

**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**

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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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<sup>1</sup> 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. Secondly, 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 not 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 (7<sup>th</sup> 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 would be better off if they actually were 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 (9<sup>th</sup> 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<sup>2</sup>), 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 (8<sup>th</sup> 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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<sup>2</sup> 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.<sup>3</sup> 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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<sup>3</sup> 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 (7<sup>th</sup> 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, 87<sup>th</sup> Cong., 1<sup>st</sup> 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.<sup>4</sup>

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.<sup>5</sup> 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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<sup>4</sup> 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.

<sup>5</sup> 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 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 111<sup>th</sup> 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 (6<sup>th</sup> 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 in 1984 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,<sup>6</sup> 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.

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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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<sup>6</sup> 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).