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THE FANS ACT: ARE SPORTS BLACKOUTS AND ANTITRUST EXEMPTIONS HARMING FANS, CONSUMERS, AND THE GAMES THEMSELVES?

HEARING

BEFORE THE

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THE FANS ACT: ARE SPORTS BLACKOUTS AND ANTITRUST EXEMPTIONS HARMING FANS, CONSUMERS, AND THE GAMES THEMSELVES?

WEDNESDAY, DECEMBER 4, 2014

UNITED STATES SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 10:20 a.m., in Room SD–226, Dirksen Senate Office Building, Hon. Richard Blumenthal, presiding.

Present: Senators Klobuchar, Franken, Blumenthal, Grassley and Lee.

Senator BLUMENTHAL. Senator McCain, I was going to suggest if the Ranking Member agrees, that you go first and then we will give our opening statements.

Senator GRASSLEY. Yes, go ahead.

STATEMENT OF HON. JOHN MCCAIN, A U.S. SENATOR FROM THE STATE OF ARIZONA

Senator MCCAIN. I thank you, Mr. Chairman and Ranking Member Grassley, and I thank you for allowing me to testify and thank you to Senator Blumenthal for making this hearing happen. Senator Blumenthal's commitment to advocating for consumers has made him a valuable partner to work with on this issue, an area where the rules and regulations far too often leave consumers holding the short end of the stick. I am here this morning to discuss sports blackouts and to explain why the continued use of blackout rules and policies fail to serve the interests of consumers, in this case, loyal sports fans.

I will truncate my opening statement just to say the simple fact is that the rules as they are today only serve to benefit sports leagues and their member teams at the expense of the hard-working fans who support them so loyally through their money, time, and passion. Just last year during the NFL wildcard playoffs, fans of the Cincinnati Bengals, Indianapolis Colts and Green Bay Packers came very close to experiencing blackouts when those games had not sold out just days before the kickoff.

The blackouts in these regions were only averted when, at the last-minute, local businesses bought-up tickets to bring the total above the NFL's required threshold. Mr. Chairman, there is something wrong with a situation in which the NFL can say to all of those fans who have made the League what it is today, "you had

better purchase tickets or else." The NFL and its teams have benefited from myriad public benefits, including an exemption from antitrust rules, a specialized tax status, and taxpayer dollars that subsidize their multimillion dollar football stadiums.

These public benefits carry with them a responsibility back to the public an obligation to treat their loyal fans with fairness. We have been chipping away at these rules for some time, but there is still a lot of work to do. This year I am happy, Mr. Chairman, to join you and introduce the FANS Act aimed at eliminating the various causes of sports blackouts. This legislation would condition the NFL and other leagues' antitrust exemptions on ending blackout practices including in those circumstances when stand-offs during contractual disputes between broadcasters and cable and satellite companies result in blackouts.

We would strongly prefer that the League take the initiative itself and demonstrate leadership by reforming anti-consumer policies and practices. But let us be clear, should the League fail to act, we should do everything we can to stand up for consumers by advancing the FANS Act and other initiatives.

I look forward to hearing from the witnesses on the following panel on ways we can work together to finally blow the whistle on sports blackouts once and for all.

I would like to say, again, Mr. Chairman, you come from a State where it is huge as far as sports broadcasting is concerned. So I particularly admire your courage on this issue. Again, it is just unconscionable to have average fans be deprived of the ability to see an activity in a stadium they paid for. So it is a no-brainer in many respects and if we are not able to succeed, it is frankly a triumph of the special interests over the public interests.

I want to thank you for your leadership and I want to thank the Ranking Member who, as always, I have the greatest admiration for and respect. Thank you.

Senator BLUMENTHAL. Thank you so much Senator McCain. I really appreciate you being here. I know it is a busy day in a busy time of our closing days of this session and I want to express my personal thanks for your leadership and courage in sponsoring this bill and working with me on it and I look forward to continuing our work together.

I know that you have another meeting and certainly you should feel free at any time to leave despite the powerful and riveting remarks that I am about to give. I know you will find it difficult to break away.

[Laughter.]

Senator MCCAIN. Thank you. I would also like to invite Senator Grassley to come to Arizona for the Super Bowl and join many of his constituents who are smart enough to spend the winter with us. Thank you.

[Laughter.]

Senator BLUMENTHAL. Thank you Senator McCain. We are going to give opening remarks and then, unfortunately, we are going to have to take a recess because of the votes that are ongoing right now. We are going to come back at the end of those votes, we hope not too long from now, in a little while to continue the hearing at that point with the remainder of the witnesses.

I will give my opening remarks. Then Senator Grassley will give his.

OPENING STATEMENT OF HON. RICHARD BLUMENTHAL, A U.S. SENATOR FROM THE STATE OF CONNECTICUT

Senator BLUMENTHAL. As Senator McCain said so eloquently, Americans really love sports and they deserve to see them on their terms, not on the terms that are prescribed by the professional sports leagues in blacking out what they think Americans should see rather than what Americans want to see on their terms. The competitive teams of professional football, baseball, hockey and basketball leagues represent a rich and vibrant part of our American culture. They contribute immensely to what makes America the greatest country in the history of the world.

Professional sports leagues generate billions of dollars, thousands of jobs and critical economic activity in multiple industries. The Super Bowl is, in fact, the highest rated event on television and last year the NFL playoffs collectively accounted for the ten most-watched sporting events of the entire year.

So these games are a part of what makes America great. Most of these games were carried on free over-the-air television and I believe we ought to keep it that way. Sports fans power this media and merchandising juggernaut by purchasing tickets and merchandise, watching games on TV and supporting their teams through thick and thin.

These billion-dollar professional sports leagues derive almost half of their revenue from licensing TV rights to cable, broadcast and regional sports networks. Some estimate those rights cost upwards of $17 billion a year. A large bill, a large cost that is increasingly passed on to consumers in the form of higher monthly rates for cable and pay-TV and we have evidence of it at this very table when we have had recent hearings on some of the proposed mergers.

Sadly, in return, fans and the public are often treated like a fumbled football, sometimes even a kicked football. When places like Buffalo, New York fail to sell out its 74,000 person stadium, the Bills game is blacked out for local fans. When powerful cable companies and broadcasters failed to reach an agreement, it is often the threat of holding sports programming hostage that is used to negotiate higher fees. And, by the way, higher rates for consumers.

Even the Internet cannot escape blackouts. When fans live too close to their favorite baseball team, but not close enough to actually watch them on television, they face online blackouts that force them to drive to the next city to catch a game. These blackouts are loathed by fans and rightly so, hated by consumers and even reviled by most of the industry stakeholders in the business of television.

The good news is we can do something about it. The NFL, the NBA, the MLB and the NHL receive tremendous assistance, huge benefits from the Congress in puting their brands, their sport and their advertising before the American people. This public assistance takes several forms, but chief among them is the antitrust exemption enjoyed by the four major sports leagues.

Essentially, every American company is bound by antitrust regulations that prevent coordination and price-fixing. Sports leagues are an exception. Almost a unique exception to this antitrust rule. In the Sports Broadcasting Act of 1961, Congress granted a special exemption from the rules that govern other companies permitting professional sports leagues to coordinate and fix prices for negotiating broadcast rights.

The country affords these teams their special status because of their special role in American culture. But that does not give them the right to abuse this privilege and the Government certainly should not endorse abusive behavior. The public benefits come with a public trust.

The FCC recognized this when they through a flag this September on the NFL's anti-fan blackout policy. Chairman Wheeler of the FCC announced at that meeting, "Federal Government should not be a party to sports teams keeping their fans from viewing the games."

I am grateful that all five FCC Commissioners joined together in a bipartisan vote and repealed their blackout rule as I had called for there doing, along with Senator McCain, Senator Brown, Congressman Higgins and many more. But despite the FCC's actions in September, sports leagues and the NFL, in particular, retain the power to blackout games through their private contract agreements.

I believe these blackout policies are anti-fan and anti-consumer because they disregard the public trust that the leagues have because of the special benefits and public benefits that they receive and because of the trust they have to their fans and the teams. Moreover, these policies are an affront to the direct and indirect investment made by Federal and local governments that have provided tax exemptions, enhanced public transportation, infrastructure to stadiums and exemptions as, I have mentioned, from the antitrust law.

That is why I have joined with Senator McCain to introduce S. 1721 Furthering Access and Networks for Sports Act, the FANS Act, and that is why I have joined in seeking support from my colleagues and I believe that support is growing, that we have momentum on our side. This bipartisan bill leverages the antitrust exemptions that leagues enjoy against the elimination of these blackout policies.

Let me put it very simply. Unless the leagues end blackouts, they will no longer be exempt from the Nation's antitrust laws when they negotiate their billion-dollar television contracts. The FANS Act would remove language in the law that allows the NFL to maintain their local sports blackout policies when stadiums fail to sell out. It would require the leagues to instruct anyone carrying their games that they can no longer hold sports programming hostage for higher fees and cable rates and it would make more live games available on the Internet.

I want to make one thing clear. This bill does not use the heavy hand of government to force the sports leagues to do anything. It does not require them to end blackouts with the threat of fines or enforcement actions. It does end the blank check from the Govern-

ment to the leagues and it takes away Congress' implicit endorsement of blackout policies.

Fundamentally, it represents a bargain to the leagues. They can continue enjoying their exemption from existing law if they treat fans fairly. If they want to continue their blackout policies, the Government will not stop them, but they will no longer get the special public benefits and protection from antitrust enforcement that they currently have.

I want to note, particularly, that this hearing is a fact-finding mission. We are obviously not going to pass this bill out of the Senate or Congress this year, but I look forward to a lively debate and Senator McCain and I are open and committed to working with all of the stakeholders on their ideas for changes and edits before reintroducing this bill again next Congress which we expect to do.

Thank you very much and I yield to Senator Grassley.

OPENING STATEMENT OF HON. CHUCK GRASSLEY, A U.S. SENATOR FROM THE STATE OF IOWA

Senator GRASSLEY. I thank you, Mr. Chairman. You have been very thorough in your explanation and purpose of the legislation. I particularly compliment you for taking on a strong, powerful force that you are taking on. That is what has to be done if you are going to make changes sometimes.

I thank the witnesses who are here and look forward to your testimony. I think we can all agree on one fundamental notion, no one likes sports blackouts. The sports leagues and their member teams do not like them, television providers do not like them and, of course, sports fans definitely do not like them.

A particular issue in Iowa is that we do not have any major league teams, so the entire State, one way or another, falls within the blackout territory of six different teams: the Cardinals, the Royals, the Twins, the Brewers, the Cubs, and the White Sox. I can tell you the periodic blackouts are a very frustrating experience for the fans of my State.

So there is no question that blackouts are an exasperating experience and disfavored. The question is how best to minimize blackouts and maximize the benefits to the consumers while also respecting the rights of private parties to negotiate with each other at arms length.

On that note I will add one other comment. As we all know, the Federal Communications Commission voted unanimously in September to eliminate its sports blackout. I think as a general matter, the Federal Government should not be in the business of mandating policies that parties are otherwise free to negotiate privately. At the same time, however, I think we need to be mindful of the flipside of the same coin. More specifically, as a general rule the Federal Government should not be in the business of mandating which provisions should not be included in private contracts. Anytime such a step is proposed, we should tread carefully.

So the Chairman just said he is beginning discussions on this in consideration of it and I am happy to join in that dialogue. So I thank the witnesses once again and look forward to the hearing as a start of that dialogue.

Senator BLUMENTHAL. Thanks, Senator Grassley, and thanks for your excellent remarks. We are going to—I apologize—take a recess now. I want to thank the witnesses for your patience. We will be back literally as soon as we can and we will take the second panel at that time. Again, my thanks and my apologies. We will be right back. Thank you.

[Whereupon, at 10:36 a.m., the hearing was recessed.]

[Whereupon, at 11:30 a.m., the Committee reconvened.]

Senator BLUMENTHAL. We will come to order. I am going to recognize Senator Lee for an opening statement and then we will proceed to the second panel of witnesses.

OPENING STATEMENT OF HON. MICHAEL S. LEE, A U.S. SENATOR FROM THE STATE OF UTAH

Senator LEE. Thank you, Mr. Chairman. First of all I want to start by thanking you, Senator Blumenthal and Senator McCain for bringing this important matter to the attention of the committee. I think you have raised an important question.

No one really likes sports blackouts, least of all the public. Yet as we all know, Congress has permitted professional sports leagues to operate outside of our antitrust laws in order to have them. We have done so on the theory that without blackouts fans might stay home and watch the game on TV while the ticket sales necessary to support the team might dwindle as a result.

That economic assumption has now been called into question. The proponents of the bill argue that there is no evidence to support it. Fans, they say, will attend games if the ticket price is right regardless of whether they could also watch the game at home as an alternative.

At the moment, however, I am not yet prepared to support the FANS Act without additional study on my part. I am particularly concerned that the bill might unsettle some legitimate contractual expectations the sports leagues have bargained for with broadcasters without an appropriate phaseout period. I would also like to take a closer look at the economic evidence on both sides of this issue.

But I agree that the issue certainly merits the attention of Congress. Professional sports leagues have asked for and have received exemptions from the competition laws that most other American businesses are required to comply with. Those antitrust laws are an important and effective tool for ensuring free markets and protecting low consumer prices.

As Ranking Member of our Antitrust Subcommittee, I take a keen interest in ensuring that our competition laws are functioning well and having their desired effect of protecting, competition. For that reason, I am certainly open to examining in the future whether the antitrust exemptions enjoyed by professional sports leagues in their current forms rest on sound justifications and if not, how Congress might act to modify those exemptions.

Thank you very much Mr. Chairman.

Senator BLUMENTHAL. Thank you, Senator Lee. I am going to ask the next panel to please come forward and take your seats. And actually before you take your seats, why do I not swear you in which is, as you know, the custom of this committee.

Do you affirm that the testimony you are about to give is the truth, the whole truth and nothing but the truth so help you God?

Mr. LAKE. I do.

Mr. GOODFRIEND. I do.

Ms. GREENBERG. I do.

Mr. WALDRON. I do.

Senator BLUMENTHAL. Thank you. By way of introduction, let me give a brief bio of each of the witnesses today.

William Lake is the Chief of the Media Bureau at the Federal Communications Commission. He has served as the DTV Transition Coordinator for the FCC, Counsel to the Administrator at the Environmental Protection Agency, and Principal Deputy Legal Advisor at the U.S. Department of State. He was also a partner at Wilmer Cutler Pickering Hale and Dorr.

David Goodfriend is the founder and chairman of the Sports Fans Coalition, the largest multi-issue public policy organization for fans. He is currently the president of Goodfriend Government Affairs and he has served as Deputy Staff Secretary to President Clinton and Media Legal Advisor to Commissioner Susan Ness at the FCC. He also previously served as vice president of the law and public policy at DISH Network.

Sally Greenberg is the executive director of the National Consumers League. She has testified numerous times before Congress on consumer protection issues. From 2001 to 2007 she worked at Consumers Union. She served for many years on the Board of Directors of the Alliance for Justice and HALT, an organization that focuses on protection of consumer rights in their interaction with lawyers and the legal system.

Gerard Waldron is a partner at Covington and Burling, representing a range of technology companies, online social and media companies and communications client before the FCC and Congress. Before joining Covington, Jerry served as the Senior Counsel on the House Subcommittee on Telecommunications and worked on the committee staff for over 10 years.

Thank you all for being here today. Let us begin with

Mr. Lake.

STATEMENT OF WILLIAM T. LAKE, CHIEF, MEDIA BUREAU, FEDERAL COMMUNICATIONS COMMISSION, WASHINGTON, DC

Mr. LAKE. Good morning Senator Blumenthal and Senator Lee. I am Bill Lake, Chief of the Media Bureau at the Federal Communications Commission. I am pleased to appear before you today to discuss the recent FCC action to eliminate our sports blackout rules.

A bit of history may provide useful context for our action. Our sports blackout rules specifically prohibited cable and satellite operators from airing any sports event that had been blacked out on a local broadcast TV station pursuant to a private blackout policy adopted by a sports league.

The Commission adopted a sports blackout rule for cable in 1975, finding that the rule was necessary to ensure that cable importation of distant signals would not reduce ticket sales and thus, lead sports leagues to refuse to sell the rights to their events to distant stations, which could in turn reduce the availability of sports pro-

gramming to TV viewers—which was the principal concern of the Commission. We later adopted similar rules for satellite carriers and open video systems.

As you know, the Commission voted unanimously to eliminate the sports blackout rules on September 30 of this year finding that they were unnecessary and outdated today. The repeal of the rules took effect on November 24.

The Commission's action followed an open and transparent public process that began in 2011 when the Sports Fans Coalition filed a petition for rulemaking with the Commission. After careful review of the comments we received in the proceeding, the Commission found that significant changes in the sports industry since the rules were adopted had eliminated the justification for the rules.

First, for the NFL, the only league for which the Commission's sports blackout rules continued to be relevant, ticket sales are no longer the primary source of revenue. The massive popularity of pro football means that the primary source of income for the NFL has shifted to television, with TV revenues now the NFL's main source of revenue approaching $6 billion this year. Total NFL revenues reportedly exceeded $10 billion in 2013.

Second, the increased popularity of NFL games has brought fans to the stadiums in numbers that make blackouts exceedingly rare. In 1975, almost 60 percent of NFL games were blacked out because they failed to sell out. Last year only 2 of 256 regular-season NFL games, less than 1 percent, were blacked out, and no games have been blacked out so far this year. Moreover, in recent years, blackouts have affected only a few NFL markets such as Buffalo, Cincinnati, and San Diego.

Finally, the Commission determined that the impact on consumers of eliminating its sports blackout rules would be minimal. The NFL's existing contracts with the broadcast networks extend through 2022, keeping games on over-the-air stations through at least that timeframe. Beyond that, the Commission found it is highly unlikely that the NFL would find it more profitable to move its games from over-the-air stations to pay-TV in the absence of the sports blackout rules.

In conclusion, I would like to note that I am limiting my testimony to the Commission's decision and its rationale. Elimination of our rules does not prevent the sports leagues from continuing to have a sports blackout policy, and the Commission does not take a position on whether Congress should eliminate or modify existing antitrust exemptions that allow leagues to have such blackout policies in the first place.

Again, thank you for the opportunity to appear before you today. I will be happy to take your questions.

Senator BLUMENTHAL. Thank you, Mr. Lake.

Mr. Goodfriend.

STATEMENT OF DAVID R. GOODFRIEND, CHAIRMAN, SPORTS FANS COALITION, WASHINGTON, DC

Mr. GOODFRIEND. Thank you, Senator—thank you Senator Blumenthal and Senator Lee and Senator Klobuchar. Members of the committee, we appreciate very much the fact that you have invited Sports Fans Coalition to testify on the FANS Act.

My name is David Goodfriend and I am the founder and chairman of Sports Fans Coalition, the nations largest multi-issue fan advocacy organization in the public policy arena. Founded in 2009, we now have tens of thousands of members from across the USA and are led by a bipartisan, diverse and seasoned Board of Directors.

The Government should not subsidize or support anti-fan activities by professional sports leagues. When a sports league receives a public benefit, the fan should get a fair return or the subsidy should go away. That is why Sports Fans Coalition is proud to have lead the successful effort to end the FCC's sports blackout rule.

The NFL's blackout policy prohibits a local broadcaster from televising a game when tickets do not sell out 72 hours before kickoff. The FCC rule, as you have just heard, bolstered that anti-fan policy by requiring pay-TV companies, likewise, to impose such blackouts. The efforts of Sports Fans Coalition, National Consumers League, and others culminated in a unanimous five to zero vote this past September 30, to end the FCC's 40-year-old anti-fan sports blackout rule. And we could not have done it, Senator Blumenthal, without support from you, Senator McCain, and others. So thank you for that.

That was a great moment for fans, but the NFL's policy remains in place. The NFL should end its local blackout policy once and for all, effective immediately. Fans hate local blackouts and you know this. But just listen to to fans who told the FCC how they feel.

Denis Steinmiller from North Tonawanda, New York, said, "I am a disabled Vietnam vet. I also suffer from post-traumatic stress disorder. I am unable to attend the Bills games because of my disabilities. Watching the Bills on TV is one thing I look forward to every year as well as to help me with my PTSD. Please put all of the games on TV for me and the others who gave much of ourselves for our country."

Or listen to Mary Bash from Masaryktown, Florida, who said, "For people like me who are disabled, this blackout rule is discrimination against people with disabilities. I cannot physically attend a live game at any arena. I am stuck at my home with only the television to bring me to sports or anything else that I enjoy watching. The NFL blackout policy from the 70s does not reflect the times of today. Technology has changed. The NFL's market has changed. Where do they think all of that money comes from? It is us, the consumer, who buys the products from their advertisers. It is us, the taxpayer, who built most of those arenas. It is us, the American citizen, who continues to foot the bill."

Real fans. Real comments submitted to the FCC. But the fans are not alone. We saw economists from Stanford, Michigan, and other institutions submit detailed declarations to the FCC explaining why the NFL's blackout policy does not even serve its stated purpose of getting more fans into seats.

Listen to other professional sports leagues. We submitted depositions from the commissioner of baseball and the commissioner of hockey who said under oath, we got rid of our blackout policy because it does not work. And the FCC agreed with all of this when they got rid of their own sports blackout rule.

Now the NFL should do the right thing. It should listen to fans, economists, other leagues, the commissioners, the FCC, the Members of Congress and end its local blackout policy. But failing that, Congress should pass the FANS Act.

The antitrust statutes currently shield leagues from liability when imposing local blackouts and the FANS Act would eliminate this "get out of jail free card." Sports Fans Coalition also believes that fans should not be used as pawns during contractual disputes between big TV companies. The FANS Act would take care of that too.

Finally, I would like to make clear that Sports Fans Coalition fully supports putting as many games as possible on free over-the-air broadcast TV. The migration of sports off broadcast TV has created problems. All you have to do is look at Los Angeles where Time Warner Cable took over the television rights of the L.A. Dodgers and what happened? Seventy percent of L.A. fans could not watch their Dodgers play in a great season because they did not have Time Warner Cable.

So when major league baseball and the L.A. Dodgers have received so much public subsidization, fans should have a better access to those games and putting them on broadcast is one way to do that. Perhaps a revised FANS Act could require all sports leagues to maintain just a certain amount of games on free over-the-air TV so that fans have access to at least some games.

Thank you and I look forward to answering any questions.

Senator BLUMENTHAL. Thank you very much, Mr. Goodfriend.

Ms. Greenberg.

STATEMENT OF SALLY GREENBERG, EXECUTIVE DIRECTOR, NATIONAL CONSUMERS LEAGUE, WASHINGTON, DC

Ms. GREENBERG. Good morning Senator Blumenthal, Senators Lee, Klobuchar and Franken.

My organization, the National Consumers League, was founded in 1899. We are the Nation's pioneering consumer organization and our nonprofit mission is to advocate on behalf of consumers and workers in the United States and abroad. We very much appreciate your inviting the consumer point of view for this very important bill, S. 1721.

I'm delighted to see my fellow Minnesotans here because I grew up going to Minnesota Viking games and Minnesota Twins games. I am an avid fan. I love watching professional sports, but like me, millions of Americans define themselves, in part, by the teams they support. However, the professional sports leagues are also multibillion dollar businesses that benefit from a multitude of public subsidies.

These take the form of exemptions from Federal antitrust laws, tax breaks and public funding for stadiums, infrastructure support from municipalities and blackout policies that benefit the leagues and their broadcast partners. As the leagues enjoy huge profits, taxpayers are right to question what they receive in return for these public benefits.

For example, a Harvard University study recently calculated that seventy percent of capital costs of National Football League stadiums have been provided by taxpayers whether they are sports

fans are not. A 2012 Bloomberg study estimated that tax exemptions on interest paid by municipal bonds issued for sports facilities cost the U.S. Treasury $146 million a year. Over the life of the $17 billion of exempt debt issued to build stadiums since 1986, taxpayer subsidies to bondholders will total $4 billion.

Lavish public subsidies for stadiums are not the only way that taxpayers subsidize professional sports. The rising cost of acquiring sports programming is also a significant driver of rising cable bills which have gone up at more than three times the rate of inflation since 1998. Due to the widespread practice of channel bundling, the increasing cost of sports programming are passed along to all cable and satellite subscribers regardless of whether they actually watch sports.

Sports programming costs are also a major driver of the fights between broadcasters and cable television providers over retransmission fees that have contributed to the increasing number of programming blackouts. In return for the Government largess lavished on sports leagues, consumers are right to be outraged when essential services are cut to subsidize unaffordable tickets at publicly funded stadiums.

Cable and satellite subscribers, fans and nonfans alike are angry that their bills go up due to ever higher sports programming costs when the games even make it on the air. The game is clearly rigged in favor of the professional sports leagues and taxpayers are getting the short end of the sick. So it is, indeed, time for Congress to step up and began to level the playing field.

That is why NCL is proud to support the FANS Act. The bill would benefit consumers in a number of ways by reigning in cable rate hikes, reducing incentives to blackout games and giving consumers access to online game broadcasts. To elaborate, the bill conditions sports leagues antitrust exemptions on the requirement that their broadcast partners not blackout games as a result of contractual disputes with cable and satellite companies.

NCL believes the consumer should not be used as pawns in disputes over retransmission fees. Thus, the bill helps to reduce the incentive to use blackouts as a negotiating tactic and promises to reduce the frequency of these programming interruptions.

Second, the bill eliminates the antitrust exemption for local sports blackouts in the event that games do not sell out their tickets. This will benefit millions of fans in smaller markets such as Buffalo, many of which have larger stadiums but smaller populations and thus, are less likely to sell 85 percent of their seats.

Third, the bill benefits consumers living in teams' overlapping broadcast territories by conditioning the League's antitrust exemptions on the provision of alternative platforms like the Internet. This would particularly help major-league baseball fans who live in States like Arkansas, Connecticut, Nevada, Oklahoma that are overlapped by separate clubs in their home television territories and thus, subject to local blackouts.

Finally, the bill corrects a historical anomaly by bringing major-league baseball under the auspices of the Clayton Antitrust Act in the same way as the NFL, NBA and NHL are currently treated. In doing so, the statutory conditions placed on existing antitrust exemptions by this bill would also apply to MLB.

In conclusion, I would like to reiterate our strong belief that the FANS Act addresses some of the unfair and unbalanced subsidies and preferential policies like antitrust exemptions that professional sports leagues enjoy at the expense of taxpayers and sports fans alike.

Thank you very much.

Senator BLUMENTHAL. Thank you very much, Ms. Greenberg.

Mr. Waldron.

STATEMENT OF GERARD J. WALDRON, PARTNER, COVINGTON AND BURLING, WASHINGTON, DC

Mr. WALDRON. Good morning, Senator Blumenthal, Senator Lee, Senator Klobuchar and Senator Franken and Members of the committee. My name is Jerry Waldron and I am here today in my capacity as outside counsel to the National Football League on television related matters.

I appreciate the opportunity to discuss the NFL's commitment alone among the professional sports leagues in ensuring that all of its games are available across the country via free over-the-air television. For more than five decades, the Sports Broadcasting Act has been a key component in this strategy enabling the NFL, major league baseball, the NBA, and the NHL to put their games on broadcast television.

In the NFL's case, the League has agreements to put all 256 regular-season games and all playoff games on free TV. That is a claim that no other sports league can make about all of its playoff games, let alone all of its regular-season games. Quite simply, the sports broadcasting act is working to benefit fans and the public interests. For this reason, the FANS Act which attempts to dictate business decisions, would ultimately be harmful to fans.

For context, the NFL strategy serves three main goals. First, because NFL teams generally play once each week, the League tries to make each game a special event and obtain the widest possible audience for those games. Second, the League wants to encourage strong fan support in each local market. And third, the broadcast television agreements generate substantial revenues that are shared equally by the 32 NFL clubs. Thus, clubs in Buffalo, Green Bay or Minneapolis receive the same amount from TV contracts as teams in the New York City and Chicago media markets.

To promote these goals, the NFL has long maintained a blackout policy which is incorporated into the League's contracts with the broadcast networks. The hallmarks of NFL games are full stadiums, excited crowds and competitive games. Sold-out games improve the experience both for fans in the stadium and for those watching on television. Increased attendance at games also helps to support local jobs, businesses and taxes.

The League's business judgment is that it serves these objectives well. While some may disagree with the League's television policy, strong television ratings matched with high attendance demonstrates that the policy is working.

The debate about blackouts of NFL games should be seen in context. NFL game blackouts are at an all-time low. Last season only two games were blacked out across the League. This season there have been no blackouts. So over the past season and two thirds,

with almost 450 NFL games played, there have been just two blackouts. This reduction reflects adjustments in the NFL's blackout policy that the League has made over the years to promote both game attendance and viewership.

The sports broadcasting act encourages broad-based game viewership. Congress passed a law in 1961 to enable league agreements with broadcast networks and a sharing of revenues. Under the SBA, the NFL has created the most proconsumer television plan in sports today. The NFL has maintained its commitment to broadcast television even in extending its contracts to 2022 with its broadcast partners despite the dramatic change in the broadcast industry and, frankly, trends by the other sports leagues off of free TV and toward paid television.

The FANS Act proposes changes to the SBA that would ultimately harm fans by creating uncertainty around the future of sports on free television. A possible result would be to migrate popular sports programming from free broadcast television to pay-TV.

This committee has long cautioned against such a move. The FANS Act proposes untenable conditions on the SBA's antitrust provisions. The bill would deny a sports league the antitrust provision if third-parties, such as a television station and a cable or satellite company, have a contract dispute.

Yet, the NFL is not a party to those contracts and has absolutely no control over the outcome of these disputes. No business can plan its operation under laws that could change at a moments notice due entirely to the actions of third parties.

In conclusion, NFL television policies made possible by the SBA bring fans across the country a wide range of outstanding television content each week. The NFL and the other sports leagues practice of televising games on free over-the-air television is made possible by the SBA. These arrangements benefit fans and are in the public interest thus, the underlined policies should not be altered.

Thank you and I will take any questions.

Senator BLUMENTHAL. Thank you, Mr. Waldron. I have some questions that I am going to pose to you and then yield to my colleagues. I particularly am grateful to Senator Klobuchar, the head of the Antitrust Subcommittee of the Judiciary Committee, for being here today.

You mentioned the uncertainty of fans. The reason for their uncertainty right now is the potential deprivation they suffer from blackouts. There may have been few this year, but the potential for blackouts is what creates their apprehension that they may be deprived of access to these games.

So I wonder whether you have additional evidence that was not presented to the FCC that you have to present to this committee or whether it is your contention that the FCC failed to consider the evidence that you presented in reaching its conclusion.

Mr. WALDRON. Senator, I have sort of two comments. One, it was mentioned that a sports economist provided a study. Actually, Dr. Hal Singer also provided a study on the sports economists saying that an important reason why the NFL keeps games on broadcast television is because it is able to control its product. So there was

conflicting evidence before the FCC. I respect what Mr. Lake said, that the FCC made one conclusion.

The NFL's business judgment is that this is very important. But I think it misses sort of a larger point. Senator, with respect to your constituents, they have seen every Giants game this year, last year, the year before, the year before that, all the way back to the early 1990s.

If you look at the Knicks games, all of those Knicks games are on cable television. They have to pay $80 a month to get their Knicks games, to get their Rangers games and to get almost all of their Yankees games. But they have seen every one of their Giants games and I daresay every one of the Jets games going back for that same timeframe.

So I recognize that there are blackouts of NFL games. They are few and far between, but the NFL's commitment to broadcast television, actually, I think stands out among the other sports leagues.

Senator BLUMENTHAL. But the threat continues to exist in Connecticut and around the country that they will be deprived of access to those games. And if the reality is that they are seeing the games anyway, why continue with the threat of blacking them out?

It seems to me that your contention is that the blackout policy is essential to your business policy. In fact, it is the antitrust exemption that is essential to your business policy. Without the antitrust exemption you would not be able to negotiate the enormously lucrative broadcast agreements that you have and the revenue-sharing pacts that you enjoy and as a condition for receiving that very public and unique benefit, why not eliminate the threat to Connecticut consumers and others around the country, fans across the United States that simply because of a failure beyond their control of big business interests to reach an agreement, they may be deprived of access?

Mr. WALDRON. I recognize that the Sports Broadcasting Act gave an exemption to all of the sports leagues. In our view, the NFL has used that exemption very responsibly by putting overwhelmingly its games on television. But to be clear, major league baseball testified last year before the Senate Judiciary Committee, the only reason why the World Series is on Fox television is because of the Sports Broadcasting Act.

So it ensures that broadcasters—and I would say, if you look at the NFL in comparison to the other leagues, I think the League has used its antitrust exemption very responsibly by putting so many of its games, all of its regular-season games and all of its playoff games on free television. I acknowledge that there is—last year there were two. This year there have been none so far, that they are few and far between, but the overwhelming number of games are on television and we think that is a responsible use of the SBA provision.

Senator BLUMENTHAL. And the overwhelming number of games also are sold out in the stadiums. Are they not?

Mr. WALDRON. Yes, that is correct. Yes.

Senator BLUMENTHAL. So why the blackout policy?

Mr. WALDRON. Because we think over the long term it has served to promote that benefit. It is easy to—remember that in the late 1990s, 25 percent of games actually were still being blacked out.

Senator BLUMENTHAL. In fact, are there not other actions that the teams regularly take? During the 2012 season, the Miami Dolphins bought tickets to prevent a blackout for seven of its eight home games. The Jacksonville Jaguars have covered approximately 10,000 seats at EverBank Field with tarps since 2005, reducing their stadium capacity from 76,000 to 67,000.

The teams regularly take actions to fill their stadium, giving away tickets, selling them for less than face value so as to avoid blackouts. Why not just eliminate the blackouts?

Mr. WALDRON. Well, Senator, I view that activity as very pro-fan. I think it is evidence that the clubs actually understand. Look, the NFL does not want blackouts. The clubs do not want blackouts. Senator Lee and Senator Grassley both made that point in their opening statements. No one likes blackouts and that includes the NFL.

So I think the examples that you have shown are clubs trying to respond and the League has adjusted its policy to be more responsive. We think over the long term it has served and it is in the business judgment of the League that it has served it, but as that shows, clubs take extraordinary examples to avoid them.

Senator BLUMENTHAL. I am going to continue this conversation with you and the other witnesses, but I now turn to Senator Klobuchar.

Senator KLOBUCHAR. Thank you very much Senator Blumenthal. Thank you to all of the witnesses.

I thought I would start with you, Mr. Waldron. The blackout rule was put in place in 1961. Is that right?

Mr. WALDRON. The Sports Broadcasting Act was adopted in 1961. The FCC's rule was put in place in 1975.

Senator KLOBUCHAR. All right. Good. Well, most of the money made by sports tickets—it has been pointed out in the testimony—from that time came from ticket sales. But today NFL games are consistently among the most popular television programs, certainly in my State where we are proud of the Vikings. With that, comes a significant increase in revenue—as has been pointed out by the other witnesses—for the League.

The cost of tickets has also significantly increased. It is a big expense. Do sports teams need blackout rules the same way they did half a century ago? If not, why do we still have the same rule?

Mr. WALDRON. No question that those facts are all right. I will say—and this is in the record—it may surprise people that as much as a quarter of the revenue of the NFL still comes from ticket sales. So ticket sales still sort of remain important.

The NFL has a balance. They want to have popular games on television and they want to have a stadium that is full. You can imagine a scenario in which—the other sports, they play 162 games or 82 games. So every game is not a special event.

In the NFL they work hard to make every game a special event. So they try to balance that, maximizing the full stadium capacity with the engaging of the fans on television. It is a balance and they have, frankly, adjusted that balance over the years. So we do think that the blackout policy sort of strikes that balance correctly by encouraging fan attendance and also encouraging fan engagement over television.

Senator KLOBUCHAR. Thank you. Mr. Lake, the FCC unanimously voted to repeal its sports blackout rules which prevented cable and satellite operators from airing sports events blacked out on a local station. What prompted the FCC to change its stance and is there anything preventing the NFL or other sports leagues from negotiating blackout rules directly with cable and satellite operators now?

Mr. LAKE. What prompted the Commission's action was the change in the sports industry since 1975 when we adopted our rule. Principally, the two facts that the Senator has noted, in 1975, the principal source of revenue for the NFL was ticket sales, and over 60 percent of the games failed to sell out. Now those facts are both reversed. TV revenue is the principal source of revenue for the NFL and most games are sold out.

What the Commission concluded from that was that there was very little risk that elimination of the FCC's rule would lead the NFL to move its games from broadcast television to pay-TV. The objective of our rule from the outset was not to maximize the revenues of the sports leagues or the broadcasters, but to try to protect the right of viewers to see games.

At the time the rule was adopted, it was thought that the rule would help to keep games on broadcast TV by eliminating the risk that if a cable operator, for example, imported a distant station, this might lead the leagues to fail to sell the games to that distant station and more viewers would lose the right to see the games. We concluded that because of the changes in the industry, the risk no longer existed and therefore the rule was outdated.

I should note though that, to your last question, the Commission's action simply eliminates the support for the private blackout policies that was previously in the Commission's rules. That action does not prevent the leagues from continuing to implement their blackout policies as a private matter without FCC support. Although as I say today, blackouts are increasingly uncommon, the risk of blackouts continues.

Senator KLOBUCHAR. All right. Thank you. Does anyone want to add anything to that, any of our witnesses?

Mr. Goodfriend.

Mr. GOODFRIEND. Thank you Senator. I think this discussion would be helped by understanding how we got the law in the first place. We are talking a lot about the antitrust exemption as though it has always been there. Let us talk about how we got here.

In 1953, the United States Department of Justice Antitrust Division succeeded in litigation with the NFL on antitrust.

Are you commenting on the Packers tie?

Senator KLOBUCHAR. Yes. We are commenting on that. We just noticed it and it might not have been your smartest move given that half of the Senators here are from Minnesota right now.

[Laughter.]

Mr. GOODFRIEND. I was realizing that as I started talking. But we gave you Brett Favre.

Senator KLOBUCHAR. I mean we are not at all distracted. Are we Senator Franken?

[Laughter.]

Senator FRANKEN. I was just thinking of Senators Feingold and Kohl.

[Laughter.]

Senator KLOBUCHAR. They used to be——

Senator FRANKEN. How they would have enjoyed that.

Senator KLOBUCHAR. But we are on here now.

Mr. GOODFRIEND. Yes, you are.

Senator KLOBUCHAR. Continue on answering.

Mr. GOODFRIEND. I love the color purple. I am wearing a purple——

Senator KLOBUCHAR. All right. Yes, yes, yes.

Mr. GOODFRIEND. So 1953, *U.S. v. NFL*, the Department of Justice won a judgment against the NFL for violating antitrust laws. Why? Well, there were four things that the court spelled out.

Number one, the League restricted the broadcasts of games locally during a home game. Number two, the League restricted the broadcast of an away game in the home market. Number three, same restrictions with respect to radio and number four, a kind of blanket power given to the NFL commissioner to restrict broadcast overall.

The court said no. Three of those four violate antitrust laws. One, the restriction of broadcasting games locally during a home game, the judge allowed to stand. That was 1953.

In 1960, a new football league, the American Football League came along and did a deal with the ABC television network whereby it pooled all of the teams' broadcast rights and did one nationwide deal. So the NFL tried to do the same thing. It entered the same type of deal with CBS.

No, said the court. That violates our 1953 order. So what did the NFL do? It came right here to this committee, the U.S. Congress, and it said we need your help. How can it be fair that the AFL gets to pool its broadcast rights, but we do not? That is not fair. Congress agreed, and the Sports Broadcasting Act of 1961 was expressly designed to overturn the 1953 Eastern District of Pennsylvania decision while at the same time preserving that court's decision to allow local blackouts.

That is how we got here. It was to overturn a case brought by the United States Department of Justice during the Eisenhower Administration. So what does that mean for today's discussion?

The court in 1953 and Congress in 1961 both premised their decision on the importance of local ticket sales, on the importance of maintaining the economics of the League. That was over a half-century ago. It is perfectly legitimate for this committee to revisit the statute from 1961 and ask whether the same economic principles apply today.

We at Sports Fans Coalition believe they do not. Moreover, we think that anytime the Government gives a gift to a professional sports league, it is perfectly legitimate to ask, should any conditions be attached to that gift? Does the gift still make sense? It is, after all, a gift from the American people to a private multibillion dollar organization to get an antitrust exemption for your type of business practice.

Senator KLOBUCHAR. Thank you very much. My time has expired.

Senator BLUMENTHAL. Senator Franken.

Senator FRANKEN. Mr. Goodfriend, the threat of blackouts during retransmission contract disputes is especially concerning to me because that could potentially affect fans of any major sports league. Such contract negotiations seem to be growing increasingly contentious each year.

Last year, for example, negotiations between Time Warner Cable and CBS led to a month-long blackout of programming that affected millions of consumers. As you know, Comcast's proposed acquisition of Time Warner Cable is currently being reviewed by the FCC and the Department of Justice.

It is a deal that would unite the two largest cable operators in the country, and in my view—as I have made very public—it should be rejected. I think it is simply a bad deal for consumers. I do not believe it would improve service or choice and I believe that it will result in higher prices.

A combined Comcast-Time Warner Cable company would exert particular power in the sports programming market. Mr. Goodfriend, you have noticed that both companies have long track records of trying to prevent individuals who do not subscribe to cable from viewing games. Can you explain what that means and tell us what you think the implications of the proposed acquisition deal would be for sports fans?

Mr. GOODFRIEND. Thank you, Senator Franken. Let me just note that Sports Fans Coalition is on record opposing the Comcast-Time Warner Cable merger and filed a petition to deny at the FCC to that effect.

Your question regarding the effect on sports—my learned friend from Covington and Burling mentioned Hal Singer, the economist who opposed us in the sports blackout proceeding. Interesting to note, Mr. Singer also authored a paper that we cited extensively in our pleading that said when a cable company owns a regional sports network, the tendency is for fans who do not subscribe to that cable company to not be able to see the game. That is the trend. As opposed to, let us say, an independent regional sports network that is carried more widely on other providers.

Mr. Singer and his colleagues went on to conclude that the bigger the local cable company, the worse the problem gets. And that just makes sense intuitively. If I am going to give up some revenue by not sharing my sports with you, the smaller you are, the bigger I am, the less of a loss it is to me. So that was the conclusion of Singer et al.

Now, in the context of the proposed merger between Comcast and Time Warner Cable, take a market like Los Angeles. Los Angeles today has Time Warner Cable and as I mentioned earlier, Time Warner Cable owns a regional sports network. The merged entity would acquire roughly a quarter of a million new subscribers from Charter.

So what does that mean? The local cable company is getting bigger. As a result, the trend we already see today, when Time Warner Cable owns Dodgers games and will not televise those games to most fans, it is just going to get worse if the cable footprint gets bigger. So that is why Sports Fans Coalition has chosen to oppose the merger.

Senator FRANKEN. Thank you. I am going to get on a little bit of a different subject, but I think—Mr. Waldron, this is addressed to you. We have spoken a lot today about the significant taxpayer support and public benefits that sports leagues, including the NFL, enjoy. I think that as a country we provide such enthusiastic support for professional competitive teams, at least in part, because we recognize all of the ways in which they can enrich our culture.

Yet, we have a team in the NFL that continues to call themselves by an offensive name, a racial slur. The use of the name is hurtful and insulting to so many people in our country, including in my home State of Minnesota where we have a large and vibrant Native American community. I have heard from Tribal leadership in my State who understandably find this name offensive and harmful, as do I. A simple step would be for the NFL to address the need for a name change. What is the League considering doing at this time?

Mr. WALDRON. Senator, I recognize the importance of your question. I am not in a position to answer it. I advise the League on television matters, but I will consult with them and get back to you with an answer.

Senator FRANKEN. I would appreciate that. Thank you.

Mr. Chairman.

Senator BLUMENTHAL. Thank you, Senator Franken.

Just to continue with some of what we were discussing and I think Mr. Lake addressed part of this issue.

Mr. Waldron, I guess it is your contention that the FCC failed to consider certain evidence and therefore reached the wrong conclusion by a 5–0 vote?

Mr. WALDRON. Sure. I am not embarrassed to say that. I think it is an assessment of uncertainties and Mr. Lake cannot prove that he is right any more than I can prove that Mr. Lake is wrong when he said the FCC's prediction was changing the sports blackout rule will have no effect on what the NFL does with respect to it.

Their judgment in looking at the evidence and looking at the sports economists study and the Dr. Singer study that Mr. Goodfriend cited, they said no. That was their judgment looking at the evidence. The NFL has been at this for 50 years. It actually wants to maximize the number of people in the stadiums.

Senator BLUMENTHAL. But things have changed over that 50 years.

Mr. WALDRON. I understand that and they watch this every week. I assure you the NFL watches this every week.

Senator BLUMENTHAL. Is not the present policy in effect to the disadvantage of certain cities over others, certain fans over others? For example, the Ralph Wilson Stadium in Buffalo represents 28 percent of the population in that city. That stadium can hold 28 percent of the population compared to the capacity of Soldier Field in Chicago which represents 2 percent of the population of that city. The stadiums in the New York area, probably even a smaller percent which may be the reason that they are regularly filled.

But the threat is there for all fans, New York, Connecticut—maybe it falls more heavily on Buffalo, Cincinnati, San Diego, Tampa Bay where economic recession population trends may have

made the markets less robust. Is there not a discriminatory aspect here? Also, insofar as it, frankly, hits the elderly, disabled and folks who cannot attend because of the price?

Mr. WALDRON. Two parts to that answer—the first is I think the League has recognized that different stadiums and different clubs are in different situations which is why it has adopted and adjusted its policy and adopted more flexibility. Frankly, the flexibility that was adopted in—I believe it was 2011 or 2012, frankly, it has benefited the very clubs that you mentioned, sort of Tampa and San Diego and Cincinnati. That is one of the reasons why we have not seen.

To the point about the elderly—and we have all seen the studies. It may surprise people, but——

Senator BLUMENTHAL. If I may—and I will let you finish on the elderly and disabled and people of modest means who may not be able to afford tickets right now. If you are worried about filling the stadiums, why not just lower the ticket price? That is the way the market normally works.

You have the immense benefit of an exemption from normal market forces in the antitrust exemption. Why be greedy about it? The antitrust exemption are the keys to the kingdom. They are the gold mine for you and it seems to me you continue to take a step too far. Is it not in your own enlightened self-interest to eliminate the blackout rules—step to legislation?

Mr. WALDRON. Well, I will say all of the sports leagues enjoy that exemption. Congress passed it to actually benefit the public by putting sports on free television. That was the judgment when Congress passed it in 1961. But yes, it has been a benefit to the League. I do not want to suggest otherwise, Senator. We recognize that. But I think it also has been a sort of benefit to the public in that regard.

The Dr. Singer study that was cited earlier, he actually found that it actually does have a downward pressure on prices for the very reasons that you cite which is that if you want to put people in the seats, then you are going to lower your prices and you actually have an incentive. Because of the blackout policy, clubs have that incentive that you sort of point at.

But I do not want to lose sight of your very important comment about the elderly and Latinos. Many of those same people actually cannot afford cable. And yet to watch every Sabres game they are going to have to pay $80-$100 a month to watch every Sabres game and that is for 6 months of the season. To watch their Bills—everyone wishes they would watch all of their games, but they certainly watch all of their away games. Every Buffalo Bills away game is on free, over-the-air television in Buffalo and as many as are sold out.

So we think that the League has actually used its benefits under the SBA responsibly and to benefit the public.

Senator BLUMENTHAL. I am going to ask some of the other witnesses to respond to the points that you have made very well, Mr. Waldron.

Mr. Lake, in essence, I think you have heard Mr. Waldron say that the FCC could and should have adopted a contrary conclusion. What would you say to that?

Mr. LAKE. We held a public proceeding in which we received extensive comments from a wide variety of parties, including conflicting presentations by economists. The conclusion of the five unanimous Commissioners was that based on that record, elimination of our sports blackout rule would not be likely to lead the League to move their games off of over-the-air television and on to pay-TV.

We also noted, the Commission noted that the contracts today extend through 2022, so that ensures that they will remain on over-the-air television until at least within that period.

Senator BLUMENTHAL. So the FCC, in essence, to put it from the fan's perspective, found no uncertainty as to what would happen to broadcasts?

Mr. LAKE. They certainly concluded that the very likely result is that this would not take games off of over-the-air television.

Senator BLUMENTHAL. Mr. Goodfriend, do you agree with that conclusion and particularly as it affects the smaller cities and fans in those cities and the threat to fans in larger cities as well?

Mr. GOODFRIEND. Well, Senator, you will note from our prior conversation, I am wearing a Green Bay Packers tie, so I care about small market teams very much. And I think it is a little bit of a red herring to argue that all this is made possible solely by the beneficence of the U.S. Congress in granting the antitrust exemption.

The NFL is not running a charity. They are a highly profitable multibillion dollar organization. They put their games on television because that is where the money is. They put their games on broadcast because that is where the audience is. The day that Pepsi and Budweiser and GM stop paying top dollar for top ratings on broadcasts, we will see a change. But until that day comes, the NFL is maximizing its revenues as any rational business actor would.

Now, Professor Rod Fort at the University of Michigan, in the submission that he made to the FCC, pointed out that even under the most exotic assumptions, the threat of a local blackout might put a few thousand more people in seats on any given Sunday. Contrast that with the loss of revenues from taking a game off broadcast. It would be in the millions, perhaps tens of millions.

So, Professor Fort concluded the rational economic actor would say, I am not going to give up all of that money on the broadcast TV side just to put a few thousand more people in seats. That is why, intuitively, you could say there really is not going to be too much of a connection between putting games on broadcasts and having a local blackout policy or an antitrust exemption that sustains it.

Rather, the League will make money. That is what it does best. And if it thinks it is going to make more money putting games on broadcasts, then it will do so. If it thinks it is going to make more money putting it on ESPN, as we saw with Monday Night Football, or putting games on Thursday night on the NFL Network, it will do so. It already has.

So I think it is important to differentiate between what the League gets from its local blackout policy and broadcast TV. I think it is a red herring to threaten taking games off broadcasts

unless we get this antitrust exemption for local blackouts. The numbers just do not add up.

Senator BLUMENTHAL. Ms. Greenberg, what does this mean for ordinary consumers and fans? How are they impacted?

Ms. GREENBERG. Well, there is a problem with fans being able to afford to go to games. Our figures are that from 2010 to 2013 the cost for a family of four to attend an NFL game increased by 8 percent to $459.

So that is out of the—pun intended—the league of many, many families. So, of course, they turn to free broadcasts to get access to their games.

I am curious about something that Mr. Waldron has said on several occasions, that the NFL has evidenced a lot of flexibility about the blackout rule and wonder what evidence there is of that. I think what we are really talking about, as David has just pointed out, it is enormously profitable, not an act of charity on the part of the NFL. It is enormously profitable for the League to have games on broadcast television and that is why they do it, not because they are so flexible.

I do not understand, as you pointed out, fighting this blackout rule issue when it does not seem to be a problem for them and they could be part of the solution instead of being part of the problem. So for fans, it is obviously critically important for those fans who cannot make it to the game—for physical disabilities, because the costs are too high, because they have kids at home—I am puzzled by why the NFL is fighting your very, I think, sensible proposal.

Senator BLUMENTHAL. Mr. Waldron, has any consideration been given within the NFL—I know you cannot speak for other leagues—but within the NFL to changing the blackout rule?

Mr. WALDRON. After the FCC repealed its rule in late December, Commissioner Goodell said that he was going to study it and my understanding is that the owners' committee is studying this issue.

Senator BLUMENTHAL. And is there a time line for it possibly, actually, reversing the rule?

Mr. WALDRON. I am not aware of any time line for that, Senator. I can get back to you. I am not aware of any time line.

Senator BLUMENTHAL. If you could let us know whether there is any time line for the committee reaching a conclusion, I would appreciate it.

Mr. WALDRON. All right.

Senator BLUMENTHAL. What will be the determining factors in the consideration that the owners and they are the ones who decide? Am I right?

Mr. WALDRON. Yes.

Senator BLUMENTHAL. What will be the determining factor in their decision?

Mr. WALDRON. Well, it is a really good question and I will come back to a comment that was just made. My colleague, Mr. Goodfriend, referred to an economist's study that said blackouts actually increase ticket sales by 4,000. That is actually the League's contention and so that is the balance that the League has faced which is we want to have fans in attendance and we want to have games on television. That is the balance that we face and it has been adjusted over the years in order to, frankly, take care of some

of the large stadiums that were out there and lots of sort of consequences.

So that is the consequence which is the incentive for fans to attend as well as maximizing broadcast television because we do not like blackouts. No one likes blackouts, but they sort of look for that balance. So that is exactly what the owners' committee is looking at.

Senator BLUMENTHAL. I would strongly encourage them to do the right thing on their own. I think they would become heroes rather than the opposite which they are now. It is an outdated really outmoded obsolete rule which in many respects, to be very blunt, the owners seem to work hard to avoid imposing as a matter of practice. That is why they issue free tickets or low-priced tickets or fictionalize their attendance in other ways. I do not mean fictionalized in the sense of any fraudulent activity, but——

Mr. WALDRON. I understand.

Senator BLUMENTHAL. They go through the pretense of filling a stadium so as to avoid a blackout, which is against their interests and the threat of the blackout gives them a black eye no matter what they do. So I look forward to hearing more.

Mr. WALDRON. I will share that perspective. Thank you, Senator.

Senator BLUMENTHAL. Ms. Greenberg, I hear about cable rates all of the time. You have raised the issue very appropriately. When we talk to cable companies, they point to the costs of sports as driving, in many respects, these rates skyward. Is it fair to blackout games after driving up those costs to the fans of, in effect, buying the cable services? Mr. Waldron has raised this consideration as well.

Ms. GREENBERG. Absolutely not and consumers are right to be furious about the fact that they are paying these very high rates and may not even have access to the sports programming that they are paying for. Not to mention, all of the other subsidies that taxpayers and consumers provide to sports teams. No, it is patently unfair and that is one of the reasons why we are so strongly supportive of this legislation. We think consumers are angry about it and they have a right to get access to the programming that they paid for.

Senator BLUMENTHAL. And when you go back to your client whom you have represented well here today, Mr. Waldron, I hope you will remind them that we are acutely aware of those other public benefits that the League enjoys and not just your league, again. It is not meant to put the focus only on the NFL, but those benefits and subsidies, and infrastructure whether it is transportation or stadiums or other kinds of public benefits that professional sports enjoys and we have chosen to single out one, which is the antitrust exemption, but these public trusts really demand a public trust from the League itself. Special public benefits, in my view, demand a recognition of that public trust from the League.

Do any of the other witnesses—Mr. Goodfriend.

Mr. GOODFRIEND. Senator Blumenthal, there is one category of Americans here who has not been mentioned and is harmed by the local blackout policy. I just want to make sure this goes on the record. Local broadcasters, local grocery stores, local business peo-

ple often scramble at the last minute to buy up blocks of tickets in order to avoid a blackout.

Now if ever there was an example of a tax being imposed on business people, that is it. And it is a tax imposed on them by virtue of this protection, the antitrust exemption, allowing the League to threaten a blackout.

Now I will point out that Sports Fans Coalition in our reply comments described allegations provided to us by an executive who wished to remain anonymous. This person said that the reason why those three playoff games that you alluded to in your opening statement in Green Bay, Indianapolis, and Cincinnati, the reason why those threatened blackouts did not occur, it was alleged, was because the NFL pressured broadcast networks to buy up unsold tickets in order to avoid the blackout.

Now let us just assume for a moment that that allegation is true. Let me get this straight. The U.S. Government gives the NFL an antitrust exemption. The NFL takes that antitrust exemption and exerts power on other third parties to get them to buy something from the NFL at full value.

Now the NFL had every opportunity to turn around to me, the Sports Fans Coalition, and say that the allegation is blatantly false. How dare you make such allegations? Instead they said nothing—nothing—for weeks, nothing.

When it was their turn to file at the FCC, the best they could come up with was if Sports Fans Coalition really purports to speak for fans, we should not care how we avoid local blackouts. In my opinion, Senator, that is a tacit admission.

So do we allow the League to avoid blackouts by coercing others into buying blocks of tickets? They talked about how few blackouts there are. Yes, that is true, but how did we get there? Do we allow the League to avoid blackouts under its own policy by coercing others, allegedly, to purchase tickets? Or do we just say enough is enough? You do not get the gift anymore. You do not get to have your antitrust exemption for local blackouts. There would be a loud cheer not just among fans, but in my opinion, local broadcasters, local grocery stores, and local business people, if we did that.

Senator BLUMENTHAL. Thank you. I might point out with respect to those local businesses and grocery stores and broadcasters, if they got together the way that the clubs or teams do in collaboration to maximize their bargaining power, they would be seeing their State Attorney General or United States Attorney Geneneral and they would be in court defending against an antitrust prosecution, civil or criminal. So this exemption is really very special, very unique, and very undeserved if the leagues, in my view, fail to recognize their special public trust because of that unique exemption.

So I would invite any other comments. If there are none, we are going to keep the record open for 1 week and I will adjourn the hearing. Thank you.

[Whereupon, at 12:30 p.m., the hearing was adjourned.]

[Additional material submitted for the record follows.]

APPENDIX

Additional Material Submitted for the Record

Witness List

Hearing before the
Senate Committee on the Judiciary

On

"The FANS Act: Are Sports Blackouts and Antitrust Exemptions Harming Fans, Consumers, and the Games Themselves?"

Thursday, December 4, 2014
Dirksen Senate Office Building, Room 226
10:15 a.m.

Panel I

The Honorable John McCain
United States Senator
State of Arizona

Panel II

William Lake
Chief, Media Bureau
Federal Communications Commission
Washington, DC

David Goodfriend
Chairman
Sports Fans Coalition
Washington, DC

Sally Greenberg
Executive Director
National Consumers League
Washington, DC

Gerard Waldron
Partner
Covington & Burling
Washington, DC

PREPARED STATEMENT OF SENATOR JOHN MCCAIN

Statement of Senator John McCain

Hearing before the Senate Committee on the Judiciary
"The FANS Act: Are Sports Blackouts and Antitrust Exemptions Harming Fans, Consumers, and the Games Themselves?"

Thursday, December 4, 2014

Good Morning Chairman Leahy and Ranking Member Grassley.

Thank you for inviting me to testify this morning, and thank you to Senator Blumenthal for making this hearing happen. Senator Blumenthal's commitment to advocating for consumers has made him a valuable partner to work with on this issue—an area where the rules and regulations far too often leave consumers holding the short end of the stick.

I am here this morning to discuss sports blackouts and to explain how the continued use of blackout rules and policies fail to serve the interests of consumers—in this case, loyal sports fans.

2014 has been a good year for those of us advocating an end to sports blackouts. In September, the FCC voted to eliminate its sports blackout rule. That rule prohibited a cable or satellite company from carrying a game that is blacked-out within the local broadcast area, leaving sports fans in the dark. Senator Blumenthal and I had been calling on the FCC to repeal this outdated rule for the past year and a half, and we applaud the FCC for unanimously spiking it this fall.

However, the FCC's vote was not the final word on sports blackouts, failing to address the root causes for a majority of blackouts. Indeed, as FCC Chairman Tom Wheeler pointed out shortly after the vote in September: "[E]veryone needs to be aware of who allows blackouts to exist, and it is not the Federal Communications Commission." The spotlight is now squarely on the leagues themselves and their own rules and practices, the most infamous being the NFL rule that requires blackouts when a home game does not sell out at least 72 hours before kickoff.

This is an issue that must be addressed by the league itself; and, if the NFL fails to show leadership, then through congressional action.

It is clear that blackout rules fail to serve their original stated purpose, which was to increase stadium attendance and improve the viewing experience. The record established leading

up to the FCC proceeding, including a large body of research by sports economists, underscored this point, demonstrating that any arguments in support of the blackout rule expired long ago. I hope this hearing will do the same.

The simple fact is that these rules only serve to benefit sports leagues and their member teams at the expense of the hardworking fans who support them so loyally through their money, time, and passion. Just last year, during the NFL wild card playoffs, fans of the Cincinnati Bengals, Indianapolis Colts, and Green Bay Packers came very close to experiencing blackouts when those games hadn't sold-out just days before kick-off. The blackouts in these regions were only averted when, at the last minute, local businesses bought-up tickets to bring the total above the NFL's required threshold.

There is something wrong with a situation in which the NFL can say to all those fans who have made the league what it is today, "you had better purchase tickets, or else." The NFL and its teams have benefitted from myriad public benefits, including an exemption from antitrust rules, a specialized tax status, and taxpayer dollars that subsidize their million-dollar football stadiums. These public benefits carry with them a responsibility back to the public—an obligation to treat their loyal fans with fairness.

We have been chipping away at these rules for some time, but there is still much work to be done. This year, Senator Blumenthal and I introduced the FANS Act, aimed at eliminating the various causes of sports blackouts. This legislation would condition the NFL and other leagues' antitrust exemption on ending blackout practices, including in those circumstances when stand-offs during contractual disputes between broadcasters and cable and satellite companies result in blackouts. We would strongly prefer that the league take the initiative itself, and demonstrate leadership by reforming anti-consumer policies and practices. But let's be clear, should the league fail to act, we will do everything we can do stand up for consumers by advancing the FANS Act and other initiatives.

I look forward to hearing from witnesses on the following panel on ways we can work together to finally blow the whistle on sports blackouts once and for all.

Thank you.

PREPARED STATEMENT OF WILLIAM T. LAKE

Statement of William T. Lake
Chief, Media Bureau
Federal Communications Commission

Before the
Committee on the Judiciary
United States Senate

Hearing on
The FANS Act: Are Sports Blackouts and Antitrust Exemptions Harming Fans, Consumers and the Games Themselves?

December 4, 2014

Good morning, Senator Blumenthal and members of the Committee, I am Bill Lake, Chief of the Media Bureau at the Federal Communications Commission. I am pleased to appear before you today to discuss the recent FCC action to eliminate our sports blackout rules.

A bit of history may provide useful context for our action. Our sports blackout rules specifically prohibited cable and satellite operators from airing any sports event that had been blacked out on a local broadcast television station pursuant to a private blackout policy adopted by a sports league. The Commission originally adopted a sports blackout rule for cable in 1975, finding that the rule was necessary to ensure that cable importation of distant stations would not reduce ticket sales revenue and thus lead sports leagues to refuse to sell the rights to their events to distant stations, which could reduce the availability of sports programming for television viewers. We later adopted similar rules for satellite carriers and open video systems.

As you know, the Commission voted unanimously to eliminate these sports blackout rules on September 30, 2014, finding that they were unnecessary and outdated today. The repeal of the rules was published in the Federal Register on October 24, and took effect 30 days later, on November 24.

The Commission's action followed an open and transparent public process that began in 2011, when the Sports Fan Coalition filed a *Petition for Rulemaking* with the Commission. The Media Bureau first sought comment on the *Petition* in 2012, and the Commission officially proposed to eliminate the rules in a *Notice of Proposed Rulemaking* adopted in December 2013.

After careful consideration of the comments we received in the proceeding, the Commission found that significant changes in the sports industry since the rules were adopted had eliminated the justification for the rules.

First, for the National Football League (NFL), the only league for which the Commission's sports blackout rules continued to be relevant, ticket sales are no longer the primary source of revenue. The massive popularity of that sport means that the primary source of income for the NFL has shifted to television, with TV revenues now the NFL's main source of

revenue, approaching $6 billion this year. Total NFL revenues reportedly exceeded $10 billion in 2013.

Second, the increased popularity of NFL games has brought fans to the stadiums in numbers that make blackouts increasingly rare. In 1975, almost 60 percent of NFL games were blacked out because they failed to sell out. Last year, only two of 256 regular season NFL games -- less than one percent – were blacked out, and no games have been blacked out so far this year. Moreover, in recent years, blackouts have affected only a few NFL markets, such as Buffalo, Cincinnati, and San Diego.

Finally, the Commission determined that the impact on consumers of eliminating its sports blackout rules would be minimal. The NFL's existing contacts with the broadcast networks extend through 2022, keeping games on over-the air stations through at least that timeframe. Beyond that, the Commission found it is highly unlikely that the NFL would find it more profitable to move its games from over-the-air stations to pay TV in the absence of the sports blackout rules.

In conclusion, I would like to note that I am limiting my testimony to the Commission's decision and its rationale. Elimination of our rules does not prevent the sports leagues from continuing to have sports blackout policies, and the Commission does not take a position on whether Congress should eliminate or modify existing antitrust exemptions that allow leagues to have such blackout policies in the first place.

Again, thank you for the opportunity to appear before you today. I will be happy to take your questions.

PREPARED STATEMENT OF DAVID R. GOODFRIEND

Testimony of David R. Goodfriend
Founder and Chairman, Sports Fans Coalition
before the U.S. Senate Judiciary Committee
"The FANS Act: Are Sports Blackouts and Antitrust Exemptions Harming Fans, Consumers, and the Games Themselves?"
November 19, 2014

Senator Blumenthal, Members of the Committee, thank you for inviting Sports Fans Coalition to testify on the FANS Act. My name is David Goodfriend and I am the founder and Chairman of Sports Fans Coalition, the nation's largest multi-issue fan advocacy organization in the public policy arena. Founded in 2009, we now have tens of thousands of members from across the USA and are led by a diverse and seasoned board of directors.

One of our board members seated behind me, Brad Blakeman, worked in the George W. Bush White House. Since I worked for President Clinton, he and I do not agree on much. But we do agree on one thing: the government should not subsidize or support anti-fan activities by professional sports leagues. When a sports league receives a public benefit, the fans should get a fair return, or the subsidy should go away.

That is why Sports Fans Coalition is proud to have led the successful effort to end the FCC's Sports Blackout Rule. The NFL's blackout policy prohibits a local broadcaster from televising a game when tickets do not sell out 72 hours before kickoff. The FCC rule bolstered that anti-fan policy by requiring pay-TV companies likewise to impose such blackouts.

Sports Fans Coalition, National Consumers League and our allies' efforts culminated in a unanimous 5-0 vote this past September 30th to end the 40-year-old, anti-fan Sports Blackout Rule.

That was a great moment for fans. But the league's policy remains in place.

The NFL should end its local blackout policy once and for all, effective immediately.

Fans hate local blackouts. Just listen to two fans who told the FCC how they feel:

Denis Steinmiller, from North Tonawanda, New York said, "I'm a disabled Vietnam vet. I also suffer from [Post Traumatic Stress Disorder]. I am unable to attend the Bills games because of my disabilities. . . . Watching the Bills on TV is one thing I look forward to every year, as well as help me deal with PTSD. Please put all the games on TV for me and others who gave much of ourselves for our country."

Mary Bash, from Masaryktown, Florida said, "For people like me, who are disabled, this blackout rule is discrimination to people with disabilities. I cannot physically attend a live game at any arena. I am stuck at home with only the television to bring me to the sports, or anything else, I enjoy watching. . . . The NFL blackout policy from the 70's do[es] not reflect the times of today. Technology has changed. [The] NFL's market has changed. Where do they think all that money comes from? It is us, the consumer who buys the products from their advertisers. It is us, the taxpayer, who built most of the arenas. It is us, the American citizen, who continues to foot the bill. . . ."

The fans are not alone in opposing local blackouts. Economists from Stanford, Michigan, and seven other top academic institutions proved in two separate FCC filings that the NFL's local blackout policy does not serve its stated purpose of selling tickets or keeping games on broadcast TV.

Even other sports leagues have concluded that local blackouts do not work. The Commissioners of Major League Baseball and the National Hockey League recently stated in depositions that keeping games off local TV does not help to increase attendance.

The FCC agreed with all of this when it ended its own Sports Blackout Rule.

Now the NFL should do the right thing. It should listen to fans, economists, other leagues, all five Commissioners of the FCC, and Members of Congress from both parties and both chambers. The NFL should end its local blackout policy.

Failing that, however, Congress should pass the FANS Act.

The Antitrust statutes currently shield leagues from liability when imposing local blackouts. The FANS Act would eliminate this get-out-of-jail-free card and with it, the last remaining government support for the NFL's local blackouts.

Sports Fans Coalition also believes that fans should not be used as pawns during contractual disputes between big TV companies. We should end sports take-downs as a tool for gaining leverage during contract disputes.

Section 3 of the FANS Act would do the job. It says to professional sports leagues, if you want to keep your antitrust exemption, here is something fans want in return: prohibit your distributors from taking down games during contract disputes.

Finally, I would like to make clear that Sports Fans Coalition fully supports putting as many games as possible on free, over-the-air broadcast TV.

The migration of sports off broadcast TV has created problems.

Just look at the L.A. Dodgers. When Time Warner Cable recently took over the team's TV distribution, 70% of local Dodgers fans ended up missing most of this past regular season because only Time Warner Cable subscribers could see the games. When Major League

Baseball and the LA Dodgers have received so much public subsidization, fans should have better access to those games.

Perhaps a revised FANS Act could require all sports leagues to maintain a certain amount of the games on free, over-the-air broadcast TV so that all fans have access to at least some games.

Thank you and I look forward to answering any questions.

PREPARED STATEMENT OF SALLY GREENBERG

Testimony of

Sally Greenberg

Executive Director

National Consumers League

Hearing on "The FANS Act: Are Sports Blackouts and Antitrust Exemptions Harming Fans, Consumers, and the Games Themselves?"

Before the

United States Senate

Committee on the Judiciary

December 4, 2014

I. Introduction

Good morning Senator Blumenthal and members of the committee. My name is Sally Greenberg and I am the Executive Director of the National Consumers League (NCL).[1] Founded in 1899, NCL is the nation's pioneering consumer organization. Our non-profit mission is to advocate on behalf of consumers and workers in the United States and abroad. I appreciate this opportunity to appear before the subcommittee to speak in support of S. 1721 and I commend you for considering this important bill.

II. In Return For Government Handouts to Sports Leagues, Consumers Get Blackouts, Higher Cable Bills and Rising Ticket Prices

Professional sports teams are part of the fabric of American culture. Millions of Americans define themselves, in part, by the teams they support. The professional sports leagues are also multi-billion dollar businesses that benefit from a multitude of public subsidies. These take the form of exemptions from federal antitrust laws, tax breaks and public funding for stadiums, infrastructure support from municipalities, and blackout policies that benefit the leagues and their broadcast partners.

[1] The National Consumers League, founded in 1899, is America's pioneer consumer organization. Our non-profit mission is to protect and promote social and economic justice for consumers and workers in the United States and abroad. For more information, visit www.nclnet.org.

As the leagues enjoy huge profits, taxpayers are right to question what they receive in return. Harvard University professor Judith Grant Long recently calculated that 70% of the capital costs of National Football League (NFL) stadiums have been provided by taxpayers, whether they are sports fans or not.[2] For example, the $36 million that Hamilton County, Ohio taxpayers paid in debt service and operating costs for the Cincinnati Bengals and Reds' stadiums exceeded the $23.6 million that the county cut from the health-and-human services spending budget. Cincinnatians are not alone. Despite a $1.1 billion budget deficit, the Minnesota state legislature extracted $506 million in public money to cover half the cost of the new Vikings stadium,[3] despite the owner of the team's billion-plus net worth

A 2012 Bloomberg study estimated that tax exemptions on interest paid by municipal bonds issued for sports facilities cost the U.S. Treasury $146 million per year. Over the life of the $17 billion of exempt debt issued to build stadiums since 1986, taxpayers' subsidies to bondholders will total $4 billion.[4]

Lavish taxpayer subsidies for stadia aren't the only way that taxpayers subsidize professional sports. The rising cost of acquiring professional sports programming is also a significant driver of rising cable bills, which have gone up

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[2] Easterbrook, Gregg. "How the NFL Fleeces Taxpayers," *The Atlantic*. September 18, 2013. Online: http://www.theatlantic.com/magazine/archive/2013/10/how-the-nfl-fleeces-taxpayers/309448/?single_page=true

[3] Ibid.

[4] Kuriloff, Aaron and Preston, Darrell. "In Stadium Building Spree, U.S. Taxpayers Lose $4 Billion," Bloomberg. September 5, 2012. Online: http://www.bloomberg.com/news/2012-09-05/in-stadium-building-spree-u-s-taxpayers-lose-4-billion.html

131% since 1998, at more than three times the rate of inflation.[5] The cable industry reports that subscribers typically pay $12-15 each month for the cost of sports-related programming.[6] Due to the widespread practice of channel bundling, the increasing costs of sports programming are passed along to *all* cable and satellite subscribers regardless of whether they actually watch sports. The rising price of acquiring professional sports programming is also a major driver of the often-rancorous retransmission consent negotiations between broadcasters and cable and satellite providers. Increasingly, these fights result in consumers paying for content they don't receive due to programming blackouts. For example, in 2013 there were 127 blackouts, up from 91 in 2012 and 51 in 2011.[7]

Sports fans themselves are also footing an increasing burden. The high price of actually attending a professional game puts them out of reach for many Americans. From 2010-2013 the cost for a family of four to attend a NFL game increased by 8.51% to $459.65.[8] The costs for a family night out to the other major sports are similarly high: $359.17 for the National Hockey League (NHL)[9]; $333.58

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[5] Zara, Christopher. "Cable Bills Rising: Amid Comcast-TWC Merger Scrutiny, FCC Media Bureau Report Shows Pay-TV Price Hikes Outpacing Inflation," *International Business Times*. May 20, 2014. Online: http://www.ibtimes.com/cable-bills-rising-amid-comcast-twc-merger-scrutiny-fcc-media-bureau-report-shows-pay-tv-1587304

[6] Sanserino, Michael. "Cable companies balk at rising costs for sports programming," *Pittsburgh Post-Gazette*. August 17, 2014. Online: http://www.post-gazette.com/business/2014/08/17/Cable-companies-balk-at-rising-costs-for-sports-programming/stories/201408170064

[7] American Television Alliance. "Astronomical increase in broadcaster blackouts." Infographic. Online: http://www.americantelevisionalliance.org/wp-content/uploads/2014/04/ATVA_Planets.pdf

[8] Team Marketing Report. "2014 NFL Fan Cost Index," September 2014. Online: https://www.teammarketing.com/public/uploadedPDFs/FOOTBALL_FCI_TWENTYFOURTEEN.pdf

[9] Team Marketing Report. "NHL Fan Cost Index," October 2014. Online: https://www.teammarketing.com/public/uploadedPDFs/nhl%20fci%2015.pdf

for the National Basketball Association (NBA)[10]; and $212.46 for Major League Baseball (MLB).[11]

In return for the government largesse lavished on sports leagues, consumers are right to be outraged when essential services are cut to subsidize unaffordable tickets at publicly funded stadiums. Cable and satellite subscribers – fans and non-fans alike -- are angry that their bills go up due to ever-higher sports programming costs (when the games even make it on the air). The game is clearly rigged in favor of the professional sports leagues and taxpayers get the short end of the stick. It is time for Congress to step in and begin to level the playing field.

III. The FANS Act Would Benefit Consumers By Reigning In Cable Rate Hikes, Reducing Blackouts and Incentivizing Next-Generation Viewing Platforms

S. 1721, the Furthering Access and Networks for Sports ("FANS") Act addresses the harms described above in a several important ways.

Section 3(a) of the bill conditions sports leagues' antitrust exemptions upon a requirement that their broadcast partners not black out games as a result of contractual disputes with cable and satellite companies. The leagues value their

[10] Team Marketing Report. "Slam dunk: NBA ticket price going up," November 2014. Online: https://www.teammarketing.com/public/uploadedPDFs/2014-15%20nba%20fci.pdf
[11] Team Market Report FactBook. "2014 MLB Fan Cost Index," March 2014. Online: https://www.teammarketing.com/public/uploadedPDFs/2014%20mlb%20fci.pdf

antitrust exemptions highly and they are unlikely to put those exemptions at risk. . Thus, the bill will make it less likely that broadcasters will be able to leverage the prospect of denying in-demand sports programming to subscribers as a way of extracting higher retransmission fees from cable and satellite companies. This alone would start to rein in one of the major contributors to rising cable and satellite bills.

Section 3(b) of the bill eliminates the antitrust exemption for local sports blackouts in the event that games do not sell out their tickets. This complements the Federal Communications Commission's recent 5-0 vote to eliminate the Sports Blackout Rule by also prohibiting private blackout agreements between the leagues and their programming partners. This will benefit millions of fans in smaller markets such as Buffalo, New York – which may have larger stadiums but smaller populations and thus are less likely to sell 85% of seats. It will also benefit broadcasters and other local businesses that are called upon to buy up unsold blocks of tickets in order to avoid a local television blackout.[12]

Section 3(c) of the the bill benefits consumers living in teams' overlapping broadcast territories by conditioning the leagues' antitrust exemptions on the provision of alternative platforms (such as via the Internet) for obtaining otherwise blacked out sports programming. This would particularly help Major League Baseball fans who live in states like Arkansas, Connecticut, Nevada and Oklahoma

[12] Eggerton, John. "Sports Fans Coalition: Sports Exec Alleges NFL Pressured Broadcasters To Buy Tickets," *Broadcasting & Cable*. February 24, 2014. Online: http://www.broadcastingcable.com/news/washington/sports-fan-coalition-sports-exec-alleges-nfl-pressured-broadcasters-buy-tickets/129381

(to name only a few)[13] that are overlapped by separate clubs' "home television territories" and thus subject to local blackouts. These baseball fans would have access to content, albeit paid content, over the Internet, similar to the way in which the NHL and NBA currently make their games available online.

Finally, Section 4 corrects a historical anomaly by bringing Major League Baseball under the auspices of the Clayton Act's antitrust exemptions in the same way as the NFL, NBA and NHL are currently treated. This addresses a recommendation by the Supreme Court that Congress step in and address a problem created by a previous Court case that granted the MLB its anomalous exemption. In doing so, the statutory conditions placed on existing antitrust exemptions by this bill would also apply to MLB.

IV. Conclusion

In closing, I would like to reiterate NCL's strong support for S 1721. This bill provides important remedies to the problem of some of the unfair and unbalanced subsidies and preferential policies that professional sports leagues have enjoyed at the expense of taxpayers and sports fans alike.

Senator Blumenthal and members of the committee, on behalf of the National Consumers League and America's consumers, I commend you for your leadership in

[13] For a complete map of the many overlapping MLB television territories, please see: http://www.bizofbaseball.com/images/MLB_Blackout_Map1000x733.gif

convening this hearing and thank you for your invitation to testify on this important topic. I look forward to answering any questions you may have.

Thank you.

PREPARED STATEMENT OF GERARD J. WALDRON

Hearing on

The FANS Act: Are Sports Blackouts and Antitrust Exemptions Harming Fans, Consumers, and the Games Themselves?

Before the

United States Senate Committee on the Judiciary

December 4, 2014

Statement of Gerard J. Waldron

On behalf of the National Football League

Good morning, Senator Blumenthal, Chairman Leahy, Ranking Member Grassley, and members of the Committee. My name is Gerry Waldron, and I am a partner at the law firm of Covington & Burling LLP. I am here today in my capacity as outside counsel to the National Football League ("NFL" or the "League").

I appreciate the opportunity to discuss the NFL's dedication to ensuring that its games are available to all Americans via broadcast television. For more than five decades, the Sports Broadcasting Act ("SBA") has been a key component in that strategy, enabling the League to reach business deals that allow the League to put *all* 256 regular season games and *all* playoff games on free, over-the-air television. Quite simply, the SBA is working.

For this reason, the FANS Act, which attempts to dictate business decisions by threatening the SBA, would ultimately be harmful to fans. Any changes to the SBA would undermine the complex business and legal structure that allows the NFL to be the *only* professional sports league that offers all of its regular-season games to viewers *at no charge*. The FANS Act would disrupt a business model that provides games at no charge to tens of millions of football fans nationwide. The bill would create tremendous uncertainty about the ability of sports leagues to enter into nationwide broadcast arrangements, and also would raise serious First Amendment issues by *requiring* sports leagues to provide broadcast content to cable and satellite companies during contract disputes.

I. Sports Leagues in the Entertainment Marketplace

A professional sports league like the NFL is a unique business entity because it creates and markets a single, jointly-produced entertainment product. The NFL produces athletic competition among its 32 member clubs, none of which can produce and present that product on

its own. The NFL sports entertainment product in turn competes in a broad entertainment marketplace, which includes the jointly-produced entertainment products of other sports leagues, as well as other entertainment products of all kinds. It is well accepted that outside a league structure no individual team could produce a product – whether that be a game, a telecast, or something else – that would have significant value or gain much in the way of consumer acceptance.

The entertainment marketplace within which the NFL competes is growing and increasingly competitive. In recent times, each of the four major professional sports leagues has expanded, new leagues have been formed, and other sports television products, such as "extreme sports" and NASCAR, have developed a significant fan base. Within individual communities, the number of professional sports offerings has grown considerably. College football and basketball have substantially expanded their presence on television. The increasing number of television channels on cable, telephone company and satellite video distribution systems; the growth of satellite radio; and the explosion of video content on the Internet and available via mobile devices have all brought vast new entertainment options to consumers. This Committee has examined closely the growth in entertainment options in recent decades and what that has meant for communications and competition policies. Sports leagues have been affected by the same changes in the marketplace that have affected the music business, the movie business, television networks, and virtually every other entertainment producer.

The typical household today has access to between 60 and 400 channels of television programming. In that environment, the size of the audience for many kinds of programming, including sports, can be so marginal and fragmented, that it is of little value to advertisers. The

key factor that distinguishes the NFL from other types of programming is its ability consistently to deliver a mass audience at a fixed time.

II. The NFL's Television Policies

The centerpiece of the NFL's television policy is free, over-the-air broadcasting of NFL games. Every NFL regular season game and every post-season game is televised on free over-the-air television. Some games, like the Sunday night broadcasts on NBC, are televised nationally. Other games, like the Sunday afternoon games at 1:00 and 4:00 p.m., are carried on a regional basis or, in the case of games with particular fan appeal, to broader portions of the country. Every fan continues to have available all of the local team's away games on broadcast television. When home games are sold out at least 72 hours in advance, the home game is televised as well. This season, *every* NFL game has been sold out and broadcast live in the home city. Only two games were blacked out in the 2013 season.

Even games that are televised on the NFL Network as part of our national cable arrangement are televised on free over-the-air television in the home cities of the competing teams. Thus, the game tonight between Dallas and Chicago is available on over-the-air television in those two communities for any fan who does not have access to cable television. This is a unique requirement that is not imposed by any other league or in the context of any other sports telecast.

This same policy applies to the games shown on the NFL Network. While those games will be available throughout the country via cable and satellite carriers that offer the NFL Network, they will similarly be available on free, over-the-air television in the home cities of the

competing teams, on the same basis as if they were televised on a broadcast network or on ESPN.

In short, no fan needs to pay to see a wide variety of NFL games, including all games of the home team. The NFL is proud of that fact — a claim that no other sports league can make about all of its regular season games, or even all of its playoff games. By contrast, NFL fans will have available 90 or more games on free television during the regular and post-season.

The NFL's television policy, and particularly its overwhelming emphasis on broadcast television, is intended to serve three main goals. *First*, because NFL teams normally play once each week, we try to make each game a special event and obtain the broadest possible audience for those games. The best way to do so has been, and continues to be, through broadcast television.

Second, we want to encourage strong fan support in each local market. More than five decades ago, it was recognized that one way of accomplishing this was by televising away games into the home market to ensure that fans could see their team play on television even when it was impossible to buy a ticket. Consistent with the 1973 Blackout Legislation, sold out home games are also televised live in the home city. Further, our television agreements provide for each team's games to be live telecast in its local market. This is a unique requirement in sports, and is fully consistent with our desire to maintain the NFL's status as a mass-appeal sport.

Third, the broadcast television agreements generate substantial revenues that are equally shared by the 32 NFL Clubs; thus, clubs like Buffalo, Green Bay or Minneapolis receive the same amount as teams in New York City and Chicago. The equal sharing of television revenues is a principal reason why the NFL includes strong franchises in small and mid-size markets like

Buffalo, Green Bay and Pittsburgh. Those revenues are used principally to support growing player benefits and salaries under our collective bargaining agreement, which itself is predicated on this equal sharing of media and other League revenues. Television revenue is also used to support stadium construction throughout the League.

Each of these three goals remains as important to the NFL today as they were when first adopted in the Sixties and Seventies. Our policies over the decades have continued to focus on providing NFL games to the broadest possible television audience, on ensuring that all teams have their games televised, and on generating equally shared television revenues to maintain franchise stability, preserve competitive balance on the playing field, and support our Collective Bargaining Agreement.

III. The NFL's Blackout Policy

Recently, there has been some debate about the "blackout rule." To clarify, people often are referring to two different concepts when they use that term. The NFL has a blackout *policy*, a reflection of the League's private business decisions; and the FCC has had a blackout *rule* that was designed to protect local broadcasters when a blackout occurs.

To promote home game attendance, the NFL has long maintained its blackout policy, which is incorporated into our contracts with the broadcast networks. A blackout is triggered only if at least 85 percent of the tickets for the game have not sold 72 hours in advance, and only applies in the local market of the home team (not the away team). The hallmarks of NFL games are full stadiums, excited crowds, and competitive games. Sold-out games improve the experience both for fans in the stadium and for those watching on television. Increased attendance at games also helps to support local jobs, businesses, and taxes. In fact, a number of

unions and other stakeholders, including the AFL-CIO, the PUSH Coalition, the Urban League, the chair of the Mayor's Committee on Sports, and the National Conference of State Legislatures, supported the FCC's blackout rule because of its effect on local jobs and businesses.

Thus, it is not surprising that Congress has approved this practice multiple times. In enacting the SBA in 1961, Congress expressly permitted blackouts "within the home territory of a member club of the league on a day when such a club is playing at home." In 1973, Congress adopted legislation that prohibited blackouts in the home team's local market when the game actually was sold out 72 hours in advance; this law was in effect during the 1973-75 seasons but was not extended in light of the NFL's commitment to abide by these terms voluntarily (a commitment that the NFL has honored). Further, in 1999, Congress specifically required that the FCC extend the sports blackout rule, which at the time applied only to cable operators, to satellite operators.

The FCC first passed its blackout rule in 1975 to prevent cable companies from doing an end-run around this blackout policy. Under the FCC's rule, cable and satellite providers were not able to carry a game locally when the over-the-air broadcast was blacked out. The NFL, MLB, and the entire broadcast industry advocated to keep the rule, which protects local broadcasters. But the FCC earlier this year voted to repeal. However, the League's policy, and its business decisions, remain in place.

But I urge you to view this debate in context. Blackouts are at an all-time low. Two seasons ago, six percent of games were blacked out. Last season only two games were blacked out nationwide. To date this season, there have been no blackouts. So over the past season and a

half, with roughly 450 games played, there have been just two blackouts. This reduction in blackouts reflects adjustments to the NFL blackout policy that the League has made over the years to work with the clubs to promote game attendance and viewership.

Although the vast majority of games are not blacked out, and the number of blackouts has steadily decreased, the League continues to believe that its policy enables it to advance and balance two goals: engaging fans on television and promoting a high-quality stadium experience. The FCC's repeal of the rule makes it more challenging for the League to ensure widespread in-stadium attendance *and* free, over-the-air broadcasts of every game. The Commission, of course, did not (and cannot) repeal the NFL's blackout policy, which reflects its private business decisions and is reflected in contracts with the League's broadcast partners. The NFL is committed to ensuring that its stadiums continue to be sold-out, and that its games remain available on free, over-the-air television.

IV. Television Policy and the 1961 Statute

Congress adopted the 1961 Act because it recognized that without an amendment to the law, many sports teams and their fans would be unable to make effective use of television. For example, in the absence of a single-network package with equally-shared revenues, several NFL teams may well have ceased operations due to their inability to obtain sufficient exposure and revenue from television. Under the Sports Broadcasting Act, the NFL has created the most pro-consumer television plan in sports today. The NFL has maintained its commitment to broadcast television even while the league has grown from 12 teams in 1960 to 32 teams today, and even though network television has experienced dramatic changes and prime time entertainment programming has seen its ratings erode as a result of competition from cable, satellite and other

options. Although the 1961 Act applies equally to all sports leagues, no other league today has a remotely similar commitment to broadcast television.

The SBA is as relevant today as it was in 1961, notwithstanding changes in the media marketplace. The NFL, like the other sports leagues, negotiates television rights on behalf of all of its member clubs so that it can deliver, in any given week, access to games that elicit the greatest fan interest, whatever and wherever they may be. If the League could not negotiate media deals on behalf of its member clubs, much more generous contracts for larger market teams would threaten, if not vitiate, the competitive balance upon which fan engagement depends; chaos in negotiating and arranging broadcast windows would likely reduce the number of games and broadcast windows available to fans nationwide; and large numbers of games would be available only on pay-TV. Small and medium-sized communities around the country especially rely on the NFL's broadcast policies. The existence of small-market teams in Green Bay, Pittsburgh, Buffalo, and Kansas City, much less their success, would be threatened by any changes to the SBA.

The SBA remains important because unlike the other professional sports leagues that have moved away from broadcast television, the NFL has extended its commitment to broadcast television by reaching agreements to keep NFL games on broadcast television at least until the 2023 season. NFL football on television is stronger than ever. Through the first ten weeks of the current season, here are some results:

- For the week of Nov. 9, 2014, the most-viewed primetime broadcast was "NBC Sunday Night Football," with 18.13 million viewers, nearly 10% higher than the next-highest rated show ("Big Bang Theory" with 16.56 million viewers).
- For that same week, the most-viewed primetime broadcast among adults 18-49 was "NBC Sunday Night Football," with 8.25 million viewers, 43% higher than

the next-highest rated broadcast for that week ("The CMA Awards," with 5.77 million viewers).

- Of the ten most viewed single telecasts in all of 2013, nine were NFL programs (the one exception was the Oscars).
- The three most-viewed regularly scheduled programs in 2013 were NFL shows ("NBC Sunday Night Football," with an average 21.7 million viewers, "Sunday Night NFL Pre-Kick on NBC," with 15.71 million viewers, and "The OT" on Fox, with 14.75 million viewers).

These strong performances and growth in ratings and total audience are rare in today's fragmented television environment. They demonstrate the continuing strength and attractiveness of NFL games on television. They also reinforce two key beliefs that underlie our television policy: the NFL's commitment to broadcast television as the best available means of attracting large national audiences for our games; and its belief that careful supplements of live game telecasts – such as NFL Sunday Ticket, NFL Network, Red Zone and other programming– can reinforce game telecast ratings and drive fan interest in football.

V. The FANS Act

The FANS Act proposes changes to the SBA that would harm fans by creating such uncertainty around sports on broadcast television that the likely result would be to migrate popular sports programming from free broadcast television to pay TV such as cable and satellite. For this reason, we respectfully urge the Committee not to adopt this legislation.

As explained above, the Sports Broadcasting Act is one of the foundations for why professional sports are available on free, broadcast television. Without the SBA, sports leagues could encounter difficulties in negotiating with national broadcast networks for television deals. The NFL has used its SBA authority carefully and responsibly, and in a way that has allowed the maximum number of fans to engage with NFL clubs at the least cost. The result is that all local

games are available to fans for free, on conventional, over the air television. We think that is a strong reason to recognize the SBA as clearly promoting the interests of fans.

The FANS Act proposes untenable conditions on the SBA's antitrust provisions. The bill would deny the antitrust exemption if a television station went dark due to contract disputes between local broadcasters and cable and satellite distributors. The NFL is not a party to these contracts and has absolutely no control over the outcome of these disputes. No business can plan its operations under laws that could change at a moment's notice due entirely to the actions of third parties. The FANS Act would discourage nationwide deals between broadcast networks and sports leagues, ultimately resulting in the migration of professional sports games from broadcast to pay television. Such a result clearly would not be in the interest of fans.

Moreover, we believe the FANS Act impinges on the First Amendment by mandating speech. The bill would allow a cable or satellite company to retransmit a professional sports contest — but not any other content — over the objection of (a) the broadcaster airing the game, and (b) the sports league that owns the copyright in the program, during a retransmission consent dispute. It is well-established that the denial of a government benefit because of the content of an entity's speech raises the same constitutional concerns as a law that prohibits or restricts speech. The FANS Act would be subject to the most stringent form of First Amendment scrutiny because its speech mandate is plainly content-based. The bill singles out for adverse government treatment only one kind of broadcast content: sports. The bill would not impose the same requirement on other broadcast programming, such as news, reality shows, sitcoms, or soap operas.

Conclusion

NFL television policies have evolved to reflect changes in technology, the growth of the League, and our increasingly mobile society, among other factors. But throughout the past five decades, we have not lost sight of our principal responsibility – to bring fans across the country a wide range of outstanding NFL television each week, and to keep our game a healthy and robust entertainment product for generations to come. Our current practice of televising all games on free, over-the-air television and making additional games available on other outlets certainly meets that responsibility.

PREPARED STATEMENT OF CHAIRMAN PATRICK J. LEAHY

Statement of Senator Patrick Leahy (D-Vt.),
Chairman, Senate Judiciary Committee,
Hearing on
"The FANS Act: Are Sports Blackouts and Antitrust Exemptions Harming Fans, Consumers, and the Games Themselves?"
December 4, 2014

Last Sunday, millions of Americans gathered around their televisions to watch the much anticipated match-up between the New England Patriots and the Green Bay Packers. This game was one of the highest-rated regular season telecasts in recent years. While many Vermonters were undoubtedly disappointed by the outcome of the game, which Green Bay won by a score of 26-21, thousands of Patriots fans back home were able to watch it without paying a dime because it was available on over-the-air television.

The relationship between sports leagues like the National Football League (NFL) and broadcast television has benefitted all parties. Consumers win because games are available for free, the NFL wins because it reaches the largest possible audience, and, as the ratings show, broadcasters win when NFL games are shown on their stations. I appreciate that of all the leagues, the NFL has been the one to keep the vast majority of its content available on over-the-air television.

Unfortunately, the NFL has policies in place that can result in fans losing access to their local teams on television in certain circumstances. These instances are generally called "blackouts." The NFL is here to testify at today's hearing to explain why its blackout policies are necessary and describe what, if any, benefit they have to consumers. Given the fact that Congress has granted the NFL special rights to show its games on television – including the right to blackout games – it should not shy away from explaining the theory behind its policies to the American people.

Blackouts are disruptive and frustrating for consumers. The Federal Communications Commission (FCC) acted recently to repeal its sports blackout rule. Some of the witnesses here today will argue that this action alone has not gone far enough to ensure that consumers will not lose access to local televised games.

I know from experience that Vermonters do not like losing access to games they expect to see. In 2007, during the historic run of the New England Patriots, the season finale against the New York Giants was set to be broadcast on the NFL Network. The Patriots were playing for a perfect regular season record. Vermont is home to both Patriots and Giants fans, meaning this game had great significance to many Vermonters. The NFL's policy, however, was only to show an NFL Network game on over-the-air television in the local market of the teams playing, in this case Boston and New York City.

I led the Vermont delegation in writing to NFL Commissioner Roger Goodell asking that the game be made available on broadcast television in other New England television markets. The NFL agreed, which is why Vermonters were able to see the Patriots go undefeated on their way to the Super Bowl. I would once again like to extend my thanks to the NFL for that decision.

There is no doubt that the NFL has been dealing with other important issues recently. The scourge of domestic violence is one that our society must continue to confront. I was proud to author the bipartisan Violence Against Women Act Reauthorization Act and steer it through Congress last year to help prevent and combat this terrible problem and provide more help to victims. Laws like this go a long way, but we must always be working to change the culture that allows this kind of violence to go unchecked.

Senator Blumenthal is chairing the hearing this morning. He has long been an advocate for consumers on this and many other issues. I look forward to the discussion that he will be having with the witnesses today.

# # # # #

QUESTIONS SUBMITTED TO GERARD J. WALDRON BY SENATOR FRANKEN

Hearing before the Senate Committee on the Judiciary
"The FANS Act: Are Sports Blackouts and Antitrust Exemptions Harming Fans, Consumers, and the Games Themselves?"
Questions for the Record Submitted by Senator Al Franken

Question for Gerard Waldron:

Question 1. During the hearing, witnesses discussed the significant taxpayer support and public benefits that sports leagues, including the NFL, enjoy. At the same time, we have a team in the NFL that continues to call itself by an offensive name—a racial slur that is harmful and insulting. I've heard from tribal leadership in my home state of Minnesota, and they are understandably hurt and disappointed by the continued use of this name. I share their concerns. What is the league planning to do at this time to address the need for a name change?

QUESTIONS SUBMITTED TO DAVID R. GOODFRIEND BY SENATOR GRASSLEY

Senator Grassley
Questions for the Record
Hearing on "The FANS Act: Are Sports Blackouts and Antitrust Exemptions Harming Fans, Consumers, and the Games Themselves?"
December 10, 2014

David Goodfriend
Chairman
Sports Fans Coalition

1. As we know, the legislation conditions the sports leagues' antitrust exemptions – and therefore, some argue, their viability – on the elimination of blackout requirements during contract negotiations. This raises a number of complicated issues regarding the current contracts, their duration, and whether it's feasible for the parties to alter their terms. And for future negotiations, it raises the question of whether or not the leagues have privity of contract with all of the relevant parties and affiliates.

    a. In your view, would the legislation require the parties to open up and alter the terms of any existing contracts?

    b. And for future contracts, in your view does the legislation impose a duty or requirement on the leagues that they are unable to enforce due to lack of privity with a third party?

QUESTIONS SUBMITTED TO SALLY GREENBERG BY SENATOR GRASSLEY

Senator Grassley
Questions for the Record
Hearing on "The FANS Act: Are Sports Blackouts and Antitrust Exemptions Harming Fans, Consumers, and the Games Themselves?"
December 10, 2014

Sally Greenberg
Executive Director
National Consumers League

1. As we know, the legislation conditions the sports leagues' antitrust exemptions – and therefore, some argue, their viability – on the elimination of blackout requirements during contract negotiations. This raises a number of complicated issues regarding the current contracts, their duration, and whether it's feasible for the parties to alter their terms. And for future negotiations, it raises the question of whether or not the leagues have privity of contract with all of the relevant parties and affiliates.

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QUESTIONS SUBMITTED TO WILLIAM T. LAKE BY SENATOR GRASSLEY

Senator Grassley
Questions for the Record
Hearing on "The FANS Act: Are Sports Blackouts and Antitrust Exemptions Harming Fans, Consumers, and the Games Themselves?"
December 10, 2014

William Lake
Chief, Media Bureau
Federal Communications Commission

1. In your written testimony, it seems that both you and the NFL cite some of the exact same data, but rely on it to reach diametrically opposed conclusions. Specifically, you note that in 1975 almost 60 percent of NFL games were blacked out because they failed to sell out, while last year only two of the 256 games were blacked out. You used that data to suggest that the blackout rules are no longer necessary. The NFL, on the other hand, cites the same data, but relies on it as evidence that the current policies are working. It seems to me, therefore, that it's a question of whether there is a causal connection between the current policies and the decrease in blackouts, as the NFL argues, or if it's merely a correlation, as you seem to suggest.

    a. Please address the conclusion reached by the NFL: specifically, if there were only two blackouts last year, then why should we upset the policy that appears to be working?

2. As we know, the legislation conditions the sports leagues' antitrust exemptions – and therefore, some argue, their viability – on the elimination of blackout requirements during contract negotiations. This raises a number of complicated issues regarding the current contracts, their duration, and whether it's feasible for the parties to alter their terms. And for future negotiations, it raises the question of whether or not the leagues have privity of contract with all of the relevant parties and affiliates.

    a. In your view, would the legislation require the parties to open up and alter the terms of any existing contracts?

    b. And for future contracts, in your view does the legislation impose a duty or requirement on the leagues that they are unable to enforce due to lack of privity with a third party?

QUESTIONS SUBMITTED TO GERARD J. WALDRON BY SENATOR GRASSLEY

Senator Grassley
Questions for the Record
Hearing on "The FANS Act: Are Sports Blackouts and Antitrust Exemptions Harming Fans, Consumers, and the Games Themselves?"
December 10, 2014

Gerard Waldron
Partner, Covington & Burling

1. In your written testimony, it seems that both you and the FCC cite some of the exact same data, but rely on it to reach diametrically opposed conclusions. Specifically, the FCC notes that in 1975 almost 60 percent of NFL games were blacked out because they failed to sell out, while last year only two of the 256 games were blacked out. The FCC used that data to suggest that the blackout rules are no longer necessary. On the other hand, you cite the same data, but rely on it as evidence that the current policies are working. It seems to me, therefore, that it's a question of whether there is a causal connection between the current policies and the decrease in blackouts, as you argue, or if it's merely a correlation, as the FCC seems to suggest.

    a. Please address why you believe the decrease in blackouts is caused by the blackout policies and is not merely a correlation between the policy and the decrease?

2. As we know, the legislation conditions the sports leagues' antitrust exemptions – and therefore, some argue, their viability – on the elimination of blackout requirements during contract negotiations. This raises a number of complicated issues regarding the current contracts, their duration, and whether it's feasible for the parties to alter their terms. And for future negotiations, it raises the question of whether or not the leagues have privity of contract with all of the relevant parties and affiliates.

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    b. And for future contracts, in your view does the legislation impose a duty or requirement on the leagues that they are unable to enforce due to lack of privity with a third party?

RESPONSES OF DAVID R. GOODFRIEND AND SALLY GREENBERG
TO QUESTIONS SUBMITTED BY SENATOR GRASSLEY

David Goodfriend
Chairman
Sports Fans Coalition
1300 19th Street NW
5th Floor
Washington, DC 20036

Sally Greenberg
Executive Director
National Consumers League
1701 K Street, NW Ste 1200
Washington, DC 20006

December 30, 2014

Chairman Patrick Leahy
U.S. Senate
Committee on the Judiciary
Washington, DC 20510-6275

Dear Chairman Leahy,

The undersigned hereby respectfully provide a joint response to your letters of December 16, 2014 and the Questions for the Record from Sen. Grassley dated December 10, 2014 ("Questions").

First, in response to Question 1, the FANS Act does not condition the antitrust exemption "on the elimination of blackout requirements during contract negotiations." Instead, the FANS Act conditions the antitrust exemption on a league expressly prohibiting its television licensees from "intentionally removing" the league's games during or related to a programming carriage dispute.*

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* The antitrust exemption does not apply to any professional sports league "that does not expressly prohibit sponsored telecast licensees of such league, and any agreement with any video licensee, from intentionally removing the live content of such league from a multichannel video programming distributor (as defined in section 602 of the Communications Act of 1934 (47 U.S.C. 522)), when such removal occurs during or is related to a negotiation regarding carriage of the games of such league by the multi-channel video programming distributor.'' S. 1721, The Furthering Access for Networks and Sports ("FANS") Act of 2013 (113th Cong., 2nd Sess.), at §3(a) (emphasis added).

All professional sports leagues enter copyright licensing agreements with broadcasters and pay-TV companies, usually with voluminous and detailed terms and conditions. Such copyright licensing is something with which leagues are very familiar-- we all have heard an announcer say, "any rebroadcast, retransmission, or account of this game, without the express written consent of [the league], is prohibited."

Under the FANS Act, to maintain its antitrust exemption, the league would have to include in its licensing agreements an express, written prohibition on the licensee intentionally taking down games during or related to a carriage dispute. As long as the league includes such language in its licensing agreements with broadcast networks and cable operators, the league has met its burden under the statute. If one of the league's licensees intentionally removed games in such a manner, then the league would be in a position to pursue penalties under its licensing agreement.

This is not a new concept. The Sports Broadcasting Act of 1961 ("SBA") already includes a similar provision. The statute as originally enacted conditions the antitrust exemption on professional sports leagues refraining from telecasting any games at times when college and high school teams typically play.[†] Thus, if a professional sports league chooses to schedule games at such times, in order to maintain its antitrust exemption under the SBA, its licensing agreements with broadcasters and pay-TV companies should (and probably do) expressly prohibit the televising of games at those times. The FANS Act simply takes this statutory device and applies it, not to the televising of games during college and high school games, but rather to the intentional removal of games during carriage disputes.

Second, in response Question 1(a), assuming that the leagues' licensing agreements today are silent with respect to intentional removal of games during carriage disputes, and assuming that the leagues wish to maintain their gift from the American taxpayer and voter of an exemption from criminal and civil antitrust liability, then yes—the leagues would have to exercise their rights under the existing contracts' "force majeure" clauses, which generally allow parties to revisit contractual terms when an act of government so necessitates. It should be noted that this is a fairly common occurrence and precisely why such clauses are included in almost all contracts.

Third, in response to Question 1(b), no, the legislation does not impose a duty or requirement on the leagues that they are unable to enforce due to lack of privity with a third party. As explained above, all the league must do is to include in its licensing agreements with TV providers a prohibition on the TV provider itself (the licensee) intentionally removing games during carriage disputes. Privity is met.

To illustrate, suppose the NFL enters a licensing agreement with CBS that includes the prohibition on taking down games during a carriage dispute. Suppose further that CBS, during a carriage dispute with cable operator Mediacom, takes down its CBS programming from all

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[†] *See* 15 USC §1293.

Mediacom systems. The NFL might notify CBS that unless CBS offers to restore carriage temporarily during the broadcast of the forthcoming NFL game, it will be in violation of its NFL licensing agreement. If CBS offers Mediacom such interim carriage to the NFL's satisfaction, no violation of the NFL/CBS licensing agreement has occurred (regardless of whether Mediacom accepts the offer of temporary carriage during the NFL game). The FANS Act provision is met because the NFL included in its contract with CBS a prohibition on taking down games during contract disputes and has reasonably enforced that contract provision.

This entire fact pattern would arise under the FANS Act only if the NFL had been sued for antitrust violation by a third party, who asserted that the NFL's antitrust exemption under the SBA did not apply because the NFL did not sufficiently prohibit its licensee (CBS) from taking the NFL game off Mediacom. This would become a fact inquiry for the court to determine if the NFL had, in fact, met its burden under the FANS Act to prohibit the intentional removal of the NFL game by the licensee, CBS. If the court finds that the NFL, through its licensing provision and enforcement thereof, had sufficiently guarded against the intentional removal of the game by CBS, then the court would rule that the antitrust exemption remains in place for the purpose of the antitrust case in front of it.

Please let us know if you have any further questions. Thank you.

Sincerely,

David R. Goodfriend
Chairman,
Sports Fans Coalition

Sally Greenberg
Executive Director,
National Consumers League

RESPONSES OF WILLIAM T. LAKE TO QUESTIONS SUBMITTED BY SENATOR GRASSLEY

Federal Communications Commission
Office of Legislative Affairs
Washington, D.C.20554

December 22, 2014

The Honorable Patrick Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Chairman Leahy:

Enclosed please find the responses to the Questions for the Record submitted for William T. Lake regarding his appearance before the Committee on the Judiciary on December 4, 2014, at its hearing entitled, "The FANS Act: Are Sports Blackouts and Antitrust Exemptions Harming Fans, Consumers, and the Games Themselves?"

If I can be of further assistance, please have your staff contact me at (202) 418-0095.

Sincerely,

Sara W. Morris
Director

Enclosure

Senator Grassley
Questions for the Record
Hearing on "The FANS Act: Are Sports Blackouts and Antitrust Exemptions Harming Fans, Consumers, and the Games Themselves?"
December 10, 2014

William Lake
Chief, Media Bureau
Federal Communications Commission

1. In your written testimony, it seems that both you and the NFL cite some of the exact same data, but rely on it to reach diametrically opposed conclusions. Specifically, you note that in 1975 almost 60 percent of NFL games were blacked out because they failed to sell out, while last year only two of the 256 games were blacked out. You used that data to suggest that the blackout rules are no longer necessary. The NFL, on the other hand, cites the same data, but relies on it as evidence that the current policies are working. It seems to me, therefore, that it's a question of whether there is a causal connection between the current policies and the decrease in blackouts, as the NFL argues, or if it's merely a correlation, as you seem to suggest.

   a. Please address the conclusion reached by the NFL: specifically, if there were only two blackouts last year, then why should we upset the policy that appears to be working?

   RESPONSE: The Commission's decision has no impact on the NFL's ability to continue to have its blackout policy if it chooses to do so. When the Commission adopted the sports blackout rules forty years ago, it took the underlying NFL blackout policy as a given and sought to protect the ability of viewers to see NFL games on over-the-air TV by prohibiting multichannel video programming distributors from importing a distant TV broadcast signal into a local market if the NFL's policy required the local TV station to black out the game on its station. The Commission's concern then was that such importation of a distant signal might lead the league to decline to authorize the distant station to carry its games. In its recent action, the Commission found that marketplace changes had eliminated that justification for our rules. As Chairman Wheeler noted in September, "we at the FCC shouldn't be complicit in preventing sports fans from watching their favorite teams on TV." Tom Wheeler (September 9, 2014) *Updating Old Policies; Pioneering New Ones* [Retrieved at http://www.fcc.gov/blog/updating-old-policies-pioneering-new-ones]

   The Commission has an obligation to ensure that the rules on its books are in the public interest. After careful consideration of all of the issues raised, the Commission decided unanimously that its sports blackout rules were no longer justified. The analysis in coming to that decision evaluated the issue that you raise. The popularity of the NFL has substantially increased in the four decades since the rule was first adopted, which translates into more sold out games and fewer blackouts. Additionally, there was little

evidence in the record– or justification by the NFL or broadcasters – that relaxation of the NFL blackout policy in 2012 had any significant impact on the number of blacked out games or that the decrease in blacked out games was due to the NFL's blackout policies or the FCC's rules. *See Sports Blackout Rules Report and Order*, 29 FCC Rcd 12053, at ¶ 19 (Sept. 30, 2014).

2. As we know, the legislation conditions the sports leagues' antitrust exemptions – and therefore, some argue, their viability – on the elimination of blackout requirements during contract negotiations. This raises a number of complicated issues regarding the current contracts, their duration, and whether it's feasible for the parties to alter their terms. And for future negotiations, it raises the question of whether or not the leagues have privity of contract with all of the relevant parties and affiliates.

   a. In your view, would the legislation require the parties to open up and alter the terms of any existing contracts?

   b. And for future contracts, in your view does the legislation impose a duty or requirement on the leagues that they are unable to enforce due to lack of privity with a third party?

RESPONSE: As noted in my written statement, the Commission does not take a position on the FANS Act and whether Congress should modify or eliminate the existing antitrust exemptions that allow the leagues to have sports blackout policies. The questions posed appear to be outside of the purview of the FCC.

RESPONSES OF GERARD J. WALDRON TO QUESTIONS SUBMITTED BY SENATOR FRANKEN AND SENATOR GRASSLEY

Senator Grassley
Questions for the Record
Hearing on "The FANS Act: Are Sports Blackouts and Antitrust Exemptions Harming Fans, Consumers, and the Games Themselves?"
December 10, 2014

Gerard J. Waldron
Partner, Covington & Burling LLP

1. In your written testimony, it seems that both you and the FCC cite some of the exact same data, but rely on it to reach diametrically opposed conclusions. Specifically, the FCC notes that in 1975 almost 60 percent of NFL games were blacked out because they failed to sell out, while last year only two of the 256 games were blacked out. The FCC used that data to suggest that the blackout rules are no longer necessary. On the other hand, you cite the same data, but rely on it as evidence that the current policies are working. It seems to me, therefore, that it's a question of whether there is a causal connection between the current policies and the decrease in blackouts, as you argue, or if it's merely a correlation, as the FCC seems to suggest.

   a. Please address why you believe the decrease in blackouts is caused by the blackout policies and is not merely a correlation between the policy and the decrease?

Answer:

The blackout policy is one component of the NFL's overall television model, through which the NFL makes every single regular season and playoff game available on free, over-the-air television, rather than exclusively via cable programming services. This comprehensive television model is the most pro-consumer television policy in sports today, and has helped make football one of the nation's most popular forms of sports entertainment. A key feature of the model is revenue sharing among the 32 NFL Clubs, which enables small- and mid-sized market teams to succeed and helps promote parity. Parity contributes to the competitiveness and excitement of the games, which in turn improve attendance across the League and thereby reduce the likelihood of potential blackouts. Moreover, other factors such as weather, team performance, stadium size, and scheduling considerations may affect the number of blackouts in a season. The blackout policy is an additional factor that explains the decrease in blackouts, because it has the effect of helping to ensure that clubs sell the final tranche of seats.

The NFL has adjusted its blackout policy in recent years to maximize both attendance at games and television viewership and has successfully reduced blackouts. Last season, there were only two blacked out games, and this season there were none. The NFL runs a complex business, and the ability to contract freely and exercise sound business judgment has allowed the League to maintain its successful television model, benefiting fans both in stadiums and over free television.

2. As we know, the legislation conditions the sports leagues' antitrust exemptions – and therefore, some argue, their viability – on the elimination of blackout requirements during contract negotiations. This raises a number of complicated issues regarding the current contracts, their duration, and whether it's feasible for the parties to alter their terms. And for future negotiations, it raises the question of whether or not the leagues have privity of contract with all of the relevant parties and affiliates.

   a. In your view, would the legislation require the parties to open up and alter the terms of any existing contracts?

Answer:

While it is impossible to predict what the parties to any particular agreement would do if the bill were passed, S. 1731, the Furthering Access and Networks for Sports Act, certainly would fundamentally alter the circumstances under which a number of agreements were consummated. The risk of losing the protection of the Sports Broadcasting Act would necessarily affect the League's view of its broadcast model and all of its broadcast relationships and could lead to substantial revisions of the League's contracts and media policies.

   b. And for future contracts, in your view does the legislation impose a duty or requirement on the leagues that they are unable to enforce due to lack of privity with a third party?

Answer:

A primary reason the FCC's rule was necessary to protect local broadcasters is that the NFL has no privity of contract with cable companies or satellite companies that could import a distant signal and thus undermine a local blackout. The Commission's rule thus served to protect the local broadcaster, which would not receive the blacked-out local game, from unfair competition by a cable company or satellite company electing to import a distant signal. Those basic features of the industry remain true today -- the NFL has television rights agreements in place with each of its broadcast network partners, but it has no contractual relationship with those network partners' hundreds of affiliate stations and no contractual relationship with cable or satellite companies regarding their carriage of those affiliate stations. This inherent gap in the sports-media distribution system certainly would remain a problem that the League could not reasonably solve in future contracts. The NFL documented this lack of privity in the record before the FCC.

In addition to interfering with existing business relationships, the proposed bill would condition the Sports Broadcasting Act's provisions on the result of contract negotiations between third parties with which the League has no applicable contractual relationships and no control: affiliate television stations, and cable and satellite companies that distribute those stations' feeds.

No entity can plan its operations under laws that could change due entirely to actions by unrelated third parties.

Hearing before the Senate Committee on the Judiciary
"The FANS Act: Are Sports Blackouts and Antitrust Exemptions Harming Fans, Consumers, and the Games Themselves?"
Questions for the Record Submitted by Senator Al Franken

Question for Gerard J. Waldron:

Question 1. During the hearing, witnesses discussed the significant taxpayer support and public benefits that sports leagues, including the NFL, enjoy. At the same time, we have a team in the NFL that continues to call itself by an offensive name—a racial slur that is harmful and insulting. I've heard from tribal leadership in my home state of Minnesota, and they are understandably hurt and disappointed by the continued use of this name. I share their concerns. What is the league planning to do at this time to address the need for a name change?

Answer:

The NFL takes seriously the expressed concerns of tribal leaders and others regarding the team name and continues to encourage discussions between the team and those who are offended by the name.