

TESTIMONY OF KEVIN MAWAE, PRESIDENT NATIONAL FOOTBALL LEAGUE PLAYERS ASSOCIATION
BEFORE THE COMMITTEE ON THE JUDICIARY, SUBCOMMITTEE ON COURTS AND COMPETITION POLICY

UNITED STATES HOUSE OF REPRESENTATIVES

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

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

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

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

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

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

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

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

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

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

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

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

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