

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

Before the
United States Senate Committee on the Judiciary

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On behalf of the National Football League

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

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

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

I. Sports Leagues in the Entertainment Marketplace

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

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

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

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

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

II. The NFL's Television Policies

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

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

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

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

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

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

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

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

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

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

III. The NFL's Blackout Policy

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

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

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

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

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

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

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

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

IV. Television Policy and the 1961 Statute

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

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

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

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

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

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

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

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

V. The FANS Act

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

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

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

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

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

Conclusion

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