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RPTS DEAN

DCMN BURRELL

HEARING ON "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, D.C.

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.

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.

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.

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 professional 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.

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.

The Chairman. 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.

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 seen 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 Saints 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. -- which has given millions 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.

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

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.

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 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.]

RPTS KESTERSON

DCMN MAYER

[12:55 p.m.]

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 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 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:]

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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:]

***** COMMITTEE INSERT *****

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:]

***** INSERT 2-2 *****

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 performance 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:]

***** COMMITTEE INSERT *****

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:]

***** INSERT 2-3 *****

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. Okay?

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:]

***** INSERT 2-4 *****

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:]

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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 cliché, 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:]

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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 be 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:]

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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 am 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. Yeah, 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.

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[1:56 p.m.]

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 unfair 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. Yeah, 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 field 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.]