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THE NFL STARCAPS CASE: ARE SPORTS' ANTI-DOPING PROGRAMS AT A LEGAL CROSSROADS?

HEARING

BEFORE THE

SUBCOMMITTEE ON COMMERCE, TRADE, AND CONSUMER PROTECTION

OF THE

COMMITTEE ON ENERGY AND COMMERCE

HOUSE OF REPRESENTATIVES

ONE HUNDRED ELEVENTH CONGRESS

FIRST SESSION

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THE NFL STARCAPS CASE: ARE SPORTS' ANTI-DOPING PROGRAMS AT A LEGAL CROSSROADS?

TUESDAY, NOVEMBER 3, 2009

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COMMERCE, TRADE,
AND CONSUMER PROTECTION,
COMMITTEE ON ENERGY AND COMMERCE,
Washington, DC.

The subcommittee met, pursuant to call, at 11:40 a.m., in Room 2123, Rayburn House Office Building, Hon. Bobby L. Rush [chairman of the subcommittee] presiding.

Present: Representatives Rush, Schakowsky, Sarbanes, Sutton, Butterfield, Barrow, Space, Waxman (ex officio), Radanovich, Stearns, Terry, Gingrey, and Scalise.

Staff Present: Michelle Ash, Chief Counsel; Brian Cohen, Senior Investigator and Policy Advisor; Timothy Robinson, counsel; Will Cusey, Special Assistant; Theresa Cederoth, Intern; Aaron Ampaw, CBC Fellow; Bruce Wolpe, Senior Advisor; Angelle Kwemo, Counsel; Brian McCullough, Minority Senior Professional Staff; Shannon Weinberg, Minority Counsel; Will Carty, Minority Professional Staff; and Chad Grant, Minority Legislative Analyst.

OPENING STATEMENT OF HON. BOBBY L. RUSH, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ILLINOIS

Mr. RUSH. The committee will now come to order. This subcommittee is called today to hear testimony based on the title, "NFL StarCaps: Are Sports' Anti-Doping Programs At a Legal Crossroads?" The Chair recognizes himself for 5 minutes for the purposes of an opening statement.

The major reason for being here today is the StarCaps case, which is now before the 8th Circuit Court of Appeals and the Minnesota State District Court.

Sports industry analysts and legal experts everywhere are of the mind that Williams v. The NFL will have a major effect on how future collective bargaining negotiations in professional sports are weighed and concluded.

Let me be real clear here, we are not here to debate the particular merits of the Williams case, or to judge which parties were at fault. We are also not here to second guess the choice of law rulings made by the three-judge panel from the 8th Circuit Court of Appeals or to predict how the case will unfold as an employment complaint under State drug and alcohol testing workplace laws.

Instead, what we should be here to do is to listen closely to our panel of expert witnesses. Two of our witnesses are key protagonists in the Williams v. NFL disagreement. We should also hone in on what they don't say and what we could say to encourage these parties to work out their serious differences.

It is in all of our interests for these parties to reach an agreement on this enormously important matter, and we are very fortunate today to have access to Commissioner Goodell, and also to Mr. Smith, and to hear that are testimony and answers of all our distinguished witnesses.

For me it would be very useful to understand better why agreement over discipline between the NFL and Kevin and Pat Williams could not be reached. What obstacles block the road to agreement?

I hope that we will also spend some time thinking about whether collective bargaining has become too soured as a consequence of this case. Will the collective bargaining agreement still be the preferred avenue for hammering out league union agreements on disciplined players.

A word about the Members of Congress, about the U.S. Congress. We as Members of Congress and we as parents are especially concerned about the serious health and safety harms to youth and to student athletes from illegal performance enhancers. Notwithstanding high profile steroid cases and scandals, a good number of young athletes still find it hard to resist performance enhancers that guarantee on-the-field performances resulting in off-the-field fame and riches.

The institution of strong anti-doping policies is what Congress has been bargaining for with the professional sports community and industry over the past 5 years. By this hearing today you can enable us to help you to achieve what is a preferred and a nonnegotiable outcome for all the stakeholders, including and most importantly your fans, our constituents, and the American people.

I look forward to hearing from all of the witnesses today, and I yield back the balance of my time.

And now I want to recognize the chairman of the full committee—no.

[The prepared statement of Mr. Rush follows:]

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November 3, 2009

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Statement by the Honorable Bobby L. Rush, Chairman

Energy and Commerce Committee Subcommittee on
Commerce, Trade, and Consumer Protection
Hearing: NFL StarCaps Case: Are Sports Anti-Doping Programs at a Legal Crossroads?
November 3, 2009

WASHINGTON — " Good morning. Our major reason for being here today is the StarCaps case, which is now before the 8th Circuit Court of Appeals and Minnesota State District Court.

"Sports industry analysts and legal experts everywhere are of the mind that *Williams v. NFL,* could have a major effect on how future collective bargaining negotiations in professional sports are waged and concluded.

"We are not here to debate the particular merits of the Williams case or to judge which parties were at fault. We are also not here to second guess the choice-of-law rulings made by the three-judge panel from the 8th Circuit Court of Appeals, or to predict how the case will unfold as an employment complaint under state drug and alcohol testing workplace laws.

"Instead, what we should be here to do is to listen closely to our panels of expert witnesses. Two of our witnesses are key protagonists in the *Williams v. NFL* disagreement. We should also hone in on what they don't say and what we could say to encourage these parties to work out their differences. It is in all of our best interests for these parties to reach an agreement on this enormously important matter. We are very fortunate to have access to Commissioner Goodell and Mr. Smith, and to hear the testimony and answers of all our distinguished witnesses.

"For me, it would be useful to better understand why agreement over a disciplinary matter between the NFL and Kevin and Pat Williams could not be reached.

– more –

"What obstacles blocked the road to agreement? I hope that we will also spend some time thinking about whether collective bargaining has become too scarred, as a consequence of this case. Will CBA negotiations still be the preferred avenue for hammering out League-Union agreements on disciplining players?

"We, as Members of Congress and as parents, are especially concerned about the short- and long-term serious health and safety hazards that illegal performance enhancers may have on our youth, in general, and student athletes in particular.

"Notwithstanding high profile steroids cases and scandals, a good number of young athletes still find it hard to resist performance enhancers that guarantee superior, 'on-the-field' performance resulting in 'off-the-field' fame and riches.

"The implementation of strong, anti-doping policies is what Congress has been angling to secure with the professional sports industry over the past five years. I hope today's hearing will help us to help you achieve what I believe is a non-negotiable outcome for Members of this body.

"I look forward to hearing from all of the witnesses.

"With that, I yield back the balance of my time."

# # #

Mr. RADANOVICH. Thank you.

Mr. RUSH. Right now I am recognizing the ranking member of this subcommittee for 5 minutes for the purposes of opening statement. Mr. Radanovich, you're recognized for 5 minutes.

OPENING STATEMENT OF HON. GEORGE RADANOVICH, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. RADANOVICH. Thank you, Mr. Chairman, and it is a pleasure to be here with you at this hearing today. I want to thank you for holding this hearing, and I believe that this hearing will continue this committee's interest in making sure that performance enhancing substances are not part of sports. The work we have done in the past has I believe produced positive changes to the existing drug changing policies of the professional sports leagues, and those policies are restoring integrity to the legacy of many sports that were severely tainted over the last 2 decades.

The pervasiveness of steroids gave way to designer steroids produced by entrepreneurial drug pushers, and the trickle down to younger athletes not surprisingly remains an issue, as hundreds of thousands of high school age and even younger athletes continue to risk their health through the use of steroids.

Steroids have a legitimate medical purpose and are often used to help treat and cure illnesses, but those substances are for the sick and must be administered under care of trained medical professionals. They are not for the healthy athlete who is looking for a fast track to obtain a competitive edge. That is cheating and it is pure and simple that it is cheating. It is also incredibly dangerous and unhealthy. Whether it is the blinding desire of an athlete to improve or the lure of increasingly lucrative careers in professional sports for the few who succeed, it is unacceptable behavior.

Mr. Chairman, I fully support the committee's interest in making sure that the stronger drug policies that have been adopted are not in jeopardy of being undermined. A legal case involving NFL players has focused attention on the collective bargaining agreement between the players and the league and the relationship to State law. I am interested to hear the facts of the case as it currently stands and the implications for any professional sports collectively bargained drug programs.

As a side note it seems a stretch to consider whether the original roots of labor law meant to protect workers from unfair and dangerous working conditions were intended to undermine a policy meant to increase the health and safety of participants while at the same time ensuring the integrity of the sport.

As I understand it, the case is going and could eventually resolve the legal uncertainty depending on its outcome. However, because of the initial determinations made by the courts, a final result in the case may present issues that challenge the balance of our Federalist approach to worker protections in the area of drug testing policies, which permits States to enact laws for worker protections that may be stricter than those collectively bargained.

The case obviously raises doubts about whether and to what extent collectively bargained agreements' drug policies in professional sports are affected by such State laws.

Additionally those questions may have implications for other sports, including at the Olympic and collegiate levels. If the drug policies are only as strong as the minimum that can be tested under State law, the significant advances in drug testing policies achieved in the last several years which were agreed to by both players and management may be erased. That is not the result that anyone of us want to see.

Mr. Chairman, I am very interested to hear the perspectives of our witnesses today, and I look forward to working with you on this issue and I yield back.

[The prepared statement of Mr. Radanovich follows:]

Statement of the Honorable George Radanovich
Ranking Member, Subcommittee on Commerce,
Trade, and Consumer Protection
"Are Sports Anti-Doping Programs At a Legal Crossroads?"
November 3, 2009

Thank you Mr. Chairman. This hearing will continue this Committee's interest in making sure performance enhancing substances are not part of sports. The work we have done in the past has, I believe, produced positive changes to the existing drug testing policies of the professional sports leagues. And those policies are restoring integrity to the legacy of many sports that were severely tainted over the past two decades. The pervasiveness of steroids gave way to designer steroids produced by entrepreneurial drug pushers. And the trickle down to younger athletes not surprisingly remains an issue, as hundreds of thousands of high school aged and even younger athletes continue to risk their health through the use of steroids.

Steroids can have a legitimate medicinal purpose and often help treat and cure illnesses. But those substances are for the sick and must be administered under the care of a trained medical professional. They

are not for the healthy athlete who is looking for a fast track to obtain a competitive edge. That is cheating, pure and simple. It is also incredibly dangerous and unhealthy. And whether it is the blinding desire of an athlete to improve, or the lure of increasingly lucrative careers in professional sports for the few who succeed, it is unacceptable behavior.

Mr. Chairman, I fully support the committee's interest in making sure the stronger drug policies that have been adopted are not in jeopardy of being undermined. A legal case involving NFL players has focused attention on the collectively bargained agreement between the players and the league and the relation to state law. I am interested to hear the facts of where the case currently stands and the implications for any of professional sports' collectively bargained drug programs. As a side note, it seems a stretch to consider whether the original roots of labor law – meant to protect workers from unfair and dangerous working conditions – were intended to undermine a policy meant to increase the

health and safety of its participants while at the same time ensuring the integrity of the sport.

As I understand it, the case is ongoing and could eventually resolve the legal uncertainty, depending on the outcome. However, because of initial determinations made by the courts, a final result in the case may present issues that challenge the balance of our Federalist approach to worker protections in the area of drug testing policies, which permits states to enact laws for worker protections that may be stricter than those collectively bargained.

The case obviously raises doubts about whether – and to what extent – collectively bargained agreements drug policies in professional sports are affected by such state laws. Additionally, those questions may have implications for testing policies for other sports, including at the Olympic and collegiate levels. If the drug policies are only as strong as the minimum that can be tested under state law, the significant advances in drug testing policies achieved in the last several years, which were

Mr. RUSH. Thank you. The Chair now recognizes for the purposes of opening statement the chairman of the full committee, the gentleman from California, Chairman Waxman.

OPENING STATEMENT OF HON. HENRY A. WAXMAN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. WAXMAN. Thank you very much, Mr. Chairman. Thank you for holding this hearing.

As a result of congressional hearings, public outrage, and the actions of professional sports leagues and players associations, progress has been made in reducing steroid use by professional athletes. Unfortunately, this recent ruling in the case of Williams v. The NFL, better known as the StarCaps case, threatens to undermine this progress, and we are holding this hearing to understand the implications of these rulings and to assess whether congressional intervention is required.

When Mark McGwire and Rafael Palmeiro and other professional baseball players appeared before the House Oversight Committee in 2005, I said we were holding the hearing because there was a absolute correlation between what happens in major league locker rooms and what happens in high school locker rooms. Rampant steroid abuse in the pros sends an unmistakable message to our kids.

Since that hearing and the hearing last year with Roger Clemens, steroid use by high school students has been dropping. The latest survey data shows that steroid use among 8th and 10th graders is at a 20-year low. In part this is attributable to examples set by professional sports and their player unions. As the scope of the problem became evident major league baseball, the NFL, and their player unions establish tougher testing policies and new codes of conduct regarding drug use. These changes have not completely eliminated steroid use, but they have made it tougher for players to cheat and increase the consequences when they are caught.

The reason we are having this hearing is that the recent court decisions involving the National Football League's drug testing policy have put this progress at risk.

We all know the story. The Federal court in Minnesota has ruled and it has been upheld by the court of appeals that State laws governing workplace drug testing may trump the collective bargaining agreement of the NFL, Major League Baseball, and other sports leagues. This is a serious problem because State laws undermine the stringent sanctions established by the sports leagues and their players associations.

If these rulings prevail, they could wreak havoc with policies designed to curb performance enhancing drug use in professional sports. In fact, if the rulings are taken to logical conclusion, players on one team could be allowed to use drugs that would subject players on another team to suspensions and fines.

The NFL, Major League Baseball, and other leagues could be limited as to how and when it could test players in Minnesota, but not players on the other teams in the league. Some players could be penalized for performance enhancing drug use while others would get away scot free.

In short, these new legal interpretations could render the NFL and Major League Baseball drug testing programs unenforceable, loophole ridden, and unacceptably weak and ineffective. I believe we can and must avoid this outcome.

Our panelists today will offer guidance on how they expect the legal issues to be resolved and how to solve the problems caused by these new legal interpretations. I am hopeful the courts will ultimately rule that the strong collectively bargained drug policies can stand against State law that would weaken them. But if this is not the case, then we need to find out if the collective bargaining process can solve these problems or whether congressional action is needed.

One thing is clear, we should not allow the drug policies that the NFL, Major League Baseball, and other sports leagues have put in place to be rendered null and void. That is an invitation to steroid abuse in professional sports, and it will inevitably lead to more steroid use on high school football fields and baseball diamonds.

I look forward to the testimony today, and I thank all of our witnesses for being here.

Mr. RUSH. The Chair now recognizes the gentleman from Louisiana for 2 minutes for the purpose of opening statements.

OPENING STATEMENT OF HON. STEVE SCALISE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF LOUISIANA

Mr. SCALISE. Thank you, Mr. Chairman. My voice is a little sore. I was watching the Saints go 7 and 0 last night with some friends. My friend from Atlanta is not really happy about that, but in New Orleans we are very happy.

Sports are part of our culture and part of the very social fabric of our Nation. Unfortunately we have recently seen how performance enhancing drugs can cast a cloud over athletes and jeopardize the integrity of sports. Professional athletes in particular bear a special responsibility. Whether they like it or not, professional athletes are role models. They have a great influence over our young people and can bring a lot of good to our local communities.

We have see this first hand in south Louisiana. We have seen the influence, a league, a team and its players can have. The NFL has been committed to helping New Orleans and the Gulf Coast region since Hurricane Katrina. By the end of 2005 the NFL had raised over $20 million for hurricane relief.

Commissioner Goodell, on behalf of my constituents and those that have been helped by the NFL in our region, thank you for your hard work and the NFL's commitment to our recovery. I also want to thank you for selecting New Orleans as the host of the Super Bowl in 2013, which will mark our 10th Super Bowl. This is yet another sign that New Orleans is still a world class city that can host major events, and it is another milestone in our recovery.

The Saints organization must also be commended for the support it has shown to the city and the State it calls home. Following Hurricane Katrina, the Saints set up a relief fund that provided much needed resources to charities around our region. They also made a commitment to return to New Orleans after not being able to play a single game in the city during the 2005 season.

I am proud to have the Saints headquartered in my district. In 2006, in their first game back in New Orleans the Saints showed what a team can do for a city and for its fans. The atmosphere that night in September in the Super Dome was electric, and the Saints started their most successful season in franchise history until this year with a resounding victory over the Falcons ironically.

More importantly, the Saints gave the people of Louisiana hope that their way of life was slowly returning to normal. They galvanized our region and provided a much needed boost and distraction from the difficult recovery process. The spirit and generosity of the New Orleans Satins started at the top with its owner Tom Benson, his wife Gail, and his granddaughter Rita LeBlanc, who are active in the community, but we also need to remember the players. Drew Brees has become actively involved in our region with his Brees Dream Foundation——

Mr. RUSH. The gentleman's time is up.

Mr. SCALISE. [continuing]. Which has given millions of dollars. So many other players, the Manning family still has a great impact.

I will look forward to the testimony. I would have appreciated us having an opportunity in the Energy and Commerce Committee to have a hearing on the health care bill, because this week we are going to be taking that up.

Mr. RUSH. The gentleman's time is up.

Mr. SCALISE. Unfortunately, we didn't get that opportunity, but I look forward to hearing from the panel.

[The prepared statement of Mr. Scalise follows:]

The NFL StarCaps Case: Are Sports' Anti-Doping Programs at a Legal Crossroads?

Statement of Congressman Steve Scalise
for the
Subcommittee on Commerce, Trade, and Consumer Protection
Committee on Energy and Commerce

November 3, 2009

Thank you, Mr. Chairman.

Sports are part of our culture and part of the very social fabric of our nation. Unfortunately, we have recently seen how performance enhancing drugs can cast a cloud over athletes and jeopardize the integrity of sports.

Professional athletes in particular bear a special responsibility. Whether they like it or not, professional athletes are role models. They have a great deal of influence over young people and have the ability to provide a positive impact upon their local communities. We have seen this first hand in Southeast Louisiana. We have seen the influence a league, a team, and its players can have.

The NFL has been committed to helping New Orleans and the Gulf Coast region since Hurricane Katrina. By the end of 2005, the league had raised well over $20 million. Commissioner Goodell, on behalf of my constituents and those that have been helped by the NFL in our region, thank you for your hard work and for the NFL's strong commitment to our recovery.

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In 2006 at their first game back in New Orleans, the Saints showed what a team can do for a city and for its fans. The atmosphere that September night in the Superdome was electric as the Saints started their most successful season in franchise history, at least until now, with a resounding victory over the Atlanta Falcons.

More importantly, the Saints gave the people of Louisiana hope that their way of life was slowly returning to normal. They galvanized our region and provided a much needed boost and distraction from the difficult recovery process. I am proud to have the Saints headquartered in my district.

The spirit and generosity of the New Orleans Saints start at the top with its owner, Tom Benson, his wife, Gayle, and Tom's granddaughter, Rita Benson-Leblanc, who is also Owner and Executive Vice President. They have dedicated countless hours and resources to helping the people of our region. In 2008, the Volunteers of America recognized Tom Benson as the recipient of its annual Good Samaritan Award in Philanthropy in recognition of his "incomparable efforts to rebuild the region following Hurricane Katrina."

And we have seen the same generosity from the Saints' players. Drew Brees has become actively engaged in the community along with his wife, Brittany, through their Brees Dream Foundation, which is dedicated to helping advance cancer research, and providing care, education, and opportunities for children in need. Since its founding, the Brees Dream Foundation has raised and/or committed over $4.5 million to help advance cancer research and help rebuild schools, parks, playgrounds, and athletic fields in New Orleans and other communities.

Drew has participated in USO tours to the Persian Gulf, Japan, and Guantanamo Bay, and he also serves on the Board of Directors of the National World War II Museum in New Orleans. In recognition of his efforts off the field, Drew was named the 2006 Walter Payton NFL Man of the

Year. Drew Brees is a true humanitarian, and we are proud to have him as a member of the New Orleans community.

There are other proud examples of the positive impact NFL athletes can have on our local community. Reggie Bush rebuilt Tad Gormley Stadium's field, which hosts many high school football games in New Orleans. And we all know the positive impact the entire Manning family has had for decades inspiring the youth of our region.

Mr. Chairman, Southeast Louisiana is a prime example of the influence professional sports can have on a community and region, especially during one of its most difficult periods. The efforts of the NFL, the Saints, and its players are a testament to the integrity of sports...an integrity that should be protected so it does not become jeopardized by the dangers of performance enhancing drugs.

Mr. Chairman, I am pleased that we are discussing an issue that affects the health of NFL players as well as the health of younger athletes. But I regret that we are missing the opportunity to discuss the 1,990 page bill that will jeopardize health care for the vast majority of Americans.

The Energy and Commerce Committee, which has primary jurisdiction over health care, has yet to have a hearing on the recently filed 1,990 page government takeover of health care that we will likely be voting on in the next week. When Health and Human Services Secretary Kathleen Sebelius appeared before our committee in September, she was not allowed to answer specific questions or discuss the Democrats' health care bill, and the chair at that committee hearing committed to invite Secretary Sebelius back. Unfortunately that has not occurred.

While I am disappointed we are not having a hearing on the health care bill, I look forward to the testimony of the panelists who are before us today.

Thank you, and I yield back.

Mr. RUSH. The Chair now recognizes Dr. Gingrey, the gentleman from Georgia, for 2 minutes.

OPENING STATEMENT OF HON. PHIL GINGREY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF GEORGIA

Dr. GINGREY. Mr. Chairman. Thank you. I thank you for calling this hearing today on an issue that impacts a very unique industry in the United States, professional sports. In recent years Congress, including this committee, has carefully examined the use of performance enhancing substances in our professional sports leagues at a time when the public rightfully questions the role that Congress has on this matter due to other pressing issues facing our Nation, mainly the economy and health care reform. We are here to review the anti-doping policies and the collective bargaining agreements of the major sports in this country.

There is no question that for millions of fans professional sports provides a way for them to take pride in their city, it helps create jobs for countless hardworking Americans, and gives us tales of athletic lore that we share with future generations.

Mr. Chairman, professional sports therefore have a large impact on our society and our way of life. However, the use of performance enhancing substances not only endangers the integrity of the athletic institutions, but they also are troublesome for the health of the players, and they set a very poor example for our Nation's youth who rightly or wrongly look up to athletes as their role models.

Yet today's hearing is not about whether or not major sports leagues, particularly the NFL, implement anti-doping policies. Instead, today's hearing is about how these policies should be enforced after they have been enacted in collective bargaining agreements to provide for fair treatment of players while maintaining a level playing field for competition within each league.

It can be argued that the current framework in which we operate does not provide that level playing field for which we strive. The NFL StarCaps case illustrates how a patchwork of State laws compromises the ability for anti-doping policies in leagues to be backed up by the enforcement tools necessary to eliminate the use of performance enhancers.

Mr. Chairman, given that professional sports inherently operate in the realm of interstate commerce, this is not just an issue of State and Federal labor laws and how they operate.

I look forward to hearing from our distinguished panel on these issues, and I see that my time is gone and I will yield back.

Mr. RUSH. The Chair thanks the gentleman.

The gentlelady from Illinois, Ms. Schakowsky, the Vice Chair of the subcommittee, is recognized for 2 minutes for the purposes of opening statements.

Ms. SCHAKOWSKY. Thank you, Chairman Rush, for holding this hearing. I also want to thank Chairman Waxman for his commitment and extensive work over the years on this issue. It is really largely due to his ongoing efforts, along with the work of this committee, that led the major sports leagues to establish stronger policies banning the use of steroids in recent years. I congratulate the leagues for doing that.

My principal concern, as I think everyone on this committee's is, has to do with young athletes. They see professional athletes making millions after juicing, and what do they learn? That it pays off, despite health costs, their own health and even sometimes fatal consequences, they continue to do it. So there has to be real consequences, real penalties that directly bear on the game itself and the right to participate, which gets me to the question today.

At the heart of this hearing is the interaction of State labor laws and league steroid policies that were developed as part of collective bargaining agreements and then overruled by the courts. We want to make sure that the policies are as strong as possible, and so I really look forward to hearing from the witnesses today on your recommendations on how we can resolve this and make sure that we keep in place those strong sanctions when the steroid policies are violated, and I yield back.

Mr. RUSH. The Chair recognizes the gentleman from Florida, Mr. Stearns, for 2 minutes.

OPENING STATEMENT OF HON. CLIFF STEARNS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF FLORIDA

Mr. STEARNS. Thank you, Mr. Chairman, and thank you for having this hearing. As former chairman of the CTCP Subcommittee in the 109th Congress, I held hearings on steroids and sports. Jan Schakowsky was the ranking member at that point. We were the first in Congress to hold hearings on performance enhancing drugs, and that was in 2003. These hearings led me to introduce legislation, the Drug Free Sports Act, which would have required the Secretary of Commerce to issue regulations requiring random testing for steroids and other performance enhancing substances and would have called for a permanent suspension from participation in a professional sport association following two previous violations.

As a result, I believe, of my legislation Major League Baseball adopted a "3 strikes and you're out" policy. Today, however, we are examining an NFL case in which two players have managed to simply escape suspension for testing positive for a banned masking agent. With the help of the NFL Players Association, the players have been successful so far in using the State of Minnesota's more lenient workplace laws to escape a mandatory 4 game suspension, as simply dictated by the NFL's collectively bargained policy in anabolic steroids. This was done and agreed upon.

The use of steroids and other performance enhancing drugs, in addition to being illegal, undermines the integrity of sports and poses significant health risks to the athletes. Allowing more lenient State laws to undermine and preempt collective bargaining agreements made between players and unions and professional sports associations such as the NFL sets a bad precedent for players and jeopardizes public confidence in professional sports. Collectively bargained uniformed steroid policies are made for a reason and should be governed by Federal labor law, if not for the integrity of professional sports as a whole, but for the health and well-being of professional athletes who are also looked to, as mentioned by Jan Schakowsky, as role models by aspiring high school athletes.

Thank you, Mr. Chairman.

Mr. RUSH. The Chair now recognizes the gentlelady from Ohio, Ms. Sutton, for 2 minutes.

Ms. SUTTON. I thank the chairman. I thank you for holding today's hearing on the NFL StarCaps case.

This situation raises several important issues, including the public health concerns that we have heard expressed here from steroid use. When a player takes steroids or a masking agent, the player's health, integrity, and accomplishments are at risk, and we would be naive to dismiss that young people look up to and admire professional athletes, imitating their behavior, whether that athlete wants that to happen or not.

A University of Michigan survey found that an estimated 200,000 high school students used steroids in 2008, and the motivation is obvious. Professional athletes' achievements are celebrated and glamorized, team owners and professional sports leagues profit considerably from the players' performances, but to protect the health and well-being of our athletes and most importantly our young people we must stand together to say that athletes should not use performance enhancing drugs.

I want to add, Mr. Chairman, if I can, that at this point Ohio, I come from Ohio, I represent a great State, Ohio's unemployment rate right now stands at 10.1 percent. With so many people unemployed, it is more than unfortunate that well paid professional athletes who serve as role models to our youth refuse to play by the rules and engage in irresponsibility and unlawful behavior.

So I am hoping that as a result of this hearing we will settle the ambiguity that exists and that we will resolve somehow to make sure the collective bargaining agreements do prevail.

Thank you.

Mr. RUSH. The Chair now recognizes the gentleman from Nebraska, Mr. Terry, for 2 minutes.

Mr. TERRY. Thank you, Mr. Chairman. I thank the witnesses here today to tell us your position on the Pelosi health care bill. That is humor. All right, I will interpret that for you.

It is nice to have a little diversion here and talk sports, as a sports fan, a true sports fan, all sports, NFL, Major League Baseball, NHL, all of them. And I dearly want to make sure that the competition is pure and it is clean. Now, the gentlelady from Ohio used the word "naive." I want to make sure that Mr. Weiner and Mr. Smith, representing players here, are not approaching this in a naive position, and don't think that this committee and subcommittee and this Congress won't take this issue up and pass Federal legislation that will preempt State law, that will be a drug testing policy that will be imposed on you, and I will guarantee we will be much harsher in trying to clean up the sports than the directors have been.

I am greatly disappointed in the Williamses' lawsuit challenging the collective bargaining agreement. The basic agreement between this committee and the major league sports was that they would handle this internally and we wouldn't have. Well, that has been breached by the players now.

So I think there is two fundamental questions here that face this committee today and that is do we need to draft a national drug testing policy to be imposed upon all major league professional

sports? If that is necessary, let's begin the work, Mr. Chairman. Otherwise, if you don't think it is necessary, maybe it is necessary that major league sports pull out of the States who claim their State laws will supersede the collective bargaining. Maybe Minneapolis without the Vikings is the appropriate remedy.

I yield back.

Mr. RUSH. The Chair recognizes the gentleman from Georgia, Mr. Barrow.

Mr. BARROW. I thank the Chair.

Mr. RUSH. The Chair thanks the gentleman. Mr. Sarbanes of Maryland is recognized for 2 minutes.

Mr. SARBANES. Thank you, Mr. Chairman. I won't need 2 minutes.

The public has been very adamant in its call for more practices and policies, and so forth, that will curb the use of performance enhancing drugs in sports, as they should be. We have had plenty of hearings in the Congress when the Oversight and Government Reform Committee in the last session under Chairman Waxman's leadership there we examined the issue quite closely. And the reason to pursue it is, number one, because of the discredit it brings to the sport. But secondly, and more importantly, it has already been alluded to is the harmful, dangerous conduct that it can lead to among our young people who aspire to these professional sports folks and hold them up as models.

Now there is these recent legal cases that have highlighted and in some instances, I guess, may have created complications in pursuing this goal of reducing the use of performance enhancing drugs. So it is important that we got that resolved.

I look forward to the testimony of the panel today to help us do that, and I yield back my time.

Mr. RUSH. The Chair now recognizes the gentleman from North Carolina, Mr. Butterfield.

The Chair now recognizes the gentleman from Ohio for 2 minutes, Mr. Space.

Mr. SPACE. In the interest of time I waive.

Mr. RUSH. The Chair thanks all the members here who are really cooperating in an outstanding way.

Now it is time to introduce the witnesses and we are going to begin at my left. The witnesses today is one, Mr. Roger Goodell, who is the Commissioner of the National Football League.

Seated next to Mr. Goodell is Mr. Robert D. Manfred, Jr. He is Executive Vice President for Labor and Human Resources, the Office of the Commissioner of Baseball, Major League Baseball.

Sitting next to Mr. Manfred, Jr., is Mr. DeMaurice Smith, the Executive Director of the National Football Leagues Players Association.

Next to Mr. Smith is Mr. Michael S. Weiner, who is the General Counsel for the Major League Baseball Players Association.

Seated next to Mr. Weiner is Mr. Travis T. Tygart. He is the Chief Executive Officer of the U.S. Anti-Doping Agency.

Next to him is Mr. Gabriel A. Feldman, who is an Associate Professor of Law and Director of the Sports Law Program at the Tulane University Law School.

And then the final witness today is Mr. Jeffrey Standen. He is a Professor of Law at the Willamette University College of Law.

I want to thank all the witnesses who are appearing before the subcommittee today, and I want to ask that you would join with me now in swearing in, raising your right-hand to be sworn in. Will all the witnesses stand and raise their right-hand?

[Witnesses sworn.]

STATEMENTS OF ROGER GOODELL, COMMISSIONER, NATIONAL FOOTBALL LEAGUE; ROBERT D. MANFRED, JR., EXECUTIVE VICE PRESIDENT, LABOR AND HUMAN RESOURCES, OFFICE OF THE COMMISSIONER OF BASEBALL, MAJOR LEAGUE BASEBALL; DEMAURICE SMITH, EXECUTIVE DIRECTOR, NATIONAL FOOTBALL LEAGUE PLAYERS ASSOCIATION; MICHAEL S. WEINER, GENERAL COUNSEL, MAJOR LEAGUE BASEBALL PLAYERS ASSOCIATION; TRAVIS T. TYGART, CHIEF EXECUTIVE OFFICER, UNITED STATES ANTI-DOPING AGENCY; GABRIEL A. FELDMAN, ASSOCIATE PROFESSOR OF LAW AND DIRECTOR, SPORTS LAW PROGRAM, TULANE UNIVERSITY LAW SCHOOL; AND JEFFREY STANDEN, PROFESSOR OF LAW, WILLAMETTE UNIVERSITY COLLEGE OF LAW

Mr. RUSH. Please take your seats. Let the record reflect that the witnesses have all answered in the affirmative.

And now I must announce to you that there is a vote in progress on the floor of the House, and so the committee will stand in recess until 15 minutes after the final vote. There are three votes and after these three votes we will reconvene 15 minutes after the final vote.

The subcommittee stands in recess.

[Recess.]

Mr. RUSH. The subcommittee will again be called to order.

I understand that Commissioner Goodell is on his way back in, so in the interest of time, I am going to ask Mr. Manfred to start.

But before you start, Mr. Manfred, I just want to say to all of the witnesses and those who are present, we really thank you so much for your patience, for your indulgence. We do have votes that occur from time to time on the floor and we have to leave to go vote on the floor. But you have been very patient and kind to us, and we really appreciate that.

So with that said, the Chair recognizes Mr. Manfred for 5 minutes for an opening statement.

STATEMENT OF ROBERT D. MANFRED, JR.

Mr. MANFRED. Chairman Rush, Ranking Member Radanovich and members of the committee, thank you for the opportunity to be here today to address an issue of concern to Major League Baseball.

Baseball Commissioner Allan Selig has made the eradication of the use of performance-enhancing substances a strategic priority for Major League Baseball. Under Commissioner Selig's leadership, drug programs have been developed, deployed, updated and constantly improved at both the Major League and minor league level. Baseball's programs call for pre- and post-game testing for both

steroids and stimulants out of competition and off-season testing is required. In total, we conducted 13,000 tests of our players in 2009.

Baseball uses the most up-to-date drug testing technologies at laboratories certified by the World Anti-Doping Agency. And our programs are transparent in that all suspensions are announced publicly and testing statistics are published annually.

These programs have been effective in reducing the use of performance enhancing substances. We had only two steroid positives in 2009 and have been equally effective in detecting players, including high profile players, who have persisted in the inappropriate use of such substances.

Without exception, the progress baseball has made at the Major League level has been accomplished in the collective bargaining process. The first drug testing program was negotiated as part of our 2002 agreement when it became apparent that improvements needed to be made. Baseball and the Players Association took the unprecedented step of twice reopening the agreement to strengthen the drug programs. The collective parties made further improvements in the 2006 round of negotiations and then reopened that contract to deal with the recommendations made by former Senator George Mitchell.

Based on our experience, Major League Baseball believes that the substantive terms of drug testing programs should continue to be established by the collective bargaining process created and regulated by the National Labor Relations Act. The recent decision by the United States Court of Appeals for the Eighth Circuit in Williams v. NFL, however, has raised the possibility that State laws could interfere with the uniform enforcement of baseball's collectively bargained drug program.

It is well-settled law that section 301 of the NLRA preempts State claims that are inextricably intertwined with the consideration of the terms of labor contracts. Prior to the Eighth Circuit decision, we assumed that claims based on State laws establishing standards for drug testing programs would be preempted in the context of a collectively bargained program.

Uniformity of enforcement is an essential element of any drug testing program in the context of professional sports. The essence of sport is fair competition, the use of performance-enhancing drugs undermines fair competition. In a nationwide sport such as professional baseball, all athletes must be held to a single standard of clean competition. Once Major League Baseball and its players association have agreed on a drug testing program, individual States and local governments cannot be allowed to undermine the program with employee protective statutes.

Unfortunately, the problem of inconsistent State and local regulations is not merely hypothetical. There are a number of States and municipalities that have laws related to drug testing that could create claims for players covered by our programs. Such claims could lead to uneven enforcement of the drug policy which, in turn, would undermine the credibility of our program and the integrity of the competition known as Major League Baseball.

Because we have always believed that claims based on State drug testing laws would be preempted, we have never bargained with our Players Association in an attempt to deal with the prob-

lem of State claims. I am a firm believer in the process of collective bargaining and the utility of that process in dealing with difficult issues. Having said that, I doubt that the collective bargaining parties had the legal power to waive in advance State law claims of individual union members.

Major League Baseball, of course, recognizes the legitimate right of States to pass employee protective legislation in the area of drug testing. Even a cursory review of the applicable State laws, however, demonstrates that such statutes were intended to deal with programs that regulate drugs of abuse in traditional workplaces such as factories and hospitals, not the use of performance-enhancing drugs by professional athletes. Given this fact, it would seem that a narrowly drafted statute could solve the problem faced by professional sports without creating undue interference with the prerogatives of the States, while preserving the primary role of collective bargaining in setting the substantive terms of drug testing programs.

I thank you for giving us the opportunity to be here today, Mr. Chairman.

Mr. RUSH. The Chair thanks the witness.

[The prepared statement of Mr. Manfred follows:]

STATEMENT OF ROBERT D. MANFRED, JR.
EXECUTIVE VICE PRESIDENT, MAJOR LEAGUE BASEBALL
HEARING BEFORE THE SUBCOMMITTEE ON COMMERCE, TRADE, AND CONSUMER PROTECTION, HOUSE COMMITTEE ON ENERGY AND COMMERCE
NOVEMBER 3, 2009

Chairman Rush, Chairman Waxman, Ranking Member Radanovich and members of the Committee, thank you for the opportunity to be here today to address an issue of concern to Major League Baseball.

Baseball Commissioner Allan H. Selig has made the eradication of the use of performance enhancing substances a strategic priority for Major League Baseball. Under Commissioner Selig's leadership, drug programs have been developed, deployed, updated and constantly improved at both the Major League and Minor League level. Baseball's programs call for pre-game and post-game testing for both steroids and stimulants. Out of competition or off-season testing is required. In total, we conducted almost 13,000 tests in 2009. Baseball uses the most up to date testing technology at laboratories certified by the World Anti-Doping Agency. And, our programs are transparent in that all suspensions are announced publicly and testing statistics are reported annually by the Independent Program Administrator. These programs have been effective in reducing the use of performance enhancing substances (we had just 2 steroid positives in 2009) and have been equally effective in detecting players, including high profile players, who have persisted in the inappropriate use of such substances.

Without exception, the progress Baseball has made at the Major League level has been accomplished in the collective bargaining process. The first drug testing program was negotiated as part of our 2002 collective bargaining agreement. When it became apparent that improvements needed to be made, Baseball and the Players Association took the unprecedented step of twice reopening the agreement to strengthen the drug program. The collective bargaining parties made further improvements in the 2006 round of negotiations and then reopened that new agreement to deal with recommendations made by former Senator George Mitchell at the conclusion of his high-profile investigation. In short, the collective bargaining process has proven to be an effective vehicle for dealing with the issue of performance enhancing drugs.

Based on our experience, Major League Baseball believes that the substantive terms of drug testing programs should continue to be established through the bargaining process created and regulated by the National Labor Relations Act. Consistent with the policies of the NLRA, the parties to the collective bargaining process are best situated to craft a program that deals with the unique circumstances presented by Major League Baseball.

The recent decision by the United States Court of Appeals for the Eighth Circuit in Williams v. National Football League,[1] however, has raised the possibility that state laws could interfere with the uniform enforcement of Baseball's collectively bargained drug program. It is well-settled law that section 301 of the National Labor Relations Act preempts state claims that are "inextricably intertwined with consideration of the terms of

[1] 2009 U.S. App. LEXIS 20251 (8th Cir. 2009)

the labor contract."[2] Prior to the Eighth Circuit decision, we assumed that claims based on state laws establishing standards for drug testing programs would be preempted in the context of a collectively bargained program because a court could only determine if the state law standards were met by "considering" -- in the words of the Supreme Court -- the terms of a labor contract. In fact, we remain convinced that the Eighth Circuit decision is wrongly decided because it ignores this tenent of the law of preemption established by the Supreme Court.

Uniformity of enforcement is an essential element of any drug testing program in the context of professional sports. The essence of sport is fair competition. The use of performance enhancing drugs undermines fair competition. In a nation-wide sport such as professional baseball, all athletes must be held to a single standard of clean competition. Once Major League Baseball and the Major League Baseball Players Association have agreed on a drug testing program, individual states and local governments cannot be allowed to undermine the program with employee-protective statutes. All players, regardless of the state in which their Club is located, must be held to the same standard. In short, players in Minnesota should not have greater leeway to use performance enhancing drugs than players in other states.

Unfortunately, the problem of inconsistent state and local regulations is not a merely hypothetical problem. There are a number of states and municipalities that have laws related to drug testing that could create claims for players covered by our program. Such claims could lead to uneven enforcement of the drug policy which, in turn, would

[2] Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 213 (1985)

undermine the credibility of our program and the integrity of the competition known as Major League Baseball.

Because we have always believed claims based on state drug testing laws to be preempted, we have never bargained with our Players Association in an attempt to deal with the problem of state claims. I am a firm believer in the process of collective bargaining and the utility of that process in dealing with difficult issues. Having said that, I doubt that the collective bargaining parties have the legal power to waive in advance state law claims of individual union members. Moreover, it would be impractical to suggest that these issues can be dealt with by litigating the precise contours of a myriad of state and local statues.

Major League Baseball, of course, recognizes the legitimate right of states to pass employee protective legislation in the area of drug testing. Even a cursory review of the applicable state laws, however, demonstrates that such statutes were intended to deal with programs that regulate the use of drugs of abuse in traditional workplaces such as factories and hospitals, not the use of performance enhancing substances by professional athletes. For example, some statutes require laboratory certification. But, these required certifications are for those laboratories that test for marijuana and cocaine. There is, to the best of my knowledge, no mention in a state statute of WADA certification, the gold standard in testing for performance enhancing drugs. Given this fact, it would seem that a narrowly drafted statute could solve the problem faced by professional sports while

avoiding undue interference with the prerogatives of the states and preserving the primary role of collective bargaining in setting the substantive terms of drug programs in sports.

I thank you for giving us the opportunity to address this important issue.

Mr. RUSH. The Chair now recognizes the Commissioner of the National Football League, Mr. Goodell, for 5 minutes.

STATEMENT OF ROGER GOODELL

Mr. GOODELL. Mr. Chairman, thank you. And I apologize for being late. Ranking member, members of the committee thank you for having me here today. I do appreciate the opportunity to appear again today to discuss the NFL's longstanding commitment to eliminate steroids and other performance-enhancing substances from sports.

In recent years, several committees of Congress reviewed our collectively bargained antisteroid policies and have commended us on a strong and effective program that accomplishes three main goals: first, protects the health and safety of our players; two, upholds the integrity of competition on the field; three, sends an important message to young people that these substances are dangerous and wrong.

For the last 20 years, a central principle of our policy has been the player is responsible for what is in his body. The player is responsible for what is in his body. As Gene Upshaw, the late head of the Players Association testified only last year, and I quote, "We have strict liability for players. There is no excuse for any player that says he was not aware of a banned substance in what he was taking. That is his responsibility. He is responsible for what goes into his body," end of quote. This principle ensures that the program will operate in a fair and uniform manner throughout the league, and that is the essential issue today whether we can continue to have a uniform program with credibility and integrity that applies on an equal basis to all players.

In the past, we have always testified with the full support of our Players Association. I am sorry to report today, for the first time, our Players Association sits next to me, but does not stand with us on this issue. Last season, three players from the New Orleans Saints and two players from the Minnesota Vikings tested positive for a banned substance. The particular substance is banned because both it can be used as a masking for steroid use and because of potential adverse health effects.

Based on the positive test, each player was suspended for four games, 25 percent of our regular season. The five players appealed and argued that they had ingested the banned substance inadvertently by using a supplement that did not list a diuretic on the label. Following lengthy hearings, the suspensions were upheld.

The Minnesota players then sued the NFL in State court in Minneapolis arguing that the suspensions violated Minnesota State law. A State court judge issued an injunction that same day allowing the two players to participate in critical late season games.

The next day, the Players Association sued the league in Federal court on behalf of all five players, even though doing so expressly violated the collective bargaining agreement. Last May, the Federal judge dismissed every one of the Player Association's challenges and the Eighth Circuit Court of Appeals unanimously upheld that ruling in September.

There were claims of impropriety, bias and the like in the proceeding and you may hear such claims today. But all of those

claims were fully considered and rejected by every Federal judge to hear them. Regrettably, the Federal courts permitted the two Minnesota players to proceed with a different set of claims under State law. That is why we are here today.

We have vigorously opposed the application of State law to our antisteroid program and will continue to do so. The Players Association, that for nearly two decades has been our partner in developing and administering this program, has refused to support us on this issue, even after I wrote to DeMaurice Smith in June and specifically asked for his support.

Mr. Chairman, to that point I ask that this be entered into the record. It is the letter I sent to DeMaurice back in June.

Mr. RUSH. Hearing no objection, so ordered.

[The information follows:]

NATIONAL FOOTBALL LEAGUE

June 25, 2009

ROGER GOODELL
Commissioner

DeMaurice Smith
Executive Director
NFL Players Association
1133 20th Street
Washington, DC 20036

Re: Williams v. National Football League, et al.

Dear De:

As you know, two of the union's members continue to challenge our collectively bargained Policy on Anabolic Steroids and Related Substances. They do so on grounds that have the potential to undermine, if not eradicate, the substantial progress that the League and the Players Association have made in addressing the problems associated with performance enhancing drugs.

In short, Kevin Williams and Pat Williams argue that the Policy should be governed not by the Collective Bargaining Agreement, but rather by provisions of Minnesota law addressing drug testing in the workplace. They contend, for example, that under Minnesota law, players are permitted to ingest any lawful product, regardless of its contents, "off the employer's premises during nonworking hours." Similarly, they contend that under under Minnesota law, if a player who has tested positive for a prohibited substance "provides a sufficient explanation for the positive test result, such as the intake of over-the-counter products, that explanation must excuse the violation." Such arguments, if accepted, would vitiate our Policy, which has been repeatedly praised as a model by Members of Congress and the press.

More broadly, if *any* of their state law arguments were accepted, the Williams' position would either (i) subject the Policy to conflicting requirements, making it impossible to administer on a uniform basis, or (ii) gut the Policy by limiting its requirements to the "least common denominator" of the jurisdictions in which NFL clubs play or NFL players live. Either result would (a) preclude uniform treatment of players, an outcome that should be intolerable to the NFLPA, (b) set aside the exemplary progress that we have made in an important area affecting player health and safety, and (c) undermine the ability of every other sports league to prohibit the use of performance enhancing drugs.

Our lawyers tell me that the Eighth Circuit Court of Appeals *should* reject the Williams' argument that state laws trump the CBA, and that the Minnesota state court *should* reject on the merits the Williams' challenge to the Policy. But they also tell me that the defense of the Policy would be significantly enhanced if the Players Association, as well as the League, were expressly to take issue with the Williams' attacks.

Accordingly, and without regard or prejudice to our position that the Players Association's own appeal in the *Starcaps* proceeding is unjustified and in breach of the CBA, I write to request (a) that the Players Association submit an amicus brief in support of the League's position in the *Williams* appeal on the applicability of state law and (b) if the *Williams* case goes forward in state court, that the Players Association join with us in defending the collectively bargained Policy.

Given that the Court of Appeals matter is on an accelerated briefing schedule, I look forward to your prompt response.

Sincerely,

ROGER GOODELL

ROGER GOODELL
Commissioner

Mr. GOODELL. As a result of these court rulings, there is no barrier to suspending the New Orleans players. But considerations of fairness and uniformity led me to defer those suspensions while we addressed the Minnesota State law issue.

More broadly, our collectively bargained policy, which was intended to apply on a uniform basis to all players on all teams, is now subject to individual State laws, as interpreted by individual State court judges. Every sports organization has recognized it is simply impossible to operate a credible and effective program on this basis.

For example, the Minnesota players claim that they are permitted under State law to use any banned substance so long as they do so outside of the locker room. If that is the law, it will effectively end antisteroids programs in all sports in the State of Minnesota.

We have always supported collectively bargained solutions in this area. While we are reluctant to seek action from Congress, we believe this presents the rare case in which narrow and tailored Federal legislative action is warranted to confirm the primacy of Federal labor law and respect agreements on this important subject.

The NFL's policy is straightforward: Substances banned under our steroid policy are bad for players' health and undermine the integrity of the game. We have made that policy clearly known to players, and we have zero tolerance for failure to follow it.

I appreciate your time and look forward to your questions.

Mr. RUSH. Thank you, Mr. Goodell.

[The prepared statement of Mr. Goodell follows:]

TESTIMONY OF ROGER GOODELL

COMMISSIONER, NATIONAL FOOTBALL LEAGUE

BEFORE THE

SUBCOMMITTEE ON COMMERCE, TRADE, AND CONSUMER PROTECTION

OF THE

COMMITTEE ON ENERGY AND COMMERCE

UNITED STATES HOUSE OF REPRESENTATIVES

NOVEMBER 3, 2009

Chairman Rush and Members of the Committee:

We appreciate this invitation to appear before your Committee to discuss the impact of state laws on collectively bargained substance abuse policies in professional sports.

We – and we also believe Congress – have always understood that the negotiation, administration and enforcement of the collectively-bargained steroid policies in professional sports are governed exclusively by federal labor law. Yet, during the past year, the courts have permitted NFL players – regrettably, with the acquiescence of the NFL Players Association (NFLPA) – to use state laws to avoid the agreed-upon consequences for the players' admitted violation of our collectively-bargained anti-steroid policy. These court decisions call into question the continued viability of the steroid policies of the NFL and other national sports organizations.

We believe that a specific and tailored amendment to the Labor Management Relations Act is appropriate and necessary to protect collectively-bargained steroid policies from attack under state law. Our view is supported by the other major professional sports leagues, as well as the United States Anti-Doping Agency. A narrow and targeted amendment would preserve the rights of sports leagues and their player associations to negotiate and administer effective anti-drug and steroid programs.

We have always believed that collective bargaining is the best approach to developing and implementing effective anti-drug and steroid policies. I have testified to that effect in the past, as have my predecessors. That belief had always been shared by the NFL Players Association, which until last December, had been our partner in developing, improving, administering and enforcing these policies. We still believe that collective bargaining is and

should remain the preferred approach, and that a uniform policy that applies to all teams and all players throughout the league is the best way to preserve the integrity of the sport, protect the health and safety of athletes, and ensure that young people understand that the use of performance-enhancing drugs is dangerous and wrong.

But where successful collective bargaining is frustrated by the unintended application of state law, we believe that specific and tailored Congressional action is appropriate. That is particularly true on an issue, such as use of steroids and related substances, that Congress has addressed on numerous occasions, and in respect of which Congress has praised the leadership and strong programs of the NFL.

Summary of NFL Policy

As you know, the NFL has appeared before this Committee in the past, and we have provided testimony detailing the League's collectively-bargained steroid policy with the NFLPA. To summarize: more than 25 years ago, in 1983, Commissioner Pete Rozelle notified all NFL players that anabolic steroids fell squarely within the League's prohibition against drug abuse and that steroids had serious adverse health effects. The NFL's steroid testing program was implemented a few years later, in 1987, and was intended to advance three important goals:

- to preserve the health of athletes who use these substances;
- to preserve public confidence in the integrity of professional sports, including competitive equality and maintaining competition free of performance-enhancing substances; and
- to ensure that young people know that using steroids and other performance enhancing substances is dangerous and wrong.

Although the policy has changed over the past 25 years, these remain its fundamental goals.

Prior to the 1989 season, Commissioner Rozelle publicly announced the suspension of active players who had tested positive for steroids during the preseason.

In 1990, Commissioner Paul Tagliabue took a number of steps to enhance the program. He initiated random, unannounced testing for all players throughout the year, retained Dr. John Lombardo as the League's independent Advisor on Anabolic Steroids (a position Dr. Lombardo continues to hold today under the title of Independent Administrator), recruited other prominent scientists to advise the League in developing its program, and directed that all testing for steroids be conducted only at laboratories certified by the International Olympic Committee.

Since 1993, the NFL and the NFL Players Association have jointly administered the program through the collective bargaining process. The parties meet regularly to discuss changes to the Policy, and they update and revise the Policy yearly. A copy of the 2009 Policy is attached to this testimony.

Our steroid policy has uniformly been recognized as strong and effective, including by Congress. As a former House Committee Chairman said:

> Drug-testing experts have long hailed football's testing program as the top of the heap in professional sports. It's a policy that the league and players association review quarterly and improve upon annually. It's a policy that has evolved along with advancements in science and technology. It's a policy with tough penalties, and it's getting tougher all the time.

Hearing on NFL Steroid Policy Before the House Comm. on Government Reform, 109th Cong., 1st Sess. 2 (2005) (Rep. Davis).

The effectiveness of the Policy is based on a wide range of factors, including a comprehensive list of banned substances; year-round random testing; education of players and

club personnel; prompt and fair resolution of appeals; confidentiality; and mandatory penalties. Each of these elements is spelled out in detail in the Policy itself.

For many years, the NFL was the only professional sports league to test players for steroids (and related substances such as masking agents) and to impose significant discipline on players who tested positive for these prohibited substances. Today, all of the major professional team sports organizations maintain collectively-bargained steroid testing programs, including Major League Baseball, the National Hockey League, and the National Basketball Association.

As with all effective anti-steroid programs, the Policy embodies what is referred to as a "strict liability" approach – the athlete is responsible for what is in his body. Claims of inadvertent or unintentional use of a tainted supplement or other product will not excuse a positive test. This has been a core element of the Policy since its inception and repeatedly endorsed by the NFLPA in collective bargaining and by the NFLPA's previous Executive Director in testimony before Congress.

The Policy itself includes clear and explicit warnings to players about the risks of supplement use. They are advised of the health dangers of dietary supplements, and of the very real risk that those supplements may lead players to test positive. Players are further advised that if they do test positive, they will be disciplined under the terms of the Policy. The Policy makes clear that players who use supplements do so at their own risk.

This is not simply a concern for NFL players. As recently documented in several media reports, high school athletes are increasingly using dietary supplements, many of which are tainted with illegal steroids and other controlled substances. *See* Michael S. Schmidt and Natasha Singer, *Two Dietary Supplements Said To Contain Steroids*, N.Y. Times, July 23, 2009. Use of these products by young people in particular can have serious health repercussions.

* * *

The need for narrow legislation results from a specific lawsuit brought against the NFL in 2008 involving the use of bumetanide, a diuretic the use of which has been prohibited by the Policy for at least two decades. Bumetanide has been identified as a masking agent – a substance that athletes use to cover up their use of a steroid. All anti-steroid programs ban the use of masking agents, including diuretics such as bumetanide.

Before the start of the 2008 season, two players on the Minnesota Vikings football team and three players on the New Orleans Saints football team tested positive for this masking agent. Each was notified of his positive test and of a resulting suspension under the terms of the policy. The players appealed, claiming that they took the banned substance inadvertently by using a supplement that did not identify Bumetanide on the label. The players did not challenge the accuracy of the test results or identify any other defect in the testing procedures. The NFL hearing officer (whom the players specifically requested handle their appeals) held lengthy hearings and upheld their suspensions in a decision that – under the collectively-bargained policy – is to be "final and binding."

Immediately following the decision, the two Vikings players challenged their suspensions in Minnesota state court. The state court judge immediately enjoined the suspensions. The next day, on behalf of all five players the NFLPA filed a separate lawsuit against the NFL in federal court – the first time that the Players Association had ever challenged the policy in court and a clear violation of the CBA. The two cases were consolidated before the federal judge.

After more than five months of litigation, the federal court earlier this year upheld the hearing officer's decision and rejected all of the NFLPA's challenges. However, the judge allowed the two Vikings players to pursue their Minnesota state law claims in Minnesota state court. Because Louisiana statutes did not provide any basis for a state law claim, there was no

longer any barrier to enforcing suspensions against the three New Orleans players, but the two Minnesota players remained free to litigate their claims and their suspensions were enjoined.

The federal district court's decision was appealed to the U.S. Court of Appeals for the Eighth Circuit, which unanimously agreed that all of the NFLPA's claims were without merit but also permitted the Vikings players to pursue their state law claims in Minnesota state court. We have sought rehearing in the Eighth Circuit, and that request remains under consideration.

The Impact of the Minnesota Court's Ruling and the Need for Narrow Legislation

The use of state law—with no objection from the NFLPA-- to enjoin the suspensions under the two Minnesota state statutes illustrates with compelling force the need for legislation here.

First, these state law attacks on the collectively-bargained Policy jeopardize public confidence in the integrity and competitive equality of the game, which is critical to the success of the NFL, as it would be to every other professional sports league. *See* Amicus Brief of Major League Baseball, the National Basketball Association, and the National Hockey League, dated July 13, 2009. The practical result of the lawsuits makes this point clear: because the Minnesota players have been able to allege violations of Minnesota statutes while Louisiana does not have comparable statutes under which the Saints players could sue, the three players from the Saints are subject to suspension, while the Vikings players – who admittedly engaged in precisely the same conduct in violation of the Policy – have been permitted to avoid any discipline. The Vikings players are thus able to work under terms and conditions that differ from those governing every NFL player outside Minnesota.

Professional athletes and their collective bargaining representatives should not be permitted to manipulate state statutes as a means to gain a competitive advantage. More

importantly, the professional sports leagues cannot operate properly and maintain even competition on the field if players in one state are subject to rules in this area that vary from state to state.

Second, the success of the players and the NFLPA in delaying – and possibly even avoiding – their mandatory discipline under the Policy has significantly undermined one of the key elements of the Policy: timely resolution of appeals by means of collectively-bargained arbitration procedures. With the help of the NFLPA, the Vikings players have been able to prolong their litigation for almost one year now. And this delay has succeeded even though we strongly believe that the players' state law claims have no merit.

Third, several key elements underlying the Policy will be significantly undermined – if not eviscerated – in the event the players succeed in their state law challenges. For instance:

- **Strict Liability and Personal Responsibility For Use Of Dietary Supplements.** The players claim that under the Minnesota drug testing statute, they have a "right to explain" their positive test results, and that the NFL must accept their "innocent explanation" (that they unintentionally used a banned substance found in a dietary supplement). Such a requirement would eliminate the strict liability rule underlying the Policy and upon which the Policy's success critically depends. This result would also be completely at odds with our many warnings to players to avoid the use of supplements and would undermine the positive example we aim to set for young people.
- **Adherence To Strict Collection And Analytical Standards.** The players claim that the Program is unlawful because testing is not done at a laboratory certified under the Minnesota drug testing statute. But, to our knowledge, there is no laboratory that is capable of testing for steroids (as opposed to the workplace drug testing for which the

state's certification requirements are designed) certified in Minnesota. The Minnesota statute thus does not permit testing in the only two laboratories in the United States with the ability to test for steroids and masking agents, both of which are certified by WADA and the International Organization for Standardization, and both of which have been approved for testing by the NFL and the Players Association in our collectively bargained Policy.

- **Comprehensive List of Banned Substances and Year-Round Testing.** The players claim that the Minnesota Lawful Consumable Products Act permits them to take any legal product as long as they consume it off of their employer's premises and not during working hours. Under this rationale, any substance listed on the Policy's banned substances list must be permitted as long as the players take it at home. This would include any lawfully obtained supplement that may contain an unlawful steroid or masking agent. As a result, enforcement of the state statute would undermine both the banned substances list as well as the strict liability policy. In addition, the use of such state "consumable product" laws to avoid responsibility flies in the face of the repeated warnings given to players that supplements are *not regulated* by the FDA and should be avoided.
- **Administrative Independence.** According to the players, Minnesota's law requires the NFL to receive notice of a positive confirmatory test result from the laboratory within three days of the test. But under our Policy only Dr. Lombardo – and not the NFL, the player's team, or the NFL Players Association – is notified of a player's positive result. In fact, notice is often not provided to the NFL for more than three days after Dr. Lombardo's receipt from the laboratory. This is because a test is confirmed under the

Policy only after both Dr. Lombardo and the Program's expert toxicologist, Dr. Bryan Finkle, have had the chance to examine the underlying data to ensure the accuracy of the test and to discuss any relevant medical information with the player to determine whether a therapeutic use exemption would apply. Only after these checks are performed do the NFL and the player's team become aware of a positive test result. A requirement that the lab immediately notify the NFL of players' test results would undermine this bargained-for protection for the players.

- **Mandatory penalties.** The players argue that the NFL's lack of "compliance" with the Minnesota statute's procedural requirements should excuse their admitted violation of the Policy. They even argue that it should excuse their breach of their Player Contracts, which had individually negotiated provisions separately prohibiting the players from taking such substances in the first instance. But the mandatory penalty provisions of the Policy are clear: if a player tests positive for a prohibited substance, he will not avoid a suspension on the basis of inadvertent or unintentional use. Permitting players to escape discipline by arguing that the NFL failed to comply with certain state procedural rules – rules not even required by the Policy, some of which vary from state to state –would undermine the bargained-for mandatory discipline agreed to by the parties.

Finally, the potential impact of the actions of the players and their representatives is not confined to Minnesota and is not limited to the National Football League. Other professional sports organizations have teams located in dozens of locations throughout the country. Because NFL players are tested year-round, in the off-season wherever they may be, the laws of all 50 states could apply. A requirement that professional sports leagues comply with a patchwork of

up to 50 varying state laws would destroy the uniform application of their steroid policies, providing certain players with individualized defenses to a steroid policy's application.

Furthermore, application of these laws to professional athletes threatens to undermine the collective bargaining process. How can a professional sports league and a union negotiate an effective steroid policy when neither party can be sure exactly what agreement it is striking? Although some state legislatures seemingly account for collectively bargained programs in the text of their statutes, this does not prevent players from raising challenges and convincing elected judges to grant them relief. In Minnesota, for example, the statute specifically permits parties to agree in a collective bargaining agreement to policies that "meet or exceed" its statute's requirements, and the legislature has indicated that the statute was not meant to "interfere with the labor agreements between athletes and their employers." Nonetheless, the Vikings players have been able to prolong their litigation -- and to avoid their suspensions for admitted violations of the Policy -- for almost one year.

On the other hand, some states arguably prohibit parties to a collective bargaining agreement from negotiating policies that differ from their statutes. For example, a provision of Connecticut's workplace drug testing statute states that "[n]o provision of any collective bargaining agreement may contravene or supersede any provision of" the statute "so as to infringe the privacy rights of any employee," arguably providing a basis for athletes caught violating a steroid policy to file lawsuits seeking to enjoin or overturn their suspensions. Conn. Gen. Stat. Ann. § 31-51aa.

* * *

In summary, Mr. Chairman, we support narrow and specific legislation that would confirm the primacy of federal labor law and respect agreements on this important subject. We

are committed to maintaining a level playing field in the NFL, protecting the health of our athletes, ensuring public confidence in the integrity of the game of professional football, setting a positive example for young people, and working together with the NFL Players Association to continue to refine our steroid policy. We believe such focused legislation will aid us in these goals.

Thank you for inviting us to appear today. We will be pleased to answer any questions.

The Chair now recognizes the Executive Director of the National Football League Players Association, Mr. DeMaurice Smith. You are recognized for 5 minutes, Mr. Smith.

STATEMENT OF DEMAURICE SMITH

Mr. SMITH. Thank you, Mr. Chairman, Subcommittee Chairman Mr. Rush, Mr. Ranking Member. Good afternoon. My name is DeMaurice Smith, and I thank you for the opportunity to testify concerning the important issues being considered by your subcommittee.

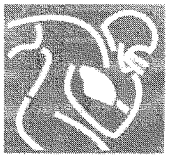
I serve as the Executive Director of the National Football League Players Association. Having been elected to that position in March of this year, one of my first priorities was to become fully conversant with the NFL and the NFLPA's policy on anabolic steroids and related substances. The policy has been in place for many years and it has been successful in terms of preventing the use of performing enhancing substances in the National Football League.

Let me make one thing clear. The National Football League Players Association believes in this policy. I believe in this policy. It is a collectively bargained policy. That is why in September of 2009, myself, along with Roger Goodell, sent a memorandum to every player in the National Football League, reminding them of the applicability of the policy, signed at the bottom, Mr. Roger Goodell, Commissioner, Mr. DeMaurice Smith, NFLPA Executive Director. And with permission, I would like this to be added to the record.

Mr. RUSH. Hearing no objection, so ordered.

[The information follows:]





NFL PLAYERS
ASSOCIATION

NATIONAL FOOTBALL LEAGUE

POLICY ON ANABOLIC STEROIDS AND RELATED SUBSTANCES 2009

as Agreed by the
National Football League Players Association
and the
National Football League Management Council

NATIONAL FOOTBALL LEAGUE POLICY ON ANABOLIC STEROIDS AND RELATED SUBSTANCES

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NATIONAL FOOTBALL LEAGUE POLICY ON ANABOLIC STEROIDS AND RELATED SUBSTANCES

1. General Statement of Policy

The National Football League prohibits the use of anabolic/androgenic steroids (including exogenous testosterone), stimulants, human or animal growth hormones, whether natural or synthetic, and related or similar substances. (See Appendix A). For convenience, these substances, as well as masking agents or diuretics used to hide their presence, will be referred to as "Prohibited Substances".[1] These substances have no legitimate place in professional football. This policy specifically means that:

- **PLAYERS** may not, under any circumstances, have Prohibited Substances in their systems or supply or facilitate the distribution of Prohibited Substances to other players.

- **COACHES, TRAINERS, OR OTHER CLUB PERSONNEL** may not condone, encourage, supply, or otherwise facilitate in any way the use of Prohibited Substances.

- **TEAM PHYSICIANS** may not prescribe, supply, or otherwise facilitate a player's use of Prohibited Substances.

- **All PERSONS**, including players, are subject to discipline by the Commissioner for violation of this Policy or of laws relating to possession and/or distribution of Prohibited Substances, or conspiracy to do so.

The League's concern with the use of Prohibited Substances is based on three primary factors.

First, these substances threaten the fairness and integrity of the athletic competition on

[1] An illustrative list of Prohibited Substances (see Appendix A) is attached to this Policy. Please note that, in addition to the substances specifically named, other categories and related substances can also violate the Policy.

the playing field. Players use these substances for the purpose of becoming bigger, stronger, and faster than they otherwise would be. As a result, their use threatens to distort the results of games and League standings. Moreover, players who do not wish to use these substances may feel forced to do so in order to compete effectively with those who do. This is obviously unfair to those players and provides sufficient reason to prohibit their use.

Second, the League is concerned with the adverse health effects of using Prohibited Substances. Although research is continuing, steroid use has been linked to a number of physiological, psychological, orthopedic, reproductive, and other serious health problems, including heart disease, liver cancer, musculoskeletal growth defects, strokes, and infertility.

Third, the use of Prohibited Substances by NFL players sends the wrong message to young people who may be tempted to use them. High school and college students are using these substances with increasing frequency, and NFL players should not by their own conduct suggest that such use is either acceptable or safe, whether in the context of sports or otherwise.

The NFL Player Contract specifically prohibits the use of drugs in an effort to alter or enhance performance. The NFL Player Contract and the League's Constitution and Bylaws require each player to avoid conduct detrimental to the NFL and professional football or to public confidence in the game or its players. The use of Prohibited Substances violates both these provisions. In addition, the Commissioner is authorized to protect the integrity of and public confidence in the game. This authorization includes the authority to forbid use of the substances prohibited by this Policy.

2. Administration of the Policy

As agreed in the 1993 Collective Bargaining Agreement, the program is conducted under the auspices of the NFL Management Council. The program will be directed by the Independent Administrator on Anabolic Steroids and Related Substances ("Independent Administrator"). The Independent Administrator shall have the sole discretion to make determinations regarding the method by which players will be subjected to testing each week; selecting which players will be tested each week; deciding when tests will be administered; determining the number and frequency of reasonable cause tests to be

administered (subject to the collectively-bargained maximum of 24 tests per player per year); determining the number and timing of offseason tests to be administered (subject to the collectively-bargained maximum of 6 tests per player); analyzing test results data over time; conducting medical evaluations associated with the possible use of prohibited substances; granting "therapeutic use exemptions;" communicating with, instructing, and overseeing the work of the independent specimen collection group; deciding whether there is credible evidence that a player has failed to cooperate with testing, attempted to dilute, tamper with, or substitute a specimen to defeat testing, or otherwise violated protocols; and certifying violations for disciplinary or administrative action. In addition, he will make himself available for consultation with players and Club physicians; oversee the development of educational materials; participate in research on steroids; confer with the Consulting Toxicologist;[2] and serve on the League's Advisory Committee on Anabolic Steroids and Related Substances.[3]

Neither the NFL, the NFLPA, nor any NFL Member Club directs the specific testing schedule, decides which players will be tested, or influences the Independent Administrator's determination whether a potential violation has occurred and should be referred for further action.

3. Testing for Prohibited Substances

A. Types of Testing

All testing of NFL players for Prohibited Substances, including any pre-employment testing, is to be conducted pursuant to this Policy. All specimens will be collected by an authorized specimen collector and tested at the appropriate laboratory (see Section 3D below). As is the case in the employment setting, players testing positive in a pre-employment setting will be subject to medical evaluation and clinical monitoring as set forth in Sections 3A, 4C and 12, and to the disciplinary steps outlined in Section 6.

[2] The Consulting Toxicologist on Anabolic Steroids and Related Substances ("Consulting Toxicologist") will consult on testing procedures and results, laboratory quality, and other issues referred to him by the Independent Administrator. For more information, see Appendix B ("Personnel").

[3] The Advisory Committee on Anabolic Steroids and Related Substances is appointed by the Commissioner and chaired by the Independent Administrator.

Testing will take place under the following circumstances:

Pre-Employment: Pre-employment tests may be administered to free agent players (whether rookies or veterans). In addition, the League will conduct tests at its annual timing and testing sessions for Draft-eligible football players.

Annual: All players will be tested for Prohibited Substances at least once per League Year. Such testing will occur at training camp or whenever the player reports thereafter, and will be deemed a part of his preseason physical.

Preseason/Regular Season: Each week during the preseason and regular season, ten (10) players on every team will be tested. By means of a computer program, the Independent Administrator will randomly select the players to be tested from the Club's active roster, practice squad list, and reserve list who are not otherwise subject to ongoing reasonable cause testing for steroids. The number of players selected for testing on a particular day will be determined in advance on a uniform basis. Players will be required to test whenever they are selected, without regard to the number of times they have previously been tested.

Postseason: Ten (10) players on every Club qualifying for the playoffs will be tested periodically so long as the Club remains active in the postseason. Players to be tested during the postseason will be selected on the same basis as during the regular season.

Off-Season: Players under contract who are not otherwise subject to reasonable cause testing may be tested during the off-season months up to 6 times at the discretion of the Independent Administrator. Players to be tested in the off-season will be selected on the same basis as during the regular season, irrespective of their off-season locations. Any player selected for testing during the off-season will be required to furnish a urine specimen at a convenient location acceptable to the Independent Administrator. Only players who advise in writing that they have retired from the NFL will be removed from the pool of players who may be tested. If, however, a player thereafter signs a contract with a Club, he will be placed back in the testing pool.

Reasonable Cause Testing For Players With Prior Positive Tests Or Under Other Circumstances: Any player testing positive for a Prohibited Substance, including players testing positive in college or at a scouting combine session, or with otherwise documented prior steroid involvement, will be subject to ongoing reasonable cause testing at a frequency determined by the Independent Administrator. Such players will be subject to ongoing reasonable cause testing both in-season and during the off-season. Reasonable cause testing may also be required when, in the opinion of the Independent Administrator, available information provides a reasonable basis to conclude that a player may have violated the Policy or may have a medical condition that warrants further monitoring. (See Section 12.)

B. Testing Procedures

In-season tests will ordinarily be conducted on two days each week, and each player to be tested will be notified on the day of the test. On the day of his test, the player will furnish a urine specimen to the authorized specimen collector. To prevent evasive techniques, all specimens will be collected under observation by an authorized specimen collector. Specimens will be shipped in collection bottles with tamper-resistant seals. Each bottle will be identified by a control identification number, not by the player's name. The player will be given an opportunity to witness the procedure and to sign the chain-of-custody form.

For more detailed information, see Appendix C ("Collection Procedures").

C. Failure or Refusal to Test/Efforts to Manipulate Specimen or Test Result

An unexcused failure or refusal to appear for required testing, or to cooperate fully in the testing or evaluation process, will warrant disciplinary action. Any effort to substitute, dilute or adulterate a specimen, or to manipulate a test result to evade detection will be considered a violation of the Policy and likely will result in more severe discipline than would have been imposed for a positive test.

D. Testing Laboratories

The Independent Administrator will determine the most appropriate laboratory or laboratories to perform testing under the Policy. Currently, the UCLA Olympic Analytical Laboratory in Los Angeles and the Sports Medicine Research and Testing Laboratory in Salt Lake City have been approved to analyze specimens collected for Prohibited Substances. These laboratories have been accredited by ISO and the World Anti-Doping Association for anti-doping analysis, and perform testing for the NCAA, the United States Anti-Doping Agency and other sports organizations.

Screening and confirmatory tests will be done on state-of-the-art equipment and will principally involve use of GC/MS or LC/MS equipment. In addition, testing will be done for masking agents (including diuretics) as appropriate.

E. Unknowing Administration of Prohibited Substances

Players are responsible for what is in their bodies, and a positive test result will not be excused because a player was unaware that he was taking a Prohibited Substance. If you have questions or concerns about a particular dietary supplement or other product, you should contact Dr. John Lombardo at (614) 442-0106. As the Independent Administrator, Dr. Lombardo is authorized to respond to players' questions regarding specific supplements. You may also contact the NFL/NFLPA Supplement Hotline at (866) NFL-SUPP or NFLSupp@DrugFreeSport.com. **Having your Club's medical or training staff approve a supplement will not excuse a positive test result.**

4. Procedures In Response to Positive Tests or Other Evaluation

(See Appendix D for a full outline of procedures normally followed after a positive test result.)

A. Notification

Once a positive result is confirmed, the Independent Administrator will notify the player. Following confirmation of the positive result by "B" bottle analysis and review by the Consulting Toxicologist, the Independent Administrator will notify the player, the

Management Council and the Players Association.

B. Re-Test of Split Sample

Unless waived, any player testing positive from the first or "A" bottle will be afforded a test of the other portion of his specimen from the second or "B" bottle.

The player may not be present for the "B" test; however, except for pre-employment tests, at the player's request and expense the "B" test may be observed by a qualified toxicologist not affiliated with a commercial laboratory. The "B" test will be performed at the same laboratory that did the original test according to the procedures used for the original test and by a technician other than the one performing the original confirmation test on the "A" bottle. The player will be notified of the results as soon as practicable.

C. Medical Evaluation

A medical examination such as outlined in Appendix E may be required of any player who tests positive. The Independent Administrator will arrange for the evaluation, and the results of this evaluation will be reported to the player, the Independent Administrator, and the Club physician. If medical treatment (including counseling or psychological treatment) is deemed appropriate, it will be offered to the player. Players with a confirmed positive test result will also be placed on reasonable cause testing at a frequency to be determined by the Independent Administrator.

The player is responsible for seeing that he complies with the arrangements of the Independent Administrator for an evaluation as soon as practicable after notification of a positive test. This requirement is in effect throughout the year.

5. Discipline for Violation of Law

Players or other persons within the NFL who: are convicted of or otherwise admit to a violation of law (including within the context of a diversionary program, deferred adjudication, disposition of supervision, or similar arrangement) relating to use, possession, acquisition, sale, or distribution of steroids, growth hormones, stimulants or related substances, or conspiring to do so; or are found through sufficient credible evidence (*e.g.*, authenticated medical or pharmacy records indicating receipt or use of banned substances;

corroborated law enforcement reports) to have used, possessed or distributed performance-enhancing substances, are subject to discipline by the Commissioner, including suspension or, if appropriate, termination of the individual's affiliation with an NFL Club. Any suspension shall be without pay and served as set forth below. Longer suspensions may be imposed for repeat offenders. In addition, players violating this Policy by a violation of law will be appropriately placed or advanced within the three-step program. In this respect, players are reminded of federal legislation which criminalizes possession and distribution of steroids. (See Appendix H.)

6. Suspension and Related Discipline

Players with a confirmed positive test result will be subject to discipline by the Commissioner as outlined in the Policy below.

Step One: The first time a player violates this Policy by testing positive; attempting to substitute, dilute or adulterate a specimen; manipulating a test result; or by violation of law (see Section 5), he will be suspended without pay for a minimum of four regular and/or postseason games. The suspension will begin on the date set in the League's notification to the player of his suspension, subject to any appeal (see Section 10). If fewer than four games remain in the season, including any postseason games for which the Club qualifies, the suspension will carry over to the next regular season, until a total of four regular and/or postseason games have been missed.

If the imposition of a player's suspension occurs prior to or during the preseason, the player will be permitted to engage in all preseason activities. Upon the posting of final rosters, however, he will be suspended for four regular-season games.

In addition, the player will be subject to evaluation and counseling if, in the opinion of the Independent Administrator, such assistance is warranted.

Step Two: The second time a player violates this Policy by testing positive; attempting to substitute, dilute or adulterate a specimen; manipulating a test result; or by violation of law (see Section 5), he will be suspended without pay for a minimum of eight regular and/or postseason games. The suspension will begin on the date set in the League's notification to the player of his suspension, subject to any appeal (see Section 10). If there are fewer than eight regular and/or postseason games remaining

in the season, including any postseason games for which the Club qualifies, the suspension will continue into the next regular season until a total of eight regular and/or postseason games have been missed.

Step Three: The third time a player violates the Policy by testing positive; attempting to substitute, dilute or adulterate a specimen; manipulating a test result; or by violation of law (see Section 5), he will be suspended without pay for a period of at least 12 months, subject to any appeal (see Section 10). Such a player may petition the Commissioner for reinstatement after 12 months. Reinstatement, and any terms and conditions thereof, shall be matters solely within the Commissioner's sound discretion.

Players who are suspended under this Policy will be placed on the *Reserve/Commissioner Suspension* list. During the period that he is suspended (subject to the preseason activities permitted for Step One violations), the player will not be paid, nor may he participate in team activities, use the Club's facilities or have contact with any Club officials except to arrange off-site medical treatment.

In addition to the suspension imposed on him, any player suspended for a violation of the Policy will be ineligible for selection to the Pro Bowl, or to receive any other honors or awards from the League or the NFL Players Association, for the season in which the violation is upheld (*i.e.,* following any appeals) and in which the suspension is served.

7. Procedures Regarding Testosterone

The Independent Administrator is authorized to subject a percentage of all specimens to Carbon Isotope Ratio (CIR) testing to detect the use of exogenous testosterone.

If the introduction of testosterone or the use or manipulation of any other substance results in increasing the ratio of the total concentration of testosterone to that of epitestosterone in the urine to greater than 4:1, the test will be considered presumptively positive. Tests showing a ratio greater than 10:1 will be considered conclusively positive. Notwithstanding, when information available to the Independent Administrator suggests but is not conclusive of testosterone use, the Independent Administrator may require the player to submit to ongoing reasonable cause testing and shall order other medical procedures including Carbon Isotope

Ratio Testing or other diagnostic tests to confirm whether exogenous testosterone has been used in violation of the Policy. In addition, the Independent Administrator will be entitled to review any available past and/or current medical or testing records.

In addition, the use of epitestosterone to lower a player's T:E ratio is prohibited. When such use is detected or reasonably suspected by the Independent Administrator, additional diagnostic tests may be required if the Independent Administrator deems it necessary. If a player's epitestosterone level exceeds 200 ng/mL, it will be considered a positive test result regardless of the player's T:E ratio.

If on the basis of such follow-up tests, records, prior or subsequent test results, discussions with the player, or other studies, the Independent Administrator subsequently concludes that the test results do in fact reflect the player's use of steroids, the player will be subject to discipline according to the terms of the Policy. Such discipline may be imposed within the season of the year in which the positive test occurred, or, if the Independent Administrator prescribes follow-up measures that entail delay in the final determination, in a subsequent season.

8. Masking Agents and Supplements

The use of so-called "blocking" or "masking" agents is prohibited by this Policy. These include diuretics or water pills, which have been used in the past by some players to reach an assigned weight.

In addition, a positive test will not be excused because it results from the use of a dietary supplement, rather than from the intentional use of a Prohibited Substance. Players are responsible for what is in their bodies. For more information concerning dietary supplements, see Appendix F.

9. Examination in Connection with Reinstatement

Before a player is reinstated following a suspension, he must test negative for all Prohibited Substances under this policy in order to be approved for return to play by the Independent Administrator. In addition, the player must be examined and approved as fit to play by the Club physician before he may participate in contact drills or in a game.

10. Appeal Rights

As is more fully outlined in Appendix D, any player who is notified by the League Office that he is subject to discipline for a violation of this Policy is entitled to an appeal.

The League will designate a time and place for a hearing, at which either the Commissioner or his designee will preside as Hearing Officer. The player may be accompanied by counsel and may present relevant evidence or testimony in support of his appeal. Additionally, the NFL Players Association may attend and participate notwithstanding the player's use of other representation.

After the record has been closed, the Hearing Officer will issue a written decision, which will constitute a full, final, and complete disposition of the appeal and which will be binding on all parties. (If appropriate, a summary ruling may be issued followed by a formal written decision as time permits.) Pending completion of this appeal, the suspension or other discipline will not take effect.

11. Burdens and Standards of Proof; Discovery

Upon appeal of a positive test result, the League shall have the initial burden to establish a prima facie violation of the Policy, and the specimen collectors, Independent Administrator, Consulting Toxicologist and testing laboratories will be presumed to have collected and analyzed the player's specimen in accordance with the Policy. The player may, however, rebut that presumption by establishing that a departure from the Policy's stated protocols occurred during the processing of his specimen. In such case, the League shall have the burden of establishing that the departure did not materially affect the validity of the positive test or other violation.

In presenting an appeal under this Policy, the player shall be entitled to access to only the information upon which the disciplinary action was based; in no event shall a player have access to records, reports or other information concerning the application of this Policy to any other player. Notwithstanding, this provision does not limit the Players Association's access to appropriate information concerning all violations under this Policy.

12. Reasonable Cause Testing

Reasonable cause testing procedures are more fully outlined in Section 3A of the Policy.

No Club may require any player to submit to reasonable cause testing without the agreement of both the team physician and the Independent Administrator.

In addition, players on reasonable cause testing may be removed from their Club's active roster and placed in the category of *Reserve/Non-Football Illness* if, after consultation with the Club physician, it is the Independent Administrator's opinion that such a step is medically necessary.

13. Confidentiality

A. Scope

The confidentiality of players' medical conditions and test results will be protected to the maximum extent possible, recognizing that players who are disciplined for violating this Policy will come to the attention of and be reported to the public and the media.

B. Discipline for Breach of Confidentiality

Any Club or Club employee that publicly divulges, directly or indirectly, information concerning positive tests or other violations of this Policy (including numerical summaries or specific names of persons) or otherwise breaches the confidentiality provisions of this Policy is subject to a fine of up to $500,000 by the Commissioner.

14. Bonus Forfeiture

The computation of the amount a player must forfeit and return to his Club as a result of violating this Policy is set forth in Appendix J of the Policy.

15. Eligibility of Persons Suspended by Other Organizations

Any person who has been suspended from competition by a recognized sports testing organization based on: (a) a positive test result reported by a World Anti-Doping Agency

accredited laboratory for a substance banned under this Policy; (b) an effort to substitute, manipulate or otherwise fail to cooperate fully with testing; or (c) a violation of law or admission involving the use of steroids or other performance-enhancing substances, shall be permitted to enter into an NFL Player Contract or Practice Contract. Such person, however, will be placed on reasonable cause testing and will be immediately advanced to Step Two of the Policy subject to a minimum eight-game suspension upon subsequent violation.

APPENDIX A

List of Prohibited Substances

The following substances and methods are prohibited by the National Football League:

I. ANABOLIC AGENTS

A. ANABOLIC/ANDROGENIC STEROIDS:

Generic Name	Brand Names (Examples)
Androstenediol	Androstederm
Androstenedione	Androstan, Androtex
1-Androstenediol	1-AD
1-Androstenedione	---
Bolandiol	
Bolasterone	Myagen
Boldenone	Equipoise, Parenabol
Boldione	
Calusterone	---
Clostebol	Turinabol, Steranabol
Danazol	Cyclomen, Danatrol
Dehydrochloromethyltestosterone	Oral-Turinabol
Dehydroepiandrosterone	DHEA
Desoxymethyltestosterone	DMT, Madol
Dihydrotestosterone	DHT, Stanolone
Drostanolone	Drolban
Ethylestrenol	Maxibolin, Orabolin
Fluoxymesterone	Halotestin
Formebolone	Esiclene, Hubernol
Furazabol	Miotolon
Gestrinone	Tridomose
17-Hydroxypregnenedione	---
17-Hydroxyprogesterone	---
Hydroxytestosterone	---
Mestanolone	---
Mesterolone	Proviron
Methandienone	Danabol, Dianabol
Methandriol	Androdiol
Methandrostenolone	Dianabol
Methenolone	Primobolan
Methyltestosterone	Metandren
Methyl-1-testosterone	M1T

I. Anabolic/Androgenic Steroids (cont'd)

Generic Name	**Brand Names (Examples)**
7α-Methyl-19-nortestosterone	MENT
Methylnortestosterone	
Methyltrienolone	
Metribolone	
Mibolerone	Testorex
19-Norandrostenediol	19-Diol
19-Norandrostenedione	19 Nora Force
Norbolethone	Genabol
Norclostebol	---
Norethandrolone	Nilevar
Normethandrolone	---
19-Nortestosterone (Nandrolone)	Deca-Durabolin
Oxabolone	
Oxandrolone	Anavar, Lonovar
6-Oxoandrosterone	6-Oxo
Oxymesterone	Oranabol
Oxymetholone	Anadrol
Prostanazol	
Quinbolone	Anabolicum Vister
Progesterone	---
Stanozolol	Stromba, Winstrol
Stenbolone	---
Testosterone	Andronate
1-Testosterone	---
Tetrahydrogestrinone	THG
Trenbolone	Finaject

and related substances

B. HORMONES:

Generic Name	**Brand Names (Examples)**
Human Growth Hormone (hGH)	Saizen, Humatrope, Nutropin AQ
Animal Growth Hormones	---
Human Chorionic Gonadotropin (hCG)	Novarel, Menotropins
Insulin Growth Factor (IGF-1)	---
Erythropoietin (EPO)	---

and related substances

I. Anabolic/Androgenic Steroids (cont'd)

C. BETA-2-AGONISTS (Clenbuterol, etc.)

D. ANTI-ESTROGENIC AGENTS:

Generic Name	**Brand Names (Examples)**
Aminoglutethimide	Cytadren
Anastrozole	Arimidex
Clomiphene	Clomid
Cyclofenil	
Exemestane	Aromastin
Fadrozole	Afema
Formestane	Lentarone
Fulvestrant	Faslodex
Letrozole	Femara
Raloxifene	Evista
Tamoxifen	
Testolactone	Teslac
Toremifene	Acapodene
Vorazole	Rivizor

II. MASKING AGENTS

A. DIURETICS

Generic Name	Brand Names (Examples)
Acetazolamide	Amilco
Amiloride	Midamor
Bendroflumethiazide	Aprinox
Benzthiazide	Aquatag
Bumetanide	Burine
Canrenone	
Chlorothiazide	Diuril
Chlorthalidone	
Cyclothiazide	Anhydron
Ethacrynic Acid	Edecrin
Flumethiazide	---
Furosemide	Lasix
Hydrochlorothiazide	Aprozide
Hydroflumethiazide	Leodrine
Indapamide	Lozol, Natrilix
Methyclothiazide	Aquatensen
Metolazone	Zaroxolyn
Polythiazide	Renese
Probenecid	Benemid
Quinethazone	Hydromox
Spironolactone	Aldactone
Triamterene	Jatropur, Dytac
Trichlormethiazide	Anatran

and related substances

B. EPITESTOSTERONE

C. PROBENECID

D. FINASTERIDE (Propecia, Proscar)

III. CERTAIN STIMULANTS

Generic Name	Brand Names (Examples)
Amphetamine	Greenies, Speed, Adderall
Ephedrine	Ma Huang, Chi Powder
Fenfluramine	Phen-Fen, Redux
Methamphetamine	---
Methylephedrine	---
Methylphenidate	Ritalin, Daytrana, Metadate, Methylin
Modafinil	Provigil
Norfenfluramine	---
Pseudoephedrine *	Sudafed, Actifed
Phentermine	Fastin, Adipex, Ionamin
Synephrine	Bitter Orange, Citrus Aurantium

* Except as properly prescribed by Club medical personnel.

IV. DOPING METHODS

Introduction of a Prohibited Substance into the body by any means, including but not limited to the introduction of a Prohibited Substance, or the ingestion or injection of a supplement or other product containing a Prohibited Substance.

Pharmacological, chemical or physical manipulation by, for example, catheterization, urine substitution, tampering, or inhibition of renal excretion by, for example, probenecid and related compounds.

APPENDIX B

Personnel

The Independent Administrator of the NFL Policy on Anabolic Steroids and Related Substances is Dr. John Lombardo, who is currently Medical Director of the Max Sports Medicine and Clinical Professor in the Department of Family Medicine at the Ohio State Medical School. He also was previously a member of the faculty at the Sports Medicine Center of the Cleveland Clinic and has served as team physician to the Cleveland Cavaliers of the NBA and as an adviser on steroid issues to both the NCAA and the Olympic Committee.

The Consulting Toxicologist on Anabolic Steroids and Related Substances is Dr. Bryan Finkle, a board-certified forensic toxicologist and Research Professor of Pharmacology-Toxicology in the College of Pharmacy and Department of Pathology in the College of Medicine at the University of Utah Health Sciences Center. He also serves as a consultant to the International Olympic Committee Medical Commission, World Anti-Doping Agency and United States Anti-Doping Agency.

APPENDIX C

Collection Procedures

Upon reporting to the collection site, the player to be tested shall be required to produce a government-issued photo ID. Once his identity is confirmed, the player will be given the opportunity to select a sealed urine specimen cup. The player will furnish a urine specimen under observation by an authorized specimen collector. Thereafter, the player will be given the opportunity to select a sealed collection kit which will be used to store and ship his urine specimen. In the player's presence, the specimen will be split between an "A" bottle and a "B" bottle and sealed with security seals. The specimen collector will note any irregularities concerning the specimen, following which the player will be given the opportunity to sign the chain-of-custody form.

Once the bottles have been sealed and the chain-of-custody form has been completed, the bottles will be inserted into containers and placed back into the kit. The kit will then be sealed and sent by Federal Express or similar carrier to the appropriate testing laboratory.

All bottles will be identified by a control identification number. The number on the bottles will be the same as the number on the chain-of-custody form. The testing laboratories themselves will be unable to associate any specimen with an individual player.

APPENDIX D

Procedures Following Positive or Presumptively Positive Tests

The following will outline the procedures to be used following the testing laboratory's notification to the Independent Administrator of a positive "A" test:

A. Standard Tests

1. The Independent Administrator will match the control identification number with the player's name, and will then notify the player in writing of the positive result and request that the player call him to discuss the result.
2. If the player wishes to have the "B" sample test observed by a qualified toxicologist, he must notify the Independent Administrator in writing within five (5) business days of receiving written notification of the positive test result. If observation is requested, the Independent Administrator will schedule the test for the first mutually available date. Otherwise, in the absence of a reasonable basis for delay, the "B" sample test will be initiated within seven (7) business days following player's receipt of written notification of the positive test or as soon as possible following the Independent Administrator's receipt of written notification by the player that he does not wish the test to be observed, whichever is sooner.
3. The laboratory will report the "B" sample test result to the Independent Administrator, who may review the case with the Consulting Toxicologist and the laboratory director as appropriate.
4. The Independent Administrator will report his findings to the player and, if confirmed positive or if reasonable cause testing is indicated, to the League Office and the Players Association.
5. If the player is subject to disciplinary action, the League Office will notify him in writing, with a copy to the Players Association.
6. If the player decides to appeal, he must so indicate in writing within five (5) business days after receiving a notice of discipline from the League Office. He should state in his notice of appeal whether or not he desires a hearing.
7. If a hearing is requested, the League will schedule it to take place within twenty (20) calendar days of the request absent mutual agreement or extenuating circumstances. The hearing may be conducted by conference call upon agreement of the parties.
8. Prior to the hearing, the League will provide the player and NFL Players Association with a laboratory documentation package prepared in accordance with Appendix I. In the absence of clear evidence to the contrary, such package will be deemed full and complete for the purpose of evaluating the integrity of the chain-of-custody and test results. Once the player has had sufficient opportunity to review the documentation package, he must provide to the

League a written statement setting forth the specific grounds of his appeal. Additionally, no later than two (2) business days prior to the hearing the parties will exchange copies of any documents or other evidence on which they intend to rely and a list of witnesses expected to provide testimony. Following the exchange, the parties may provide further supplementation as appropriate.

9. Once the record is closed, the Hearing Officer will evaluate the evidence and render a written decision with respect to disciplinary action within five (5) calendar days. (If appropriate, a summary ruling may be rendered, followed by a formal decision as time permits.)

B. Pre-Employment Tests

When notified of a positive test result obtained in connection with Pre-Employment Testing, the procedure set forth in Part A above shall apply, except that:

1. The "B" sample test will be conducted on the first available date without the opportunity for observation by an outside toxicologist.
2. Upon confirmation of the positive test result, the Independent Administrator shall promptly notify the League Office and: all Clubs in the case of a Combine test, and the requesting Club(s) in the case of a Free Agent test.

The League will endeavor to conduct and conclude these procedures expeditiously, with appropriate regard to the possible need for follow-up tests or other measures required in the Independent Administrator's judgment, or other extenuating circumstances.

APPENDIX E

Examples of Medical Evaluations Following a Positive Test

A. Initial Positive Test

History and Physical

Emphasize:
- Cardiovascular
- Abdominal
- Genitourinary (testicle, prostate, impotence, sterility)
- Psychological (aggressiveness, paranoia, dependency, mental status)
- Immune system (masses, infections, lymphadenopathy)

Testing

- CBC with Differential
- General chemistry panel
  - Electrolytes, BUN/Creatinine, Glucose, Liver enzymes
- Lipid Assay
  - Triglycerides/cholesterol, HDL-C, LDL-C
- Urinalysis
- Cardiovascular
  - EKG
  - Chest X-ray
  - Stress test
  - Echocardiogram
- Semen analysis
- Endocrine Profile
  - TSH, LH, FSH, T4, TBG, Testosterone, SHBG (TBG), Cortisol, ACTH, Serum, Beta hCG
- Liver scan (either MRI or CT or Ultrasound or liver/spleen Scan)
- CT scan of chest/abdomen
- MRI of brain (with attention to pituitary gland)
- Ultrasound of testes

B. Repeat Positive Test Evaluation+

History and Physical - as above

Testing - Lab as above

CV, Liver scan } As indicated by time since last test and by history and physical

APPENDIX F

POLICY ON ANABOLIC STEROIDS AND RELATED SUBSTANCES
-Use of Supplements-

Over the past several years, we have made a special effort to educate and warn players about the risks involved in the use of "nutritional supplements." Despite these efforts, several players have been suspended even though their positive test result may have been due to the use of a supplement. Subject to your right of appeal, **if you test positive or otherwise violate the Policy, you *will* be suspended.** You and you alone are responsible for what goes into your body. Claiming that you used only legally available nutritional supplements will not help you in an appeal.

As the Policy clearly warns, supplements are not regulated or monitored by the government. This means that, even if they are bought over-the-counter from a known establishment, there is currently no way to be sure that they:

(a) contain the ingredients listed on the packaging;
(b) have not been tainted with prohibited substances; or
(c) have the properties or effects claimed by the manufacturer or salesperson.

Therefore, if you take these products, you do so AT YOUR OWN RISK! For your own health and success in the League, we strongly encourage you to avoid the use of supplements altogether, or at the very least to be extremely careful about what you choose to take.

Take care and good luck this season.

Sincerely,

HAROLD HENDERSON

Executive Vice President
National Football League

GENE UPSHAW

Executive Director
NFL Players Association

APPENDIX G

To: NFL Players
From: Dr. John Lombardo
Subject: Supplements

Gene Upshaw and representatives from the NFLPA along with Harold Henderson and representatives from the NFL Management Council recently met with me and a number of my colleagues to discuss dietary supplements and their interrelationship with the NFL Policy on Anabolic Steroids and Related Substances.

Upon the conclusion of the meeting all participants felt that I should advise you of both health and policy violation risks you may be faced with by adding over-the-counter supplements to your diet.

In 1994, the U.S government passed a law entitled "The Dietary Supplement Health and Education Act". As a result of this law, the supplement manufacturers and distributors do not have to prove the effectiveness or the safety of their products. Also, the ingredients of the supplements are not checked by any independent agency, such as the Food and Drug Administration (FDA), to certify the contents of the supplements. **Therefore, the effectiveness, side effects, risks and purity of many products you can buy at the health food store are unknown.**

This law also permits over-the-counter sale of products that violate the NFL's policy. For example, DHEA, a steroidal hormone that serves as a direct precursor for the synthesis of testosterone, is widely advertised. However, since this substance is found in some plants and animals, manufacturers currently are allowed to market it as a dietary supplement. This product, like many other supplements that contain substances that violate the policy, can be purchased at your local health food store and, when ingested, is no different than taking illegal anabolic steroids or related substances.

If you take supplements that contain a substance that violates the policy it will subject you to discipline. More importantly, you run the risk of harmful health effects associated with their use.

I will continue to provide you with information on the subject throughout the year. In the meantime, if you have any questions about supplements or the steroid policy, please contact me.

JOHN A. LOMBARDO, M.D.
Independent Administrator of the NFL Policy on Steroids and Related Substances

APPENDIX H

U.S. Department of Justice
Drug Enforcement Administration

Office of the Administrator *Washington, D.C. 20537*

July 15, 2008

Mr. Roger Goodell
Commissioner
National Football League
280 Park Avenue
New York, New York 10017

Dear Commissioner Goodell:

Thank you for your concern regarding the policies of the Drug Enforcement Administration (DEA) in enforcing the Anabolic Steroid Control Act of 1990, as amended in 2004, and the National Football League's (NFL) policies to eliminate the use of anabolic steroids in the NFL.

Your program of random and reasonable cause testing for steroids reinforces the provisions of the Anabolic Steroid Control Act. Under this law, DEA has the responsibility to regulate all aspects of the legitimate steroid industry, including doctors and pharmacists.

To those who use anabolic steroids, including professional athletes, I should emphasize that under the Act, possession of even personal use quantities not validly prescribed by a doctor is a federal crime. The maximum penalty for simple possession (possession not for sale), is one year in a federal prison and a minimum $1,000 fine.

DEA will also investigate and prosecute violations involving the unlawful manufacture, distribution, and importation of anabolic steroids. Doctors who prescribe anabolic steroids for other than legitimate purposes will be prosecuted. Pharmacists who dispense anabolic steroids without a doctor's prescription or with one that they know is fraudulent or not issued for a legitimate medical purpose will also be prosecuted.

While DEA's primary focus is law enforcement, we also recognize the importance of public education on matters such as these. I would thus appreciate it if you would make this letter directly available to each NFL team, its players, physicians, trainers, and other personnel.

Sincerely,

Michele M. Leonhart
Acting Administrator

APPENDIX I

Standard Form of Documentation Package

Tab	Item(s)
1.	Cover Sheet
2.	Table of Contents
3.	General Overview of Laboratory Procedures
4.	Custody and Control Forms
	a. External Chain of Custody Form
	b. Specimen Chain of Custody
5.	Initial Test Information (A-Bottle)
6.	Confirmation Test Information
	a. Confirmation Test Description
	b. Chain of Custody Pull List
	c. Confirmation Aliquot Chain of Custody Log
	d. Specimen ID Verification Report
	e. Analytical Data
7.	Certification Information
	a. Pending Positive Report (Certifying Scientist Worksheet)
	b. Laboratory Report
8.	Re-Test Information (B-Bottle)
	a. Chain of Custody Pull List
	b. Confirmation Aliquot Chain of Custody Log
	c. Specimen ID Verification Report
	d. Analytical Data
9.	Re-Test Certification Information
	a. Pending Positive Report (Certifying Scientist Worksheet)
	b. Laboratory Report

APPENDIX J

Calculation of Bonus Forfeiture

A Player who is suspended under this Policy shall forfeit and return to his Club (or forgo entitlement to unpaid portions of) the proportionate amount of his signing bonus corresponding to the period of the suspension; provided that, if (a) the suspension is for a period of one year or more, (b) the Player's Contract is tolled during such suspension, and (c) the Player subsequently performs under the Contract during the extended period that results from the tolling, then the Player shall earn back the proportionate amount of forfeited or forgone signing bonus for the extended period in which he performs. For purposes of this Section, "proportionate amount" means $1/17^{th}$ of the signing bonus allocation for each regular season week or regular season game missed per League Year covered by the suspension, or $1/17^{th}$ of the forfeited or forgone signing bonus allocation for each regular season week or regular season game subsequently played per extended year of the Player's Contract, in the case of a Player earning back previously forfeited or forgone signing bonus.

By way of example, without limitation on any other example, if a Player with a four-year Player Contract for the 2006-2009 League Years that contains a signing bonus of $4 million is suspended for the 2007 and 2008 League Years for violation of the Policy, then the Player would forfeit and return to his Club $2 million in signing bonus allocation ($1 million for the 2007 League Year and $1 million for the 2008 League Year). If, after performing under the Player Contract in the 2009 League Year, the Player then performed one of his previously tolled years in the 2010 League Year, he would earn back $1 million. If the Player then performed for eight games of the second of his previously tolled years in the 2011 League Year and then retired, he would earn back an additional $470,588 (8/17 x $1 million).

Mr. SMITH. Is extremely important to me that our players compete on a playing field that is level and that the competition among these elite athletes occurs without the help of any performance-enhancing substances.

I am keenly aware that our players' choices, both on and off the field, not only affect themselves but also members of the vast audience who watch them. I am also keenly aware that there are serious and adverse health effects from using steroids and other substance. It is why the health of our players is paramount.

The safety of our players remains paramount, and I will always stand with the National Football League when we fight and work together to ensure player safety. It is for those reasons that our union first negotiated this very strict policy in the early 1990s.

Over time, we have made collectively bargained changes to that policy to ensure safety, to ensure that the players who play this game play so at an even playing surface. As a result, we have always agreed to the strict liability feature which makes every player responsible for what he puts in his bodies. As a result, players will be suspended under the policy even when they do not know that a product they are using contains a prohibited substance.

We test at least 10 players per week per team during the season, and the player is likely to be tested about six times in the off season. A player's first positive test typically brings an automatic game suspension; a second positive test brings an eight-game suspension; And a third positive test and a suspension of up to 1 year.

As a testament to the success of this policy, there have only been five two-time offenders since the policy was put in place in 1993. No player—no player in our history has ever been suspended for a third offense.

We have also placed great emphasis on education under the policy. We have developed various educational materials to warn our players about the health risks of using steroids. Players are encouraged to call a hotline number to check on the acceptability of various products under the policy. That hotline is a crucial safety measure that was inspired by the National Football League and our union to ensure that our players have immediate access to the best information.

We have also created the Sports Nutrition Label Certification Program which certifies to players that products of any company participating in the program are free from any substances.

Against this background it is unfortunate that the policy has attracted some negative attention related to this StarCaps case.

Most importantly today, Mr. Chairman, I want to emphasize what StarCaps is not about. StarCaps is not about any player who used a product to gain a competitive advantage. It is not a case about any player who used a product to enhance their performance. Instead, it is about the use of a product called StarCaps, which was used by players to help them lose weight.

It is not a steroid. StarCaps was marketed over the counter as an all-natural product, and the list of ingredients on its packaging did not include any banned substances. The players who ingested the product did not know nor were they ever told that StarCaps actually contained bumetanide, an unlisted ingredient and a prescription diuretic that is prohibited under our policy.

In normal circumstances, of course, it does not matter under the policy whether the players knew this or not since they are responsible for everything they put in their bodies. But this case did not involve normal circumstances. That is because, unknown to the players, the person appointed by the National Football League as the independent administrator of the program had previously become aware that StarCaps contained bumetanide. He, along with other League officials, failed to inform the players of this fact.

Making matters worse, a League lawyer interfered with the administrator's independence by dictating that he change his response to such cases to ensure that players who unknowingly took StarCaps would be suspended.

I remain concerned about these revelations for two reasons. First, I believe our policy contemplates that an independent administrator, who in this case is a medical doctor, well credentialed in his field, must at all times have the health of the players as his first priority. He should not serve as strictly a functionary. He must serve as a doctor who is obligated to inform players as patients when their health is at risk. That did not happen in this case.

The same goes for a League lawyer who also failed to convey the information that he knew to the players or to the hotline that they used to make sure that the information is accurate. That is why we filed our action in Minnesota. That is why we sought this appeal.

That being said, as a result of the StarCaps case, I believe that we have to make some changes to the policy. But the issues with the collectively bargained program that emerge in the context of StarCaps can and should first be addressed by working with the league through the collective bargaining process.

I believe in the collectively bargained process. I believe in the program that resulted from collective bargaining. I believe that the league should have adhered to that collectively bargained process.

Mr. Chairman and the subcommittee, let me conclude by saying that we appreciate this committee's and this subcommittee's continuing interest in the health of players at all levels of the game. We believe that the most effective way to ensure that our collectively bargained policy does not conflict with State law is for the league and our union to draft carefully crafted language in the new CBA, that we are currently negotiating, that reflects our acute awareness of these issues.

We are confident that we can effectively work through the process with the league to implement these changes as we have done in the past. We will do so together to strengthen our policy.

I look forward to working with this subcommittee. I appreciate all of your efforts, and I am happy to ask and answer—I am sorry—answer, any of your questions today. Thank you very much.

Mr. RUSH. The Chair thanks the gentleman.

[The prepared statement of Mr. Smith follows:]

TESTIMONY OF DEMAURICE SMITH

EXECUTIVE DIRECTOR, NATIONAL FOOTBALL LEAGUE PLAYERS ASSOCIATION

BEFORE THE SUBCOMMITTEE ON COMMERCE, TRADE AND CONSUMER PROTECTION

UNITED STATES HOUSE OF REPRESENTATIVES

NOVEMBER 3, 2009

Good morning Chairman Waxman, Subcommittee Chairman Rush, and Members of the Subcommittee, my name is DeMaurice Smith, and I thank you for the opportunity to testify concerning the important issues being considered by your Subcommittee today.

I serve as the Executive Director of the National Football League Players Association, having been elected to that position by the NFLPA Board of Representatives back in March of this year. Although I am relatively new to my job, one of my first priorities was to become fully conversant with the NFL/NFLPA Policy on Anabolic Steroids and Related Substances ("the Policy"). The Policy has been in place for many years, and it has been very successful in terms of preventing the use of performance enhancing substances in the National Football League.

As Executive Director of the NFL Players union, it is extremely important to me that our players compete on a level playing field, and that the competition among these elite athletes occurs without the help of any substances that could artificially enhance performance. Moreover, I am keenly aware that our players' choices, both on and off the field, affect not only themselves, but also members of the vast audience who watch them play -- particularly young people who play sports and aspire to higher levels of competition. I am also keenly aware that there can be serious adverse health effects

from using steroids and other substances, and the health of our players is always the absolute top priority for our union.

It is for these reasons that our union first negotiated a very strict policy in the early 1990s, and later agreed with the NFL to make changes over time to strengthen that policy. As you may know, we have year-round, random testing of our players, and the Policy has a "strict liability" feature which makes every player responsible for what he puts into his body. As a result, players will be suspended under the Policy even when they do not know that a product they are using contains a prohibited substance.

We test at least 10 players per week per team during the season, and a player is likely to be tested about six times in the off season. A player's first positive test typically brings an automatic four game suspension. A second positive test brings an eight game suspension, and a third positive test results in a suspension of up to one year. As a testament to the success of the Policy, there have been only 5 two-time offenders since the Policy was put in place in 1993, and no player in our history has been suspended for a third offense.

We have also placed great emphasis on education under the Policy, and we have developed various educational materials to warn our players about the health risks in using steroids. Players are encouraged to call a "hotline" number to check on the acceptability of various products under the Policy. The hotline is a crucial safety measure inspired by the League and our union to ensure that our players have immediate access to information about ingredients in supplements. We have also created the Sports Nutrition Label Certification Program, which certifies to the players that products of any company participating in the program are free of any substances that are prohibited under the Policy. As a result, players who want to use supplements can obtain them through our certification program, knowing that use of those certified supplements will not cause them to test positive for a prohibited substance.

Against this background, it is unfortunate that the Policy has attracted some negative attention recently in the so-called *StarCaps* case in Minnesota, and I want to take a few moments to comment on that case. Most importantly, I want to emphasize what the *StarCaps* case is not about. It is not about players who used a product to enhance their performance. It is not about players who were trying to gain a competitive advantage. Instead, it is about the use of a product known as "StarCaps," which was used by some players to help them lose weight.

StarCaps was marketed over-the counter as an all-natural product, and the list of ingredients on its packaging did not include any banned substances. The players who ingested the product did not know, nor were they ever told, that StarCaps actually contained bumetanide, an unlisted ingredient and a prescription diuretic that is prohibited under our Policy. In normal circumstances, of course, it does not matter under the Policy whether the players knew this or not, since they are responsible for everything they put in their bodies. But this case did not involve normal circumstances. That is because, unbeknownst to the players, the person appointed by the NFL as the Independent Administrator of the program had previously become aware that StarCaps contained bumetanide, but he, along with other league officials, failed to inform the players of that fact. Making matters worse, a league lawyer interfered with the Administrator's independence, by dictating that he change his response to such cases to ensure that players who unknowingly took StarCaps would be suspended.

As the Executive Director of the NFLPA, I was extremely disturbed about these revelations for obvious reasons. First, I believe, and our Policy clearly contemplates, that the Independent Administrator, who is a physician well-credentialed in his field, must at all times have the health of the players as his first priority. He should not serve strictly as a disciplinarian, but also as a doctor for the players who is obligated to inform them as patients that there is a health risk in using a product that he knows they are

using. Frankly, the fundamental failure of that doctor to ensure immediate disclosure of the fact that StarCaps included bumetanide violated his paramount duty as a doctor - to protect patients, in this case, our players. The same goes for the league lawyer who also failed to convey the information to the players, and who also failed to inform the people answering inquiries on the hotline that StarCaps contained bumetinide. I was also disturbed when I learned that the league lawyer interfered with the Independent Administrator's discretion under the Policy.

This unique array of facts shaped our union's decision to argue in Federal District Court in Minnesota that the players' suspensions should be set aside. The Minnesota players also retained personal lawyers who filed a case alleging violations of the state of Minnesota's drug testing law. Analysis of this state law claim by the trial and appellate courts led to the conclusion by both courts that the collectively bargained Program did not preempt certain claims under the Minnesota statutes. As a union, we determined that we would not submit a filing that could undermine legal arguments made by our players that had merit given the language of the CBA and the Policy as currently drafted. We should note that there has been no judicial determination at the trial court or appellate level that the Policy directly conflicts with specific provisions of the Minnesota statute. Indeed, the *StarCaps* case is not over; the NFL has sought further review of the Eighth Circuit's preemption holding and, if necessary, could seek Supreme Court review.

That being said, as a result of the *StarCaps* case, I believe that we have to make some changes to the Policy. But the issues with the collectively bargained Program that emerged in the context of the *StarCaps* case can and should first be addressed by assiduously working with the League through the collective bargaining process. The Players Association and the League are absolutely committed to enforcement of a rigorous Policy on Anabolic Steroids and Related Substances that ensures the health and safety of the players and the integrity of the game. In September, Roger Goodell

and I issued a joint memo to all players that clearly stated that although the players involved in the *StarCaps* case would not be suspended at this time, the Policy remains in full effect, and they are responsible for everything they put into their bodies.

The *StarCaps* case revealed to us that we need to change the Policy to provide that, if the Independent Administrator or any league official administering the Policy finds out that a product contains a prohibited substance, they must immediately inform the NFLPA and the players of that fact. Further, we believe that the players should have outside, impartial arbitration of any disputes under the Policy, just as players in Major League Baseball, the National Hockey League, and the National Basketball Association have under their drug policies. Experience has shown that allowing the NFL to pick one of its own attorneys to arbitrate Drug Policy appeals undermines the credibility of the process. Players have to believe that they are getting a fair shake under the Policy, and this change, I believe, would enhance the Policy's effectiveness without threatening any of its basic tenets.

Most importantly, I believe we need to re-emphasize that the health of our players as our highest priority, and that there must be measures put in place to assure that the dangers of a given product, once they become known, must be revealed to the players immediately. Medical experts warn that use of diuretics can have dangerous side effects including dehydration and other problems. We lost one of our members, Korey Stringer, several years ago because of symptoms related to dehydration during early training camp practices in Minnesota. We must do everything we can to prevent that from ever happening again.

Mr. Chairman and members of the Subcommittee, let me conclude by saying that we appreciate this Committee and Subcommittee's continuing interest in the health of players at all levels of the game. We believe that the most effective way to ensure that our collectively bargained Policy does not conflict with any state law is for the League

and our union to draft carefully crafted language in the new CBA that reflects our acute awareness of these issues. We are confident that we can effectively work through the collective bargaining process with the league to implement changes that will better protect our players, ensure the uniform application of the drug testing policy, and strengthen the integrity of that policy. We look forward to keeping the Subcommittee apprised of our efforts and the success of this approach.



FINAL



NFL PLAYERS
ASSOCIATION

September 2009

MEMO TO ALL NFL PLAYERS

You have probably heard about lawsuits involving several players who tested positive for a banned substance that was contained in a supplement called "StarCaps." Those cases are being heard by the courts. Earlier this week, Commissioner Goodell said that those players would not be suspended at this time.

It is important for all players to understand that the Policy on Anabolic Steroids and Related Substances remains in place and that you will be tested this year just as you have been in other years and a positive test will generally result in a suspension.

Please be sure that you understand your rights and obligations under the Policy.

- You are responsible for what is in your body. A positive test will not be excused because you used a supplement that contained a banned substance.
- If you take any supplements other than those certified under our Sports Nutrition Label Certification Program, you do so at your own risk. Supplements are not tested or regulated, and often have ingredients that will cause you to test positive.
- Weight-loss supplements such as "StarCaps" are particularly risky. You should not take them.
- If you have questions, you should call Dr. John Lombardo at 614-442-0106.

We continue to support the policy and our players and will continue to work to maintain its effectiveness, to improve it, and to ensure that it applies fairly and consistently.

Best of luck for the 2009 season.

ROGER GOODELL
Commissioner

DEMAURICE SMITH
Executive Director

Mr. RUSH. The Chair recognizes Mr. Michael Weiner, who is the General Counsel for Major League Baseball Players Association.

Mr. Weiner, you are recognized for 5 minutes and, to be fair, thereabouts. OK?

STATEMENT OF MICHAEL WEINER

Mr. WEINER. Thank you, Mr. Chairman, Ranking Member Radanovich and members of the committee. Thank you for the opportunity to testify today. In addition to my comments now, I would ask that my written testimony be made a part of the official record of today's proceeding.

As Mr. Manfred indicated, we have an effective joint drug program in Major League Baseball. It has been collectively bargained, it is comprehensive, its science is state of the art and it contains elements of fundamental fairness to all involved with the program. We have an independent program administrator, we have year-round testing both during the playing season and during the off season and, of importance, the collective bargaining parties have demonstrated the flexibility and the program itself calls for this flexibility for us to respond to developments—legal developments, scientific developments—and we have through the bargaining process responded to those developments to maintain the effectiveness of our program.

The Williams decision that is the impetus for today's hearing has had no impact on the operation of the joint drug program in Major League Baseball, and the Players Association does not believe that the ongoing litigation in Williams warrants congressional intervention. That intervention would implicate longstanding congressional policy, longstanding Supreme Court precedence that accommodates State prerogatives that pass laws to regulate workers in the workplace.

The bargaining parties in Major League Baseball and those in many industries regularly bargain collective bargaining agreements against a backdrop of State laws. It is something that unions and management do all the time. And because of that, both Congress and the Supreme Court have repeatedly expressed reluctance to—and I will now quote from the Allis-Chalmers decision of the United States Supreme Court—to grant to collective bargaining parties the ability to contract for what is illegal under State law.

The Williams case again does not warrant deviation from that principle. As I indicated, it is ongoing litigation. The decision of the Eighth Circuit is not even necessarily the final word of the Eighth Circuit. There is a petition for rehearing pending before the Eighth Circuit right now and there are other possibilities for further appellate proceedings. In addition, if the case is ultimately remanded, sent back to the State court, at that point there will be a trial of the State law claims.

I emphasize that nothing has been decided with respect to the State law claims other than that they can be heard. In addition, as Mr. Smith emphasized in some detail, the Williams case is not about steroids. The substance involved, as he indicated, is StarCaps, an over-the-counter weight loss supplement that turned out to contain a prescription drug that was not listed on its label. And as he said—Mr. Smith said—that litigation has focused in

large part on the administration of the agreement as it relates to StarCaps, the fact that the NFL had knowledge of—that StarCaps contained the prescription medication and the lack of disclosure of that to players and to the union. These are relevant facts in weighing the league's request for congressional intervention.

Turning to the Minnesota statutes involved, again it is important to note that there has been no determination at this point that those statutes even apply or affect in any way professional sports. I have had the opportunity to read Professor Feldman's written testimony, and we agree with him that in the end there may well be no conflict at all between the Minnesota statutes and the collective bargaining agreements that govern professional athletes in the State of Minnesota.

We have also, in advance of this hearing, spoken with the AFL–CIO. It is their position that they do not support congressional intervention in a matter such as this. They believe that collective bargaining should be permitted to work to address any problem that might exist.

So, in summary, the Players Association—the Baseball Players Association, I should say—hopes that this committee and the Congress will allow the Williams litigation to play itself out fully. At that point, all concerned about this issue can determine whether any problem actually exists, and if there is a problem, all involved can make a determination as to the best solution.

Thank you for your time, and I welcome the chance to answer any of your questions.

Mr. RUSH. Thank you.

[The prepared statement of Mr. Weiner follows:]

BEFORE THE UNITED STATES

HOUSE OF REPRESENTATIVES

COMMITTEE ON ENERGY AND COMMERCE

SUBCOMMITTEE ON COMMERCE, TRADE,

AND CONSUMER PROTECTION

STATEMENT OF MICHAEL WEINER

GENERAL COUNSEL, MAJOR LEAGUE

BASEBALL PLAYERS ASSOCIATION

NOVEMBER 3, 2009

Mr. Chairman and Members of the Committee:

My name is Michael Weiner, and I serve currently as the General Counsel of the Major League Baseball Players Association (MLBPA). Thank you for the opportunity to testify today about the court's decision in *Williams et al. v. NFL et al.*, Nos. 09-2247/2462 (Sept. 11, 2009 8th Cir.) and its potential impact on current drug testing programs in professional sports.

At the outset, I note that today in baseball, we have an effective, comprehensive, scientifically robust, and administratively fair testing program. It is run by an independent administrator, operates both in and out of season, and has sufficient flexibility to allow us to improve the program in response to developments. The Commissioner has repeatedly said that he believes our program is the best in professional sports, and on this point, we agree. And the program can continue to operate effectively regardless of what happens in the ongoing Williams litigation, the case that is the impetus for today's hearing.

In Williams, the United States Court of Appeals for the Eighth Circuit upheld an arbitrator's decision that, in turn, upheld suspensions of two NFL players under the league's drug program. The court also held claims of violations of certain Minnesota statutes were not preempted by Section 301 of the Labor Management Relations Act, and that those claims should be remanded to state court for further proceedings. Apparently, it has been suggested that to save drug testing in professional sports, Congress must pass legislation that overturns this portion of the Eighth Circuit's ruling.

We do not support this proposition. Nothing we have seen – in this litigation, or in the Minnesota law, or elsewhere – suggests that Congress needs to take such extraordinary action.

As the United States Supreme Court has said, as quoted by the Eighth Circuit in Williams:

> *[T]here [is not] any suggestion that Congress, in adopting § 301, wished to give the substantive provisions of private agreements the force of federal law, ousting any inconsistent state regulation.* Such a rule of law would delegate to unions and unionized employers the power to exempt themselves from whatever state labor standards they disfavor. *Clearly, § 301 does not grant the parties to a [CBA] the ability to contract for what is illegal under state law.* [Slip Op. at 19-20, quoting Allis-Chalmers Corp. v. Lueck, 471 U.S. 202 at 211-12 (1985)(footnote omitted)(emphasis added)].

A bill that would preempt state law would not only overturn this long-standing precedent, it would stand for the unusual proposition that parties to a collective bargaining agreement *can* contract for that which is illegal under state law.

For decades, Congress and the Supreme Court have struck a well-considered balance between encouraging collective bargaining and, in the interests of federalism, accommodating state legislation regarding the workplace. Indeed, collective bargaining routinely occurs against the backdrop of state laws. Our Basic Agreement, like many collective bargaining agreements, expressly references many subjects governed by state law, including worker's compensation, unemployment compensation, privacy of medical records and licensing of physical therapists.

Today, this Committee is being asked to upset this balance because, apparently, one employer disagrees with one circuit court decision (still subject

to further review) interpreting one state's statutes on one subject matter. That is not sufficient reason to take such a major and potentially consequential step. Further analysis of the *Williams* case reinforces that position.

First, the Williams litigation is ongoing and far from over. The NFL has sought further review of the preemption holding within the 8th Circuit (a petition for rehearing is pending) and, if necessary, can seek review from the United States Supreme Court. And, if those appeals are not successful, the NFL can litigate the state law claims on remand to the state court. The 8th Circuit's ruling (thus far) is only that the players' state law claims are not preempted; the players have not actually prevailed on any of those claims. An interlocutory ruling, with expected additional proceedings at the appellate and trial level, should not provoke Congressional action.

Second, the Minnesota statutes of which the NFL now complains had nothing to do with the court orders that prevented the suspensions from going into effect during 2008. The preliminary injunction issued by the federal District Judge was based on concerns about the fairness of the arbitration, including the fact that the case was not heard by a truly neutral arbitrator, but instead by the General Counsel of the NFL. 598 F. Supp. 2nd 971. It was not until later that the players filed an amended complaint first raising the claims under the Minnesota statutes. See Williams, Slip Op. at 10.

Third, the Williams case does not even involve a claim that the players were taking illegal steroids in order to obtain an unfair advantage. The players tested positive due to traces of a diuretic contained in a legally purchased supplement which did not list on the label the ingredient which caused the players to test positive. According to the opinions, the NFL was aware that the

supplement was tainted but failed to warn the union or the players. The opinions also reflect that the NFL directed the independent program administrator to suspend the players (he had previously not been suspending players who had consumed this product) and did not even tell the union it was doing so. These specifics must be considered by the Committee in weighing this request for legislative intervention in light of the Williams saga.

Importantly, the two Minnesota statutes in question do not threaten the operation of our program.

Under the Drug and Alcohol Testing in the Workplace Act (DATWA), Minn. Stat. §§ 181.950-957, professional athletes covered by collective bargaining agreements can be subjected to drug testing, but that testing must meet certain standards. Employers and unions are free to bargain as long as they comply with the minimum requirements of DATWA, and employee protections in CBAs may exceed those minimum requirements. Finally, before resorting to a claim under DATWA, employees must exhaust their remedies under the CBA.

We do not believe that DATWA presents any threat to our program. For the most part, our program already complies with the statute's requirements. In the instances in which some adjustments may need to be made (e.g., having our laboratory obtain certification under DATWA), we do not think those would be difficult to achieve or that they would interfere with enforcement of the JDA.

The same is true of the Minnesota Consumable Products Act (CPA), Minn. Stat. § 181.938. Under that statute, employers cannot discipline employees for using "lawful consumable products" away from the workplace during nonworking hours. But employers can restrict consumption of such

products if they relate to a bona fide occupational requirement (BFOQ) that is reasonably related to employment activities, or if such a restriction is necessary to avoid a conflict of interest (or its appearance) with any responsibilities owed by the employees to the employer. Williams Slip Op., supra, at 20. No court or arbitrator has considered these questions; put differently, no court or arbitrator has determined whether the CPA's "lawful consumable products" provision even applies to professional sports. It is premature to assess whether Williams warrants any legislative correction until these and other issues are fully litigated.

In short, we do not believe the Minnesota statutes pose any serious threat to our drug program. Nor are we aware of other state or local laws that interfere with administration of our program. For example, a San Francisco ordinance forbids employers from requiring urine tests as a condition of continued employment. Sec. 3300A.5. That same ordinance, however, says that it "does not intend to regulate or affect the rights or authority of an employer to do those things that are required, directed or expressly authorized by .... collective bargaining agreement between an employer and an employer labor organization." Sec. 3300A.10. Our testing in San Francisco, thus, has continued without interruption, despite the local ordinance. Putting aside other arguments against congressional interference with state prerogatives, it is plain that Congress should not preempt state action in response to a potential or hypothetical problem.

Ironically, the supplement at the heart of the Williams case should never have been on the market in the first place. It is difficult to understand how a supplement containing a prescription drug was allowed to be sold over-the-

counter throughout the United States, let alone one that contained such high levels of the drug.

Unfortunately, this particular product, Starcaps, is not the exception. Earlier this year, the Food and Drug Administration published a list of more than 95 supplements containing prescription drugs, steroids or diuretics. This fall, we notified our members that yet another supplement, Armitest, was found to contain extremely high levels of both testosterone and androstenedione.

There is no longer any question that the current federal regulatory scheme for dietary supplements is not working. We hope, as this Committee moves forward, that consideration will be given to either amending the Dietary Supplement Health and Education Act or providing the FDA with sufficient resources to ensure the safety of supplements for all consumers.

Nearly half of all Americans claim to use dietary supplements, many on a daily basis. Those individuals are worthy of the same basic protection promised those who consume traditional food – the assurance that the products regulated by the FDA, that are sold without restriction throughout the country, are safe and that the products' labels can be trusted.

Thank you, Mr. Chairman, and I would be happy to answer any questions you may have.

Mr. RUSH. The Chair now recognizes Mr. Travis T. Tygart, the CEO of the United States anti-doping agency. Mr. Tygart, you are recognized for 5 minutes.

STATEMENT OF TRAVIS T. TYGART

Mr. TYGART. Thank you, Mr. Chairman, Ranking Member Radanovich, members of the committee. Good afternoon. My name is Travis Tygart, and I am the Chief Executive Officer of the United States Anti-Doping Agency. I want to thank you for the opportunity to be here today and for your longstanding interest in the rights of clean athletes and the integrity of competition.

USADA, as you probably know, has been recognized as the national anti-doping agency for the U.S. Olympic Movement; and while our current mandate does not extend to professional sport, we do not work in a vacuum. The elimination of doping in professional sports is equally important to the elimination of doping at all levels of sport in this country.

Sport in America has taken on a significance that extends well beyond a form of entertainment. In its purest form, sports builds character, promotes selfless teamwork, dedication and commitment to a greater cause. Sadly, when doping is introduced, its corrosive effects eat away at the core attributes and compromises everything valuable about sports. The existence of doping in professional sport hurts us all.

Last year, the subcommittee conducted hearings on the Mitchell Report. Major League Baseball and its players were not the only sports organization or players hurt by those revelations; unfortunately, the accomplishments of clean athletes at all levels of sports in this country were hurt.

I would like to digress momentarily to the StarCaps problem that led to the Williams case. Recently I testified in the Senate and outlined a series of legislative changes that we believe are necessary to protect athletes of all ages and other consumers from mislabeled dietary supplements, in particular, those supplements that contain undisclosed drugs that are dangerous to consumers like the one in this case.

With respect to today's issues, we strongly support Federal legislation that protects uniform national enforcement of a sports league's sound anti-doping program against interference from inconsistent State laws. This preemption should be available for all sound sport anti-doping policies, not just those collectively bargained. Where a sports league has a national scope, its anti-doping program cannot be effective unless it is uniform and national in scope. We have learned that lesson from the history of anti-doping in the Olympic Movement, from the adoption of the World Anti-Doping Code and the acceptance of the world code by the U.S. and other governments through the ratification of UNESCO's International Convention against Doping in Sport. That convention commits the U.S. to coordinate the fight against doping in sport in the U.S. through appropriate measures including legislation consistent with principles of the code.

As described in the code, sport anti-doping programs are based on three fundamental objectives to maintain a level playing field for athletes, to protect the health of athletes and to preserve the

spirit of sport. If application or enforcement of anti-doping rules can vary depending on where a particular competition takes place or where an athlete or a team is located, the playing field is not even and clean, athletes' rights are violated.

There could be unique or inconsistent State regulations pertaining to conduct which constitute a violation of anti-doping rules, the selection of athletes to be tested, the sample collection process, the laboratory analysis of samples, the results management process and the imposition of discipline.

The problem of an uneven playing field caused by nonuniform anti-doping rules was the primary reason behind the adoption worldwide of the World Anti-Doping Code. Before the enactment of the code, the rules of international sports federations like FIFA, the world governing body for soccer, could not be uniformly enforced worldwide because of the patchwork of inconsistent national anti-doping rules and laws.

USADA follows all of the requirements of the code in the operation of our Olympic program. Some professional leagues, like the ATP and the WTA, have now also adopted the code. Any sports league that adopts the gold standard, the code, should receive the benefit of Federal preemption of any inconsistent State law.

Now, whether viewed from the perspective of the obligations under the UNESCO convention or simply from the public policy goal of eliminating doping in America, sports that adopt sound anti-doping programs that substantially comply with the basic principles of the code should also be protected from inconsistent State laws. There is much less justification, however, for preempting State laws in favor of professional sports league programs that are not fair or effective.

To obtain the protection of Federal preemption as a matter of public policy, of sports anti-doping programs, should, most importantly, be independent and transparent in addition to being required to satisfy the following criteria: effective out-of-season and out-of-competition testing; a full list of prohibited substances and methods that are prohibited; and implementation of best legal and scientific policies, investments into education, investments into research, partnerships with law enforcement to hold those accountable who manufacture or illegally distribute these dangerous drugs.

In conclusion, requiring these minimal principles is consistent with the WADA code, the USADA protocol and the recommendations you heard from Senator Mitchell. If all U.S. professional sports leagues implemented anti-doping programs that met these criteria, it would go a long way towards eliminating doping in the U.S., in restoring public confidence and the integrity of achievement and the value of true sport as a teacher of life lessons. Most importantly, it would be a significant step toward protecting the health our young athletes who emulate our professional heroes. Thank you.

[The prepared statement of Mr. Tygart follows:]

November 3, 2009 House Hearing

"The NFL StarCaps Case: Are Sports' Anti-Doping Programs at a Legal Crossroads?"

Conducted by the House Energy and Commerce Subcommittee on Commerce, Trade, and Consumer Protection

Testimony of Travis T. Tygart

Chief Executive Officer

United States Anti-Doping Agency

Mr. Chairman, Members of the Committee, good morning. My name is Travis Tygart and I am the CEO of the United States Anti-Doping Agency (USADA). I want to thank this Committee for its longstanding interest in the rights of clean athletes and for its support for clean sport and for the opportunity to appear before you today to discuss an important issue in all of our efforts to eliminate doping in sport.

USADA has been recognized by Congress as the independent, national anti-doping agency for Olympic, Paralympic and Pan American Sports in the United States. Our mission is to protect and preserve the health of athletes, the integrity of competition, and the well-being of sport through the elimination of doping. USADA is responsible for drug testing, investigation of potential doping violations, results management of anti-doping rule violations, and anti-doping education and research in Olympic, Paralympic, and Pan American Games sport in the United States.

While USADA's current mandate does not extend to professional sports outside of the Olympic Movement, we do not work in a vacuum. The elimination of doping in professional sport is very important to the elimination of doping at all levels of sport in our country.

Sport in America has taken on a significance that extends well beyond a type of leisure time activity or a form of entertainment. Sport has become woven into the fabric of our society because sport inspires dreams and passions. In its purest form, sport builds character and promotes the virtues of selfless teamwork, dedication and commitment to a greater cause. True

sport is built on the idea of honesty and respect--respect for the rules, respect for one's competitor, respect for the fundamental fairness of stepping onto a playing field and competing against another individual or team. True sport teaches active lessons that can create a lifetime legacy of ethical values and healthy habits.

It is these core principles of sport that bring our communities together to cheer athletes and empower athletes to pursue their dreams and inspire others through the accomplishment of those dreams. Sadly, when doping is introduced into sport, its corrosive effect eats away at these core attributes and compromises everything valuable about sport.

The existence of doping in professional sport hurts us all. Last year, this Subcommittee conducted hearings on the Mitchell Report detailing past widespread doping in Major League Baseball. Major League Baseball was not the only sport organization hurt by those revelations. Sports fans everywhere felt disillusioned and betrayed. Once again, the accomplishments of clean athletes in all sports were brought into question by a public that has come to assume that doping is the status quo at the highest levels of all sport.

Most importantly, the stars in our professional sports are often the heroes and role models for all young athletes in our country, regardless of what sport a young athlete plays. I live in Colorado, and I am reminded of this weekly when our local newspaper runs a feature on its high school athlete of the week. Invariably, the student athlete, whether he or she plays tennis, volleyball, soccer, or swims, identifies the Denver Broncos or Colorado Rockies as his or her favorite team and names a professional player as his or her favorite athlete. As we learned in the

hearings that were conducted by the House Committee on Government Reform in March 2005, young athletes like Taylor Hooton are keen observers of the actions of their professional heroes and more than one young athlete has died as a result of taking performance enhancing drugs while imitating his or her professional role model. Simply put, USADA cares, and we should all care, that our professional sports leagues have strong and effective anti-doping programs.

Before I address the specific topic of federal legislation to protect the uniform enforcement of anti-doping programs implemented by professional leagues, I would like to digress momentarily to the StarCaps problem that led to the case of *Williams v. National Football League*. Four weeks ago, I testified before the Senate Committee on the Judiciary, Subcommittee on Crime and Drugs, and outlined a series of legislative and regulatory changes that USADA believes are necessary to protect athletes and other consumers from mislabeled dietary supplements – in particular, those supplements that contain undisclosed substances that are either prohibited in sport or are otherwise dangerous to the consumer. Had these legislative and regulatory changes been in place back in 2008, the prohibited diuretic, bumetanide, would most likely not have been in the StarCaps supplement, if that is in fact where it came from. In my prior testimony, for example, we specifically recommended that:

- Dietary supplement companies should provide the FDA with a comprehensive list of all dietary supplements they manufacture with a copy of the master formulas and product labels.
- Distributors and retailers of dietary supplements should obtain evidence of compliance from the manufacturers and licensors that all pre-market requirements have been complied with or bear responsibility for the products they sell as if they were the manufacturer.
- The FDA should be given the power to unilaterally prohibit sales and initiate immediate recall of any product that has not followed all pre-market requirements.

With respect to today's hearing, USADA strongly supports federal legislation that protects the uniform national enforcement of a professional sports league's sound anti-doping program against interference from inconsistent state laws. Where a sport league has a national scope, its anti-doping program cannot be effective unless it is uniform and national in scope. Players, coaches, officials and teams must all be subject to the same uniform anti-doping requirements.

We have learned that lesson from the history of anti-doping in the Olympic Movement, the adoption of the World Anti-Doping Code, and the acceptance of the World Anti-Doping Code by governments like the United States through ratification of UNESCO's International Convention Against Doping in Sport.

On October 4, 2008, the President, following the advice and consent of the Senate, executed the UNESCO International Convention Against Doping in Sport. That Convention commits the United States to coordinate the implementation of the fight against doping in sport in the United States through appropriate measures, which may include legislation, regulation, policies, or administrative practices consistent with the principles of the World Anti-Doping Code. The UNESCO Convention specifically recognizes that "the elimination of doping in sport is dependent in part upon progressive harmonization of anti-doping standards and practices in sport and cooperation at the national and global levels." There can be no national-level harmonization of anti-doping policy if each state is allowed to legislate around the policy in its own unique way.

As described in the World Anti-Doping Code, sport anti-doping programs are based on three fundamental objectives:

- To maintain a level playing field for the athletes.
- To protect the athletes' health.
- To preserve the spirit of sport.

To ensure a level playing field for athletes, the anti-doping rules of a national professional league must apply uniformly across the nation without interference from unique or inconsistent state laws. If application or enforcement of anti-doping rules can vary depending on where a particular competition takes place, or where an athlete or team is domiciled, the playing field is not level. This problem, created when unique state laws are superimposed upon a national anti-doping program, is illustrated by the fact that the Minnesota Vikings players in the StarCaps case claimed the benefit of unique Minnesota statutes. As a result, they were allowed, by means of a judicial injunction, to continue playing while New Orleans Saints players, who also tested positive for StarCaps, had no similar statute to rely on. The fact that because the Williamses played for Minnesota they were allowed to play after violating a rule that applied to players in all states was not fair to the clean players on any of the teams that the Williamses played against.

The same scenario, where a particular state's laws could make the playing field uneven for different athletes in the same sport, could play out in any of the critical aspects of an anti-doping program. For example, there could be unique or inconsistent state regulations pertaining to conduct which constitutes a violation of the anti-doping rules, the selection of athletes to be tested, the sample collection process, the laboratory analysis of samples, the results management and hearing process, and the imposition of discipline.

In states where employee drug testing is prohibited during non-working hours or cannot be done without advance notice, teams in those states could gain a competitive advantage if their players use prohibited substances to improve their off-season training and conditioning. Free agent players who use prohibited substances may also gravitate to those states that do not allow such testing.

In any professional sports league, an anti-doping program establishes rules of competition for that sport. If players on teams in particular states are exempted from some of these rules, you are allowing those states to change the rules of the game. You might as well allow a state to change the strike zone to favor its hometown baseball team.

The problem of an uneven playing field caused by non-uniform anti-doping rules was the primary reason behind the worldwide adoption of the World Anti-Doping Code. Before the enactment of the World Anti-Doping Code, the rules of international sports federations like the International Amateur Athletic Federation could not be uniformly enforced worldwide because of the patchwork of inconsistent national anti-doping laws. The result was that a track athlete in France could be treated very differently than a Dutch track athlete despite having positive tests for the same prohibited substance.

The World Anti-Doping Agency and the hundreds of governments and sport organizations around the world that have agreed to follow the World Anti-Doping Code have recognized that, for important public policy reasons, anti-doping rules must be uniform and not

subject to a patchwork of state and national regulation. Only then can a level playing field be ensured for all participants.

As a signatory to the World Anti-Doping Code, USADA is obligated to follow all of the requirements of the Code in the operation of its Olympic anti-doping program, known as the USADA Protocol. Some professional leagues, like the ATP Tour (men's professional tennis tour) and the WTA Tour (women's professional tennis tour), are also now committed to comply with the World Anti-Doping Code. Any sports league or sport governing body that adopts the gold standard World Anti-Doping Code should receive the benefit of federal preemption of any inconsistent state law that could interfere with uniform application of its anti-doping rules. Federal preemption in these circumstances is consistent with, if not mandated by, the UNESCO International Convention Against Doping in Sport to which the United States is a party.

Other professional leagues have adopted anti-doping programs that substantially comply with the principles of the Code. Whether viewed from the perspective of the obligations of the United States under the UNESCO Convention, or simply from the public policy goal of eliminating doping in United States sport, these sound anti-doping programs should also be protected from inconsistent state regulation. There is much less justification, however, for preempting state laws in favor of professional league anti-doping programs that are not fair or effective.

To obtain the protection of federal preemption as a matter of public policy, a professional league's anti-doping program should most importantly be independent and transparent in addition to being required to at least satisfy the following criteria:

- Effective out of season and out of competition, no advanced notice testing;
- A full list of prohibited substances and methods that would capture new, designer drugs such as THG as they are developed;
- Implementation of best legal and scientific policies and practices as they evolve which must include adequate sanctions and due process protections for those accused of doping violations;
- Investments into education to truly change the hearts and minds of would be cheaters and to teach the lessons of life that can be learned only from ethical competition;
- Investments into scientific research for the detection of new doping substances and techniques and for the pursuit of scientific excellence into anti-doping;
- And importantly, partnerships with law enforcement to ensure that in addition to holding athletes accountable, those who illegally manufacturer, traffic and distribute these dangerous drugs and who are typically outside of sports jurisdiction are also held accountable for their illegal behavior. (It is the success of this very cooperation seen here in the U.S. through the BALCO investigation and others like it such as Gear Grinder and Operation Raw Deal that has demonstrated to the world the importance of sport and government partnership in fighting doping.)

Requiring these minimal principles is consistent with the World Anti-Doping Code, the USADA Protocol and the recommendations you all heard about in the Mitchell Report. If all of the U.S. professional leagues implemented anti-doping programs that met these criteria, it would go a long way towards eliminating doping in U.S. sport and restoring public confidence in the integrity of achievement and the value of true sport as the teacher of life lessons. Most importantly, it would be a significant step toward protecting the health of our young athletes who emulate their heroes in the professional leagues.

Mr. RUSH. The Chair now recognizes Professor Gabriel A. Feldman for 5 minutes for the purposes of an opening statement, 5 minutes or thereabouts.

STATEMENT OF GABRIEL A. FELDMAN

Mr. FELDMAN. Mr. Chairman, Ranking Member Radanovich and other members of the committee, I want to emphasize that the Eighth Circuit's decision in NFL v. Williams has only created a potential problem.

The Eighth Circuit did not hold that the suspension of the Williamses violated Minnesota State law. The Eighth Circuit only held that the Williamses may challenge those suspensions in Minnesota State court under Minnesota State law because that independent Minnesota State law was not preempted by section 301 of the LMRA.

That is an important point to focus on because we only have a problem if the Minnesota State court then determines that the suspensions of the Williamses violated that Minnesota State law. That would be the problem. If that is the problem, we can focus our solution on that particular problem.

We don't have that problem yet. If we get there, then we need to recognize we only have a narrow problem. We have the laws of one State, Minnesota, potentially interfering with the NFL's performance-enhancing drug policy—just one State.

I do not think it is appropriate or wise for Congress to pass a Federal law providing a broad exemption for professional sport leagues from State law just because of this narrow problem involving one State. Granting an exemption to any industry to protect it from State law should only be done for compelling reasons, even if it is a narrow exemption, because even a narrow exemption has potential for producing harmful unintended and unanticipated consequences.

And to put a spin on an old cliche, for Congress to pass a law now based on this particular problem would be like the man who uses a shotgun to kill an ant that has crawled into his house. Except here we are not even sure the ant is in the house.

I think the more appropriate way to fix this narrow problem is with a narrow solution. I think the most appropriate narrow solution, the first step, is for the NFL to litigate this case in State court and convince the State court that the suspensions of the Williamses do not violate Minnesota State law. That may seem like an obvious solution, but it addresses the problem head on, and I think it is likely to be successful.

And here is why I think it is likely to be successful: Putting aside the merits of the claims—and we are dealing with two different Minnesota State statutes, the DATWA and the CPA. Neither of those statutes was intended to apply to the performance-enhancing drug policies of professional sport leagues.

Look at each one briefly. DATWA was designed to regulate the testing of recreational drug use by employees in Minnesota. It was a byproduct of the War on Drugs in the 1980s. Employees were coming to work under the influence of drugs; they were causing accidents, they were unproductive, they weren't showing up at all. So

private employers started instituting strict drug-testing policies for their employees.

States responded with regulations like DATWA to protect these employees. And those regulations had protections in place such as ensuring that the testing procedures were not overly invasive and ensuring that employees who did test positive for recreational drug use were given treatment and rehabilitation, not just simply punishment and termination.

As an important aside, those goals are completely consistent with the goals of the leagues' recreational drug-testing policies, but there is simply no indication nor any reason to believe that DATWA's was intended to regulate or limit the ability of professional sport leagues to test their athletes for performance-enhancing drug use.

The Minnesota legislature was concerned about the use of performance-detracting and addictive drugs by employees; the legislature was not concerned about the use of performance-enhancing drugs or cheating by professional athletes. They are very different purposes.

I think the best argument the NFL has is, these laws should not apply at all. Even if there were technical violations—and I think the NFL has a strong argument that there were no technical violations; but even if there were technical violations, those laws simply should not apply here.

The suspension of the Williamses does not violate the spirit or the purpose of DATWA. The argument with respect to the CPA is even stronger. CPA was essentially passed to prevent employers from disciplining employees for using alcohol and tobacco off work site in nonworking hours—nothing to do with performance-enhancing drugs of professional athletes.

If litigation in State court is unsuccessful, then the NFL's next step should just seek an exemption from the Minnesota State legislature. Ask the Minnesota State legislature to carve out an exception from its drug-testing statutes. Louisiana has carved out an exception from its drug-testing statutes to make it clear that it does not apply to professional athletes; Minnesota could do the same thing.

In fact, Minnesota amended the DATWA in 2005 to allow sports leagues to use random drug testing for its pro athletes. They did it in 2005; there is no reason to think they wouldn't do it now. If both of those solutions are unsuccessful and if the players in the league can't negotiate around it, then and only then do we have a problem.

Then we have this one law potentially interfering with the NFL's drug policy. There are not many other laws out there that pose the same problem. They are looked to be two State statutes that have minor conflicts with the NFL policy, just two others in addition to Minnesota.

If we get to the point, though, that in Minnesota State court has said that the suspension of NFL players is not allowed because it violates Minnesota law, then Congress should consider passing a Federal exemption, but that must be a narrow exemption. The risk of having a broad exemption or providing too much protection for the leagues is pretty clear.

Congress right now may think it is a good idea for the NFL policy to trump State law because Congress likes the current policy. What happens in the next round of collective bargaining negotiations if the players in the league agree to a different policy that Congress doesn't like? What if it is too lenient? What if it is too strict? What if it doesn't supply a list of banned substances? What if it gives the Commissioner the ability to increase or decrease a particular penalty as he sees fit? Do we want that policy protected under attacks from State law?

I think we have a long way to go before this is a problem that Congress should be concerned with. Thank you.

[The prepared statement of Mr. Feldman follows:]

United States House of Representatives Committee on Energy and Commerce
Subcommittee on Commerce, Trade, and Consumer Protection
Washington D.C., November 3, 2009

The NFL StarCaps Case: Are Sports' Anti-Doping Programs at a Legal Crossroads?

Testimony of Gabriel A. Feldman
Associate Professor of Law and Director of Tulane Sports Law Program,
Tulane University School of Law

I would like to thank Chairman Rush, the House Subcommittee on Commerce, Trade, and Consumer Protection and their staffs for inviting me to participate in this hearing to discuss the implications of the United States Court of Appeals for the Eighth Circuit's recent decision in *Williams v. NFL*.[1] My name is Gabriel Feldman and I am a law professor at the Tulane University School of Law and the Director of the Tulane Sports Law Program. My research and teaching focuses on sports law and the sports industry and its intersection with a number of areas of substantive law, including antitrust, labor, and intellectual property. Prior to joining the Tulane faculty in 2005, I served as an associate for five years at Williams & Connolly LLP, where I represented a number of clients in the sports industry.

Williams v. NFL raises a potentially significant issue regarding the interplay between state statutory drug testing laws and the performance enhancing drug ("PED") testing policies contained in the collective bargaining agreements of professional sports leagues. In *Williams*, two players for the Minnesota Vikings (the "Williamses") and three players for the New Orleans Saints were suspended for violating the NFL Policy on Anabolic Steroids and Related Substances (the "NFL PED Policy"). The Williamses argued, among other things, that the suspensions violated their rights under Minnesota's statutory workplace drug laws—the Drug

[1] 582 F.3d 863 (8th Cir. 2009).

and Alcohol Testing in the Workplace Act ("DATWA") and the Consumable Products Act ("CPA") (collectively, the "Minnesota Laws"). The NFL argued that the DATWA and CPA claims were preempted by the terms of the collectively bargained NFL PED Policy. The Eighth Circuit disagreed with the NFL, concluding that the Williamses can challenge their suspensions under the Minnesota Laws.

It is important to emphasize that the Eighth Circuit did not hold that the NFL PED Policy violates Minnesota state law. Instead, the court only held that the Williamses may challenge their suspensions in Minnesota state court under state law.[2] A Minnesota state court will thus determine if the NFL is able to suspend two of its players for violating their collectively bargained performance enhancing drug policy. A determination by the Minnesota state court that the NFL PED Policy violates Minnesota state law may present a problem for the NFL for two reasons: First, the Minnesota Laws are intended to provide uniform regulations for recreational drug testing of employees working for businesses located in Minnesota. In contrast, the NFL PED Policy is designed to provide uniform regulations for PED testing of NFL football players throughout the country. In other words, the Minnesota Laws were never intended to apply to the testing of PEDs in professional sports leagues; the Minnesota Laws and the NFL PED Policy were designed to protect very different interests. Second, application of the Minnesota Laws in this case could threaten the ability of the NFL to maintain a strict, uniform performance enhancing drug testing policy.

Yet, because the state court has yet to determine whether the NFL suspensions violate Minnesota state laws, this is still only a *potential* problem. It is also only a narrow potential problem—even if the state court rules that the suspensions must be lifted because they violate

[2] The Eighth Circuit has not yet ruled on the NFL's request for an *en banc* rehearing. Pending the Eighth Circuit's decision on rehearing, the Minnesota state court is scheduled to hear the case next year.

Minnesota law, this case only means that the NFL PED Policy conflicts with one state's law. That is, this case only involves one federal court of appeal's interpretation of the application of one state's law to the NFL PED Policy.

This narrow potential problem warrants a very narrow solution, and many steps should be taken before Congress intervenes. The most appropriate—and simple—solution is for the NFL to litigate the case in state court and convince the court that the Minnesota Laws were not intended to apply to the NFL PED Policy and that the suspensions do not violate the Minnesota Laws. If that suit is unsuccessful, the NFL should seek an exemption from the state legislature that makes it clear that the Minnesota Laws do not apply to the NFL PED Policy. If that fails, the NFL and the players association should try to bargain around the Minnesota Laws. If that fails, then, only as a last resort, Congress should consider passing a narrow federal law that will protect the NFL PED Policy and similar policies in other leagues from interference from state drug testing statutes such as the Minnesota Laws. At this point, since we are only dealing with a potential problem, it would be premature for Congress to take any action.

My testimony will thus focus on three areas. First, I will briefly discuss the Eighth Circuit's decision and address whether the court reached the correct result, or, more specifically, whether a different court could reach a different result if faced with the same set of facts in the future. Second, I will discuss how the Eighth Circuit's ruling—and the imposition of state drug testing laws on the NFL— might impact the ability of the NFL and other similarly situated leagues to effectively maintain and enforce performance enhancing drug policies. Third, I will discuss possible solutions to remedy the potential problem created by the Eighth Circuit's decision.

I. Did the Eighth Circuit Reach the Correct Result?

To be clear, as I previously discussed, the Eighth Circuit did not rule that the suspension of the Williamses violated Minnesota state law. The court only determined that a Minnesota state court gets to decide if the suspensions violated Minnesota state law. Although, as I discuss later, this creates a potential problem for the NFL, I do not believe that the Eighth Circuit decided *Williams v. NFL* incorrectly. In other words, I do not believe that Congress needs to act to fix the Eighth Circuit's mistake, because the court did not make a mistake. While a different court could have reached a different conclusion, I do not believe there is a clear "right" or "wrong" answer here. I will discuss the two primary legal arguments in turn.

A. Section 301 Preemption

The Eighth Circuit held that the Minnesota Laws were not preempted by Section 301 of the Labor Management Relations Act (the "LMRA"), and thus the Williamses could challenge their suspensions under the state laws. Did the Eighth Circuit correctly decide the preemption issue? The short answer is—perhaps. Section 301 preemption is a fact-specific inquiry that does not provide courts with a clear, bright-line rule.[3]

Under Section 301, the terms of a collective bargaining agreement preempt state law claims that are either "inextricably intertwined" with an examination of the terms of the collective bargaining agreement or that are "substantially dependent upon analysis of the terms

[3] *See, e.g., Cramer v. Consolidated Freightways*, 255 F.3d 683, 691 (9th Cir. 2001) ("The demarcation between preempted claims and those that survive § 301's reach is not, however, a line that lends itself to analytical precision.").

of an agreement made between the parties in a labor contract."[4] In other words, Section 301 preempts any state claim "whose outcome depends on analysis of the terms of the agreement."[5]

The primary rationale for Section 301 preemption is to ensure the "uniform interpretation of collective bargaining agreements" and to "promote the peaceable consistent resolution of labor-management disputes."[6] The basic theory is that parties would have a reduced incentive to reach agreement through collective bargaining if the terms of the collective bargaining agreement might be subject to different meanings depending on a particular state law. Section 301 preemption thus allows for a more consistent application and interpretation of the terms of the collective bargaining agreement and is integral for promoting, encouraging, and protecting collective bargaining and collective bargaining agreements.

Nevertheless, there are limitations to Section 301 preemption. The terms of a collective bargaining agreement will not preempt state law where the state law claim confers substantive rights on the party that exist independently of the collective bargaining agreement.[7] That is, if the state law creates a right separate and apart from the rights created by the collective bargaining agreement, the state law claim will not be preempted, even if the analysis of the state law claim would overlap with the analysis of a claim brought under the terms of the collective bargaining agreement.

In *Williams v. NFL*, the Eighth Circuit held that the Minnesota Laws were not preempted because those laws created substantive rights that existed independently of the NFL PED Policy. In other words, determination of the Williamses' claims under the Minnesota Laws did not

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[4] *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 213, 220 (1985).
[5] *IBEW v. Hechler*, 481 U.S. 851, 854 (1987).
[6] *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 404 (1988).
[7] *See Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399 (1988).

require a court to interpret any terms of the NFL collective bargaining agreement or the NFL PED Policy. Rather, in order to resolve the claims brought under the Minnesota Laws, a judge would need only to refer to the facts of the case and to the state statutes—not the league rules.

While there is support for the Eighth Circuit's holding, a different court in a different jurisdiction could certainly reach a different conclusion and determine that the state law claims were inextricably intertwined with the terms of the collective bargaining agreement. This conclusion is perhaps strongest with respect to a possible claim under the CPA. Under the CPA, an employer may only discipline employees for using lawful products[8] if the prohibition of the use of such product "relates to a bona fide occupational requirement." The NFL has a strong argument that a court would need to interpret the terms of the NFL collective bargaining agreement to determine if punishment for use of a particular drug related to a bona fide occupational requirement of the NFL. That is, the NFL has a persuasive claim that an analysis of the CPA's "bona fide occupational requirement" is inextricably intertwined with the terms of the collective bargaining agreement, and thus should be preempted.

The Eighth Circuit disagreed, however, concluding that the bona fide occupational requirement clause did not trigger preemption because the clause provided only a defense to liability under the CPA, and defenses cannot serve as a basis for triggering preemption. In other words, the Eighth Circuit held that an employer's defenses are irrelevant for the Section 301 preemption issue. Instead, only the underlying claims of the employee can trigger preemption. Significantly, however, the Eighth Circuit noted that there was a conflict within the circuit regarding that rule. That is, some courts within the Eighth Circuit (as well as courts in other

[8] Some lawful products are included in the list of banned substances in the NFL PED Policy.

circuits)[9] have held that an employer's defenses *should* be considered as part of the preemption analysis. Thus, a different court within the Eighth Circuit could have reached a different conclusion in this case.[10]

I do not believe there is a clear "right" answer with respect to the preemption issue, and the resolution of any claim will vary depending on the terms of the specific state statute at issue, but I do believe that a different court-- even within the Eighth circuit-- could have reached a different conclusion based on the same set of facts presented in the *Williams* case.

B. Dormant Commerce Clause

Interestingly, the NFL may have a stronger argument than preemption. The league can also argue[11] that the Dormant Commerce Clause prevents the application of the Minnesota State Laws to the NFL PED Policy.

The Commerce Clause provides the federal government with the power to regulate interstate commerce, and also restricts the ability of states to regulate commerce among the states.[12] The restriction on the states, known as the Dormant Commerce Clause, invalidates state legislation if it discriminates against or unduly burdens interstate commerce. In determining if the state statute is unduly burdensome, a court will balance the state's interest with the impact of the statute on interstate commerce. Here, the NFL could argue that any interest Minnesota has in regulating the use of PEDs by professional athletes playing for its home teams is outweighed by

[9] *See Newberry v. Pacific Racing Ass'n,* 854 F.2d 1142, 1146 (9th Cir. 1988).

[10] The preemption claim regarding the DATWA claim is not as strong as the claim regarding the CPA claim, but there is at least an argument that the DATWA claims are also inextricably intertwined with the NFL collective bargaining agreement.

[11] Although the Eighth Circuit did not address the dormant commerce clause argument in its opinion, the NFL may in fact have raised the dormant commerce clause argument.

[12] U.S. CONST. art. I, § 8, cl. 3.

the negative impact its state drug laws will have on the ability of the NFL to maintain a uniform PED policy.

Notably, courts have used the Dormant Commerce Clause to strike down state statutes that interfered with the uniform, interstate operation of sports leagues and associations in other contexts. For example, Curt Flood's state antitrust attack against baseball's reserve clause was rejected because the burden on the interstate operation of baseball outweighed the state's interest in regulating baseball's reserve system.[13] In rejecting Flood's state antitrust claim, the Second Circuit highlighted the problem with applying individual state laws to an interdependent, interstate industry like Major League Baseball:

> [W]here the nature of an enterprise is such that differing state regulation, although not conflicting, requires the enterprise to comply with the strictest standard of several states in order to continue an interstate business extending over many states, the extra-territorial effect which the application of a particular state law would exact constitutes, absent a strong state interest, an impermissible burden on interstate commerce. [14]

Similarly, a California state court relied on the Dormant Commerce Claus to reject the city of Oakland's attempt to use a state eminent domain statute to prevent the Raiders from relocating

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[13] *Flood v. Kuhn*, 443 F.2d 264, 267-68 (2d Cir. 1971). The Supreme Court affirmed the Second Circuit's decision. *See Flood v. Kuhn*, 407 U.S. 258 (1972).

[14] A California court reached the same conclusion in rejecting a state antitrust challenge to a term of the NFL collective bargaining agreement. *See Partee v. San Diego Chargers Football Co.*, 688 P.2d 684, 677-79 (Cal. 1983). The court noted:

> Professional football is a nationwide business structured essentially the same as baseball. Professional football's teams are dependent upon the league playing schedule for competitive play, just as in baseball. The necessity of a nationwide league structure for the benefit of both teams and players for effective competition is evident as is the need for a nationally uniform set of rules governing the league structure. Fragmentation of the league structure on the basis of state lines would adversely affect the success of the competitive business enterprise, and differing state antitrust decisions if applied to the enterprise would likely compel all member teams to comply with the laws of the strictest state.
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> *Id.*

out of Oakland, noting that the exercise of eminent domain would have been unduly burdensome on the interstate operation of the NFL.[15]

The Ninth Circuit has also invalidated a Nevada statute that granted certain procedural rights to students under investigation by National Collegiate Athletic Association ("NCAA") institutions.[16] The court recognized that the NCAA schools were interdependent—they agreed on certain rules governing the game, athlete eligibility, etc.— and that the uniform application of rules regarding student-athlete eligibility was important for maintaining a level playing field. The court thus found that the Nevada statute was invalid because it would force the NCAA "to regulate the integrity of its product in every state according to Nevada's procedural rules."[17]

These are precisely the types of arguments the NFL could make in challenging the application of the Minnesota Laws to its PED policy. Granted, courts have recognized that states have a greater interest in regulating and protecting the health of its citizens than in regulating areas such as antitrust law. Thus, the NFL may have a more difficult argument when the state regulation involves drug testing, because the state can argue that the regulations are necessary to protect the health and privacy of its citizens. But, that claim is weakened in the *Williams* case by the fact that Minnesota's laws are designed to regulate recreational—not performance enhancing—drug use. That is, the NFL can argue that Minnesota has no real interest in regulating the testing of performance enhancing drugs, so the Minnesota Laws should not be used to interfere with the NFL's interest in maintaining a national performance enhancing drug testing policy.

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[15] *City of Oakland v. Oakland Raiders*, 174 Cal. App. 3d 414 (Cal. Ct. App. 1985). The court noted that "relocation of the Raiders would implicate the welfare not only of the individual team franchise, but of the entire League. The specter of such local action throughout the state or across the country demonstrates the need for uniform, national regulation."

[16] *Nat'l Collegiate Athletic Ass'n v. Miller*, 10 F.3d 633 (9th Cir. 1993).

[17] *Id.* at 639.

Thus, the NFL and other leagues might be able to prevail on a dormant commerce clause argument if another case arises (or, if the Eighth Circuit agrees to rehear the *Williams* case) where a state law claim is brought against discipline imposed by a league performance enhancing drug policy. Nevertheless, there are no clear "right" answers to the Section 301 or dormant commerce clause questions—the appropriate answer will vary from case to case and statute to statute.

II. Does the Eighth Circuit's Decision Present a Problem for the NFL and Other Similarly Situated Sports Leagues?

The Eighth Circuit's decision does not pose a problem yet for the NFL because the court only held that the Minnesota state court gets to determine if the suspensions violate Minnesota state law. If the state court concludes that the suspensions must be lifted because they violate state law, then the state court's ruling poses a problem for the NFL and other similarly situated sports leagues because that ruling may jeopardize the ability of the leagues to enforce a strict and uniform performance enhancing drug policy. To be clear, there are two different issues here: First, imposition of the Minnesota Laws interferes with the uniformity of the NFL PED Policy. Second, as I will discuss later, the Minnesota Laws were never intended to apply to the performance enhancing drug testing policy of a professional sports league.

A. The Importance of Maintaining a Uniform Performance Enhancing Drug Policy

As a general matter, it is advisable for any company in any industry—sports or not—to uniformly apply its drug policies. Uniformity ensures fairness—all persons who engage in a particular type of misconduct will receive the same punishment. The need for uniformity is

heightened, however, in professional team sports. A (non-sports league) business that has offices in multiple states throughout the country would prefer to have a uniform drug testing policy for its employees. For example, consider a corporation that has offices in 10 different states. A uniform drug policy not only allows for equal treatment of all the corporation's employees, but is also more efficient for the corporation—it allows it to create a single policy that applies to all employees. The uniform policy is therefore easier to create and also to enforce, as the corporation only needs to refer to one set of rules that are consistently applied throughout the corporation.

A professional sports league such as the NFL, however, has a heightened interest in maintaining a uniform performance enhancing drug policy. The reason for the heightened interest becomes clear when one identifies the product created by the NFL and its teams. The NFL is composed of autonomous, separately owned teams that compete with each other on a number of levels. Yet, these teams are also interdependent and cooperate in a number of areas. For example, on the most basic level, the teams must cooperate to agree on a time and place to play the game and on a set of rules that will define the game itself.[18] The NFL, however, does not merely create an unrelated series of football games. Rather, the NFL and its teams cooperate to create a season of games, including the playoffs and a championship game, involving teams that are relatively evenly matched and operate on a "level playing field." That is, the NFL and

[18] For example: How long is each game? How does a team score points? What constitutes a penalty or foul within the game? How many timeouts does each team get? Where will the teams play? When will the teams play?

the other leagues seek to achieve a level of competitive balance among its teams that will help ensure fan interest in the sport.[19]

A non-uniform performance enhancing drug policy might interfere with the ability of the league to maintain competitive balance. The *Williams* saga is a perfect example of how non-uniformity might have an impact on the competitive balance of the league. The two players on the Vikings used the same banned substance, under the same general circumstances, as the three players from the Saints. The NFL runs into a problem if the three Saints are suspended for four games, but the Vikings—because of Minnesota state law—cannot be suspended at all. It is "unfair" to the Saints players that they were treated more harshly than the Vikings players for engaging in the same misconduct. But, perhaps more significantly, the more lenient treatment of the Vikings players gives the Vikings team a competitive advantage (or puts the Saints at a competitive disadvantage) on the field. In other words, non-uniform treatment of the players has the potential to inhibit the NFL's ability to create its product—competitively balanced football games.

Maintaining a uniform policy is also a key factor for ensuring that the NFL PED Policy is effective. There is little question at this point regarding the importance of a strict and effective policy for policing, preventing, and deterring the use of PEDS by athletes.[20]

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[19] In other contexts, courts have long recognized that professional sports leagues have a legitimate interest in maintaining the competitive balance of their teams. *See, e.g.*, Salvino v. MLB, 542 F.3d 290, 332 (2d Cir. 2008); *Mackey v. National Football League*, 543 F.2d 606, 610 (8th Cir. 1976).

[20] The California Supreme Court summed up well the importance of a strict drug testing policy for the NCAA:

> [T]he practical realities of NCAA-sponsored athletic competition cannot be ignored. Intercollegiate sports is, at least in part, a business founded upon offering for public entertainment athletic contests conducted under a rule of fair and rigorous competition....A well announced and vigorously pursued drug testing program serves to:

B. How the Eighth Circuit's Ruling Could Jeopardize the Uniformity of League Performance Enhancing Drug Policies

The NFL and other major professional sports leagues have achieved a uniform performance enhancing drug testing policy through the collective bargaining process. The Eighth Circuit's ruling, however, may permit a Minnesota state court to threaten the ability of the NFL to maintain this uniform policy. According to the Eighth Circuit, the collectively bargained PED Policy of the NFL does not override Minnesota's state statutes governing the drug testing of employees in the workplace. According to the Eighth Circuit's reasoning, the NFL must comply with the various protections and provisions provided for by the relevant Minnesota statutes. If courts in other jurisdictions agree with the Eighth Circuit's ruling, then the NFL will also have to comply with the various protections and provisions provided for by every other applicable state employee drug testing statute.

The implications of such a ruling—for the NFL and other professional sports leagues—are fairly clear. In order to have a uniform Policy, the NFL must ensure that every provision of its NFL PED Policy complies with every provision of every applicable state statute. In other words, the NFL PED Policy can only be as strict as the most lenient, or "employee-friendly," policy. And, in a sense, the states would be able to dictate how the NFL performs its performance enhancing drug tests. For example, if Minnesota state law does not allow an employer to discipline an employee for a positive drug test without first allowing the employee

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(1) provide a significant deterrent to would-be violators, thereby reducing the probability of damaging public disclosure of athlete drug use; and (2) assure student athletes, their schools, and the public that fair competition remains the overriding principle in athletic events. Of course, these outcomes also serve the NCAA's overall interest in safeguarding the integrity of intercollegiate athletic competition.

Hill v. National Collegiate Athletic Assn. 7 Cal.4th 1, 46 (Cal. 1994).

to provide an explanation for the positive test, the NFL must also allow all of its players to provide an explanation for the positive test. If the NFL's Policy did not allow the players to provide an explanation, the Minnesota players would be subject to a different set of rules than the other players, and thus the uniformity of the policy would be destroyed. Similarly, assume, for the sake of argument, that Florida enacted a state workplace drug testing law that did not permit an employee to be suspended from his job for more than one day for a first offense. The NFL would have to adopt the same provision for all of its players—otherwise players on the Jaguars, Dolphins and Buccaneers would be subject to a different set of rules. Thus, uniformity can only be achieved by examining every state or local drug testing law and ensuring that the NFL's policy complies with every facet of every one of these laws. As I discuss later, this result would be particularly problematic because the league would be forced to comply with state statutes that were not intended or designed to govern PED testing for professional athletes.

C. Number of States with Potentially Conflicting Drug Testing Laws

The obvious question then becomes—how many states have drug testing laws that might conflict with the NFL PED Policy? Of the 23 states that are home to an NFL team, only 5 (Arizona, Louisiana, Maryland, Minnesota, and North Carolina) have any form of mandatory statutory workplace drug regulations, and only 3 of those (Maryland, Minnesota, and North Carolina) have possible conflicts with the NFL PED Policy.[21] Thus, other than Minnesota, only Maryland and North Carolina present potential conflicts for the NFL. And, even those potential conflicts are relatively small: 1) All three state statutes require that employers use state-certified testing facilities and give the employee the right to seek independent confirmation of a positive

[21] Four other states provide voluntary state regulations. The attached appendix contains a brief discussion and analysis of all of the applicable state laws.

test result; 2) The Minnesota and Maryland statutes do not explicitly allow testing for masking agents; and 3) The Minnesota statutes give the employee the right to explain a positive test result and only permit an employer to restrict an employee's use of a legal substance during nonworking hours if the restriction relates to a bona fide occupational requirement. Of course, the risk remains that a state might enact a new statute or modify an existing statute such that the statute would conflict with the NFL PED Policy. But, at this point, the NFL only has to be concerned with the drug testing statutes in 3 different states.

III. What Can be Done to Resolve the Potential Problem Created by the Eighth Circuit's Decision?

There are two related approaches that can serve as a simple solution to the potential problem created by the Eighth Circuit's decision. First, the NFL can litigate the case in state court and get a judicial determination from a Minnesota court that the Minnesota Laws do not apply to the NFL PED Policy. Second, the NFL and the other professional sports leagues can ask the Minnesota state legislature to add a provision to the Minnesota Laws that makes it clear that the laws do not apply to performance enhancing drug policies contained in the collective bargaining agreements of professional sports leagues. If those approaches are not successful, then the league and players should try to bargain around the problem. If all of those approaches fail, then Congress should consider creating a narrow exemption that will protect the performance enhancing drug policies from attack under state drug testing laws. I will discuss each of these solutions in turn.

A. Litigate the Case in Minnesota State Court

As I discussed earlier, the *Williams* case presents us with a very narrow problem—a Minnesota state court may determine that the suspension of the Williamses violates the Minnesota Laws. This determination, in turn, would interfere with the ability of the NFL to maintain a uniform performance enhancing drug policy. The narrowest solution to this problem, therefore, is simply to convince the Minnesota state court that the suspension of the Williamses does not violate the Minnesota Laws.

1. DATWA Claims

It is difficult to analyze the merits of the DATWA claims, because it is not clear what claims the Williamses are bringing under DATWA. Nevertheless, the NFL's strongest argument may be that DATWA was not intended to apply to the NFL PED Policy. Rather, DATWA was designed to regulate testing for recreational drug use and abuse by employees in Minnesota. Thus, even if the suspensions of the Williamses were technical or literal violations of DATWA—as the NFL appeared to concede during the litigation— the suspensions did not violate the spirit of the law. A brief look at the origin and purpose of workplace drug laws in United States is instructive.

In the 1980's, the U.S. waged a "war" against recreational drug use, as the rate of drug abuse among Americans climbed and the awareness of the harmful effects of drug use increased. With respect to the workplace, there was a general consensus that recreational drug use by employees had the potential for causing significant problems, including the following: 1) Loss of productivity on the job; 2) Absenteeism of the employees; 3) Accidents on the job; and 4)

Addiction and health issues for the employees. Thus, many private employers began instituting strict drug testing of their employees.[22]

As a result of the rapid growth of drug testing by these private employers, several states, including Minnesota, enacted workplace drug regulations to protect employees. These state legislatures recognized that employers had a legitimate interest in detecting and preventing drug use by their employees, but also recognized that employees had basic privacy rights that warranted protection. State regulations, such as Minnesota's DATWA, thus helped protect employees by accomplishing two broad goals: 1) Mandating strict procedures to ensure that the drug testing was not unnecessarily invasive, unfair, or unreliable; and 2) Requiring that proper treatment, counseling, and rehabilitation—as opposed to discipline and punishment—was provided for the employees.[23]

This focus on implementing fair and reliable procedures and providing for the treatment and rehabilitation of recreational drug users is a central part of the NFL's *recreational drug testing policy* (the NFL Policy and Program for Substances of Abuse). The use of PEDs by NFL players, however, raises very different issues and warrants a very different type of testing policy. The four primary concerns associated with the use of PEDs by professional athletes are that it: 1) Threatens the integrity of the game; 2) Provides the PED users with a competitive advantage, which in turn may have a coercive impact on other athletes and "force" them to use PEDs; 3)

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[22] In 1986, President Reagan issued an Executive Order that permitted drug testing of federal employees, and the President's Commission on Organized Crime asked all companies in the U.S. to test employees for drug use. *See* Deborah F. Crown & Joseph G. Rosse, "A Critical Review of the Assumptions Underlying Drug Testing," 3 Journal of Business and Psychology 22 (1988).

[23] Florida's workplace drug laws are representative of laws in this area, and state that the purpose of their regulations is to afford employers "the opportunity to maximize their levels of productivity, enhance their competitive positions in the marketplace, and reach their desired levels of success without experiencing the costs, delays, and tragedies associated with work-related accidents resulting from drug abuse by employees." *Fla. Stat. § 440.101, et seq.*

Poses health risks to the PED users; and 4) Contributes to the use of PEDs by college, high school, and youth athletes.

There is simply no indication—nor any reason to believe—that DATWA was intended to limit the ability of professional sports leagues to test for the use of PEDs.[24] The Minnesota legislature was concerned about the use and abuse of performance-*detracting* and addictive drugs by its employees. The legislature was not concerned about the use of performance-*enhancing* drugs—cheating—by professional athletes in an interdependent sports league. In fact, when the DATWA was passed in 1987, PEDS were not a particularly great concern of professional sports leagues, much less of the Minnesota state legislature.

Interestingly, in 2005, the DATWA was amended to allow random drug testing for professional athletes subject to a collectively bargained drug testing policy.[25] Thus, with this amendment, the legislature recognized that the DATWA conflicted with sports leagues' recreational drug testing policies, and were willing to make an exception for Minnesota sports teams. But, there is no indication that this was meant to limit the ability of sports leagues to test and punish for PEDs.

2. CPA Claims

The NFL's argument with respect to the CPA is even more powerful. The CPA was enacted to prevent employers from disciplining employees who used legal substances—in particular,

[24] Several of the state regulations do not even permit private employers to test their employees for performance enhancing drugs.

[25] According to the amendment, "An employer may request or require employees to undergo drug and alcohol testing on a random selection basis only if (1) they are employed in safety-sensitive positions, or (2) they are employed as professional athletes if the professional athlete is subject to a collective bargaining agreement permitting random testing but only to the extent consistent with the collective bargaining agreement." *See M.S.A.* §181.951, subd. 4.

alcohol or tobacco— off of company property and during nonworking hours.[26] Again, it seems fairly clear that the Minnesota legislature did not intend for the CPA to limit the ability of professional sports leagues to test for the use of PEDs.

Even if the CPA were applied to the NFL PED Policy, the NFL has a strong argument that the suspensions of the Williamses did not violate the CPA. The CPA makes clear that employers may restrict the use of legal substances during nonworking hours if the restriction relates to a "bona fide occupational requirement" and is "reasonably related to employment activities ... of a particular employee or group of employees." The NFL can certainly make a strong case that banning legal PEDs or related substances relates to a bona fide occupational requirement.

B. Seek a Statutory Exception from the State Legislature

If the Minnesota state court concludes that the suspensions violate the Minnesota Laws, then the NFL's next step should be to seek an exemption from the Minnesota state legislature. The appeal to the state legislature would be the same as the appeal to the state court—the Minnesota Laws were not intended to apply to the testing of PED use by professional athletes, and the laws are interfering with the ability of the NFL to maintain a strict, uniform PED policy. Thus, the Minnesota legislature should carve out an exception in the Minnesota Laws that make clear that the laws do not apply to the collectively bargained performance enhancing drug testing policies of professional sports leagues. Such an exception would obviously not be unprecedented—Minnesota already provides an exception in DATWA that permits professional sports leagues to conduct random drug testing of its athletes. More broadly, though, Louisiana's workplace drug testing statute contains a provision that explicitly excludes NFL and NCAA

[26] Minn. Stat. §181.938. *See* V. John Ella, "What do They Have I Mind? Minnesota's Drug-Testing Law Turns 20," 64-Sep. Bench & B. Minn. 22, 23 n.4 (2007).

athletes entirely from its regulations.[27] Several other state statutes have an even broader exemption that excludes all collectively bargained drug policies from its coverage.

C. Bargain Around the State Laws

If the state litigation and the appeal to the state legislature are unsuccessful, then the league and the players should be given the opportunity to collectively bargain a solution to the problem posed by interference from the Minnesota Laws. These parties have bargained around other state laws that interfere with the operation of the league, so they should be given the opportunity to bargain around this particular set of state laws and achieve a voluntary, contractual solution.

D. Narrow Federal Statutory Exemption

If all of the other potential solutions fail and the Minnesota Laws have interfered with the NFL PED Policy, then Congress should consider passing narrow federal legislation that will protect the collectively bargained performance enhancing drug policies of professional sports leagues. I want to focus this last section on why federal legislation should be a last resort. And, I think we need to start by asking a very basic question—why is a federal law necessary? In other words, why should the league PED policies take precedence over state law? I do not believe it is because sports leagues should be entitled to special protection or deference under the law. Rather, I believe it is because we want a particular result—we want this particular NFL PED Policy (because it is uniform and strict) to trump this particular state law. It is a drastic step to enact a federal law insulating the term of a collective bargaining agreement from state law

[27] The Louisiana statute states that the provided drug testing standards "shall not apply to drug testing conducted by the National Collegiate Athletic Association (NCAA) or the National Football League (NFL)." *See La. Rev. Stat.§ 49:1001 et seq.*

simply because Congress favors that particular term. Thus, any federal exemption must be narrowly tailored to solve the specific problem at issue here and to avoid any unintended consequences.

A quick hypothetical may be instructive as to why federal legislation might not be the appropriate solution here and how it might be lead to unintended consequences. Assume that Congress passes a narrow law that provides that collectively bargained league PED testing policies trump conflicting state drug testing statutes. That law would obviously protect the NFL PED Policy from a challenge under the Minnesota Laws and allow the NFL to maintain a uniform testing policy. But, what happens if, in the next round of collective bargaining negotiations, the parties agree to a different policy? And, what happens if this new policy permits the NFL to suspend a player for a positive PED test without a confirmatory test, and without providing a hearing for that player? Or, what if the new policy allows the commissioner to unilaterally determine the discipline for any positive test? In other words, what if the policy does not provide sufficient rights for the players? What if it does not provide for uniformity? Then, do we want state law to apply or do we still want to protect the league policy?

If Congress chooses to pass legislation that would protect league PED testing policies from interference by state workplace drug laws, the legislation must be narrowly and carefully tailored to achieve the intended result. In order to do that, of course, we must identify the intended result. Is the federal legislation designed to protect all PED policies contained in the NFL collective bargaining agreement, or only the ones that Congress believes are sufficiently strict, or sufficiently uniform? If Congress is only concerned with making sure that the leagues have strict, uniform PED testing policies, then we need to understand that a broad exemption will not necessarily accomplish that goal. Rather, a broad exemption will give the leagues free reign

to change the policy to be more lenient, more restrictive, less uniform, or whatever the owners and players choose. Moreover, an overly broad exemption might open up the possibility of leagues arguing that the terms of their collective bargaining agreements should trump state laws in other areas.

Thus, if a federal exemption is necessary as a last resort, and the goal of the exemption is to protect the current NFL PED Policy, then the law must be narrowly drafted. One method for achieving this result, while still permitting the NFL and the players to modify the policy, is to pass legislation that prevents states from interfering with the collectively bargained PED policies of professional sports leagues, so long as the policies have certain minimum protections (and punishments) in place. For example, the federal law could state something to the effect of: "No state shall have a law that interferes with a professional sports league's ability to test and discipline players for the use of PEDs or masking agents, provided that the league has a uniform policy in place that provides certain minimum protections, punishments, and standards." These "minimum protections, punishments, and standards" could then be defined in the law. Of course, the problem with this type of legislation is that it permits Congress—as opposed to the parties—to determine the necessary minimum standards for league PED policies.

Any federal legislation in this area presents risks. Thus, Congressional intervention should only used as a last resort and then must be carefully and narrowly tailored to avoid any unintended consequences.

IV. Conclusion

At this stage, any action by Congress would be premature. The *Williams* case only presents a potential problem. An actual problem will arise only if the Minnesota state court

concludes that the suspensions of the Williamses violate the Minnesota Laws. If that occurs, the NFL should request that the Minnesota state legislature carve out an exception for the PED testing policies of professional sports leagues. If that fails, and if the parties are unable to bargain around the Minnesota state laws, then Congress should consider drafting a narrow statute to protect the PED testing policies of professional sports league.

I would be happy to answer any questions from members of the Subcommittee or provide you with additional information.

Summary and Comparison of State and NFL Drug Testing Policies
Appendix to Testimony of Gabriel A. Feldman

State	Statute	Compliance	CBA Exception?	Athlete Exception?	Conflict(s) with NFL Policy	Team(s)
Arizona	Drug Testing of Employees *Ariz. Rev. Stat. §23-493 et seq.*	Mandatory	Yes	No	• No conflict because of CBA exception.	Arizona Cardinals
California	*None*	n/a	n/a	n/a	n/a	Oakland Raiders San Diego Chargers San Francisco 49ers
Colorado	*None*	n/a	n/a	n/a	n/a	Denver Broncos
Florida	Comprehensive Economic Development Act of 1990 *Fla. Stat. § 440.101, et seq.;* *Fla. Stat. § 627.0915*	Voluntary	Yes	No	• No conflict because of CBA exception. • No conflict because program is voluntary.	Jacksonville Jaguars Miami Dolphins Tampa Bay Buccaneers
Georgia	Georgia Workers' Compensation Act *Ga. Code Ann. § 34-9-410 et seq.* *Ga. Code Ann.§ 33-9-40.2 & 34-9-412*	Voluntary	No	No	• No conflict because program is voluntary.	Atlanta Falcons
Indiana	*None*	n/a	n/a	n/a	n/a	Indianapolis Colts
Illinois	*None*	n/a	n/a	n/a	n/a	Chicago Bears
Louisiana	Employee Drug Testing Act *La. Rev. Stat.§ 49:1001 et seq.*	Mandatory	No	Exempts NCAA & NFL athletes from the statute	• No conflict because of NFL athlete exception.	New Orleans Saints
Maryland	*Md. Code Ann. Health Gen. §17-214*	Mandatory	Only for job applicants	No	• Requires Maryland certification of drug testing facilities • No testing for masking agents	Baltimore Ravens

State: Includes all states that currently headquarter an NFL team.
Statute: Lists state statutes relevant to drug testing standards in the private sector.
Compliance: If a private employer elects to institute a drug testing program, is compliance with the standards of the state statute mandatory or voluntary?
CBA Exception?: Does the state statute make exceptions for preemption by an applicable collective bargaining agreement?
Athletic Exception?: Does the state statute make any exceptions for athletes?
Conflicts: Briefly describes any potential conflicts between the state statute and the NFL Policy on Anabolic Steroids and Related Substances.
Teams: Lists current NFL teams that are headquartered in the state. The location of a team's stadium may be relevant for certain state statutes.

Summary and Comparison of State and NFL Drug Testing Policies
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State	Statute	Compliance	CBA Exception?	Athlete Exception?	Conflict(s) with NFL Policy	Team(s)
Massachusetts	*None*	n/a	n/a	n/a	n/a	New England Patriots
Michigan	*None*	n/a	n/a	n/a	n/a	Detroit Lions
Minnesota	Drug and Alcohol Testing in the Workplace Act *Minn. Stat. 181.950 et seq.* Consumable Products Act *Minn. Stat. 181.398*	Mandatory	Yes, if CBA meets minimum standards of DATWA	Allows random testing of professional athletes	• Employee right to explain a positive result • Employee right to seek independent confirmation of a positive result • No testing for masking agents • Requires specific certification of drug testing facilities • No discipline of employees for the use of lawful consumable products during nonworking hours, subject to bona fide occupational requirement.	Minnesota Vikings
Missouri	*None*	n/a	n/a	n/a	n/a	Kansas City Chiefs St. Louis Rams
New Jersey	*None*	n/a	n/a	n/a	n/a	New York Giants New York Jets
New York	*None*	n/a	n/a	n/a	n/a	Buffalo Bills
North Carolina	Controlled Substance Examination Regulation Act *N.C. Gen. Stat. 95-230*	Mandatory	No	No	• Requires specific certification of drug testing facilities • Employee right to seek independent confirmation of a positive result	Carolina Panthers
Ohio	Drug-Free Workplace Discount Program *Ohio Admin. Code §4123-17-58*	Voluntary	Yes	No	• No conflict because of CBA exception. • No conflict because program is voluntary.	Cincinnati Bengals Cleveland Browns
Pennsylvania	*None*	n/a	n/a	n/a	n/a	Pittsburgh Steelers
Tennessee	Drug-Free Workplace Program *T.C.A. §50-9-101 et seq.*	Voluntary	Yes	No	• No conflict because of CBA exception. • No conflict because program is voluntary.	Tennessee Titans
Texas	*None*	n/a	n/a	n/a	n/a	Dallas Cowboys Houston Texans
Virginia	*None*	n/a	n/a	n/a	n/a	Washington Redskins
Washington	*None*	n/a	n/a	n/a	n/a	Seattle Seahawks
Wisconsin	*None*	n/a	n/a	n/a	n/a	Green Bay Packers

Summary and Comparison of State and NFL Drug Testing Policies
Appendix to Testimony of Gabriel A. Feldman

Summary of State Statutory Private Employer Drug Testing Regulations

Arizona

Ariz. Rev. Stat. §23-493 et seq.

Arizona provides mandatory regulations for drug testing in the private workplace. The purpose of the state law is to develop uniform standards of drug testing and to ensure "the protection of the public, the safety of the workplace and the preservation of privacy and dignity." Private employers may require drug testing for any job-related purposes consistent with business necessity. Arizona's drug-free workplace statute makes clear that it cannot be construed to infringe on or preempt the valid provisions of any collective bargaining agreement. The statute declares that applicable collective bargaining agreement provisions are "fully valid and enforceable, notwithstanding the provisions of [the statute]."

Prior to testing, employers must provide employees or job applicants with a written policy that includes, among other things, the substances for which the employer may test, any disciplinary action that an employer may take based on a positive result, and the right of an employee to explain a positive test result. Employers may test for any controlled substance listed in the Comprehensive Drug Abuse Prevention and Control Act—which includes "anabolic steroids"—or a metabolite of such substances. Arizona explicitly permits random drug testing. Based on a confirmed positive drug test result, an employer may take any adverse employment action, including termination or suspension, or may require that that the employee enrolls in an approved rehabilitation program. If an employer establishes a drug testing program in compliance with the statute, an employee may not bring a cause of action against the employer based on a testing-related adverse employment action "unless the employer's action was based on a false positive test result and the employer knew or clearly should have known that the result was in error and ignored the true test result because of reckless or malicious disregard for the truth or the willful intent to deceive or be deceived."

Because the Arizona drug testing statute states that the relevant terms of a collective bargaining agreement are "fully valid and enforceable, notwithstanding the provisions of [the statute]," the state law does not conflict with the NFL's drug testing policy.

California

No Applicable Statute

California's Drug-Free Workplace Statutes, under California Government Code Section 8350, *et. seq.*, apply only to state contractors or grantees. The statutes do not impose any standards for drug testing, but merely require state contractors and grantees to enforce an appropriate drug-free workplace policy. Additionally, private employers with twenty-five or more employees must "reasonably accommodate" an employee who voluntarily elects to participate in a drug rehabilitation program, so long as the accommodation "does not impose undue hardship on the employer." *See* Cal. Lab. Code § 1025 *et. seq.*

By local ordinance, the San Francisco Board of Supervisors prohibits random drug testing. *See* San Francisco, CA Municipal Code Part II, Police Code, §3300A.5. The local ordinance also states, however, that "the Board of Supervisors does not intend to regulate or affect the rights or authority of an employer to do those things that are required, directed, or expressly authorized by … a collective bargaining agreement between an employer and…labor organization." Accordingly, the local ordinance would not conflict with NFL policy.

Colorado

No Applicable Statute

Colorado does not have any statutory employee drug testing provisions.

Florida

Comprehensive Economic Development Act of 1990
Fla. Stat. § 440.101, et seq.; Fla. Stat. § 627.0915; Fla. Stat. § 112.0455 et seq.

Florida state workers' compensation and labor laws provide voluntary, incentivized guidelines for drug testing in the workplace. The purpose of the state law is to discourage drug abuse and to afford employers "the opportunity to maximize their levels of productivity, enhance their competitive positions in the marketplace, and reach their desired levels of success without experiencing the costs, delays, and tragedies associated with work-related accidents resulting from drug abuse by employees." Qualifying drug testing programs receive state-approved discounted rating plans for workers' compensation and employer's liability insurance. The Florida statute indicates that the state drug-free workplace laws should "not be construed to eliminate the bargainable rights as provided in the collective bargaining process if applicable."

A qualifying drug-free workplace program must include sufficient notice and proper testing. Notice consists of a one-time written statement to all employees or job applicants which contains, among other things, a list of all drugs for which the employer will test, a list of the most common medications which may affect a drug test (as provided by the Florida Agency for Health Care Administration), the consequences of refusing to submit to or failing a drug test, and a guarantee that an employee who fails a drug test may contest or explain the result within five days of notification. Drugs covered by the program are defined by a list of substances which includes, *inter alia,* alcohol, amphetamines, synthetic narcotics, and "designer drugs." Steroids and performance enhancing drugs are not explicitly listed in the statute's definition of "drugs." Proper testing must include job applicant testing, reasonable-suspicion drug testing, and routine fitness-for-duty drug testing. An employer may refuse employment to a job applicant or discipline or dismiss a current employee based on a confirmed positive test result.

Because the Florida Drug-Free Workplace Program is voluntary for private employers, there is no conflict between the NFL policy and the state policies unless the Florida teams elect to apply for the workers' compensation discount. If the Florida laws did apply, the NFL's policy would conflict with it in the following ways: 1) Florida employees have a right to explain a positive test result; and 2) Florida does not allow for the testing of masking agents currently banned under the league's policies.

Georgia

Georgia Workers' Compensation Act
Ga. Code Ann. § 34-9-410 et seq.
Ga. Code Ann.§ 33-9-40.2 & 34-9-412

Georgia state workers' compensation and labor laws provide voluntary, incentivized regulations for drug testing in the workplace. The purpose of the state law is to afford employers "the opportunity to maximize their levels of productivity, enhance their competitive positions in the marketplace, and reach their desired levels of success without experiencing the costs, delays, and tragedies associated with work-related accidents resulting from drug abuse by employees." Qualifying drug testing programs receive state-approved discounted plans for workers' compensation insurance.

A drug-free workplace program must include sufficient notice, substance testing, employee education, and supervisor training. Employers must provide employees and job applicants with a written policy which must contain, among other things, the types of drug testing, the actions an employer may take on the basis of a positive confirmed test result, and a guarantee that an employee who fails a drug test may contest or explain the result within five days of notification. Proper testing must include job applicant testing, reasonable-suspicion drug testing, and routine fitness-for-duty drug testing, and may include random testing. Employers may test for amphetamines, cannabinoids, cocaine, phencyclidine (PCP), methadone, methaqualene, opiates, barbiturates, benzodiazepines, propoxyphene, or a metabolite of any such substances. Steroids and performance enhancing drugs are not explicitly listed in the statute's definition of "drugs." Prior to a test, an employee or job applicant must have the opportunity to record any information about recently taken prescription or nonprescription medication that might be relevant to the test results. An employer may refuse employment to a job applicant or discipline or dismiss a current employee based on a confirmed positive test result.

Because the Georgia Drug-Free Workplace Program is voluntary for private employers, there is no conflict between the NFL policy and the state policies unless the Georgia teams elects to apply for the workers' compensation discount. If the Georgia laws did apply, the NFL's policy would conflict with it in the following ways: 1) Georgia employees have a right to explain a positive test result; and 2) Georgia's definition of drugs for which a qualifying program may test does not include any of the chemicals on the NFL's list of performance enhancing drugs or masking agents.

Indiana

No Applicable Statute

Indiana has not enacted any specific employee drug testing statutory provisions. Indiana Statute 22-9-5-24, provides, however, that private employers may require that "employees behave in conformance with the requirements established under the Drug-Free Workplace Act of 1988." The statute adds that "[n]othing in this chapter shall be construed to encourage, prohibit, or authorize the conducting of drug testing for the illegal use of drugs by job applicants or employees or making employment decisions based on the test results."

Illinois

No Applicable Statute

Illinois' Drug-Free Workplace Statutes apply only to state contractors or grantees. The statutes do not impose any standards for drug testing, but merely require state contractors and grantees to enforce an appropriate drug-free workplace policy.

Louisiana

Employee Drug Testing Act
La. Rev. Stat.§ 49:1001 et seq.

Louisiana provides mandatory regulations for drug testing in the workplace. The Louisiana statute, however, states that the provided drug testing standards "shall not apply to drug testing conducted by the National Collegiate Athletic Association (NCAA) or the National Football League (NFL)."

Private employers have considerable flexibility under the Louisiana statutes, as employers may require drug testing of employees or job applicants without a written policy or reasonable cause. Employers explicitly may test for marijuana, opiates, cocaine, ampehetamines, and phencyclidine (PCP), and may also test for any controlled substance listed in the Comprehensive Drug Abuse Prevention and Control Act (21 U.S.C. 812). Louisiana does not require that private employers offer any rehabilitation options to an employee upon a positive test result. An employer may not discharge an employee after an initial positive result, but may take any disciplinary action after a confirmed positive test.

Because of the specific exclusion of NCAA and NFL drug testing policies, there is no conflict between the state law and the NFL policy.

Maryland

Md. Code Ann. Health Gen. §17-214

The Maryland Health Code provides mandatory regulations for drug testing in the workplace. Employers may test current employees for "any legitimate business purpose." An employer may only screen job applicants with drug testing if the employer has not entered into a collective bargaining agreement which prohibits such preliminary screening.

The Maryland Health Code provides detailed testing rules about the laboratories that may administer testing and the types of samples the laboratories may collect. Employers may only require employees to submit to testing at laboratories that have been certified by the Maryland Department of Health and Mental Hygiene. Employers may only test for alcohol or "controlled dangerous substances" as defined by the Maryland Criminal Code. Section 5-101 and Sections 5-401 through 5-406 of the Criminal Code provide an extensive list of "controlled dangerous substances," including many of the anabolic or androgenic steroids currently banned by the NFL. In particular, Schedule III, codified in Section 5-404, deems numerous well-known performance enhancing drugs like testosterone, stanozolol, and mesterolone as "controlled dangerous substances." These sections do not list potential masking agents, like bumetanide, as "controlled dangerous substances." If an employer receives a confirmed positive test result from a properly certified laboratory, the employer must, within thirty days, give the employee a copy of the test results, its policies on drug abuse, notice of any planned disciplinary action, and notice that the employee may request an independent verification of the results from another certified testing facility.

Maryland allows for collective bargaining agreements to override only the sections of its health code that concern the testing of job applicants, not current employees. Accordingly, any parts of the NFL's drug testing policy regarding current players are likely subject to the provisions of Maryland's health code. Two potential conflicts arise between the state law and the NFL policy: 1) the drug testing facility used by the NFL must be certified by the Maryland Department of Health and Mental Hygiene; 2) the state law does not permit testing for masking agents, which are not found in the Maryland statute's list of controlled dangerous substances; and 3) an employee may request an independent verification of the results from another certified facility.

Massachusetts

No Applicable Statute

Massachusetts does not have any statutory employee drug testing provisions.

Michigan

No Applicable Statute

Michigan does not have any statutory employee drug testing provisions.

Minnesota

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Drug and Alcohol Testing in the Workplace Act
Minn. Stat. 181.950 et seq.
Consumable Products Act
Minn. Stat. 181.398

Minnesota's Drug and Alcohol Testing in the Workplace Act (DATWA) provides mandatory regulations for drug testing in the workplace. The statute states that the parties of a collective bargaining agreement may freely bargain with respect to a drug testing policy that "meets or exceeds, and does not otherwise conflict with, the minimum standards and requirements for employee protection" as provided by DATWA. The statute also recognizes that DATWA may be preempted by drug testing policies executed pursuant to federal regulations.

Employers may not conduct any testing unless their written policies meet the minimum standards of DATWA. An employer's policy must contain, *inter alia*, any disciplinary action that may result from a confirmed positive test, the guaranteed right of an employee or job applicant to explain a positive test result or request and pay for a confirmatory retest, and an explanation of any other appeal procedures available. Employers may freely conduct routine physical examination testing, job applicant testing, and reasonable suspicion testing. Employers typically cannot conduct random testing, but DATWA carves an exception specifically for professional athletes that allows random testing if the professional athlete is subject to an applicable collective bargaining agreement that includes random testing. Employers may test for any drug listed under Minnesota Statute Section 152.01, Subdivision 4. This section includes most classes of drugs, including an extensive list of known performance enhancing anabolic steroids that coincides with the list of performance enhancing drugs for which the NFL tests. Minnesota also requires that all testing facilities are certified by the National Institute on Drug Abuse, the College of American Pathologists, or the State of New York Department of Health.

If a job applicant or employee or tests positive for drug use, the employer must give the employee the opportunity to explain the result and indicate any over-the-counter or prescription medication that the individual has recently taken. The employee may also request a confirmatory retest of the original positive sample at the employee's own expense. An employer may not discipline or discharge an employee "on the basis of a positive test result from an initial screening test that has not been verified by a confirmatory test." An employer may, however, temporarily suspend an employee, with or without pay, between the initial positive test and the confirmatory test if the employer believes "it is reasonably necessary to protect the health or safety of the employee, coemployees, or the public." If the confirmatory retest is negative, the employer must reinstate the employee with back pay, if appropriate. If the confirmatory test is positive and it is the employee's first offense, an employer still may not discharge the employee without first offering the employee the opportunity to undergo a drug rehabilitation program at the employee's own expense or pursuant to coverage under a benefit plan.

Under the Minnesota Consumable Products Act (CPA), employers may not discipline or discharge an employee if the employee consumed lawful products off the premises during nonworking hours. "Lawful consumable products" is defined as any lawful product, including alcoholic beverages and tobacco. Employers may restrict the use of lawful consumable products during

nonworking hours if the restriction relates to a "bona fide occupational requirement" and is "reasonably related to employment activities … of a particular employee or group of employees." The CPA also permits employers to restrict the use of lawful products during nonworking hours if it is "necessary to avoid a conflict of interest or the appearance of a conflict of interest with any responsibilities owed by the employee to the employer." The CPA does not provide a collective bargaining agreement exception.

Although DATWA allows for collective bargaining around the statute, an applicable collective bargaining agreement must still meet the minimum standards of the statute. The NFL's drug testing policy conflicts with the Minnesota statutes in the following ways: 1) Minnesota grants employees the right to explain a positive result; 2) Minnesota allows employees to seek an independent confirmation of a positive result; 3) Minnesota may not allow testing for masking agents; and 4) Testing facilities must meet Minnesota's certification standards. Under the CPA, the NFL may not discipline employees for the use of lawful consumable products during nonworking hours, subject to a bona fide occupational requirement exception.

Missouri

No Applicable Statute

Missouri statutes only enforce a drug-free workplace standard for the Executive Branch of the Missouri state government. (*See* Mo. Rev. Stat. 105.1100 *et. seq.*). The Drug-Free Public Work Force Act does not impose drug testing standards, nor does it offer incentives to private employers for participation.

New Jersey

No Applicable Statute

New Jersey does not have any statutory employee drug testing provisions.

New York

No Applicable Statute

New York does not have any statutory employee drug testing provisions.

North Carolina

Controlled Substance Examination Regulation Act
N.C. Gen. Stat. 95-230

North Carolina provides for mandatory regulation of drug testing in the private workplace with the intent to protect individuals from "unreliable and inadequate examinations and screening for controlled substances." The state does not require or incentivize testing for public or private employers, but instead seeks to ensure that "employers who test employees for controlled substances shall use reliable and minimally invasive examinations."

North Carolina does not restrict any specific types of testing (i.e., random, routine fitness) but requires that all testing be conducted according to the state's specific procedures. Only laboratories which comply with the drug testing programs of the United States Department of Health and Human Services or the College of American Pathologists may test an employer's current employees. An approved laboratory must retest any positive sample to confirm the positive result. An employee may request, at the employee's own expense, that a separate approved facility retest a confirmed positive result. The statute does not offer any guidelines on permitted or prohibited disciplinary action based on a positive test result.

The NFL's drug testing policy is subject to the North Carolina examination regulations, as the state statutes do not make any exceptions for collective bargaining agreements, professional athletes, or preemptions of any kind. The NFL's policy conflicts with the North Carolina statute in the following ways: 1) North Carolina allows employees to request independent retests of any positive samples at separate facilities; and 2) Testing facilities must meet North Carolina's certification standards.

Ohio

Drug-Free Workplace Discount Program
Ohio Admin. Code §4123-17-58

The Ohio State Bureau of Workers' Compensation provides voluntary, incentivized minimum standards for drug testing in the workplace. Employers that implement qualifying Drug-Free Workplace (DFWP) Programs receive state-approved discounts on their workers' compensation premium rates, starting at a ten percent discount and potentially rising to a twenty percent discount with continual compliance and stricter guidelines. The Administrative Code provision includes a "hold harmless statement" that states that "nothing in this rule requires an employer to implement any policies or practices in developing a DFWP program that conflict or interfere with existing collective bargaining agreements."

A qualifying program requires proper notice, education, supervisor training, drug testing, and an employee assistance plan. Notice consists of a statement to all employees which contains, among other things, the types of drug or alcohol tests which will be used, the cutoff levels that will lead to disciplinary action, and the consequences for a violation of the employer's provided alcohol and drug abuse policy. The notice must also "contain appropriate references to collective bargaining agreements and show how the DFWP program works in concert with these agreements to promote a safer workplace for all employees." Proper testing includes mandatory pre-employment testing, post-accident testing, and reasonable suspicion testing. The Code only provides five drugs that are included in drug testing: amphetamines, cannabinoids (THC), cocaine, opiates, and phencyclidine (PCP). Performance enhancing

drugs and masking agents are not mentioned. Upon an employee's confirmed positive test, an employer may take any disciplinary action deemed appropriate.

Because the Ohio Drug-Free Workplace Program is voluntary for private employers, there is no conflict between the NFL policy and the state policies unless the Ohio teams elect to apply for the workers' compensation discount. If the Ohio laws did apply, the NFL's policy would conflict with it in the following way[s]: Ohio's narrow definition of drugs for which a qualifying program may test does not include any of the chemicals on the NFL's list of performance enhancing drugs or masking agents.

Pennsylvania

No Applicable Statute

Pennsylvania does not have any statutory employee drug testing provisions. The state has passed a "Clean Urine Statute" which makes it a misdemeanor to sell or give drug-free urine to deceive drug tests. *See* 18 Pa.C.S.A. § 7509.

Tennessee

Drug-Free Workplace Program
T.C.A. §50-9-101 et seq.

The Tennessee Department of Labor and Workforce Development provides voluntary incentivized regulations for drug testing in the workplace. The purpose of the state law is to discourage drug abuse and to afford employers "the opportunity to maximize their levels of productivity, enhance their competitive positions in the marketplace, and reach their desired levels of success without experiencing the costs, delays, and tragedies associated with work-related accidents resulting from drug abuse by employees." Qualifying programs receive state-approved discounted rating plans for workers' compensation insurance, among other benefits. Section 59-9-102 explicitly states that the drug-free workplace statutes are "subject to the provisions of any applicable collective bargaining agreement."

A qualifying drug-free workplace program must include proper notice and testing. Notice consists of a one-time written statement to all employees or job applicants which contains, among other things, a list of all drug classes for which the employer will test, the consequences of refusing to submit to or failing a drug test, and a statement about any applicable collective bargaining agreements. Tennessee uses the same list of testable controlled substances as the United States Department of Transportation. Under 49 CFR Part 40, the Department of Transportation tests for marijuana, cocaine, amphetamines, phencyclidine (PCP), and opiates. Performance enhancing drugs and masking agents are not included. Proper testing must include job applicant testing, reasonable-suspicion drug testing, post-accident testing, and routine fitness-for-duty drug testing. An employer may refuse employment to a job applicant or discipline or dismiss a current employee based on a confirmed positive test result.

Because the Tennesse drug testing statute states that the statute is "subject to the provisions of any applicable collective bargaining agreement," the state law does not conflict with the NFL's drug testing policy. Further, the Tennessee Drug-Free Workplace Program is voluntary for private employers, so there is no conflict between the NFL policy and the state policies unless the Tennessee team elects to apply for the workers' compensation discount.

Texas

No Applicable Statute

Texas does not have any statutory employee drug testing provisions. Under the Texas Administrative Code (Section 169.1 *et. seq.*), employers with more than fifteen employees and workers' compensation insurance must institute a written drug-free workplace policy. The policy must include a purpose, consequences for violations, the availability of rehabilitation programs, and a description of any drug testing program that the employer chooses to enforce. These Texas Workers' Compensation Commission rules, however, do not impose any minimum standards for drug testing programs.

Virginia

No Applicable Statute

Virginia does not have any statutory employee drug testing provisions. The Virginia Code authorizes insurers to give discounts to private employers who institute a drug-free workplace program, but allows the insurers to establish the qualification criteria. *See* Va. Code Ann. 65.2-813.2.

Washington

No Applicable Statute

Washington formerly provided discounted rating plans on workers' compensation insurance for private employers who instituted drug testing policies in accordance with state law. *See* Wash. Rev. Code. § 49.82.010 *et. seq.* The program required written notice, drug testing, employee education, and supervisor training sessions. The program expired on January 1, 2001.

Wisconsin

No Applicable Statute

Wisconsin does not have any statutory employee drug testing provisions.

Mr. RUSH. The Chair now recognizes Professor Standen for 5 minutes for an opening statement.

STATEMENT OF JEFFREY STANDEN

Mr. STANDEN. Thank you, Chairman Rush and Mr. Ranking Member, for inviting me here today to testify. I am Jeffrey Standen from Willamette University in Salem, Oregon; and in my view, the Williams decision is built on a simple premise and that premise is erroneous.

Professional sports leagues, such as the NFL, are not typical multistate business organizations. They are hybrid business organizations, neither fish nor fowl, and do not easily fit within the mold anticipated by section 301 of the LMRA and the judicial decisions interpreting it.

The NFL and the other major American professional sports leagues are unique business operations. The NFL requires its franchises to be owned by a single individual or group of individuals, and to be owned locally. In other words, a single owner may not own more than one franchise. This aspect of the business arrangement provides incentives for local teams to promote local marketing opportunities and ticket sales. Local ownership gives teams strong incentives to hire and retain the best players and coaches possible to enhance their chances for on field success.

Yet the fact that teams are individually owned by local interests does not mean that NFL teams are competitors in a regular business sense. NFL teams compete, but they do not wish to drive their competitors out of business. Instead, NFL teams rely on a high degree of cooperation in both obvious and nonobvious ways. Teams cooperate to create uniform game rules, game schedules and championship tournaments. They cooperate to create and sell national and international marketing opportunities, including broadcast rights, digital media and national sponsorships.

This obvious cooperation, which is currently under scrutiny by the Supreme Court of the United States and the American Needle antitrust litigation masks a deeper codependency among teams. When one franchise does poorly, the entire league suffers, even to the extent that professional leagues have been known to take over ailing franchises rather than allowing them to fail.

As co-venturers, franchises actively help ensure the financial health and continuing viability of their competitors, devising rules to assist their nominal opponents in the hiring of high-quality players and coaches. These rules promote competitive parity and include salary caps, wage scales, luxury taxes and entry drafts, preferential draft and waiver rights to the least competitive teams, restrictions on draft picks, prohibitions on one-sided trades, weighted schedules and so forth.

In short, the multistate location of the franchises of a sports league tends to mask the nearly complete dependency that teams, in fact, have on each other to ensure the overall success of the league.

In my view, the NFL and other professional sports leagues are better characterized as single national firms and not as a number of independent companies that cooperate in small matters such as game schedules or rules of play. Yet, even as a single entity, the

sports leagues have unique needs that require special consideration under the law.

Ordinary national businesses that have operations in several States must abide by the respective State laws, for example, drug-testing restrictions, minimum-wage rules and the like. But the NFL differs from the ordinary single entity because, although teams are financial co-venturers, they are also, of course, on-field competitors. The league relies on competition among its cooperators. As a result, where a State law or other law strikes down a term of employment that directly or indirectly creates competitive balance, then the very continuation of the NFL as a business enterprise is threatened. Such decisions might make sense in the context of a single national business that happened to have local operations in multiple States, but in the context of a professional sports league, such applications of State law would be devastating to the chief product the league produces—competitive and exciting game contests.

One important way that leagues ensure competitive parity is by prohibitions on player doping. Doping is prohibited in part because it allows certain players and their respective teams an unfair advantage over their competitors. As a result, I would suggest to this subcommittee that the Congress amend section 301 of the LMRA to preempt any State claim that would conflict with any drug-testing policy that is incorporated as part of a valid collective bargaining agreement.

Thank you, Mr. Chairman.

Mr. RUSH. The Chair thanks the gentleman.

[The prepared statement of Mr. Standen follows:]

Testimony of Jeffrey Standen
November 3, 2009

Subcommittee on Commerce, Trade, and Consumer Protection
Committee on Energy and Commerce
House of Representatives
111th Congress of the United States

November 3, 2009
11:30 a.m.
Rayburn House Office Building
Room 2123

THE NFL STARCAPS CASE:
ARE SPORTS' ANTI-DOPING PROGRAMS AT A LEGAL CROSSROADS?

TESTIMONY OF:

JEFFREY STANDEN
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245 State Street, SE
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Testimony of Jeffrey Standen
November 3, 2009

Summary

The very recent decision of the United States Court of Appeals for the Eighth Circuit in Williams v. National Football League[1] presents a substantial obstacle to effective anti-steroid or anti-doping testing in the National Football League and other major sports leagues. The decision in effect replaces the testing procedures and the remedies for positive tests that were agreed to as part of the NFL collective bargaining process with those that are provided by the state law of Minnesota. The ramifications from this decision could be far-reaching. Professional sports leagues would be limited to testing procedures and remedies permitted by the state law most lenient to player rights, frustrating the anti-doping movement. As significantly, this decision threatens the competitive balance that lies at the heart of NFL football.

The Williams Decision

The two Williamses are players for the Minnesota Vikings. They are not accused of taking steroids, but instead tested positive in 2008 for the diuretic bumetanide, which is banned by the NFL because it can mask the presence of steroids. The players acknowledged taking an over-the-counter weight-loss supplement sold under the brand name "StarCaps." The StarCaps label did not state on its label that it contained bumetanide. In response to the positive test, the NFL imposed a suspension of the players for four games each, pursuant to the league's anti-

[1]No. 09-2249, September 11, 2009.

doping policy.[2] The Williamses then sued the NFL in state court, arguing that the NFL's testing violated Minnesota workplace laws. The case was moved to federal court, where the NFL Players Association then filed suit on the players behalf. The NFL argued in federal court that the state claims should be dismissed on the grounds that federal labor law preempted state law and that uniform national standards are necessary for professional team sports. The federal court dismissed several claims in the Williams' case and sent two claims for damages arising from Minnesota workplace laws back to state court. The state court judge issued an injunction prohibiting the NFL from suspending the players. A trial in state court on the state law claims is currently scheduled for March 8, 2010. The opinion of the Eighth Circuit upholds these decisions by the federal trial court.

My opinion about the Eighth Circuit's decision is both laudatory and critical. On the one hand, the court applies section 301 of the Labor Management Relations Act[3] in a predictable manner consistent with many other federal decisions. The LMRA protects the right of workers to unionize. It also establishes a national policy favoring arbitration, rather than litigation, to resolve disputes between labor and management. Section 301 grants to federal courts the jurisdiction to adjudicate challenges to arbitral rulings and related questions.[4] The Supreme

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[2]The NFL's Policy on Anabolic Steroids and Related Substances was collectively bargained by the NFL and the NFL Players Association.

[3]29 U.S.C. section 185(a).

[4]Section 301 provides that "[s]uits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . may be brought in any district court of the United States having jurisdiction of the parties."

Court, however, has long interpreted Section 301 to have the more significant substantive effect of preempting law suits based on state law that either enforce the apposite collective bargaining agreement or require its interpretation. Thus, the interpretation and enforcement of the CBA are matters for arbitrators, and their decisions are reviewable by federal courts exclusively.

As long as a question of state law can resolved without enforcement or interpretation of the federally protected collective bargaining agreement, however, then state law will regulate the employment relation of a unionized worker. As a result, business organizations that have operations in more than one state customarily have to adapt certain practices to meet local law, for example with regard to insurance obligations, building codes, or even professional practice. Here, the Eighth Circuit decided the both state law claims could be resolved without enforcement or interpretation of the NFL CBA, and thus refused to deem the claims preempted by federal law. The ruling allows for a trial on the merits of the players' state law claims.

The Unique Nature of the Sports Firm

Despite the straightforward ruling, the decision of the Eighth Circuit panel is open to criticism. The Williams decision is built on a simple premise, and that premise is erroneous, in my view. Professional sports leagues such as the NFL are not a typical multi-state business organizations. They are hybrid business organizations, neither fish nor fowl, and do not easily fit within the mold implicitly anticipated by section 301 and the judicial decisions interpreting it.

The NFL and the other major American professional sports leagues are unique business operations. The NFL requires its franchises to be owned by a single individual or group of

individuals and to be owned locally. In other words, a single owner may not own more than one franchise. This aspect of the business arrangement is designed to provides incentives for local teams take full advantage of local marketing opportunities for team merchandise and local sponsorships and also do their best to sell game tickets to local fans. Local, individual ownership also gives teams strong incentives to hire and retain the best players and coaches possible, to enhance their chances for on-field success. The NFL relies on local ownership to ensure competitive, enjoyable contests.

Yet the fact that teams are individually owned by local interests does not mean that NFL teams are competitors in a regular business sense. NFL teams compete, but do not wish to drive their competitors out of business. Instead, NFL teams rely on a high degree of cooperation, in both obvious and non-obvious ways. Teams cooperate to create uniform game rules, game schedules, and championship tournaments. They also cooperate to create and sell national and international marketing opportunities, especially broadcast rights, digital media, and national sponsorships.[5] This obvious cooperation, which is currently under scrutiny by the Supreme

[5]Although this cooperation is currently conducted through collective efforts, it is probably fair to say that such common goods could theoretically be supplied without centralization. For instance, game or tournament promoters could establish rules of play and set a schedule independent of league operations, much as is done in tournament sports such as golf or tennis. Therefore, as a theoretical matter, the NFL could be broken into independent, unaffiliated teams competing against each other, and to that extent could be treated like any other competitive industry. Under this scenario, professional football would appear much different in character than the familiar NFL. In any event, the days of "barnstorming" professional athletic teams is long past, and would seem to present a comparatively inefficient manner to organize team sports in this day of national television networks and worldwide internet access, which together seem to place a premium on national or even international marketing of sports teams and leagues.

Court of the United States in the American Needle antitrust litigation,[6] masks a deeper co-dependency among teams. Although NFL teams are competitors on the field, off the field they are co-venturers. For the most part, teams do not compete against each other off the field. The Green Bay Packers do not wish to drive the Minnesota Vikings out of business, no matter how angry Packers' fans may be with Minnesota's quarterback. When one franchise does poorly the entire league suffers, even to the extent that professional leagues have been known to take over ailing franchises rather than allow them to fail, as we see currently with the National Hockey League taking over the Phoenix Coyotes franchise. As co-venturers, franchises actively help ensure the financial health and continuing viability of their competitors, devising rules to assist their nominal opponents in hiring high-quality players. Teams ensure the financial health of their on-field rivals by various "parity" rules, such as salary caps, wage scales, luxury taxes, entry drafts, awarding preferential draft and waiver rights to the least-competitive teams, restricting the alienability of draft picks, prohibitions on one-sided trades, weighted schedules, and so forth. In short, the multi-state location of the franchises of a sports leagues tends to mask the nearly complete dependency that teams in fact have on each other to ensure the success of the league.

In my view, the NFL and the other professional leagues are better characterized as a single, national firms,[7] and not as a number of independent companies that cooperate in small

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[6]American Needle v. NFL, 538 F.3d 736 (7th Cir. 2009).

[7]Major League Baseball, the National Hockey League, and the National Basketball Association also have franchises in Canada.

matters such as game schedules or rules of play. But even as single, national firms, the sports leagues have unique needs that require special consideration under the law.[8] Ordinary single entities that have operations in several states must abide by the respective state laws, for example minimum wage rules and the like. But the NFL differs from the "ordinary single entity" because, although teams are financial co-venturers, they are also on-field competitors. The league relies on competition among its cooperators. As a result, where a state law or other law strikes down a term of employment that directly or indirectly creates competitive balance then the very continuation of the NFL as a business enterprise is threatened. State laws could conceivably be devised to prohibit the player entry draft, or negate the rookie wage scale, or render illegal any restraints on the trade of player contracts, or allow teams to break their contracts to play scheduled games, or declare illegal any revenue sharing or luxury taxes.[9] Such

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[8]In Wood v. National Basketball Association, 809 F.2d 954, 961 (2d Cir. 1987) (rejecting player's challenge on antitrust grounds to league's salary cap and college player draft), the court stated:

> [B]argaining relationships [between professional athletes and their leagues] raise numerous problems with little or no precedent in standard industrial relations. As a result, leagues and player unions may reach seemingly unfamiliar or strange agreements. If courts were to intrude and to outlaw such solutions, leagues and their player unions would have to arrange their affairs in a less efficient way.

See also Mackey v. National Football League, 543 F.2d 606, 619 (8th Cir. 1976)(discussing "the unique nature of the business of professional football").

[9]One such issue has been resolved by a decision of the Supreme Court. In the spring of 1995, both the City of Baltimore and the State of Maryland passed laws that prohibited us of so-called replacement players during the baseball strike in Camden Yards. Despite state law, the Supreme Court has made it clear that the employer's rights to use replacement workers under federal labor law preempts any state laws to the contrary. Golden Gate Transit Corp. v. City of

decisions might make sense in the context of single, national businesses that happened to have local operations.[10] But in the context of professional sports such applications of state laws would be devastating to the chief product the leagues produce: competitive and exciting game contests.

The Importance of Uniform Doping Standards

One important way that leagues ensure competitive parity is by prohibitions on player doping. Doping is prohibited in part because it allows certain players and their respective teams an unfair advantage over competitors. To preclude unfair advantages, the leagues have imposed anti-doping testing and sanctions. These testing procedures and sanctions may not in all cases comply with the law of the states in which the respective franchises are located.[11]

Some local competitive advantages are inevitable. The "home field advantage" signifies the collection of attributes or conditions that impliedly assist the home team in winning games, including familiar playing surfaces, cheering fans, familiar routines, and perhaps inadvertently slanted officiating. Yet the leagues even out this inevitable advantage by scheduling teams to an equal number of home and away games.

Los Angeles, 475 U.S. 608 (1986).

[10]Cramer v. Consollidated Freightways, Inc., 255 F.3d 683, 695 n.9 (9th Cir. 2001). A national employer doing business in multiple states has to cope with different wage laws, antidiscrimination laws, and family leave laws.

[11]The Appendix to this testimony reviews state laws on one point: workplace drugtesting rules. As that review makes plain, devising a coherent, single policy that satisfies the requirements of all state laws is impossible. The laws differ markedly along many dimensions, including the requirements of notice, the privacy of the drug sample, the cause needed for a test, and the sanctions that result from a positive result.

Professional sports leagues try to eliminate other local advantages more directly. Financial advantages in the NFL are in part removed by revenue sharing that encompasses nearly all revenue sources. The NFL also imposes a total cap or limit on players' salaries in the aggregate in order to preclude the hiring of all the best players in a few locations. Potential scheduling disparities are reduced by having each team in the same division play an identical slate of opponents from another division. League-wide revenues from broadcast contracts are shared equally among teams.

All of these various league restrictions are imposed, ultimately, for a single purpose: to ensure that rival teams field players that comprise teams of roughly equal ability and skill. The NFL's product is on the field each fall Sunday afternoon. The players play the game, and the game is the entertainment. Numerous NFL policies seek to make sure that the players on each side of the field are roughly commensurate in skill and ability. Most of these policies, such as revenue sharing and draft order, try to create competitive parity indirectly. These policies give teams the wherewithal to hire quality players.

The NFL's anti-doping policy, however, helps ensure a level playing field in a more direct fashion. It prohibits any player from gaining an unfair or undue advantage over another. As a direct means of ensuring on-field competitiveness, the NFL's steroid policy is more important to the NFL's successful ability to field competitive game contests than are the NFL's other parity rules, such as the draft or revenue sharing. It is as vital to competitive balance as restrictions on game equipment or the number of players permitted to a team. It lies at the heart of competitive professional football.

Recommendation to the Congress

Federal law has long recognized the unique nature of the sports firm. Professional baseball has enjoyed an exemption from the reach of the federal antitrust law for approximately a century. Although that decision has been much-criticized by commentators and even circumscribed by an Act of Congress, the Supreme Court has never overruled that decision, and even arguably has extended its scope in recent decades. Similarly, the Congress just a few decades ago allowed nearly all the major professional sports leagues to act as a single entity in negotiating their contracts with television broadcasters. Finally, recent Congresses including this one have taken a particular interest in the anti-doping policies of both professional and amateur sports, recognizing the unique status of sports in the contemporary American culture and the special needs and vulnerabilities of professional sports in matters concerning competitive balance and fair play.

I would urge this Congress to act once again to ensure that the professional sports leagues are able to maintain their paramount goals of competitive balance and competitive integrity. The NFL needs a uniform and national anti-doping policy because the NFL is a single national firm that supplies competitive football games among locally owned franchises. It is a unique business entity.

In my view, there are four possible ways to resolve the problem posed by the decision of the Eighth Circuit.

Option 1. In its next collective bargaining agreement, the NFL could amend its anti-doping policy to meet or exceed the most protective state standards.[12] This approach could satisfy the NFL's need for parity among teams, as all players would be subject to the same restrictions.

There are at least two problems with this possible resolution. First, state law varies widely and is changeable. Although Minnesota appears among the more protective state laws,[13] another state in which the NFL has or one day will have a franchise could establish more protective standards. As a result, the NFL policy would be implicitly amended by recurring decisions of state legislatures. The appendix to this testimony reviews workplace drug testing statutes from a number of states, most of which are currently home to at least one professional sports franchise. This brief review evidences the great variety of restrictions that states place on workplace drug testing. It would appear difficult, if not impossible, for a particular CBA to articulate a drug testing policy that complied with all potentially applicable state laws.

Second, the testing procedures or sanctions established by one particular state might not be responsive to the NFL's needs. For example, Minnesota gives first-time violators the right to

[12]The NFL currently has franchises in twenty-two states, so theoretically a new NFL standard geared to satisfy the most protective state law would not need to satisfy the law of any U.S. state.

[13]The state of Louisiana has a statute that regulates workplace drug testing that is similar to Minnesota's. The Louisiana statute, however, provides an exemption for the NFL. As a result, two players from the New Orleans Saints who, like the Williams, ingested StarCaps and thus tested positive for the banned diuretic bumetanide, are eligible to serve their four-game suspension imposed by the NFL pursuant to league policy.

go to rehabilitation; the NFL's policy suspends first-time offenders immediately. The NFL may prefer its more punitive response because of the comparative brevity of the typical NFL career when compared to that of the typical wage earner subject to state law. Prolonged, long-term sanctions with multiple chances for cure may not be effective for players who are practically speaking close to retirement.

Option 2: The NFL has appealed the panel decision to the en banc Court of Appeals, and should it lose there, could appeal to the Supreme Court. The pre-emptive scope of labor law is judge-made, and therefore it is always possible that a high court could expand the scope of Section 301 preemption.

Option 3: The U.S. Congress could amend Section 301 to preempt any state claim that would conflict with any drug-testing policy incorporated as part of a valid collective bargaining agreement.

Option 4: In the next collective agreement, the NFL and the NFLPA could amend the current drug policy to require mandatory arbitration of all state claims related to drug testing.[14]

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[14]The courts have long favored arbitration agreements in collective bargaining agreements involving professional sports. Davis v. Pro Basketball, Inc., 381 F.Supp. 1 (S.D.N.Y. 1974); Erving v. Virginia Squires Basketball Club, 349 F.Supp. 716 (E.D.N.Y. 1972); Kansas City Royals v. Major League Baseball Players Association, 532 F.2d 615 (8th Cir. 1976).

Just this year, in the 14 Penn Plaza decision,[15] the Supreme Court explicitly sanctioned a union's waiver of a statutory right to a judicial forum in age discrimination claims. By the same logic, the player's association should be allowed legally to waive rights created by state drug testing laws. Here the Players Association would waive the right to the judicial forum, and not the substantive right itself. The waiver must be clear and unmistakable. Thus, all drug testing-related claims would be subject to arbitration. If a player believes he has a claim under the state law, the union would have the discretion to file a grievance on his behalf.[16]

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[15]14 Penn Plaza v. Pyett, Slip Opinion (07-581) April 1, 2009.

[16]Unions of course are not obliged to process all grievances claimed by members of a bargaining unit. Unions frequently choose not to do so. In the NFL, the NFLPA alone controls access to arbitration. Chuy v. NFLPA, 495 F.Supp. 137 (E.D.Pa. 1980). The union's only constraint is the duty of fair representation, which sets a very deferential standard in judging the union's grievance processing decisions. So if a player's conduct constitutes a violation of: (a) the CBA's substance abuse policy and (b) a parallel (but more protective) state law, the union can choose to grieve: (a), (b), (a/b), or none. In the wake of Penn Plaza, this seems like a possible strategy for unions and employers. However, it's unclear whether a court would uphold a union's decision to both waive a statutory right to a judicial forum and refuse to process a grievance related to that right. Unions are under a duty of fair representation. Vaca v. Sipes, 386 U.S. 171 (1967).

APPENDIX

State Statutes that Govern Workplace Drug Testing

Alabama

Alabama subscribes to the "Drug Free Workplace Act," which provides benefits to employers who use certain drug testing procedures for their employees. Ala. Code § 25-5-330 (1995). The purpose of the act is to promote a workplace free of drugs. *Id.* The program is required to contain:

> (1) A written policy statement as provided in Section 25-5-334.
>
> (2) Substance abuse testing as provided in Section 25-5-335.
>
> (3) Resources of employee assistance providers maintained in accordance with Section 25-5-336.
>
> (4) Employee education as provided in Section 25-5-337(a).
>
> (5) Supervisor training in accordance with Section 25-5-337(b). Ala. Code § 25-5-333 (1995).

The program also requires written notice by the employers to the employees explaining the types of testing available and the bases for testing, the actions an employer may take against an employee after a positive test, a statement of confidentiality, the consequences of refusing to submit to a test, and an explanation that an employee who receives a positive test may contest the result within five working days of notification of the result. Ala. Code § 25-5-334 (1995). The statute also lists when an employer can give a drug test to an employee, including reasonable suspicion testing. Ala. Code § 25-5-335 (1995).

Alaska

Alaska's drug testing policy states that employers must disclose a drug testing policy to their employees and cannot test outside the bounds of that policy. Alaska Stat. § 23.10.600 (2007). Drug testing by employers is not mandatory, and by following the rules regarding drug testing, employers are immune from lawsuits by employees for being drug tested. Alaska Stat. § 23.10.610-15 (2007). These laws are collectively termed the "Drug Free Workplace Act." *Id.*

Arizona

Employers in Arizona may drug test their employees subject to the written policy the employer has previously distributed to all employees subject to the testing or that was made readily available to them in the same manner as the personnel handbook. Ariz. Rev. Stat. Ann. § 23-493.04(A) (2000). The employer is responsible for creating the policy. Under the policy, employers may test their employees, so long as it is for "any job-related purposes consistent with business necessity." *Id.* Specifically listed as when an employer can drug test an employee are:

> 1. Investigation of possible individual employee impairment.
> 2. Investigation of accidents in the workplace. Employees may be required to undergo drug testing or alcohol impairment testing for accidents if the test is taken as soon as practicable after an accident and the test is administered to employees who the employer reasonably believes may have contributed to the accident.
> 3. Maintenance of safety for employees, customers, clients or the public at large.
> 4. Maintenance of productivity, quality of products or services or security of property or information.
> 5. Reasonable suspicion that an employee may be affected by the use of drugs or alcohol and that the use may adversely affect the job performance or the work environment. Ariz. Rev. Stat. Ann. § 23-493.04(B) (2000).

Further, an employer may randomly drug test its employees subject to the written policy. Ariz. Rev. Stat. Ann. § 23-493.04(C) (2000). An employer may then use a positive test or a refusal to submit to a test as a basis for action, including mandatory entrance in treatment, suspension, termination or "other adverse employment action." Ariz. Rev. Stat. Ann. § 23-493.05 (2000).

Arkansas

The laws in Arkansas were designed to promote a drug free workplace for employers. Employers are required to inform their employees in writing before testing. Ark. Code § 11-14-105 (2001). The statutes do not explain what methods should be used or what an employer can do in the event of a positive test result.

Connecticut

Connecticut has a much stricter drug testing policy. The statute states

> No employer may determine an employee's eligibility for promotion, additional compensation, transfer, termination, disciplinary or other adverse personnel action solely on the basis of a positive

> urinalysis drug test result unless (1) the employer has given the employee a urinalysis drug test, utilizing a reliable methodology, which produced a positive result and (2) such positive test result was confirmed by a second urinalysis drug test, which was separate and independent from the initial test, utilizing a gas chromatography and mass spectrometry methodology or a methodology which has been determined by the Commissioner of Public Health to be as reliable or more reliable than the gas chromatography and mass spectrometry methodology. Conn. Gen. Stat. § 557-31-51(u) (2003).

Employers are also not allowed to view an employee as he/she is producing the specimen for the urinalysis. Conn. Gen. Stat. § 557-31-51(w) (2003).

"No employer may require an employee to submit to a urinalysis drug test unless the employer has reasonable suspicion that the employee is under the influence of drugs or alcohol which adversely affects or could adversely affect such employee's job performance." Conn. Gen. Stat. § 557-31-51(x) (2003).

Georgia

Georgia also subscribes to the "Drug Free Workplace Act." Ga. Code Ann. § 34-9-410 (2003). The statutes, however, do not describe the requirements of the act. The only specific requirements listed are those for public employment.

Hawaii

The statutes in Hawaii list many requirements for the laboratories that receive the results. Hawaii Rev. Stat. Ann. §§ 329B 4-5 (2007). Employers there are allowed to administer a "substance abuse on-site screening test." *Id.* Before any testing, the employee must receive written notice of what the test is designed to find and that prescription or over the counter medications may be found in the test. *Id.* If there is a positive result with an employee in the screening test, the employer must send the employee, within four hours, to a licensed employee for a drug test. *Id.* Before testing, an employee must be informed that he/she has the right to refuse the test, but that the employer may commence an adverse employment action against the employee as a result of refusal. *Id.*

Idaho

Idaho subscribes to the "Drug Free Workplace Act." Idaho Code § 72-1702(1) (2002). The statute also includes a list of how the test should be taken, including the procedures set forth for the person administering the test. Idaho Code § 72-1704 (2002).

Employers are required to give their employees their drug testing policy in writing prior to any drug testing. Idaho Code § 72-1705 (2002). The policy must explain that an employee may be terminated for violation of this policy. *Id.* The employer must also include in the policy the situations in which it can drug test the employees, including "random" and "reasonable suspicion." *Id.*

In the event of a positive test result, the employee must receive written notice of the positive result and must be given an opportunity to explain the test result. Idaho Code § 72-1706 (2002). The employee can also request a retest within seven working days of the positive test result. *Id.* An employer can demonstrate the termination of an employee for "work related conduct" if the employee fails a drug test, refuses to submit to a drug test, alters a drug test, or gives a sample that is not his/her own. Idaho Code § 72-1707 (2002).

Illinois

Illinois also subscribes to the "Drug Free Workplace Act" for public employees and for the employees of employers contracting with the government. 30 ILCS 580. Here, the Act does not mention private employers and their employees.

Iowa

Iowa has a statute entitled "Private Sector Drug-Free Workplaces." Iowa Code 730.5 (2006). The statute here does have a disclaimer: "This section does not apply to drug or alcohol tests conducted on employees required to be tested pursuant to federal statutes, federal regulations, or orders issued pursuant to federal law." Iowa Code § 730.5(2) (2006). An employer is not required to drug test its employees and may even limit testing to employees at certain job sites. Iowa Code § 730.5(3) (2006). An employer may make the submission of an employee to a drug test a condition of employment and continued employment. Iowa Code § 730.5(4) (2006). Employers may require of their employees reliable pieces of identification before testing. Iowa Code § 730.5(5) (2006). The test itself should occur either during, or immediately before or following the employee's workday. Iowa Code § 730.5(6)(a) (2006). The statute describes in significant detail the procedures that must be followed during an employee drug test. Iowa Code § 730.5(7) (2006). An employer may take an adverse employment action against an employee who has a positive drug test. Iowa Code § 730.5(7)(f) (2006).

Employers may conduct random drug testing of all employees selected from three types of pools of employees: "the entire employee population at a particular work site," "the entire full-time active employee population at a particular work site," and "[a]ll employees at a particular

work site who are in a pool of employees in a safety-sensitive position and who are scheduled to be at work at the time testing is conducted." Iowa Code § 730.5(8)(a) (2006). Employers may also conduct drug tests of prospective employees, employees immediately after leaving treatment or rehabilitation, for reasonable suspicion, in investigating accidents in the workplace, and as required by federal law. Iowa Code § 730.5(8) (2006).

Like other states under the "Drug Free Workplace Act," employers are required to provide employees with a written policy on drug testing in advance of any actual testing. Iowa Code § 730.5(9) (2006). After a positive test, an employer can take action against the offending employee, including refusal to hire a prospective employee, suspension of the employee with or without pay, termination of employment, required enrollment in treatment, or any other adverse employment action explained in the employer's policy. Iowa Code § 730.5(10)(a) (2006).

Maine

Maine requires of an employer to have an Employee Assistance Program before it can drug test its employees. Maine Rev. Stat. Ann. § 26-683(1) (1995). Like many other states, an employer must provide a written policy to its employees prior to any testing. Maine Rev. Stat. Ann. § 26-683(2) (1995). The policy must include the procedure, state when drug testing may occur, and explain how the samples are collected. Employees may not be required to remove clothing, nor be observed directly giving a urine sample. The policy must also stipulate the consequences of a positive test, the consequences of refusing to submit to a test, opportunities for rehabilitation after a positive test, and methods for the employee to appeal a positive test free of charge. *Id.* The employer must provide the written policy to its employees no fewer than 30 days before the policy comes into effect. Maine Rev. Stat. Ann. § 26-683(3) (1995).

An employer may test an employee if a supervisor has "probable cause" to test, which must be provided in writing. Maine Rev. Stat. Ann. § 26-684(2) (1995). An employer may do random drug testing if it was agreed to in the collective bargaining agreement, the nature of the employee's job would create a hazard to others, the employer has a written policy created with the help of an employee committee. Maine Rev. Stat. Ann. § 26-684(3) (1995).

While waiting for test results, an employer may suspend the employee without pay. Maine Rev. Stat. Ann. § 26-685(1) (1995). An employer may use a positive test result to discharge, discipline, refuse to hire, or reassign an employee. Maine Rev. Stat. Ann. § 26-685(2) (1995). After a positive result, an employer must provide the employee with up to six months of rehabilitation. *Id.*

All employers must submit their policies to the Department of Labor to be reviewed before implementation. Maine Rev. Stat. Ann. § 26-686 (1995).

Minnesota

Minnesota requires employers to have a written testing policy before they are allowed to drug test their employees. Minn. Stat. Ann. § 181.951(1)(b) (2005). The policy must include which employees may be tested, the circumstances under which a test can be requested, the right of an employee to refuse a test and the consequences for the refusal, any discipline that could result from a positive test, the right an employee has to explain a positive test or request a retest, and any other appeals available to the employees. Minn. Stat. Ann. § 181.952 (1987). Employers may randomly test their employees so long as the employee is either in a safety sensitive position or is a professional athlete and the athlete's collective bargaining agreement allows for such testing. Minn. Stat. Ann. § 181.951(1)(c) (2005). Employers may also test if they have reasonable suspicion that the employee is under the influence of drugs, has violated the employer's work rules regarding the use of drugs, has sustained a physical injury or has caused such in another employee, or caused a work related accident. *Id.*

Before any testing, the employer must provide to the employee a form to sign acknowledging that he/she has seen the employer's drug testing policy. Minn. Stat. Ann. § 181.953(6) (2005). After a positive test, an employee must be given notice of his/her right to explain the test result. *Id.* An employer cannot discipline an employee after a positive test unless the initial screening was verified by a confirmatory test and the employer has offered some type of rehabilitation or treatment. Minn. Stat. Ann. § 181.953 (2005).

Mississippi

Mississippi requires an employer to provide a written policy to its employees no fewer than 30 days before it can drug test any employees. Miss. Code § 71-7-3 (2004). The written policy must contain the same information as those in Minnesota and many other states listed above. *Id.* Like many other states, the policy should also be posted and made available to view in the workplace. *Id.* An employee may be requested to sign a form saying he/she has viewed the drug testing policy prior to any testing. *Id.*

Employers must elect to fall under the laws by posting and providing its employees with a written policy which explains the law. Miss. Code § 71-7-27 (2004). Employers do not have to follow these laws, but if they do not do so, they are not afforded the protection from liability from civil action from their tested employees. *Id.*

Employers may require drug testing as part of the application process, for reasonable suspicion, and "neutral selection." Miss. Code § 71-7-5 (2004). The statutes contain detailed explanations of the manner in which the testing can occur, including allowing the employee to explain any medications he/she may be taking, that the employer must notify the employee of a positive test within five working days of receiving the result, and the employee has ten working days after receiving a positive result to explain the results. *Id.*

An employer may not discharge an employee until after receiving confirmatory results, Miss. Code § 71-7-9 (2004), though the employer may temporarily suspend or transfer the

employee to another position after an initial positive test. Miss. Code § 71-7-13 (2004). A positive result may lead to a discharge for cause. Miss. Code § 71-7-9 (2004).

Montana

Like many other states, Montana requires the posting and distribution of a written policy to employees, but here it must be done sixty days before any testing. Mont. Code Ann. § 39-2-207 (2009). Further, the policy must include any criminal sanctions that a positive drug test may bring. *Id.* Before an employer may take action after a positive test, the results must be reviewed by a certified representative and the employee must be allowed to explain any positive result. *Id.* An employer may randomly test its employees if its testing policy includes an established date when all employees will be tested or an agreement with a third party to administer the random drug tests. Mont. Code Ann. § 39-2-208 (2009). An employer may also test an employee if it has "reason to suspect" that the use of drugs is inhibiting the ability of the employee to do his/her job or contributed to a work related accident. *Id.*

An employee must be presented with the report of any positive test and has the right to request an additional test. *Id.*

Nebraska

Nebraska requires a confirmatory test before an adverse employment action may commence. Neb. Rev. Stat. § 48-1903 (2000). Employers must detail the chain of custody of all specimens obtained. Neb. Rev. Stat. § 48-1905 (1988). An employee who refuses to submit to a drug test may be disciplined, including possible discharge. Neb. Rev. Stat. § 48-19010 (1988). Nebraska does not seem to require the posting or distribution of a drug testing policy prior to any employee testing.

North Carolina

The taking of samples in North Carolina should be done so in a manner to "preserve dignity," but also to prevent the substitution of samples by the person being tested. N.C. Gen. Stat. § 95-232 (2006). The person being examined has the right to order a retest of a confirmed positive sample. *Id.* The statute provides "that individuals should be protected from unreliable and inadequate examinations and screening for controlled substances." *Id.*

Oklahoma

Oklahoma has the "Standards for Workplace Drug and Alcohol Testing Act." Okla. Stat. Ann. § 40-551 (1993). "Drug or alcohol testing required by and conducted pursuant to federal law or regulation shall be exempt from the provisions of the Standards for Workplace Drug and Alcohol Testing Act and the rules promulgated pursuant thereto." Okla. Stat. Ann. § 40-553 (1993). Employers who elect under the statute to test employees may only do so in the following situations: applicant testing, reasonable suspicion, post-accident, random testing, scheduled periodic testing, and post-rehabilitation. Okla. Stat. Ann. § 40-554 (1993).

Before any testing, the employer must have adopted a written policy that is uniformly applied to the workforce, which will include: the employer's policy toward drug use, who may be tested, circumstances that may give rise to testing, what substances will be tested for, methods and procedures of testing, consequences of refusal to be tested, consequences of a positive test, the right of an employee to explain a positive test, the available appeals process, and the right to receive the testing reports. Okla. Stat. Ann. § 40-555 (1993). Employees must have at least 30 days notice before the implementation or change of the testing policy. *Id.* The policy should be distributed to each employee and posted in the workplace. *Id.* "Any drug or alcohol testing by an employer shall occur during or immediately after the regular work period of current employees and shall be deemed work time for purposes of compensation and benefits for current employees." *Id.*

Those obtaining the sample must be certified by the state health board. Okla. Stat. Ann. § 40-559 (1993). Employees tested should be given privacy during the test, which means they cannot be watched during a urinalysis. *Id.*

An employee may not be terminated before confirmation of a positive test, but may be temporarily suspended at that time. Okla. Stat. Ann. § 40-562 (1993).

Rhode Island

Rhode Island has a list of requirements that an employer must follow to require an employee to submit to a drug test as a condition of continued employment. R.I. Gen. Laws § 28-6.5-1 (2003). These requirements include reasonable suspicion the employee in his/her ability to perform work is impaired due to drug or alcohol use, and that the test be done in private.

Employees testing positive must be referred to a treatment specialist but not terminated from employment. The employee also has a reasonable opportunity to explain the results and may have the sample tested at an independent facility. *Id.*

South Carolina

South Carolina subscribes to the Drug Free Workplace Act for any employer wishing to contract with the state. S. Car. Code of Laws § 44-107 (1991). The rules are mirror those of Alabama and Idaho listed above.

Tennessee

Tennessee subscribes to the Drug Free Workplace Act for any employer wishing to contract with the state. Tenn. Code § 50-9-105 (2001). The rules are mirror those of Alabama and Idaho listed above.

Utah

"Any drug or alcohol testing by an employer shall occur during or immediately after the regular work period of current employees and shall be deemed work time for purposes of compensation and benefits for current employees." Utah Code § 34-38-5 (2001). An employer must have a written policy on drug testing distributed to employees and available for viewing before testing any employee. Utah Code § 34-38-7 (2001). An employer may test an employee for investigation of impairment, investigation of workplace accidents or theft, maintenance of safety, maintenance of productivity or quality of product. *Id.* After a positive test result, an employer may suspend, terminate, enroll in rehabilitation, "or other disciplinary measures in conformance with the employer's usual procedures, including any collective bargaining agreement." *Id.*

Vermont

An employer may not drug test its employees unless the employer has probable cause to test and the employer has an employee assistance program. 21 V.S.A. § 513 (1987). Further, an employer cannot terminate an employee after a positive test result if the employee has completed the employee assistance program. *Id.* However, the employer may suspend the employee during the time the employee is in the employee assistance program. *Id.* In order to test, certain other requirements must also be met, including: the test should be designed to only test for the presence of alcohol or drugs; the employer has previously distributed to all employees a written policy detailing what will happen in the event of a positive test; the procedures have been described in detail, including the timing of the test. 21 V.S.A. § 514 (1987).

Mr. RUSH. And the Chair thanks all of the witnesses for their very provocative and insightful testimony. The Chair recognizes himself for 5 minutes to question the witnesses.

One of the concerns raised by the Williams v. NFL decision is that it takes control of league performance-enhancing drug policies out of the hands of the league and the players, leaving their collectively bargained policies to the whims of State legislatures that may weaken these policies. And if this is the case, it is impossible, in my opinion, to see how these collectively bargained drug agreements can be deemed offensive.

My first question is, Mr. Smith, you represent the NFL players union and you brought this case to the courts. What is your view? Can the implications of the courts' decision in this case be resolved through the collective bargaining processes?

Mr. SMITH. Mr. Chairman, I do not believe that that is the case. As Mr. Feldman pointed out, the StarCaps decision from the Eighth Circuit, just to be absolutely clear, did not conclude that the NFL in our joint drug policy was suspended because of State law.

The other point that Mr. Feldman made absolutely clear is also true. That case is not yet over. So it is not a situation where anyone has ruled that our drug policy is now null and void. That has not happened.

The other fact that is absolutely clear, as he has taken a look at the issue, as I as not only the executive director, but still a lawyer who every now and then is consumed by arcane legal principles, when we looked at the issues of what States could pose problems to this drug policy, there were three—Minnesota, Maryland and North Carolina.

When you look at those three States, the three issues that could be problems if the case concluded in a way that was adverse to the policy if that happened, the three issues—one, that an employee would have the right to explain a positive test—that is one hurdle that could be placed in front of our NFL policy; the second hurdle deals with the certification of the labs that conduct the test; and the third hurdle is that it would have to change the testing procedures to allow for testing of masking agents.

As we look at what could happen, if this case proceeded to the worst possibility, three States would be affected and those are the three primary hurdles that would need to be addressed.

So as I look at a fix to the problem, I see the collective bargaining process as the best way not only to fix the problems of preemption that we now know to have popped up in our program, because we didn't know before; but also if we did have those problems in those three States, those three things can be specifically addressed in the collective bargaining process. And, no, I do not believe it would subject our collective bargaining agreement to the individual judgments of a State legislature.

Mr. RUSH. Mr. Goodell, would you respond to Mr. Smith's testimony, please?

Mr. GOODELL. Yes, I would appreciate the opportunity.

Just on the final point that has been raised here is that this may be a potential problem. We have gone through, in the National Football League, months of litigation and uncertainty on this issue. In addition, the players continue to play on the field during this

period of time; and as many of you discussed early on, what message is that sending to the young people that look up to the National Football League?

In addition, I—as you may know, I had to make a decision recently where the two Minnesota Viking players were prohibited from being suspended under our policy so they could pursue the State claim there are two other players at the New Orleans Saints that were not under that restriction and could have been suspended. On the basis of fairness and making sure that our policy is applied on a uniform basis, I did not think it was appropriate to suspend those two Saints players. There is a competitive issue, there are fairness issues, and there are uniformity issues; and I did not do that. And I believe it was the right decision.

But it has impacted the National Football League right now in our drug program, and I want to try to make this very clear to this committee. This is not a potential problem, it is an existing problem; and all of us have to deal with this now. We cannot wait.

The last issue and a couple of points that were raised here that we should adhere to our collective bargaining, I agree we should adhere to our collective bargaining. The union went outside of our collective bargaining and challenged our program. Not once, but twice we are told by Federal courts that there is no merit to their claims.

The other issue is, this isn't about steroids in this specific case. This is about another drug that is prohibited under our policy because of two reasons. One, it is a masking agent for performance-enhancing drugs, a masking agent. That means that potentially someone could be taking this drug to cover up the use of a performance-enhancing drug. And I am not saying that happened in this case. I don't know.

The second issue is that players were specifically warned that weight loss products can be tainted. They are unregulated, and products can be tainted and put in—products that are prohibited by our program can be put into these products. What happens unfortunately—and we saw this tragically with a Minnesota Viking player, ironically, that died on the practice field from dehydration. Weight loss products can be very dangerous if not properly supervised, particularly when they are competing at the level that they are competing on.

So there is risk right now. This is not a potential problem. This is a health problem now, and we believe it should be addressed now.

Mr. RUSH. The Chair's time has been used up.

The Chair recognizes the ranking member, Mr. Radanovich, for 5 minutes.

Mr. RADANOVICH. Thank you, Chairman Rush. And I want to thank the panel for being here for questions today.

Mr. Smith, I do have a question for you. And I did see you offer a letter for the record; so just to clarify, it is my understanding that Commissioner Goodell testified that he sent you a letter in June asking you to support the league in your collectively bargained drug program against challenges under the Minnesota State law.

According to the Commissioner, you have not responded to the letter. Is that correct? And if so, why not?

Mr. SMITH. No, that is not correct.

There was a request, after the union filed their initial challenge in the Eighth Circuit, which challenged the procedure and the fairness of the applicability of the process. The Williamses retained their own lawyers. They filed a State law claim. It was during that claim that, for the first time, this issue of State preemption was raised by the individual lawyer on behalf of those players.

What Mr. Goodell asked the union to do was to take a position against its players where they had raised the applicability of the Minnesota State drug-testing statute. We decided not to take that position against our own players.

So I believe that is the issue to what you are referring to. The letter that I have is the joint statement issued by myself and Roger, saying that the NFL's drug testing policy is still in effect, players will still be disciplined.

And to follow up on——

Mr. RADANOVICH. That is not happening?

Mr. SMITH. It is. Players are currently being tested. Players are currently being tested. Players are proceeding through the adjudication process. That process of this drug policy, Mr. Congressman, has not stopped. It has not stopped at all.

Mr. RADANOVICH. Mr. Goodell.

Mr. GOODELL. Yes.

Well, I guess I ask a question: What happens if another player from Minnesota is detected to have violated our policy? My assumption is they would fall and go under the same claims that the Williamses did.

Mr. RADANOVICH. And they would still be playing?

Mr. GOODELL. I believe that is correct.

Second of all, in the letter that I wrote to De—and I am not a lawyer, so I will profess to that up front. But it is specifically asks the plaintiff, NFL's Players Association, that they submit an amicus brief in support of the league's position on the Williams appeal on the applicability of State law. This was after the trial judge ruled in favor of the NFL and said that we followed the procedures by the policy, and it was before the Federal appeals court had made the decision in August.

Mr. RADANOVICH. Thank you.

Mr. Smith, what is your response to the fact that, as Mr. Goodell had mentioned, players were warned that the substance may not appear on the label of some of these products, but the warning was there that that may not be an excuse?

Mr. SMITH. Sure. I would love to answer that question. I agree with Roger on one thing. The players' safety and their health is important. And when we proceeded through——

Mr. RADANOVICH. If you could be specific to the question, and that is that you were warned that some of those substances may not appear on the label, but that really is not an excuse.

Mr. SMITH. They are warned, and they are warned that what they take and put in their body they would be held responsible for.

What our policy also includes is to have a doctor who is an independent administrator make a decision about what to do. And

when I found out that that independent administrator was told by a league lawyer to change his decision, that is a problem. When I am told that a lawyer is representing and advising a team about this issue on one day, and then turns around and now becomes the judge, jury and decision-maker for the players in the same issue, that is a problem.

Mr. RADANOVICH. Thank you, Mr. Smith. Thank you. I don't have a lot of time.

I want to ask Mr. Tygart on that and your response to these exceptions; and then perhaps Mr. Goodell, if I can, after that.

Mr. TYGART. And specifically on the warnings?

Mr. RADANOVICH. Yes, to the fact that there is warning.

Mr. TYGART. Yes, I think all players; certainly within the NFL's program, what has been evidenced through the StarCaps case, the players were generally warned. And that is the approach that most leagues take.

We all know that the industry is highly unregulated and there is the potential for dangerous drugs showing up in these dietary supplements, and players are on notice of that and they assume the risk if they take those.

Mr. RADANOVICH. Mr. Goodell, could you respond to that plus the physicians weighing in on this and changing decisions?

Mr. GOODELL. Yes. If I can just go back and just correct one thing on the record here.

Our lawyers did not tell the independent doctor to change his decision. They told him to enforce the program. That is what they are supposed to do: enforce the program. That is first.

Second, on your issue about warnings, even in the lengthy hearings that took place in the case with these five players—one player has since retired—each of those players recognized that they had been warned, that they were aware of the policy on supplements and that they could be tainted. They were fully cognizant of all of that; and in fact, the two players in Minnesota have a specifically negotiated provision in their contracts about weight loss that would result in a bonus if they made their weight loss.

So they were fully aware of the fact that they were taking something the team would not approve.

Mr. RADANOVICH. Thank you very much, Mr. Chairman. Thank you very much.

Mr. RUSH. The Chair now recognizes the gentleman from Louisiana, Mr. Scalise, for 5 minutes.

Mr. SCALISE. Thank you, Mr. Chairman. There are a few things I am trying to get a handle on.

Mr. Smith, if I can ask you, first of all, on the StarCaps case—and I am going to ask Mr. Goodell this, too, because there does seem to be a little bit of differentiation between what you are saying and what he is saying.

But, first of all, in your testimony you said that—you made reference to players—I will quote—"players who unknowingly took StarCaps." Do you know of any players who took StarCaps without knowing it was StarCaps? How can you unknowingly take StarCaps?

Mr. SMITH. It was unknowingly taking something that contained a banned substance.

Mr. SCALISE. They knew they were taking StarCaps?

Mr. SMITH. Correct.

Mr. SCALISE. They knew they were taking StarCaps. You are just questioning whether or not they knew the substance was——

Mr. SMITH. No, I am not questioning anything. I am saying, they did not know that it contained bumetanide.

What we do know is that the league knew that StarCaps had bumetanide in it. What we also know, after testimony under oath, is that even though the league knew that it contained that substance, they did not tell the hotline, and the doctor who knew never told the players.

Mr. SCALISE. And I am going to ask Mr. Goodell what the league knew because you made specific references to the league attorneys knowing this and withholding it. But earlier you also said—and both of you, I think, agreed on the policy—that a player is responsible for what goes into their body.

So whether or not the league knew it—maybe the league didn't know. If the league did or didn't know it, and it did contain substances that are banned under the policy that ultimately, if your earlier statement, agreement by both parties, is that the player is responsible for what goes into their body, how does that mesh with maybe they took it, but they didn't know something banned was in it?

Mr. SMITH. I think the difference would be in what we consider to be not only absolute fairness but procedural fairness.

This should not a "gotcha" game.

When a doctor who advises players about their own safety knows that there is something in a pill that could hurt them—Mr. Goodell referred to Korey Stringer and the diuretics. So we lost a Minnesota player because of among other things, massive loss in body water.

Mr. SMITH. So it does seem to me that when you have a doctor who, A, has a Hippocratic oath to first do no harm but also to help, when you have that doctor who is also the independent administrator of that program to make those decisions and that doctor knows, hey, there is something in this pill that could hurt people, the one thing that I would hope would happen is that doctor telling people that that is in it. And we know under testimony that that doctor knew. We also know under testimony that the league lawyer knew.

So the challenge to those suspensions recognizes that, yes, players are responsible for what occurs in their bodies, but, at the same time, all of us would also agree that when you do have a collectively bargained drug program, the one thing that is implicit in that program is fairness. And that is why those suspensions were challenged, not only on those facts, about the facts that eight people who had tested positive for bumetinide previous to the Williams players were not punished.

So when someone steps in and changes the decisional framework, changes that discretionary point from not punishing somebody on day one to punishing them later on, that's when the players raise that claim as a violation.

Mr. SCALISE. And I know my time is limited. Mr. Goodell, if you could——

Mr. GOODELL. Yes, let me just go back again, because the chairman said at the outset of this hearing that we weren't going to litigate something that's already been litigated.

As I stated before, the claims that DeMaurice are making here are exactly the points raised in their litigation. The trial court rejected them, and the appeals court rejected them. That is not why we're here today. We're here today to talk about the difference in Minnesota State law versus what is going to essentially gut our performance-enhancing program. That's the core issue.

The second issue is we make this extremely clear to our players at every opportunity supplements are unregulated and they can be tainted with products that are prohibited by our drug program. You are responsible for what's in your body. We do not do product-by-product warnings. As you saw, that does not do product-by-product warnings.

This is something we have done collectively in our program. If we want to change the program, I am more than happy to sit down with our Players Association and try to figure out how we can strengthen our program. We have done that consistently since I have been Commissioner and even prior to my becoming Commissioner.

Mr. RUSH. I'm sorry——

Mr. SCALISE. I yield back to the Chair.

Mr. RUSH. The Chair now recognizes the gentleman from Georgia for 5 minutes.

Dr. GINGREY. Mr. Chairman, thank you.

I will direct my first question, Mr. Smith, to you.

Mr. Smith, your predecessor, Gene Upshaw, made the following forthright statement before the Senate Commerce Committee in 2005, and I quote, "We think we're doing a very good job in the National Football League. We do not wait for anyone else to act. We want it off the field because our players believe that anyone who uses drugs are really cheaters. There is no room for cheaters in sports. It also affects the integrity of the game and integrity of the contest. We do not want cheaters in our sport and will do whatever we have to do to keep it out. We have had unanimous support from players on this issue." That ends the quote.

The result of the Minnesota litigation has been to stay the suspension of the players who did test positive. Despite the fact they cheated, they remain on the field and you intervene to support them. With your actions to intervene, is it incorrect to state the Players Association has departed from its previous position of unanimous support to get cheaters off the field as stated by Mr. Upshaw?

Mr. SMITH. Mr. Congressman, that quote by Mr. Upshaw—I can't remember it verbatim, but if you wanted to cross out or add my name to that quote, you can. I stand by everything that he said.

At the same time, there isn't a day, not a day, where Mr. Upshaw also didn't believe in the fairness of the applicability of that same program. When he spoke about cheaters, he believed it. So do I. When he spoke about the support of our program, so do I.

On September—I'm sorry, September of 2009, I wrote and agreed with Roger, it is important for all players to understand that the policy on anabolic steroids remains in place. I stand by that. We

did not depart from that at all. What we challenged, we challenged the health and safety issues as related to these players. We challenged the fairness of the applicability of that collectively bargained program.

Dr. GINGREY. Mr. Smith, let me ask you this question then. Are you concerned about the signal sent to young athletes when the professional players and their union challenge positive drug tests?

Mr. SMITH. I am only concerned if anyone believes that I don't take this seriously. I am concerned if they believe that we don't support our system. It is why on September of 2009 I agreed with the Commissioner and put out a statement that I support our program.

Let's be clear. Our program continues. People are currently tested. People are being adjudicated through the system. What I will challenge is if that system, so collectively bargained, is applied to them in an unfair manner.

Dr. GINGREY. Let me continue with you, Mr. Smith, and I'm not picking on you.

Mr. SMITH. No, it is all right.

Dr. GINGREY. I wish I had enough time so I could also ask Mr. Goodell a line of questioning, but I need to continue this. Do you support, then, the NFL's efforts to have the 8th circuit's decision overturned? And, if so, why haven't you filed a brief? And if not, why not?

Mr. SMITH. That case, we are no longer in—we are not a party to that case. Roger indicated that the court ruled against us in our case. The Williamses have separate lawyers that have filed another case. We are not parties to it.

What we have agreed to support is the existence and continuance of our policy. I believe in our policy, but I also believe that we have to get it right. If we're in a situation where a doctor from the league knows that there is a substance in a pill and that doctor can make a decision not to tell our players, that is something we have to get fixed.

Dr. GINGREY. Two more quick points. Do you support the Williams suit in the Minnesota State court?

Mr. SMITH. I support—I support their right to pursue fairness. And what they are have claimed is they have claimed that the Minnesota State law was violated with respect to the league and the NFLPA's drug-testing policy. Interestingly, the Williamses lawyer in that case has not identified what particular issues under the Michigan—I'm sorry, Minnesota State law that were violated, so I haven't seen that yet.

Dr. GINGREY. Mr. Chairman, I know I'm about to run out of time, but there is one last point I want to make, and I'll do it quickly. Thank you so much.

Mr. Smith, this will be my last question. Your predecessor, Mr. Upshaw, testified less than 2 years ago that a suspended player cannot sue in an effort to overturn a suspension. Since then, not only have players sued in their individual capacity, but the union has as well. Was Mr. Upshaw incorrect in his testimony before this committee several years ago?

Mr. SMITH. Mr. Upshaw was a spirited leader of a great union. My guess is if that he knew that this policy was applied in an un-

fair way, he would seek any and all avenues to make sure that it was applied in a fair way.

Dr. GINGREY. Mr. Chairman, thank you.

Mr. RUSH. The Chair thanks the gentleman, and the Chair is willing to entertain a second round for a brief period of time. There are some questions that I have that I want to ask.

Frankly, I would like to ask Mr. Goodell and Mr. Smith, Mr. Tygart, Professor Feldman and Dr. Standen, I'll ask you this question. I don't want to get too involved, too deeply involved in the details of the suspension of the two Minnesota Viking players. Our concern in this hearing, as I stated earlier, is the broader legal question of preemption and that was raised as a point as the case went through the courts.

One detail of the StarCaps case I would like to discuss is the question of arbitration and appeals. When the Williams initially appealed their positive test, it was not heard by a neutral official. And under NFL rules it was heard by a representative of the league.

Mr. Goodell, in retrospect, would it have made for sense for the NFL policy to require a neutral arbiter? Could that help avoiding this legal morass that we're involved in?

And I would like to ask again your comments on neutral arbitration, and I would like to ask Mr. Smith and others also the same question.

Mr. GOODELL. Yes, this is not a decision that I made. This is a decision that came out of our collective bargaining. The arbitration system that we have was collectively bargained. It was agreed to roughly 25 years ago. It was agreed to multiple times as part of extensions of our collective bargaining agreement during that period of time. And I would submit to you that probably no arbitration system is perfect, but we have a collective interest in making sure that our policy has got integrity and credibility, and that's how it was enforced, and that's how we have stood by our program, collectively with our union.

I would take issue with Mr. Smith about Gene Upshaw. As the Congressman points out, he has made it very clear here, players cannot sue against this agreement. Yes, he fought hard for his players, very hard for his players, and he respected them, but he respected the system.

Mr. RUSH. I want to move forward. Mr. Smith, would you respond on the issue of neutral arbitration?

Mr. SMITH. Sure. Baseball has a neutral arbitrator, basketball, neutral arbitrator. What Mr.—Mr. Goodell is right. This is a collectively bargained process. But where a league lawyer is advising the Minnesota Vikings on one day about the steroid issue and then on the next day sits in judgment of the players, that was a process that was challenged well before I became executive director.

Where we have, according to the court's ruling, a situation where a league lawyer informed the so-called independent administrator sometime in late 2006 or sometime in early 2007 that if a player tested positive for a banned substance, then assuming he had no therapeutic reason the player must be referred to the NFL for discipline. That was a change from what that independent administrator had done prior to that time. So to get to the point of your

issue, we collectively bargained a process that should have been fairly implemented.

When we found out——

Mr. RUSH. I do understand exactly what you're saying. But my point, and I ask Mr. Weiner this, going forward, is there a role for neutral arbiter, a neutral arbitration in these types of negotiations?

Mr. WEINER. Absolutely, yes. Our program has always incorporated a neutral arbitrator as a fact finder. And I guess I would put it this simply.

I think everybody at this table stands united against the use of performance-enhancing drugs, but you can be against the use of performance-enhancing drugs and still be in favor of fairness. And our view has always been that fairness requires adjudication of these matters by a neutral.

Mr. RUSH. Mr. Tygart.

Mr. TYGART. Yes, we'd add that. And we agree, obviously, due process is an important aspect. Because there are several different rights of athletes that you are dealing with through the arbitration process, and we do have external arbitration process as the dispute resolution over doping cases in the Olympic movement.

But the rights are of the accused. So is there the opportunity to have notice of the charge, cross-examine witnesses, have a well-written, reasoned decision? But there is also the rights of all the other clean athletes out there who have to be equally balanced in this analysis. Ours goes to independent arbitration, the NFL's obviously has gone to the Commissioner as designee, and you see the result of that in this case.

Mr. RUSH. Professor Feldman.

Mr. FELDMAN. I would agree. I think there is no question that the best result is to have a neutral arbitrator. You don't always get the best result as a result of a collective bargaining agreement. You get a compromise. I think here the compromise was not a neutral arbitrator. I think they would be better off with a neutral arbitrator, but that's for the parties to decide. And I don't think anyone here is in favor of interfering with the collective bargaining process.

Mr. RUSH. Professor Standen.

Mr. STANDEN. Yes. First, I would state that whether there was a neutral arbitrator or not in this case would not have changed the results in the 8th Circuit Court of Appeals. So it wouldn't matter in that regard. But I can understand why the parties would agree to have someone inside the Commissioner's office to arbitrate the claims. The insider knows the story better, knows the industry. And so it can make sense for parties sometimes to have arbitration done by a non-neutral, non-outside party. Whether they do that or not of course is up to the parties.

Mr. RUSH. I want—Mr. Goodell, we are at a point of impasse, it seems. I hope not, but it is pretty obvious that there is some definite lines of demarcation that exist, and I'm not sure how permanent they are. What do you see going forward? How do you see—are you going to wait until the court process and the litigation process is over? How do you see the future?

Mr. GOODELL. No, we are going to continue to defend, as I said in my opening statement, our program in the Minnesota State court. We will defend that vigorously, as I said in my opening.

In addition, just as recently as 2 weeks ago, we made proposals to the union about how to strengthen our program, our drug program. So we will continue with the collective bargaining process.

The issue here though, Mr. Chairman, as you properly brought out and was just raised, this can't be solved by the collective bargaining process. This issue was created by the NFLPA, it is exacerbated by the CBA, and now they don't know how to fix it.

The problem is this has gotten beyond the control of the two parties to negotiate in collective bargaining. That is why your committee is looking at this; and that is why we believe some narrow, tailored legislation would be appropriate.

Mr. RUSH. The Chair now recognizes the gentleman from Georgia.

Dr. GINGREY. Commissioner Goodell, in your testimony, you summarize the history of the NFL's policy on performance-enhancing substances and the partnership the league has had with the NFL Players Association on the issue since the early 1990s. Unfortunately, as you outlined, the case involving two Minnesota Vikings testing positive for the masking agent bumetinide—I'm the only doctor up here, and you guys all can pronounce it correctly, and I can't. Hopefully, that was close enough. Did that masking agent——

Let me start over. Unfortunately, as you outlined, the case involving two Minnesota Vikings testing positive for the mask agent undermines the ability of the league to enforce the very policy that was negotiated with the NFL and the Players Association. We have already seen ramifications of this due to the fact that the players from the New Orleans Saints have not been formally suspended for testing positive for the same masking agent, simply because Louisiana has different laws in Minnesota. Because the NFL has not been able to carry out the suspension of these players, the Saints players, are there other instances to date to which you can point where the outcome of this StarCaps case hinges on other suspensions or are there examples where the league is now hesitant to carry out the drug-testing policy because of purported inequitable treatment?

Mr. GOODELL. Well, not specifically right now. But, as you point out, you cannot have an effective, credible program for anti-steroid use and have the integrity in that program if players are subject by different States to different standards. You just cannot do it.

And that is the issue that is at hand today. We have to have the ability to enforce a program across all 50 States, allow every player in the NFL and other sports to be subject to the same fairness, the same standards, the same policy and, if necessary, the same discipline. That is at the core of what's going on here, and that is why the letter that DeMaurice refers to I asked DeMaurice if he would sign with me, because of the doubt and the uncertainty that presented by the StarCaps case.

It created doubt in the player's mind. Do we have a program? If I'm in Minnesota, am I subject to the same policy?

And they will probably take that defense. If a player in Minnesota is caught, whether it is in baseball or football or another sport, we will probably come in and try to use the State laws of Minnesota to protect them. That is not managing and adhering to a policy in a consistent and uniform businesses.

Dr. GINGREY. Real quickly, let me ask you a series of questions.

Did the Players Association agree to the drug policy program, including the process for appeal?

Mr. GOODELL. Absolutely. Multiple, multiple times, Congressman.

Dr. GINGREY. Has the Players Association ever challenged a suspension before?

Mr. GOODELL. In our appeals process, yes; not outside of the appeals process that I am aware of.

Dr. GINGREY. Do you know why they challenged this one?

Mr. GOODELL. I take Mr. Smith at his word.

Dr. GINGREY. Can State laws that offer employees the right to explain positive test results indicating they took a banned substance effectively give every player a free pass to take banned substances if the NFL drug policy is not upheld?

Mr. GOODELL. I know this, Congressman. What we'd be doing is deserting the principle that DeMaurice said at the beginning, and I stated, that every player is responsible for what's in their body. If we allow people the excuse, you will inherently damage the credibility of your program.

And I use an example. When you're talking to your son about drinking and driving, you have to give that individual, you are responsible for what's in your body. You may not drink beer, you may not drink vodka and soda, but if you drink punch and there's some type of liquor in there and you're driving, you've violated the law. You're responsible for that, and you have to recognize that principle.

And I do not want to desert that principle, and I don't believe anybody up here who wants to have an effective program should desert that principle.

Dr. GINGREY. Does the Minnesota State law recognize WADA, the World Anti-Doping Agency, certified labs outside Minnesota for the purpose of meeting their State requirements?

Mr. GOODELL. I don't believe they do, Congressman.

Dr. GINGREY. Mr. Smith, do you know the answer to that?

Mr. SMITH. I don't know.

Dr. GINGREY. Mr. Chairman, I thank you; and I yield back at this point.

Mr. RUSH. The Chair has a couple of other issues. I want to say this, and I want to say this with all sincerity. We are very much concerned, as you know, about this drug policy and any violations of it. We are concerned about the safety of your players, the safety of America's youth. We are concerned about fairness on the filed and in other arenas.

It certainly is within the realm of our responsibilities to come up with legislation to address this problem, but it would be something that we would do only as a last resort. We're not anxious to get involved legislatively here. We really want to see the parties work

this out and try to come up with some kind of resolution to this particular issue.

The question that I have is, Mr. Goodell, have you all gone to the Minnesota legislature and asked them to change the State law? Have you all used that as an option?

Mr. GOODELL. We can certainly do that. It doesn't prevent another State from changing their law and gutting the program in the same fashion. So I don't believe that's a fix. It may fix this hole, but there will be two or three others that will develop on the side.

Mr. RUSH. It seems as though the Players Association and the League, their lobby heads——

Professor Feldman, I watched your body language as you have listened to the testimony, and it seems to me that you might have something to say that would be able to help us get out of this dilemma that we're in. Can you offer this committee and your fellow witnesses any insight into how do we resolve this without Federal intervention or Federal legislation?

Mr. FELDMAN. First, I'll have to be careful with my body language in the future, but I think that, whether we call it a potential problem or a small current problem, it is still a narrow problem. We have the Minnesota laws. I think it is easy to make an argument that those laws do not apply to the NFL's performance-enhancing drug-testing policy. I think it is easy. I think you can win that case in State court. If you lose, I think you can make a very persuasive argument that the State legislature should change the laws.

Now the Commissioner just said, well, that is just doing it one State at a time and then another State can pass a law and another State can pass a law. Well, looking at the actual reality, there are only two other States right now, as has been mentioned, Maryland and North Carolina, that have State statutes that might conflict.

In addition to those two States, plus Minnesota, only two other States even have mandatory drug-testing regulations that would impact the NFL. Only five have regulations whatsoever. Only three of those conflict.

It may be the case that down the road some other States may add regulations and those regulations may conflict with the NFL, but there is no reason to believe they will. There is no reason to believe that any of the current State legislation is intended to deal with the NFL. So there is no reason to believe that any States will come up with new legislation.

So I think the better fix here is the narrow fix. Go to the Minnesota State legislature and say, your laws are creating this potential problem, clarify your laws, make it clear that they are not intended to apply to the NFL. That's exactly what the Louisiana statute says. I don't see why other statutes couldn't do it.

Someone had mentioned earlier the choices, either Minnesota modifies their laws or professional teams thinking about leaving the State. I think there is no question what the Minnesota legislature would do. And it is not forcing them to do anything. It is just saying, modify your law, make it clear. You want to protect your employees from recreational drug testing, do that. Just don't interfere with what the professional sports leagues are doing.

Mr. RUSH. I want to thank all of witnesses for your interest, your intensity and the time that you have given this committee. I really look forward to working with you and this committee looks forward would working with you to try to resolve this issue.

I believe that if, in fact, this became more of a one, two or three matter, then the Congress would rush—no pun intended—to solve the problem and to provide for some type of legislative remedy, some type of preemption. But, right now, I think we're reluctant to do that. But, at the same time, we are concerned about the effects of this, and we want to keep a wary eye on this procedure and on this process, and we want to work with the Players Association and with the NFL to try to encourage you to come up with a remedy to this problem and come up with it fairly quickly. This is not an issue that we can take a lot of time on, because it sends—and is currently sending—the wrong message to far too many people.

I have to commend the NFL for coming to the Congress and asking us to intervene. Mr. Goodell, when you were in my office, you asked us to intervene. I think that was a proper and responsible thing to do.

Again, we will be looking at this issue. If legislation is necessary, we love to write laws, so we won't hesitate to write them, but I think we need to go slow on this. And I'm going to ask—simply request that the Players Association and the NFL you all get together and try to work this thing out, if you possibly can.

You don't want to have 435 Members of Congress writing a law that will have in any way some immediate conduct and effect on your players. Because you never can tell. We might come up with some laws that might prohibit—put a ceiling on salaries. You don't want us to get involved in this. You can't tell what Members of Congress will ultimately do once you open up this Pandora's box.

So I just would ask that you all try to work this thing out. Ask—what's his name? Rodney—ask Rodney King for some advice. Can't we all get along?

Thank you so very much. This committee stands adjourned.

[Whereupon, at 2:28 p.m., the committee was adjourned.]

[Material submitted for inclusion in the record follows:]

Congressman Gene Green
House Committee on Energy and Commerce
Subcommittee on Commerce, Trade, and Consumer Protection
"The NFL StarCaps Case: Are Sports' Anti-Doping Programs at a Legal Crossroads?"
November 3, 2009

Mr. Chairman, I want to thank you for holding this hearing on anti-doping efforts in professional sports. Addressing this issue is just as important as looking at any other health, or substance abuse issues that we face as a nation, and particularly one that affects so many of our youth.

We are currently in the middle of the National Football League season, as well as the Major League Baseball World Series featuring one of the best, and highest paid players in the League, Alex Rodriguez, who earlier this year admitted using steroids.

Now, less than a year after that admission, he is starring in one of the largest sporting events in the world.

If we don't address this problem, and hold individuals accountable for use of steroids and other performance enhancing drugs, we might as well be condoning these actions for our youth.

The focus of today's hearing is the StarCaps Case, and to look more broadly at the implications state laws have on the enforcement of collectively-bargained substance abuse policies in professional sports. I look forward to hearing from today's witnesses about how to best address this.

Professional athletes who have agreed to the same collectively-bargained labor agreement, with the same substance abuse

provisions should be held to the same standards regardless of which state their franchise is in.

The StarCaps case highlighted a problem that needs clarifying and potentially a legislative fix.

There is plenty of background on the case in the record, so I won't go into details, but the case essentially backed the NFL Commissioner into a corner – should he uphold the League's substance abuse policy, albeit, unfairly, by only suspending two players who played for a franchise in a state that didn't offer the same protections as the Minnesota players?

The standards should be the same across the League, regardless of which state the franchise is in, and the players, and their representative association should abide by what is negotiated in their contract. If they want to change the standards, that should come up when the contract is renegotiated, not by weakening the current standards, for some teams, based on state laws.

Mr. Chairman, I again want to thank you for holding this hearing today. It is an important issue, for fairness, and for the precedent it sets for sports fans across this country, particularly our youth.

I look forward to hearing from our witnesses today for their thoughts on what Congressional action may be necessary to strengthen their substance abuse policy and enforcement efforts.

HOUSE COMMITTEE ON ENERGY AND COMMERCE
SUBCOMMITTEE ON COMMERCE, TRADE, AND CONSUMER PROTECTION
HEARING: THE NFL STARCAPS CASE: ARE SPORTS' ANTI-DOPING PROGRAMS AT A LEGAL CROSSROADS?
NOVEMBER 3, 2009

CONGRESSMAN G. K. BUTTERFIELD
OPENING STATEMENT

Mr. Chairman, thank you for holding this hearing on the use of performance enhancing drugs by professional athletes. While we can all agree that doping has no place in sports at any level, the sad reality is that this continues to happen at a frequency that would surprise many people.

Even more upsetting is the recent study that suggests some 200,000 high school students used performance-enhancing drugs in 2008. It is painfully clear that the actions of professional sports stars – the larger-than-life people our children look up to and

emulate – directly affect young people and influence their decision making.

The four major American professional sports leagues now have programs in place to deter the use of performance enhancing drugs. Unfortunately, some of these programs and their punishments directly conflict with existing state laws.

Through their individual collective bargaining agreements with the various leagues, players are made aware of the banned substances and the consequences for their use. However, because some states have labor laws that regulate the severity of the punishment for testing positive for banned substances, some players

who test positive will be more adversely affected than others. While I agree that these state laws should not give a competitive advantage to one player or team over the other, as a former state supreme court judge, I am hesitant to suggest that federal regulations need to be created that would preempt the states without thorough and thoughtful debate.

With that being said, it is clear that substantive changes are necessary to fairly regulate disciplinary actions with respect to the use of banned substances by professional sports players. I hope that the leagues and player's associations are able to come to a fair and

amicable agreement on how to proceed without Congressional action.

I am eager to hear testimony from our witnesses and look forward to working with them and my colleagues should the Committee seek to draft new regulations.

Thank you. I yield back the balance of my time.

Statement of the Honorable Joe Barton
Ranking Member, Committee on Energy & Commerce
November 3, 2009
Subcommittee on Commerce, Trade, and Consumer Protection hearing on
"The NFL StarCaps Case: Are Sports' Anti-Doping Programs At A Legal Crossroads?"

Thank you for calling this hearing, Mr. Chairman. This committee has history of bipartisan oversight on issues related to drug use by U.S. athletes, and I suspect that today's hearing will reaffirm that we all believe that drugs are bad. Whether it is illegal drugs, drugs that fall into the gray areas of "performance-enhancing drugs," or drugs that mask the use other of drugs, it runs afoul of our interest in ensuring public health.

In recent years we have seen giant, positive steps forward in drug policy in professional sports. We have all heard the adage "sunshine is the best disinfectant," and I would like to think that the Congressional interest in this issue has been partially responsible for these positive changes.

Performance enhancing drugs have many negative consequences. From a health angle, their use is detrimental to an athlete's health and welfare. They are easy to abuse and attractive to athletes ranging from someone teetering on the cusp of either a mediocre or a great career, to an older athlete looking to prolong a career, or a fringe athlete just trying to stay in the game. And the use of these substances trickles down to college athletes trying to improve their draft prospects, and to high school athletes vying for a sports scholarship with a strong college program. Finally, the use of these substances can obviously also lead to an unfair competitive advantage for teams with players using them.

Today's hearing will also touch on the issue of preemption. In Minnesota we have a situation where a state law relating to drug testing has

been found to effectively trump a collective bargaining agreement that included a zero tolerance policy for drug use.

The purpose of the State law was to protect an employee from unfair disciplinary action as a result of drug testing. I am not a State legislator in Minnesota, but I can't imagine any of those lawmakers foresaw the perverse outcome of their employee rights law trumping a zero tolerance drug policy in professional football – a policy designed to protect the health of athletes and keep the competitive playing field level. Not only does this precedent threaten the health and safety of the players who take the drugs and the other players who face off with them every Sunday, but it potentially creates a competitive disadvantage for those who play by the rules: the players of some States can get a "get out of jail free" card for taking a banned substance while another player caught with the same substance sits on the sidelines without pay for half a season.

We're here today to discuss whether legislation is necessary to achieve the intent of Congress to ensure that performance enhancing drugs will not be tolerated in the sports world. They are dangerous substances that can affect the well being of professional athletes; their use by professional athletes can encourage the use by college and high school students; and they can create an unfair competitive advantage. Any and all of these results are unacceptable. I look forward to hearing from our distinguished witnesses today to hear their concerns on this issue, and I look forward to taking their input and working with both Chairman Rush and Chairman Waxman as we move forward.

agreed to by both players and management, may be erased. That is not a result any of us want to see.

Mr. Chairman, I am very interested to hear the perspectives of the witnesses today and look forward to working with you on this issue.

I yield back.

