However, league organizers had difficulty finding investors who could not operate and control individual clubs. So the structure was changed to give investor-operators full operating control over their own teams. Significantly, however, franchise operators were given principal control over the league's board of directors. Thus, with the exception of the centralized employment of players, MLS now resembles a typical North American sports league.

3. Also at issue in the relevant case (*Radovich v. NFL*, 1957) was whether all league sports should enjoy an antitrust immunity used to reject similar challenges to conduct of baseball teams. The Court held that immunity was not in the public interest.

4. Academic defenders have also justified baseball's exemption as part of a general critique of antitrust intervention in sports. In addition to Loverro (1995), see 144 Cong. Rec. H9942-03, H9943 (1997).

5. The league denied that the decision was motivated by personal malice toward Al Davis, the maverick owner of the Raiders, and was unable to claim that a move from Oakland to Los Angeles would increase travel costs, harm media exposure, detract from traditional rivalries, or offer any other short-term operational justification.

6. This is the practice of the Australian Football League.

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Mr. JOHNSON. Thank you, Professor.

We will now begin with questioning. I will start for my 5 minutes.

I would like to ask Mr. Gertzog that, as a single entity, will it be easier for the league to shift more of its games from free over-the-air broadcasting to the NFL network cable channel? Will it be easier for the league to do that?

Mr. GERTZOG. Mr. Chairman, as I indicated in the opening statement, what the NFL is seeking in the *American Needle* case is a ruling consistent with the Seventh Circuit decision that for purposes of one aspect of its business, licensing intellectual property which promotes its game, the NFL operates as a single entity.

Mr. JOHNSON. Well, no, I understand that. I am just asking a simple question. Will it be easier for the league as a single entity to take most of its games or all of its games off of free broadcast TV and only allow the rich and the powerful to watch the games on cable or satellite?

Mr. GERTZOG. Mr. Chairman, right now, as you are probably aware, 90 percent of the NFL games are broadcast on free over-the-air television.

Mr. JOHNSON. And are——

Mr. GERTZOG. The other 10 percent of the games are broadcast on cable, but the fans in the markets of the participating teams can watch those games. That is truly unique in all of sports.

We have a longstanding commitment to free over-the-air television. We recently extended our television agreements through 2013. So we don't see any change.

Mr. JOHNSON. Well, I mean, but it is possible that it will—well, I mean, it is going to be easier if you are granted single-entity status to shift more games to pay TV or NFL cable network, or whatever you would call the entity, at the expense of free broadcast games. Isn't that true?

Mr. GERTZOG. We don't agree with that. We don't see that being a function of a single-entity decision in the *American Needle* case.

Mr. JOHNSON. All right.

And now, Professor Ross, I am sure you would disagree with that. What would be your take on that, sir?

Mr. ROSS. Mr. Chairman, in the first place, the NFLPA statement is absolutely correct. The NFL wouldn't have asked the Supreme Court to grant cert if they just wanted to win this thing and make sure that this one narrow issue, which they already won would have been prevailed.

If the Supreme Court rules aspect by aspect and simply says a very narrow ruling, then it is up to new rulings later, and it wouldn't probably raise your fears.

But if the Supreme Court broadly adopts what the NFL has been asking in their briefs, which is they are a single entity—if we accept Mr. Daly's legal position as the law—then a decision to put all the games on NFL Network is the decision of a single entity.

It would not be challengeable under Section 1 as an agreement among the clubs. The Sports Broadcasting Act, which only exempts agreements among clubs, and assumes that these things were agreements among clubs, would not apply.

And unless one could come up with a theory that by putting it on the NFL Network the NFL was somehow contributing to the monopolization of broadcast, or something like that, it would be completely immune from antitrust scrutiny.

So the NFL can claim its commitment here. Perhaps of a greater concern of free market conservatives, the NFL could, if the ruling comes back, keep coming back and making political deals with your—you know, you could cut a deal with them yourself where they make a voluntary deal and they say, "We will keep 14 games on TV," and then you could say, "Well, I am going to introduce legislation," and then they go, "Okay, 13 games on TV." They could do all that, and they could have a—but legally, your question is correct.

Under Section 1, if they win, there is no antitrust remedy to moving the games to NFL Network.

Mr. JOHNSON. All right. Thank you.

And let me ask this question. A Reebok executive publicly stated that NFL-branded caps that used to cost $20 can now be priced at $30 because Reebok no longer has any competition in this market. How is the consumer better off when the league and the 32 teams act together in this way, Mr. Gertzog?

Mr. GERTZOG. The consumer has been much better off since we entered into the agreement with Reebok. The consumer has found that the——

Mr. JOHNSON. The price has gone up or gone down for merchandise?

Mr. GERTZOG. We have products priced at all different price points.

Mr. JOHNSON. Well, I mean——

Mr. GERTZOG. If you go on——

Mr. JOHNSON [continuing]. New products come online and——

Mr. GERTZOG. Yes. If you——

Mr. JOHNSON [continuing]. That kind of thing, but——

Mr. GERTZOG. If you go——

Mr. JOHNSON [continuing]. But as far as the products that were already online at the time of the exclusive agreement with Reebok, isn't it true that there will be no—well, there will be no breaks they can put on how—that can be put on the price of merchandise?

Mr. GERTZOG. Mr. Chairman——

Mr. JOHNSON [continuing]. As you feel like you could get.

Mr. GERTZOG. Mr. Chairman, I respectfully disagree with that. You know, number one, the NFL does not set the price for its products. Those decisions are made, number one, by a licensee that will sell to a retail store; number two, the retail store will make a determination as to how much it wants to charge to the consumer.

If you go online today, you will see that NFL caps are priced competitively with caps from all of the other sports leagues, colleges, entertainment providers, branded companies like Nike. There are caps that are more expensive than NFL caps and there are caps of other companies that are less expensive.

And we have found that the consumer has the ultimate vote. If the consumer believes the hat is too expensive, the consumer will not purchase the cap. The consumer will purchase a cap from a dif-

ferent sports entity. So in this town, if someone believes the Redskins cap is too high, they can go purchase a Capitals cap.

Mr. JOHNSON. Well, but it just can't say Redskins and have the trademark on there, the NFL and the—what is it? A arrow or something like that, with a redneck, or something—there is something of that nature. You can't find an official NFL cap unless you do it through an authorized entity.

And you would be able to control the price to—that that entity would sell the hat for. Is that true?

Mr. GERTZOG. It is not true because we operate in a very competitive sports and entertainment marketplace. So as I said earlier, the consumer has the ultimate vote.

If the consumer believes the cap is too expensive and they want an NFL item, they can buy a different item. We have thousands of licensed products, and the consumer has many, many different options.

Through the Reebok agreement, they were able to, over the past few years, upgrade the quality of the products. The consumers have responded quite well to that. They have extended the number of products to our fans—women's products that didn't exist before, many different products for kids.

So we think this is——

Mr. JOHNSON. So it is better for——

Mr. GERTZOG [continuing]. Very pro-consumer.

Mr. JOHNSON [continuing]. Consumers. Yes, okay.

Well, let me interrupt you and just ask for your comment about that, Professor Ross.

Mr. ROSS. Mr. Chairman, I would like to offer you my expertise when I have expertise and not when I don't, and I have no idea if Mr. Gertzog is correct or not.

He made two key statements, though. The consumer has the ultimate vote and, relatedly, we operate in a competitive merchandise market. If that is so, this case is dismissed summarily under the rule of reason with the NFL not being a single entity because they are in a competitive marketplace.

Under the rule of reason, it is only when firms have market power or, as Judge Posner wrote, it is only when firms, if they err, will not face swift market retribution that the antitrust law needs to be concerned.

So if, in this particular case, the merchandise case, Mr. Gertzog is correct, then the proper result in this case is summary dismissal of *American Needle*'s claim under the antitrust laws.

Mr. JOHNSON. Thank you, Professor.

Next I am going to call upon the Ranking Member, Mr. Lamar Smith—I am sorry, the Ranking Member of the Subcommittee, Mr. Howard Coble.

Mr. COBLE. Thank you, Mr. Chairman.

Gentlemen, thank you all for being with us this afternoon.

Mr. Daly, to what extent do you think that the NHL teams act as a single entity? And when do the teams not act as a single entity?

Mr. DALY. Well, I think, clearly, Mr. Congressman, that the NHL clubs act as a single entity—they acted when they formed the

league to become a single entity to produce, promote and sell NHL hockey and NHL hockey games and products.

And all the decisions they make in the production, promotion and sale of those products—as decisions made by a single entity under the antitrust laws.

You know, to maybe go back to Chairman Johnson's question a little bit, I think sports leagues generally—but the NFL also—are constrained by the marketplace in those decisions, and they can't willy-nilly make decisions that aren't responsive to the competition in the marketplace.

And we compete with other professional sports leagues and other entertainment providers, many of whom are single-firm and make those pricing decisions all the time without any concerns about Section 1 scrutiny.

And so our activities within that marketplace are constrained by our competition within that marketplace. And to the extent there is a dominant position or, as Professor Ross indicated, a market power position in the marketplace, there are other competition laws that protect consumers in those circumstances, not Section 1 of the Sherman Act.

Mr. COBLE. Thank you, Mr. Daly.

Mr. Mawae, let me put a two-part question to you. Do you have any objection to the operation of NFL Properties, A? And B, is it your contention that apparel and merchandise revenues sold under this single-entity theory are distributed evenly throughout the league?

Mr. MAWAE. To answer your second question first, are they sold—do you mean sold separately as—or sold as a single entity? Can you repeat the question again, the second one, first?

Mr. COBLE. Yes. Is it your contention that apparel and merchandise revenues or revenues resulting from the sale sold under this single entity theory are distributed evenly throughout the league?

Mr. MAWAE. Well, I think, first of all, the limited amount I know about how the NFL shares their revenues—there is a portion of their revenues that are shared equally, but then there is a portion that is not.

Every team has an ability to set prices on certain things. Some of that could be merchandise, and some of it could be ticket sales, concessions or whatever. But I know there is a portion that does go into the shared profits of the NFL.

But when an NFL team has the ability to market their own products, make their own merchandise, then that puts more pockets in that single owner's—more money in that single owner's pocket, with a percentage of it due—having to go back to the NFL.

I don't know how much. We are in the process through our CBA negotiation of finding out how much they are making, how much they are sharing and how much they are not sharing. And that is information that we will get to receive.

To answer your other question, I cannot answer that. It is not my case. It is not my expertise or my knowledge to be able to answer that question.

Mr. COBLE. I thank you for that.

Mr. Gertzog, are there areas that you would concede that the NFL could or would never assert single-entity status?

Mr. GERTZOG. Yes. At the moment, there was an example that was used during the Supreme Court argument that if the NFL clubs decided to go into a new venture, in the trucking business as an example, that would be one that would fall outside of the single entity for the National Football League.

I may want to add, you know, one other point on Mr. Mawae's response. You know, the union itself, through their licensing affiliates, has their own agreement with Reebok.

They have supported the agreement with Reebok that we have had since the inception in 2001. And they have granted Reebok exclusivity for uniforms that the players wear and that are sold at retail.

Mr. COBLE. Thank you, sir.

Mr. Gertzog, I am going to put another question to you. Would you prefer that your single-entity status be affirmed by the Supreme Court or that the law explicitly lists aspects of professional sports league that should qualify? What would be your preference?

Mr. GERTZOG. Yes, our preference is the one that was adopted by the Seventh Circuit where you look at it league by league and each facet of its business. And certainly, with the Supreme Court decision, they would be reviewing an important part of the NFL's business.

And some of the principles and reasoning of that case could well extend to other facets of our business, but that is not what we asked the court for.

Mr. COBLE. Does this case have any direct bearing on the upcoming collective bargaining agreement negotiations?

Mr. GERTZOG. Absolutely not.

Mr. COBLE. Okay.

Mr. GERTZOG. As I indicated in my opening statement, those negotiations are governed by the labor laws, not the antitrust laws. The NFL owners are committed to working as hard as possible to reach a new agreement with the union. We think we will reach a new agreement. It is just a question of when.

Mr. COBLE. Thank you, sir.

Professor Ross, I hadn't forgotten you.

One final question, if I may, Mr. Chairman.

Professor, the V.F. Corporation argues that the current arrangement by NFL Properties is the best deal for consumers, manufacturers and the NFL. Their views are detailed in an amicus brief filed with the Supreme Court. Do you concur or disagree with the V.F.'s conclusion?

Mr. ROSS. Mr. Coble, I don't know enough about the merits of the particular marketing to agree or disagree. Your opening statement was one of the best defenses under the rule of reason of a reasonable restraint that I have heard in quite a while.

But my answer is if what you said in your opening statement was true, the correct legal response ought to be that under the rule of reason the restraint is reasonable.

But you can imagine a licensing scheme—for example, suppose somebody like Jerry Jones of the Cowboys provided an innovative marketing scheme, offered to share a lot of revenue with the rest of the league, but Ralph Wilson of the Buffalo Bills decided, "I don't

want to compete with Jones because he is so aggressive, so let's not let any of our members do any licensing of the sort."

And if he got one-fourth plus one of his fellow owners to go along with them, he could block that deal. That would be, in my opinion, one of the abuses you talked about.

So the real question for *American Needle* is not whether the contract with Reebok is a reasonable contract. It may well be. The question is whether courts ought to look at it to decide whether it is an abuse, as you were worried about, or whether it is something reasonable.

The position that the leagues want to take is that the antitrust courts should not look at that at all, and I would be interested to hear what possible protections exist for consumers other than the FTC act if the leagues win big in the Supreme Court.

Mr. COBLE. Thank you, Professor.

I see my red light is illuminated so I yield back, Mr. Chairman.

Mr. JOHNSON. Thank you, Mr. Coble.

And next we will have—what I would like to do—there is a important meeting that I need to attend with the speaker, and so I am going to go ahead and depart at this time.

I have asked the Chairman of the full Committee, Mr. Conyers, to—whether or not he would be so kind as to continue to Chair the Committee, and he has said that he would.

Mr. CONYERS. [Presiding.] I wanted to ask Mel Watt—because he is the only jock on this Committee—or ex-jock on this Committee. I don't know which, but—oh, I don't want to do this without him being in the room.

But let me ask Mr. Gertzog, what is it that Professor Ross doesn't quite get about this whole subject matter that we are discussing, from your friendly point of view?

Mr. GERTZOG. I think there is a few things, Congressman. You know, number one, the relief that we are seeking is an affirmance of the Seventh Circuit ruling focused on the aspect of the business that evidence was developed at trial—namely, intellectual property licensing involving—products.

Two, a lot of the opening statement for Professor Ross was focused on radical changes to the governing structure of a sports league, and we don't think that is really proper subject matter for this particular hearing.

It is an interesting academic discussion, but in real life—I have worked at the NFL 16 years. I understand how these decisions are made. And they are not made in the parochial interest of the owners. The owners understand that the whole is greater than the sum of the parts, and they do what is in the best interest of the league.

And in terms of this particular issue, what Professor Ross has said is, "Well, if the NFL is right, let's take it to a rule of reason analysis, and I am sure this sounds right. It is pro-competitive. Whether it is Reebok, V.F., they have made some valid points. Why don't we let it get to that point?"

And if we do, you are talking about over $10 million of litigation expenses, the threat of treble damages, uncertainty to our business partners, and that is really not a good way to run a business.

It would put us at competitive disadvantages with other companies that we compete against that are single entities and do not have to be faced with these sort of threats and lawsuits.

Mr. CONYERS. Well, Mr. Daly, what do you think that Professor Ross could be enlightened on in a friendly hearing like this this afternoon?

Mr. DALY. I think one of the theories of Professor Ross is that sports leagues in their current structure act irrationally and, again, protecting parochial interests of the members.

I can speak for the National Hockey League, and I believe I can speak for most other professional sports leagues—that we have in our constitution voting rules that generally produce, if not all the time produce, rational business decisions that are made, so that the interests of a few owners who may have parochial points of view on certain subject matters are overruled by a majority and, in some cases, super-majority of other owners who are looking out for the benefit of the league.

So I would say that business decisions made by the league are economically rational, in the best interests of the league and the league's business, and not made for parochial interests.

The other thing I would reinforce is Mr. Gertzog's point that while there are defenses to rule of reason and, as professor Ross said, some cases may be summarily dismissed, they are not summarily dismissed under the rule of reason until the parties have engaged in many months, and sometimes years, of very expensive discovery on rule of reason issues, on such things as market definition and market power, before you get to the point where they can be summarily dismissed.

So it is an enormous waste of resources for professional sports leagues but also for plaintiffs in those circumstances, and a waste of money.

Mr. CONYERS. Now, Mr. Gertzog, you—it is your suggestion that NFL should be a single entity—should be regarded as a single entity in the court proceedings?

Mr. GERTZOG. What we are asking is as part of the *American Needle* case, which we are discussing here today, the Supreme Court should affirm the Seventh Circuit decision which held that for purposes of the NFL's licensing business for apparel, the NFL constitutes a single entity.

Mr. CONYERS. So yes or no?

Mr. GERTZOG. In that part of the business, the NFL constitutes a single entity. It also gives plaintiffs the opportunity to pursue a Section 2 claim. They are not without an antitrust remedy.

Mr. CONYERS. Okay. Third time. Yes or no?

Mr. GERTZOG. I am sorry, maybe I didn't understand the question.

Mr. CONYERS. Do you remember what the question was?

Mr. GERTZOG. Should the NFL be a single entity in the courts?

Mr. CONYERS. Right.

Mr. GERTZOG. And I apologize. I thought I answered the question that for purposes——

Mr. CONYERS. I said yes or no.

Mr. GERTZOG. The answer would be yes, for some purposes.

Mr. CONYERS. Wow, this was quite a—all right. It is important that we all stay in the same understanding of the usage of the English language. So thanks.

Now, Professor Ross, I hope that you consider yourself somewhat enlightened by the friendly discussion that we have had so far. Do you have anything to say for yourself?

Mr. ROSS. I am always enlightened when I hear from real-life people in the business. The Members of this Committee are familiar with this issue, and it is one of the reasons why we have separation of powers in our country.

I am quite sure that the Members of this Committee want to do what they think is best for the Nation. But push comes to shove, they have a very difficult time if what they—what might well be best for the Nation happens to be contrary to what might be best for the 14th Congressional District of Michigan or the 6th Congressional District of North Carolina, et cetera.

And in that case, not always but often, the Members of this body are going to vote the interests of their district first. And that is not economically irrational. It is not political irrational.

Similarly, there are going to be times when members of sports leagues act in the best interest of their club because that is what they are responsible for.

Mr. CONYERS. Lamar, we are not supposed to do that, are we?

Mr. SMITH. Mr. Chairman, I didn't——

Mr. CONYERS. Oh. Well, I don't know how this question got turned onto the Members of the Committee, but here we are.

Mr. ROSS. It is just an illustration, Mr. Chairman, that any time somebody is a representative of a particular group, there are interests—they have two interests. There is a conflict of interest in that sense between things that might be good for the parochial self-interest and things that might be good for the general interest.

Being at Penn State, we honor Dan Rooney, the former owner of the Pittsburgh Steelers and now ambassador to Ireland. And if you read his book and look at the prologue by Commissioner Goodell, they rave about what a great owner Mr. Rooney is because he puts the interests of the league first. That is what everybody talks about.

Now, I would suggest, Mr. Chairman, that if Dan Rooney was just like every other person, if the owners were like the way Mr. Daly describes them, Dan Rooney would be nothing special. Wellington Mara would be nothing special. Jerry Colangelo in the NBA would be nothing special.

All these owners who put the league first are hailed, but the implicit reason is because many of their other colleagues are not so league-oriented.

Mr. CONYERS. Well, I thought you were going to give a profound response to the two fellow witnesses who were—well, you look it up, how about?

And now you are responding to my questions by propounding that we sometimes or frequently—I forgot which you said——

Mr. ROSS. Sometimes.

Mr. CONYERS [continuing]. That we put the interests of our district over our national responsibilities. Do you know what the Constitution says about that?

Mr. ROSS. I don't mean to suggest—I don't think you are putting your district in front of your national responsibilities, Mr. Chairman. I would respectfully suggest that the reason the framers devised a House of Representatives of people from districts is so that they would have people from different areas and different perspectives who would bring the perspectives of their districts to bear on the national interest.

That is the Madisonian genius, I would suggest, Mr. Chairman. But it is also one of the reasons why we have an executive branch as well. But I am sorry to have digressed into an area that you have greater expertise than me.

The point is I think—and——

Mr. CONYERS. But what about what they said about your thinking on the subject matter for which we are gathered today?

Mr. ROSS. Mr. Chairman, I do not believe, without regard to the particular facts of this case, which I have tried to say I don't have an opinion on. In general, when you think about the move of the Montreal Expos to Washington and how that was held up by the veto of the Baltimore Orioles, when you think about other franchise relocation issues, when you think about the Bulls litigation which I have detailed in my statement.

I think there are a number of examples of where sports leagues have acted in the best interest of individual owners and have not behaved in the way that Mr. Daly would like sports league owners to behave when they sit around the table.

Mr. CONYERS. Well, let me ask you this. Did you hear what Mr. Gertzog said——

Mr. ROSS. Yes.

Mr. CONYERS [continuing]. When he responded to my question of helping you understand things from a different point of view? And is what you said to me your answer to him?

Mr. ROSS. I disagree with his factual characterization that the National Football League owners invariably act in the best interests of the league.

I think there are many cases where the National Football League owners do not act in the best interest of the league and require leadership from the commissioner's office or others, which is sometimes successful and sometimes not.

Mr. CONYERS. Okay. Did you hear Mr. Daly make some—what he thinks as positive suggestions about your views on the subject matter that brings us here today?

Mr. ROSS. Yes, Mr. Chairman.

Mr. CONYERS. Do you have any response for him, or do you think that they were fairly accurate?

Mr. ROSS. Mr. Daly and I disagree about whether the frequency of owner behavior that is self-interested justifies having continuing antitrust treatment of sports league decisions.

Mr. CONYERS. So do you consider yourself far apart in your views from Mr. Gertzog and Mr. Daly, or are they relatively close?

Mr. ROSS. In terms of what is the subject of this hearing, which is the single entity status of sports leagues, I would say that my views are fairly far apart from Mr. Daly's and Mr. Gertzog's.

Mr. CONYERS. Well, let me turn to Lamar Smith, the Ranking Member, to——

Mr. SMITH. Thank you, Mr——

Mr. CONYERS [continuing]. See if he can throw some light on this.

Mr. SMITH. Thank you, Mr. Chairman. I do have a couple of questions. But let me also confess at the outset that my only connection to professional sports, which isn't necessarily bad, is—and I am proud of them—is the San Antonio Spurs, of course, and then I happen to represent the University of Texas, so the other professional athletes I would have to say are the front line of the University of Texas football team, or at least soon to be, probably.

Mr. Ross, let me address my first question to you, and you have already responded in part to it, but it is this. In so many issues, particularly the ones we are facing today, the real question is where do you draw the line.

And in the case of the National Football League, there are instances where it does act as a single entity—for example, in the schedule of games and in the setting of the rules of play and so forth.

So obviously, there are instances where it acts as a single entity and other instances where it does not. Where would you draw the line beyond what you have already said?

Mr. ROSS. Yes, that is the position of the government, and it has some merit. I have to say, I don't think that there is a line there per se. I think that you might want to say that on an aspect-by-aspect basis, a plaintiff should have to show that the clubs are not acting in the best interests of the league.

But let me give you a law professor example of rules. As you may know if you are a baseball fan, the strike zone basically got distorted by umpires and then got changed by Major League Baseball about 5 years ago.

And the rule that got changed happened to favor the Atlanta Braves because they had great pitching. Now, I would argue that if the Braves' owner had gotten a minority of the fellow owners to block a change in the rules purely to favor their own self-interest, and you could show some competitive harm—I don't know how you could about that, but you could show some competitive harm, then that might be something where single-entity status should not be applied.

So even in scheduling and rules, I would say that the focus ought to be is this a single economic driver or not. And in some cases, you are right, the league is operating as a single economic driver. In point of fact, the NHL and their labor dispute was completely united, and Mr. Daly and Mr. Bettman did a great job there.

But in other cases, although he would prefer it not to be, quite frankly, Mr. Daly is not leading the single economic driver, but he is basically being dictated to by a committee of horses. And when that is happening, I think they are not a—then the league is not a single entity.

Mr. SMITH. Okay. Thank you, Mr. Ross.

Mr. Gertzog, a couple of questions for you. Some of the professional sports—I think soccer is one—constituted themselves as a single entity when they formed.

Why didn't the NFL do the same thing? And in any case, why haven't they sort of reconstituted themselves as a single entity even if they didn't do it originally?

Mr. GERTZOG. Well, in terms of the NFL's structure, our league dates back many years prior to MLS, which I think is the league that you are referring to.

We believe that there are many benefits——

Mr. SMITH. Major League Soccer, yes.

Mr. GERTZOG. Correct. We believe that there are many benefits to having local ownership. It helps make the league stronger. There is an identification in the marketplace with an owner and executives, and we think we have a very strong business model that has been proven out by how successful we have been.

Mr. SMITH. Okay. Quick answer, but a good answer.

The second question is this. Going back to *American Needle*, as I recall many years ago before NFL gave Reebok the contract, American Needle was the licensee and, I think, the licensee for all 30 teams.

And it sort of looks like they are complaining now because they didn't get the contract, even though they themselves were in a very similar favorable position years ago. Do you have any comment on that?

Mr. GERTZOG. Yes. It is ironic that they are complaining about the very structure that they benefitted from for two decades.

Mr. SMITH. Right.

Mr. GERTZOG. They are also, as I understand it, currently a licensee of Major League Baseball, which has a very similar structure to NFL Properties, where they have a license agreement for all 32 teams.

What they didn't like is the nature of being a licensee in professional sports and entertainment, or any other field, is you bid for licenses. You are granted rights for a period of time, and then when those licenses expire, you have to re-bid. They re-bid. The NFL made a different decision. And after two decades of being an NFL licensee, they sued us because they didn't——

Mr. SMITH. So is this——

Mr. GERTZOG [continuing]. Like the decision.

Mr. SMITH [continuing]. A case of what is good for the goose is good for the gander, or is it a case of what is good for the goose one time should be just as well for the goose another time?

Mr. GERTZOG. I like your goose analogy better than the professor's. [Laughter.]

Mr. SMITH. Okay. Thank you, Mr. Gertzog.

Thank you, Mr. Chairman. I don't have any other questions.

Mr. CONYERS. Mr. Mawae, do you want the last response before we adjourn?

Oh, wait a minute. I didn't see you come back in. Wait a minute. Well, I will yield to you now before I yield to the gentlelady from Texas.

Mr. MAWAE. You will let me—my comments on this? You know, I can't sit here and speak from a legal standpoint with legal lexicon. I don't know contracts. I am not an educated professor. But I am a pretty smart football player, and I know the business of football.

And what I do know and what *American Needle* represents to us is a possibility that the NFL could be recognized as one single entity, in which term would give them the power to oversee every aspect of the game, including what happens with the players.

As a player, I have been on the free agent market three times. I have benefitted by the broadcasting act because in 1998 the NFL signed a new agreement with the broadcasters for $17 billion.

I hit the free agent market that year and became the highest-paid center in the history of the league. So in that sense, I benefitted from the NFL and the deals that they have struck.

But the issue goes further than that, that in the case—or in the event that the NFL gets recognized as a single entity, then they control player markets. They control player salaries and player movement.

It would not be beneficial to the players for the owners to take—say and dictate which teams that each player should go to, dictate the cost of ticket sales, which drives up the revenue, and things like that.

It is a free agent market for the owners. It is a free agent market for the players. And it is a free agent market for the NFL, because they compete against all the other major league sports.

As it pertains to the players in general, we are concerned because we have fought so hard over the years to have labor peace. That has been protected through the antitrust legislation and has not allowed them full exemption.

And we are concerned, especially in this decade or this era of our organization, that if the NFL does, indeed, get what they want out of this *American Needle* case that we could lose much of what we have fought for over the course of these last 30 or 40 years.

That is my statement. I am here to represent the 1,900 guys. And, sir, I just appreciate your time and just for me to give my very quick and brief opinion. Thank you.

Mr. CONYERS. Thank you.

Mr. Gertzog, is there anything that you could leave the head of the football players association with that would make him feel more comfortable this evening as he reflects on what we did here?

Mr. GERTZOG. I appreciate the promotion to commissioner, but I am just a mere senior vice president of the National Football League. But in any event, in terms of that question, as I said earlier, the NFL owners are firmly committed to reaching a new deal through the collective bargaining process.

As Mr. Mawae knows, there was a negotiation session yesterday. There have been 11 of these sessions over the past few months. And everyone is firmly committed to trying to reach a new deal. A work stoppage does not benefit anyone. It does not benefit the owners. It does not benefit players.

We have got a good thing going. We want to continue it. We have just got to find some common ground. And the way to do that is at the negotiation table, not at a courtroom.

Mr. CONYERS. You think that is going to make him rest more comfortably this evening?

Mr. GERTZOG. I hope so.

Mr. CONYERS. I do, too.

Well, are you? I said well, are you going to be more comfortable now that you have had his response to my question.

Mr. MAWAE. No, sir, we will not be more comfortable.

Mr. CONYERS. You won't be more comfortable. Well, I will turn this over to Congresswoman Sheila Jackson Lee. Maybe she can help us feel better about this.

Ms. JACKSON LEE. Thank you very much, Mr. Chairman.

Let me ask Mr. Daly, are you a nonprofit, the NHL?

Mr. DALY. The league itself is a not-for-profit association, that is correct.

Ms. JACKSON LEE. Not-for-profit. Is that a 501(c)(3), or what is the configuration?

Mr. DALY. I probably——

VOICE. Six.

Mr. DALY.—I should know the answer to that question.

VOICE. Six.

Ms. JACKSON LEE. 501(c)(6)?

Mr. DALY. Thank you, Joe.

Ms. JACKSON LEE. Okay.

And, Mr. Gertzog, what is the NFL?

Mr. GERTZOG. It is similar. It is an unincorporated association not-for-profit, and—but the league has a number of for-profit business units.

NFL Ventures L.P. houses our commercial operations, which would include broadcasting, NFL Properties licensed products, our international business and our Internet and satellite business.

Ms. JACKSON LEE. What is the name of it that houses it?

Mr. GERTZOG. NFL Ventures L.P.

Ms. JACKSON LEE. And I assume the value of that is public. What is the approximate value of the NFL Ventures L.P.?

Mr. GERTZOG. It is not public.

Ms. JACKSON LEE. Those numbers are not public?

Mr. GERTZOG. No.

Ms. JACKSON LEE. I thought it was for profit.

Mr. GERTZOG. It is for profit.

Ms. JACKSON LEE. So is it public on your tax returns?

Mr. GERTZOG. It is a private corporation.

Ms. JACKSON LEE. It is a private corporation, so in essence——

Mr. GERTZOG. Owned by the members of the National Football League.

Ms. JACKSON LEE. So in essence, you still have a certain degree of protection, so the public cannot access what the NFL Ventures L.P. profits are. Is that correct?

Mr. GERTZOG. Not to my knowledge.

Ms. JACKSON LEE. All right. And the——

Mr. GERTZOG. One of our teams, the Packers, is a public team, and you can track through their public filings some of the revenue streams that come from NFL Ventures.

Ms. JACKSON LEE. The NFL, then, is a 501(c)—the one that is a not-for-profit—what is that, 501(c) what?

Mr. GERTZOG. I think it is six, but I would have to check on that for you.

Ms. JACKSON LEE. And your guess would be that the NHL would be a six as well? Is that my understanding?

Mr. GERTZOG. Yes.

Ms. JACKSON LEE. Okay. Let me try to give the approach that I would like to take. And I thank you gentlemen for being here.

And I thank you, Professor. I am getting ready to come and put you either in the hot seat or the cold seat.

First, I would like to thank the Chairman for this hearing and thank Chairman Johnson for this hearing and just remind the NFL that in another hearing in another Subcommittee where our Chairman Bobby Scott had passed out of Committee the Promise Act, we were able to include language in the bill that spoke about the NHL, the MLB, the NBA and the NFL engaging in antiviolence activities that are somewhat different from antiviolence not of the players, of course, on the field—let me characterize it correctly—working with our youth.

And many times you always say we do those kinds of programs. This is somewhat different, because I found that in the NHL and others who have a certain persona of a lot of activity on the field, a lot of blustering, and may even have some persona of some missteps publicly that the media will highlight on, all the other guys that have been playing year after year that are individuals that young people should see—hard-working individuals who serve their community and many times don't get the glare of the media, except for maybe when they are on the playing field.

So we wanted to give them an opportunity to be mentors. I say that to say that I think the players are valuable. And I compare it to a situation of a teeming stadium. The big one in Texas, of course, is up north, so we are very proud of the Reliance Stadium in Houston. This, of course, is the NFL. We are proud of our—all of our teams.

But we would have this teeming team, the big stadium in Texas up north, and then the great stadium in Houston, the Reliance Stadium for the Houston Texans. And it would be teeming with excitement and noise, and we are all sitting there with bated breath, and nobody comes on the field.

A politician may go out and ask people to vote. Somebody else may come out and do a dance or two. It might even be a major entertainer that will sing the Star-Spangled Banner. But there are no players, absolutely no players. Do we have anything?

Are we going to have a audience sitting there smiling and say, "I am so excited to be here today, I am just going to sit here in silence watching an empty field?" That is what this antitrust exemption represents to me.

It is a question of whether or not the valuable aspect of this game, the people who play every day, whether it is the NHL players, the NFL players, are going to be hindered because of the approach that is being taken and the seemingly impenetrable exemption that the leagues happen to have.

Mr. Mawae, if I have it correct, let me just ask you, do you expect a lockout in 2011?

Mr. MAWAE. Ma'am, we are fully anticipating a lockout, and we are preparing all 1,900 of our players to do so. We have done them—we have educated them in terms of saving financially, on what to do in case there is a lockout and things like that.

Obviously, we don't want that to happen. We have been to the table a number of times. But right this moment, we are anticipating that, because that is all the indications are showing, that that is where we are headed.

Ms. JACKSON LEE. And tell me, what—and thank you for qualifying that you do not represent yourself as a person providing legal advice, counsel or information, but you are a player, and you do—you are the president.

So let me try to ask this question. What is a lockout? And what gives the league the authority to lock you out?

Mr. MAWAE. Over the history of our league, the work stoppages that we face have been strikes by players where we have refused to go to work. This is not the case. We are not fighting for anything. We are not wanting anything extra. We don't want another percentage point.

We like the system the way it is, and we think it works well for both sides. A lockout would be a sense where the owners are not willing to participate in the collective bargaining agreement that we have at place.

They have already opted out of our dill 2 years in advance, which would make us go into a season of uncertainty prior to the 2011 season. Players would be ready to come to training camp with the gates locked and the locker rooms shut and us not having a place to go to work.

That is what a lockout is. That is the way our players understand it.

Ms. JACKSON LEE. And with the entity being a "single entity," which is what will be affirmed possibly if the Needle case, the *American Needle* case, goes up on appeal, which is, in actuality, the league's desire to reaffirm the lower court's decision—they already won, as I understand it, but they want to put it in blood.

But as a single entity, that means that you are—if you are a player, couldn't skip over to Green Bay if you are playing for the Saints. You would be locked out.

Mr. MAWAE. I would be locked out because all——

Ms. JACKSON LEE. You would have no movement to say, "Okay, I am going to go to——"

Mr. MAWAE [continuing]. All 32 teams' doors would be shut.

Ms. JACKSON LEE. "—the Giants and take my chances." Pardon me?

Mr. MAWAE. All 32 teams would be shut.

Ms. JACKSON LEE. All 32 teams——

Mr. MAWAE. And there is no comparable league.

Ms. JACKSON LEE [continuing]. Would shut down on workers, and workers could not go onto the field to work.

Mr. MAWAE. Yes, ma'am.

Ms. JACKSON LEE. Is that my understanding?

Mr. MAWAE. Yes, ma'am.

Ms. JACKSON LEE. Professor Ross, with the *American Needle* case—and I think Mr. Gertzog made an eloquent case that American Needle had a relationship for 20 years, and I am sure they were celebrating that relationship. And so one could argue you had yours for a period of time, and it is time to say goodbye.

I take a different perspective as to whether their single relationship was healthy. If we speak about jobs, apparently American Needle is fighting for their life. They apparently have a number of employees, or had some employees, who are gainfully employed, providing for their families.

And in this context, America is looking to hire people and to lower the unemployment and raise the employment. What impact and what configuration could we actually substitute for this antitrust exemption which would balance the business interests of the NFL—which are, by the way, protected enormously with the private entity and the 501(c)(6), if that is accurate—to ensure that the product is a quality product but that there is diversity in the opportunities for businesses to do business with the NFL?

Maybe it would not be American Needle. I am not here to argue their case. But maybe it would be American Johnson, American Red White & Blue, that could stand alongside Reebok, provide the opportunity for good quality, decent prices and maybe even better prices for the consumer, and a little bit of competition among the distributors.

Is that too confusing a concept?

Mr. ROSS. Congresswoman, it is not too confusing a concept. I think we don't know enough because of this single entity decision by the district court and the Court of Appeals to know what the real facts are.

Now, if you listen to Mr. Gertzog's testimony, the answer is that the efficient result is to give the business exclusively to Reebok, they can do a better job, hire more workers, produce a better-quality product that will appeal to consumers, and because, after all, what they are really doing is they are selling NFL hats in competition with other merchandise, and the idea is you—if the Redskins hat gets too pricey, somebody is going to buy a Washington Capitals hat—makes Mr. Daly happy, and Mr. Gertzog unhappy.

And if that would——

Ms. JACKSON LEE. Or off-brand somewhere.

Mr. ROSS. Or off-brand. And if that is what is going on, what the antitrust laws say is that is fine. Now, if this Committee wants to deal with the important social issues you raise about diversity in various forms of industries, that is a separate question that certainly would warrant the attention of the Committee.

But that is not what the antitrust laws look at. The antitrust laws——

Ms. JACKSON LEE. Oh, I am fully aware of that, but I am looking at the impact. But then characterizing—I am fully aware of your argument, but then what is the value of the antitrust exemption when it reaches into the quality of life and the ability for Mr. Mawae to be compensated appropriately for his work?

Mr. ROSS. Well, the particular issue as it arises in labor is relatively narrow but can be potentially important. The effect of the exemption would not change the current collective bargaining relationship between the NFL Management Council and the NFL Players Association.

What an American Needle victory would do—a big victory would do—would be to take away an option that the NFL players were able to exercise in the 1990's, which is in the face of a labor im-

passe, they could decertify as a union and then continue to offer to play and have the issue decided by the courts while the season was going on.

So to go back to the sort of battle days of labor strike and the NFL—and during the 1980's we had a couple of strikes. We had some work stoppages.

Ms. JACKSON LEE. Absolutely.

Mr. ROSS. And then in the 1990's, the NFL players kept playing the whole time that case was being litigated. Fans continued to enjoy NFL football. And then there was antitrust litigation. That option, the decertify and sue option, would be precluded if the Supreme Court's decision is a very broad decision.

Now, if the Supreme Court's decision is as narrow as Mr. Gertzog now says he wants it to be, only deciding what—the impact on licensing issues, then that issue would not arise and you wouldn't necessarily have that difficulty.

And if the players think that they are—and this would only be a last resort for the players, because I am sure that the NFL players would prefer to reach an agreement through collective bargaining and stay organized as a union under the National Labor Relations Act, as opposed to simply becoming a trade association, as they did for a brief period in the 1990's.

I note, for example, in hockey, during the NHL lockout the players did not choose to decertify but continued to use their—well, they didn't do it too well, but continued to fight the issues under the labor law.

So even having that option isn't necessarily one that would prevent a strike or a lockout. But it would at least give the union the option of continuing to play and taking it to the courts if that was the option that they chose to pursue.

Ms. JACKSON LEE. Well, my understanding is what the unions have gained are the ability to—I think it is a 51—or 60-40 breakdown of the revenue. Is that accurate? And that part of this ongoing negotiation is to break that and have the owners go up and you go down.

Mr. MAWAE. Well, initially, on the surface of it, it looks like a 60-40 percent in the total revenue, but we know now that it is more of a 54 percent to the players because of cost credits already given off the top before you take into account the percentage that we split between the——

Ms. JACKSON LEE. So are you happy with that?

Mr. MAWAE. No, ma'am.

Ms. JACKSON LEE. You think it should get——

Mr. MAWAE. Well, I am sorry about that. We are happy with where we are at right now.

Ms. JACKSON LEE. Right, that is what I am trying to understand.

Mr. MAWAE. We are being asked to give a 20 percent rollback on player salaries without proof that they have lost 20 percent in revenue.

Ms. JACKSON LEE. Okay.

Mr. Ross, does that come about with the antitrust exemption?

Mr. ROSS. The antitrust exemption only comes into play in real life if the leagues and the union are at such an impasse that the

players decide to exercise their option to stop being a union and take their chances in court.

As long as there is any opportunity for the deal to be worked out—and there was a whole series of failures in the of the NFLPA to get the owners to move at all on free agency, which was a huge psychological, I think, threshold, until their successful McNeil litigation.

But the current dispute is really one of labor law between—law and then the economics and fairness of whatever the two respective positions are going to be on whether the current thing works, whether the players ought to have give-backs or something.

That is really not an antitrust decision until and unless the players feel that their prospects are so poor that we need to take this out of collective bargaining and end the collective bargaining relationship.

Ms. JACKSON LEE. Well, I would like to be an optimist, but I think the antitrust exemption may come into being because every player that I have informally polled believes that a lockout is looming and that the option that they have to decertify, which would be thwarted by the antitrust exemption, is crucial.

And I would be interested in understanding how Mr. Gertzog believes—I guess his appeal is going to be narrowly drawn.

But how are you going to dictate what the Supreme Court may rule? And the Supreme Court may give a broad ruling which, in essence, would, in essence, implode the rights that the players have by way of the antitrust exemption.

Mr. GERTZOG. Certainly we are not in a position to dictate the Supreme Court's ultimate decision, so I agree with you on that.

It should be noted that there were 70 minutes of oral argument last Wednesday before the Supreme Court. There was not a single question by any of the justices regarding the impact on labor, and the sports unions from many different leagues had submitted amicus briefs on that point, pointing out some of what we will call the doomsday scenarios.

And eight of the nine justices asked questions, many of them multiple questions—not a single question on that point. So we don't expect that a ruling in our favor will cover labor.

Ms. JACKSON LEE. Okay.

Mr. Chairman, I will conclude with this question, I guess, to Mr. Ross.

The idea of the 32 entities, which is partly labor law, acting, I will just say, as one—the question I posed to Mr. Mawae, which means that while they are locked out, they can't go anywhere else and offer their services.

Sometimes the law intertwines, even though the antitrust distinctions you have made very clear. In and of itself, it appears that you are denying a person's worth and that the antitrust exemption gives less oversight as to whether or not there are any antitrust implications.

I know you are speaking to labor law, but does that exemption not allow, then, to look at the actions that are going on on the labor side as being—as undermining any competitiveness? On the face, it does not seem that way, but maybe there is something.

And my last point is the *American Needle* case—I am just seeing the whole crowd and cloud, and my question would be when you have these single entities like Reebok, could they not subcontract or joint venture with American Needle? Does that mean that small minority businesses need not knock on the door?

To me, that is what it says. These single distribution—that means if I am an African American business, or a small business or Hispanic business, I probably wouldn't even know where the front door of the NFL is, because they wouldn't be looking for me.

Frankly, I think that is anticompetitive.

Mr. ROSS. Congresswoman, I would be remiss in not saying what a pleasure it is to talk to the whole Committee and particularly note my father-in-law and you both went to Jamaica High, so I am particularly pleased to answer your question in that regard.

The antitrust laws are focused primarily on consumer choice. If, as Mr. Gertzog claims, the Reebok deal is good for consumers in a lower cost or more quality, then that is really only what the antitrust laws are concerned about.

There are a lot of reasons for economic diversity. But I would use the example of the Federal Communications Act which separates the issues, so that there are competition law issues, say, in a merger, and then there are issues of minority access and diversity of viewpoints and things like that.

Now, I think it is a serious public policy question whether sports leagues ought to be having exclusive contracts with single large multinational corporations, especially if there aren't some socially responsible deals with other enterprises and things like that.

Ms. JACKSON LEE. And especially if they don't look for them.

Mr. ROSS. And I think that is a fair question. But with all respect, I think that is a very useful topic for another hearing, because that is really not an antitrust question.

That is really a question of social justice and the economic power that really doesn't impact on consumer.

Ms. JACKSON LEE. So just quickly, it does impact on consumers if they did not look to see whether or not smaller entities, non-multinationals, would provide a better deal.

I am sure in their appeal they have made the argument, or the lower case they made the argument, that the better deal was with Reebok, but you made—Reebok, but you made the point. It is a multinational company and others are left outside the door.

And because of the antitrust exemption, the NFL can do that.

Mr. ROSS. Actually, let me make one other clarification to that. If, in fact, the—sports was such a driver for merchandise as it is for television, for example, that small and minority business enterprises could not compete in the marketplace without getting a sports contract—I have no idea if that is true, but if that were true, then that would be an antitrust violation.

But the single-entity status doesn't really matter there. The contract, the Section 1 agreement, that you would challenge if you were, say, a small minority business enterprises would be the agreement between the National Football League and Reebok.

There is no question that that is still an agreement—or the National Hockey League and whoever you happen to have as your agreement.

If, in fact, these sorts of agreements really do exclude small and medium apparel manufacturers and others from the marketplace, that is an antitrust question, and I think that is actually one that maybe the Federal Trade Commission or the Justice Department should take a look at.

But that really is not affected by this—the *American Needle* case. Whether they are a single entity or a group of clubs, it is the agreement with Reebok that——

Ms. JACKSON LEE. Right.

Mr. ROSS [continuing]. You would be looking at, and that is a very legitimate question that you raise.

Ms. JACKSON LEE. Mr. Chairman, thank you. I think that this hearing, once again, is vital, as the hearings that you have taken leadership on, and we have joined you, on the NFL brain injuries, one to be held in Houston on February 1st, one held in Washington, one held in Detroit.

I think it has made enormous difference. I had the chance to visit with some of my players—and when I say "my," we take ownership and have great respect for you all—and the testimonies, not in front of a hearing, Mr. Chairman, but just personal testimonies, are just amazing.

So I think we are doing good here, and I, frankly, believe the antitrust question has to be continuously explored. I don't know what the Supreme Court is going to do, but I have a sense the Supreme Court can do anything they want to do. They don't have to be narrowly defined.

And I would add that with respect to the ongoing negotiations—but do include labor agreements—I understand that—but there is some oversight that Judiciary would have. We need to monitor this particular lockout potential, which we don't want, very closely, because the product of the player is what the sports fan comes to see.

They don't want to see me singing or speaking. Great respect for all of the investors that invest into the sports, but not too many of them could draw attention on the field. And I don't know why, in the words of Rodney King, we can't all get along.

And I certainly hope that we will have a steady watch of this. And even though my great professor has interpreted very well the requirements—or the stricture, rather, of the antitrust laws, I see a little creeping over. And I am going to be exploring that, doing research, to see how this unity of the 32 is also impacting both antitrust and NLRB on the workers' rights.

So I have sort of moved around in this issue, but I do think there is a way of trying to address this question and to get the facts and to juxtapose it against the law, and maybe do a little bit more research, Professor Ross.

But I thank you, Mr. Chairman, and I thank Mr. Gertzog for his presentation.

Mr. Daly, we have left you alone a little bit but hope you will participate in this antiviolence effort. We will get your card.

And, Mr. Mawae, you need to keep us all apprised of these negotiations. Got some good Texans down there.

I will acknowledge, Mr. Chairman, that you had a chance, as I understand, to meet one of our very fine Houston Texans, a Mr. Chester Pitt, who was here and was very impressed with your lead-

ership. I think he might have been in a group meeting that you may have had with these players.

And I want you to know that they are fine civic citizens, and we really do appreciate what they do for our communities.

I thank you, Mr. Chairman, and I yield back.

Mr. CONYERS. Thank you all very, very much. This was a very instructive and beneficial hearing.

The Subcommittee stands adjourned.

[Whereupon, at 4:42 p.m., the Subcommittee was adjourned.]

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