No. 21-1243

In The
Supreme Court of the United States

CITY OF OAKLAND

Petitioner,

v.

OAKLAND RAIDERS, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF OF *AMICI CURIAE* SPORTS ECONOMISTS IN SUPPORT OF PETITIONER

DANIEL J. WALKER
ROBERT E. LITAN
Counsel of Record
BERGER MONTAGUE PC
2001 Pennsylvania Avenue, NW
Suite 300
Washington, DC 20006
202-559-9745
dwalker@bm.net

Counsel for Amici Curiae *Sports Economists*

April 13, 2022

TABLE OF CONTENTS

CASES **Page**

TABLE OF AUTHORITIES ii
INTEREST OF *AMICI CURIAE* 1
SUMMARY OF ARGUMENT 1
ARGUMENT 3
I. Oakland Has Suffered Direct, Measurable Injury.... 3
II. Application of the Lower Court's "Efficient Enforcement" Doctrine Leads to Perverse Outcomes 6
III. The Court Can Use This Case as An Opportunity to Clarify the Boundaries of Permissible and Impermissible Cooperation 8
IV. Conclusion 15
APPENDIX:
List of *Amici Curiae*.. 1a

TABLE OF AUTHORITIES

CASES **Page(s)**

Am. Needle, Inc. v. Nat'l Football League,
560 U.S. 183 (2010).. 10

OTHER AUTHORITIES

Nola Agha & Daniel Rascher, *Economic Development Effects of Major and Minor League Teams and Stadiums*, 22 J. Sports Econ. 274 (2020) 4

Gabriel M. Ahlfeldt & Georgios Kavetsos, *Form or Function? The Effect of New Sports Stadia on Property Prices in London*, 177 J. Royal Stat. Soc'y: Series A (Stat. on Soc'y) 169 (2012).. 5

Gabriel M. Ahlfeldt & Wolfgang Maenning, *Impact of Sports Arenas on Land Values: Evidence from Berlin*, 44 Annals of Regional Sci. 205 (2010)... 5

Donald L. Alexander, William Kern & Jon Neill, *Valuing the Consumption Benefits from Professional Sports Franchises*, 48 J. Urb. Econ. 321 (2000) 5

Giles Atkinson, Susana Mourato, Stefan Szymanski & Ece Ozdemiroglu, *Are We Willing to Pay Enough to "Back the Bid?": Valuing the Intangible Impacts of London's Bid to Host the 2012 Summer Olympic Games*, 45 Urb. Stud. 419 (2008) 5

TABLE OF AUTHORITIES—continued

Page(s)

Robert A. Baade & Richard F. Dye, *The Impact of Stadium and Professional Sports on Met5ropolitan Area Development*, 21 GROWTH & CHANGE 1 (1990) 4

Dean V. Baim, THE SPORTS STADIUM AS A MUNICIPAL INVESTMENT (1994) 4

William J. Baumol, Alan S. Blinder & John L. Solow, ECONOMICS: PRINCIPLES AND POLICY (Cengage Learning 14th ed. 2019) 4

Roger D. Blair, SPORTS ECONOMICS (2011) 8

Stacey L. Brook & Aju J. Fenn, *Market Power in the National Football League*, 3 INT'L J. SPORTS FIN. 239 (2008) 14

Gerald Carlino & N. Edward Coulson, *Compensating Differentials and the Social Benefits of the NFL*, 56 J. URB. ECON. 25 (2004) 5

Dennis Coates & Brad R. Humphreys, *The Effect of Professional Sports on the Earnings and Employment in the Services and Retail Sectors in U.S. Cities*, 33 REGIONAL SCI. & URB. ECON. 175 (2003) 4

Dennis Coates & Brad R. Humphreys, *The Effect of Professional Sports on the Earnings of Individuals: Evidence from Microeconomic Data*, 43 APPLIED ECON. 4449 (2011) 4

TABLE OF AUTHORITIES—continued

Page(s)

Dennis Coates, Brad R. Humphreys & A. Zimbalist, *Compensating Differentials and the Social Benefits of the NFL: A Comment*, 60 J. URB. ECON. 124 (2006) 5

Carolyn A. Dehring, Craig A. Depken & Michael R. Ward, *The Impact of Stadium Announcements on Residential Property Values: Evidence from a Natural Experiment in Dallas-Fort Worth*, 25 CONTEMP. ECON. POL'Y 627 (2007) 5

Craig A. Depken & Benjamin L. Fore, *Firm-Level Economic Activity Before, During, and After Local Events: A Case Study*, 21 J. SPORTS ECON. 327 (2020) 4

Craig A. Depken & E. Frank Stephenson, *Hotel Demand Before, During, and After Sports Events: Evidence from Charlotte, North Carolina*, 56 ECON. INQUIRY 1764 (2018) 4

Edwin Woodrow Eckard, *Team Promotion in Early Major League Baseball and the Origin of the Closed Sports League*, 42 EXPL. IN ECON. HIST. 122 (2005) 9

Charles C. Euchner, PLAYING THE FIELD: WHY SPORTS TEAMS MOVE AND CITIES FIGHT TO KEEP THEM (1994) 5

TABLE OF AUTHORITIES—continued

Page(s)

Xia Feng & Brad R. Humphreys, *Assessing the Economic Impact of Sports Facilities on Residential Property Values: A Spatial Hedonic Approach*, 19 J. SPORTS ECON. 188 (2018) 5

Rodney Fort, *Direct Democracy and the Stadium Mess*, *in* SPORTS, JOBS & TAXES: THE ECONOMIC IMPACT OF SPORTS TEAMS AND STADIUMS 146 (Roger G. Noll & Andrew Zimbalist eds., 1997) 14

Rodney Fort, *The Stadium Mess*, *in* STEE-RIKE FOUR! WHAT'S WRONG WITH THE BUSINESS OF BASEBALL? 147 (Daniel R. Marburger ed., 1997) 14

Rodney Fort, *Antitrust in Pro Sports*, *in* DIAMOND MINES: BASEBALL AND LABOR 109 (Paul D. Staudohar ed., 2000) 8

Rodney Fort, SPORTS ECONOMICS (3d ed. 2010) 3, 8, 12

Rodney Fort, *Major League Baseball Is Just Like McDonald's? Lessons from Unrecognized Rival Leagues*, *in* THE OXFORD HANDBOOK OF SPORTS ECONOMICS: ECONOMICS THROUGH SPORTS (Leo Kahane & Stephen Shmanske eds., 2012) 11

Rodney Fort & Joel Maxcy, *The Demise of African American Baseball Leagues: A Rival League Explanation*, 2 J. SPORTS ECON. 35 (2001) 12

TABLE OF AUTHORITIES—continued

Page(s)

Brad R. Humphreys, Bruce K. Johnson, Daniel S. Mason & John C. Whitehead, *Estimating the Value of Medal Success in Olympic Games*, 19 J. SPORTS ECON. 398 (2018) 5

Daraius Irani, *Public Subsidies to Stadiums: Do the Costs Outweigh the Benefits?*, 25 PUB. FIN. REV. 238 (1997) 5

Muhammad Q. Islam, *Local Development Effects of Sports Facilities and Sports Teams: Case Studies Using Synthetic Control Method*, 20 J. SPORTS ECON. 242 (2019) 4

Bruce K. Johnson & John C. Whitehead, *Value of Public Goods from Sport Stadiums: The CVM Approach*, 18 CONTEMP. ECON. POL'Y 48 (2000) .. 5

Bruce K. Johnson, Peter A. Groothuis & John C. Whitehead, *The Value of Public Goods Generated by a Major League Sports Team: The CVM Approach*, 2 J. SPORTS ECON. 6 (2001) 5

Bruce K. Johnson, Michael J. Mondello & John C. Whitehead, *The Value of Public Goods Generated by a National Football League Team*, 21 J. SPORTS ECON. 123 (2007) 5

Michael A. Leeds, Peter von Allmen & Victor A. Matheson, THE ECONOMICS OF SPORTS (6th ed. 2018) 8

Arthur C. Nelson, *Prosperity of Blight? A Question of Major League Stadia Locations*, 15 ECON. DEV. Q. 255 (2001) 4

TABLE OF AUTHORITIES—continued

Page(s)

Roger G. Noll, *The Organization of Sports Leagues*, 19 OXFORD REV. ECON. POL'Y 530 (2003) 9

SPORTS, JOBS & TAXES: THE ECONOMIC IMPACT OF SPORTS TEAMS AND STADIUMS (Roger G. Noll & Andrew Zimbalist eds., 1997) 4

Geoffrey Propheter, *Are Basketball Arenas Catalysts of Economic Development?*, 34 J. URB. AFF. 441 (2012) 4

Geoffrey Propheter, *Estimating the Effect of Sports Facilities on Local Area Commercial Rents: Evidence from Brooklyn's Barclays Center*, 20 J. SPORTS ECON. 91 (2019) 5

James Quirk & Rodney D. Fort, *Pay Dirt: The Business of Professional Team Sports* (1992) 12

James Quirk & Rubin Saposnik, *The Great Football Wars*, *in* ADVANCES IN THE ECONOMICS OF SPORTS (Gerald Scully ed., 1992) 12

Mark S. Rosentraub, David Swindell, Michael Przbylski & Daniel R. Mullins, *Sport and Downtown Development Strategy: If You Build It, Will Jobs Come?*, 16 J. URB. AFF. 221 (1994) 5

Mark S. Rosentraub, David Swindell & Alexandra Tsvetkova, *Public Dollars, Sports Facilities, and Intangible Benefits: The Value of a Team to a Region's Residents and Tourists*, 9 J. TOURISM 133 (2008) 5

TABLE OF AUTHORITIES—continued

Page(s)

Charles Santo, *The Economic Impact of Sports Stadiums: Recasting the Analysis in Context*, 27 J. URB. AFF. 177 (2005) 4

John J. Siegfried & Andrew Zimbalist, *The Economics of Sports Facilities and Their Communities*, 14 J. ECON. PERSP. 94 (2000) 4

E. Frank Stephenson, *The Cost of Losing a National Football League Franchise: Evidence from Hotel Occupancy Data*, 28 APPLIED ECON. LETTERS 1558 (2021) 5

Brandli Stitzel & Cynthia L. Rogers, *NBA Sweet Spots: Distance-Based Impacts on Establishment-Level Sales*, 50 GROWTH & CHANGE 335 (2019) 4

Charles C. Tu, *How Does a New Sports Stadium Affect Housing Values? The Case of FedEx Field*, 81 LAND ECON. 379 (2005).................. 5

Eric Joseph van Holm, *Minor Stadiums, Major Effects: Patterns and Sources of Redevelopment Surrounding Minor League Baseball Stadiums*, 56 URB. STUD. 672 (2018) 5

INTEREST OF THE *AMICI CURIAE*

This brief is submitted by *amici curiae* economists who teach and write on topics relating to the economics of sports.[1] *Amici* are concerned that the Ninth Circuit's decision to deny standing to the City of Oakland runs afoul of sound economic principles. *Amici* have an abiding, professional interest and obligation in offering insight to the Court that will aid in its deliberation of this important antitrust matter. A list of *amici* appears in Appendix A, reproduced at App. 1.

SUMMARY OF ARGUMENT

The owners of the National Football League ("NFL") Oakland Raiders announced in 2017 that they were moving the team from Oakland, California to Las Vegas, Nevada ("Las Vegas"), commencing with the 2020 season. In 2018, Petitioner City of Oakland ("Oakland") sued the NFL in the federal district court for the Northern District of California. The federal district court dismissed Petitioner's claims for lack of standing. The Federal Court of Appeals for the Ninth Circuit affirmed, accepting the district court is holding that Oakland had suffered antitrust injury, but applied an "efficient enforcement" test and determined that Oakland lacked antitrust standing.

---

[1] No counsel for either party was in any way involved in preparing this brief. No person other than *amici curiae* and their counsel made any financial contribution to pay for the preparation and submission of this brief. None of *amici curiae* are serving as experts in this matter. Counsel of record gave consent to the filing.

We advance three economic arguments why the Court should review the Federal Circuit's decision on standing.

1. Oakland Has Suffered Direct, Measurable Injury

From an economic perspective, Oakland suffered injury of the kind the antitrust laws are designed to prevent. Moreover, this injury can be measured through techniques found in the academic literature that can be applied to the estimation of damages in this case: economic impact assessment, assessment of the contribution of the team to economic growth, and estimation of quality-of-life values.

2. Application of the Lower Court's "Efficient Enforcement" Doctrine Leads to Perverse Outcomes

Oakland is an efficient enforcer of the antitrust laws, more so than Las Vegas. The lower court's "efficient enforcement" opinion ignores the real, measurable injury to Oakland. Further, Las Vegas, having "won" the franchise relocation, has little or no incentive to challenge either the harm done to it by the Raiders' move or the potentially impermissible cooperation among NFL team members that approved the move. The lower court's "efficient enforcement" opinion disallows the pursuit of redress for that injury by Oakland, and Las Vegas has no incentive to bring suit. Thus, the opinion effectively immunizes potential and actual unlawful antitrust conduct from private antitrust liability and will lead to suboptimal deterrence of such conduct.

3. The Court Can Use This Case As an Opportunity to Clarify the Boundaries of Permissible and Impermissible Cooperation

This case offers an ideal opportunity for the Court to clarify the boundaries between permissible and impermissible anticompetitive cooperation by members

of professional sports leagues. Leagues always use the "single entity" defense that everything they do is required to create any value in the first place. The inquiry should not end there. Not all cooperation is anticompetitive, but some cooperation has been declared anticompetitive in the past and could be in the future.

From an economic perspective, the correct question to ask is whether this particular instance of cooperation among NFL owners is necessary for the league to function or creates other social value on net. If instead, only higher profits for owners are created without any increased social value, then the conduct at issue may be anticompetitive.

The substantive outcome of this case depends on answers to questions that would resolve this question. Was the relocation of the Raiders team from Oakland to Las Vegas incidental to the function of the league? Did the cooperation among NFL owners that led to the move cross the line into impermissible collusion? If Plaintiffs are not allowed to bring their case, then all existing and potential city hosts to NFL franchises will be at the mercy of anticompetitive conduct by the NFL and other professional sports leagues without legal recourse.

ARGUMENT

I. Oakland Has Suffered Direct, Measurable Injury

The sports economics literature identifies three main streams of value from the presence of professional sports teams—economic impact, economic growth, and quality of life (Fort, 2010). Importantly, each type of value can be measured.

Economic impact is the value of new spending that will accrue to the specified jurisdiction considering a subsidy. *Economic impact analysis* attaches a value to

that inflow of spending. Economic impact analysis is the centerpiece of subsidy determination prior to the actual granting of the subsidy. Such an analysis is typically funded by local supporters, official local development agencies, or the professional team owner. The results of economic impact analyses are often used to bolster the case of owners seeking public funds for either an existing franchise or looking to move to a different location (Noll and Zimbalist, 1997; Siegfried and Zimbalist, 2000; Depken and Stephenson, 2018; Depken and Fore, 2020).

Economic growth might be enhanced by the location of a sports franchise and is readily estimated by comparing cities that are like each other in all key respects, except for their number of professional sports teams, if any. Through standard statistical techniques, it is possible, by controlling for growth-related variables, to isolate and estimate the growth-contributing impact of having professional sports teams (Nelson, 2001; Coates and Humphreys, 2003, 2011; Santo, 2005; Propheter, 2012; Islam, 2019; Stitzel and Rogers, 2019; Baumol, Blinder, and Solow, 2019; Agha and Rascher, 2020).

Quality of life, as economists define it, involves consumers' surpluses and positive externalities enjoyed by taxpayers. Consumers' surpluses are the additional value consumers place on the items or services they purchase above the prices they pay for them. Positive externalities are the value of amenities and wage discounts acceptable to residents because of the availability of certain activities or venues in a region. Positive externalities are not unique to professional sports teams. Similar values are generated by publicly funded art museums, symphony orchestras, and even public parks. There is a growing body of work in the sports economics literature on how and to what extent the presence of professional sports teams affects quality of life in given locations (Baade and Dye, 1990; Baim,

1994; Euchner, 1994; Rosentraub, Swindell, Przbylski, and Mullins, 1994; Irani, 1997; Alexander, Kern, and Neill, 2000; Johnson and Whitehead, 2000; Johnson, Groothuis, and Whitehead, 2001; Carlino and Coulson, 2004; Tu, 2005; Coates, Humphreys, and Zimbalist, 2006; Dehring, Depken, and Ward, 2007; Johnson, Mondello, and Whitehead, 2007; Atkinson, Mourato, Szymanski, and Ozdemiroglu, 2008; Rosentraub, Swindell, and Tzvetkova, 2008; Ahlfeldt and Maennig, 2010; Ahlfeldt and Kavetsos, 2014; Feng and Humphries, 2018; Humphreys, Johnson, Mason, and Whitehead, 2018; Propheter, 2019; van Holm, 2018).

Each of these value streams was considered under the original agreement between the Raiders and Oakland's elected officials. Revisiting that agreement at the team's request does not eliminate expectations by Oakland about the remaining values that it anticipated when Oakland's previous deal to host the Raiders was made. The relocation of the Raiders to Las Vegas eliminates the remaining amounts of these three types of benefits, which represent an injury to Oakland. Put simply, Oakland did not get its money's worth from previous subsidies extended to the Raiders.

To make Oakland whole again, the discounted present value of the remainder of those benefit streams would need to be calculated and paid. This calculation actually has been done for some of the values caused by losing an NFL franchise (Stephenson, 2021).

We realize that plaintiffs in antitrust cases usually are customers who paid a collusive high price or suffered a collusive low wage. The injured parties are readily identifiable. But people who do not buy an item or service whose price is collusively increased also suffer harm if they would have bought the item or service at the lower competitive price. Unfortunately, their attempt to seek

redress through an antitrust suit is hindered because standard business records do not contain information about who did not buy.

In the case at hand, however, the party that benefitted from the presence of the Raiders being in Oakland and then suffered the harm identified above when the team moved to Las Vegas can be identified. That party is Oakland, which lost the bidding war for the Raiders to Las Vegas. The foregoing discussion makes clear that Oakland's losses can be estimated in ways that are standard in economics.

II. Application of the Lower Court's "Efficient Enforcement" Doctrine Leads to Perverse Outcomes

The lower court opines that "efficient enforcement" of the antitrust laws requires that the allegedly damaged party most likely to provide the best information for court deliberation is the only party that has standing. The lower court suggests this party would be Las Vegas rather than Oakland.

We are not lawyers, so we do not opine on either standing or efficient enforcement in the legal context chosen by the lower court. However, we do opine on two economic consequences of denying Oakland the ability to challenge the cooperative conduct at issue in this case.

First, denying standing to Oakland does not remove the injury suffered by Oakland due to the owners' approval of the Raiders' relocation. As just noted, those damages are real, and they can be and have been calculated in similar cases. The "efficient enforcement" doctrine ignores these facts.

Second, every judicial decision creates or alters incentives. This case involves the nature and extent

of the deterrence entailed in damage awards. Denying Oakland its opportunity to sue under the antitrust laws for damages caused by the cooperation that permitted the Raiders' relocation will lead to suboptimal deterrence.

The lower court's opinion relies on host cities that win the fierce bidding battle for the team to turn right around and sue because they won! This seems unlikely at best. Las Vegas, the winning bidder for the Raiders, obtained the team and will enjoy the benefits from that result. If Las Vegas turned around, after winning the team, to sue the team, it would reduce the benefits it derived from winning. This would make no economic sense.

At the same time, the lower court's "efficient enforcement" opinion would deny Oakland, which lost the fierce bidding for the team, standing to bring a lawsuit aimed at the potentially anticompetitive cooperation that approved the team's relocation. Moreover, unlike Las Vegas, Oakland faces no adverse consequences from suing and has every incentive to do so.

The ultimate result, if the lower court's opinion is allowed to stand, is that nobody sues. Las Vegas has no incentive to do so, while the lower court's opinion disallows Oakland's suit. The courts thus never get the chance to review whether a possible antitrust violation has occurred. From an economic perspective, this is a suboptimal outcome.

Further, allowing the lower court's "efficient enforcement" doctrine to remain in place will immunize professional sports team owners in the future from antitrust suits, even when anticompetitive cooperation harms new or existing host cities. This outcome likely will allow professional sports team owners to run roughshod over agreements with their current host cities. Team owners would no longer need to fear litigation from either their new host cities or the damaged host cities

they leave behind. That, too, is a suboptimal outcome that begs for this Court's intervention to prevent.

III. The Court Can Use This Case As an Opportunity to Clarify the Boundaries of Permissible and Impermissible Cooperation

Federal courts have grappled for some time with the legal questions of permissible and impermissible cooperation by team owners in professional sports leagues. We believe the matter at hand offers the Court an opportunity to clarify this distinction, which has been subject to some confusion in the past (Fort, 2000). In doing so, we believe sports economists can assist the Court in distilling the extensive economics literature on team owner cooperation (Fort, 2010; Blair, 2011; Leeds, Von Allmen, and Matheson, 2018).

It is useful to begin by considering the economic incentives confronting a group of team owners before they engage in the cooperation necessary to make league play happen. With only minimal cooperation, the owners will begin with strictly exhibition play—contests in which the outcome doesn't "count" toward league standings or a championship. Exhibition play takes the form of owners agreeing to play an exhibition schedule on specific dates.

With more extensive cooperation, owners can form a league, realizing results that cannot be achieved through exhibitions. Branding the league in the eyes of fans creates the value of league play, as distinguished from exhibition play. However, to form a league, owners must cooperate and agree on both the number of teams in the league and their geographic locations. If the team owners create the league, they will operate the franchises in their chosen locations.

Sports leagues also require rules governing the contests, scheduling, and how the league champion will be determined. Further, to demonstrate league integrity, most leagues have ownership standards (Eckard, 2005).

All these cooperatively determined elements brand league play, as distinguished from exhibition play. Because cooperation is required to create and brand a particular variety of play, that thing that fans value, sports leagues are different from other productive activities.

This important difference between sports leagues and other private sector ventures has important implications for antitrust law and enforcement. Some degree of cooperation among competing teams must be allowed for leagues to function. Cooperation beyond that should be open to antitrust review when it has the potential to enable output-reducing and price-increasing collusion to take place. Not all cooperation beyond that branding league play is necessarily anticompetitive. But it might be.

While they often do, team owners themselves do not need to engage in the cooperation required to make league play happen (Noll, 2003). Some leagues operate as separate legal entities, selling league "services" to league members. For example, the United Soccer League (a minor North American soccer league) and Champions League (a European premier soccer league) sell organizational services—including league playing rules, an appeals process, a league schedule, champion determination, and ownership standards—to their members.

Indeed, competition has occurred among different league entities in the market for league services. When United Soccer League team owners became dissatisfied with that separate entity's league services, they created the North American Soccer League in 2011. This amounts

to competitive entry. For a while, both leagues competed for team memberships.

It is also necessary to draw the distinction between permissible and impermissible competition when team owners themselves create and operate a league, taking account of the fact that the cooperation required to make league play happen has economic justification. For example, the original NFL did not have balanced home-and-away schedules and sought only the higher revenues in higher-population locations. Owners eventually moved to a more balanced home-and-away schedule for the sake of long-term growth in the league, based on broader fan identification across a larger number of locations. As another example, multiple sports leagues have altered their championship structures to create value both for themselves and their fans.

Not all cooperation, however, is required to enable a league run by team owners to operate effectively. As recognized long ago by Adam Smith, meetings of competitors to discuss and agree upon such matters as prices to charge are inconsistent with socially efficient outcomes. For this reason, agreements about any matters not strictly necessary to differentiate league play and to make play happen should be rightly suspect as potentially anticompetitive.

This is essentially what the Court decided in *American Needle, Inc v. NFL*, 560 U.S. 183 (2010). That case involved the NFL's centralization of the production and sale of team logo caps. While the product—logo caps—has value because fans identify with their teams, joint production and sale of the caps is not necessary for the NFL to exist or to create the value of caps to fans in the first place (Blair and Wang, 2017). A more competitive alternative is for team owners individually to contract with cap producers, and that is exactly why

the Court remanded the lower court's decision, allowing centralized league control over cap production and sale.

Put more broadly, while cooperation of team owners in a league is not necessarily anticompetitive just because it exists, it has that potential. The line between permissible and impermissible cooperation separates those league matters where cooperation is essential for the league to exist at all. Cooperation beyond that point can be potentially anticompetitive and deserves demarcation as such.

Applied to the case at hand, the determination of the original membership and location of teams is part of the cooperation required to make league play in the NFL happen. However, any rearrangement of the locations of the original member owners' teams, or adding another team to the league via expansion, is not required to make league play happen. Play was happening before such an alteration in either the location or number of teams. The NFL's existence was not affected by the joint decision of team owners to approve the move of the Oakland Raiders to Las Vegas. Precisely for that reason, that joint decision should be open to antitrust scrutiny. The Court has the opportunity in this case to invoke the distinction between permissible and impermissible cooperation among sports league team owners to drive that conclusion home.

The NFL's approval of a franchise relocation is different from the franchise relocation decisions by other private sector actors, such as McDonald's (or any other similar private sector franchisor) in two important respects (Fort, 2012). First, because of economies of scale, placing a team in one location precludes another team in that area and may preclude entry by potential competitive, rival leagues. Scale economies are not

as significant for fast food and other private sector franchises.

More specifically, in the presence of economies of scale, the location of teams is often a strategic choice by a league to preclude entry. Placing a major league team in a particular location can eliminate competition by other major leagues, potential or actual, and by minor leagues. Major League Baseball used the move of the Brooklyn Dodgers and New York Giants to Los Angeles and San Francisco, respectively, to end the rising threat of the rival Pacific Coast League in the West (Fort, 2010, 2012). It had earlier used the same approach to put the final nails in the coffin of the rival Negro Leagues (Fort and Maxcy, 2001). The NFL successfully fended off the advance of the All-America Football Conference by relocating its Cleveland Rams to Los Angeles for the 1946 season to the same end (Quirk and Fort, 1992; Quirk and Saposnik, 1992).

Second, while McDonald's franchises open and close, and owners move from one location to another, typically, NFL owners also enjoy subsidies from city, county, and/or state governments. These subsidy "bargains" are struck for construction and ongoing stadium operations subsidies. Local citizens are aware of the negotiations and anticipate various returns generated from successful bargaining. Some of these values are not captured in market prices that can be specified in the "contract" between the owner and city, county, and state authorities. And if the league members decide to allow a team relocation, the remaining values are lost. Nothing of the kind happens if McDonald's decides to allow a franchise to move.

Put differently, existing owners of sports franchises have greater incentives and enhanced ability, relative to other types of franchises in the private sector, to create

an artificial scarcity of teams to enhance the bargaining power of existing owners over citizens at existing and potential franchise host cities. By carefully managing both the location and number of teams so that rivals are precluded, certain economically viable locations can be left without a team on purpose. Current owners can then use those unfilled locations as *threats* of possible future destinations for relocation when those owners negotiate lease terms and subsidies with current host cities.

The NFL in the past has demonstrated the power of relocation threats in choosing a franchise for the city of Los Angeles. After the demise of the NFL's Los Angeles Buccaneers after the 1926 season, there was no NFL team in Los Angeles until the Cleveland Rams moved there and began play in 1946. The Oakland Raiders also did a stint in Los Angeles starting with the 1982 season. However, the Rams left for St. Louis, and the Raiders returned to Oakland, both after the 1994 season. No other NFL team existed in Los Angeles until the St. Louis Rams returned for the 2016 season.

In the intervening 21 seasons (1995-2015) there was no NFL team in Los Angeles. However, multiple NFL franchise owners used the threat to move to Los Angeles in negotiations with their host cities: the owners of the San Diego Chargers, Oakland Raiders, St. Louis Rams, and the Minnesota Vikings. Eventually, the NFL allowed the owner of the Rams franchise, previously in St Louis, to move to Los Angeles, beginning with the 2016 season, to play in the Los Angeles Coliseum. Starting with the 2020 season, the Rams moved to their new SoFi Stadium in Inglewood with the owner of the Chargers as a nearly zero-rent tenant.

The NFL's control over both the location and number of teams, beyond the original configuration that was chosen to differentiate the league, endows existing

league members with market power that has been empirically established and measured (Brook and Fenn, 2008). Most obviously, the territorial restrictions confer market power on franchisees who are relieved from competing in their geographic areas against other teams. But the artificial scarcity of teams created by leagues also endows team owners with artificial bargaining power over current city, county, and/or state governments, which also compete for hosting franchises. The exercise of this power can enable team owners to extract a supracompetitive subsidy level from their host cities.

For example, suppose an owner determines that a new location would be worth additional revenue of $500 million in discounted present value compared to its current location. If the current host government determines that a $35 million *annual* spend will generate an additional $501 million for the owner at the current location, then $35 million annually is the *minimum efficient subsidy* to retain the team at its current location. The team owner will take that $35 million if driven to that minimum.

However, if the owner can advance the alternative location as a viable threat, local officials who must face reelection have incentives to bid more than the minimum efficient subsidy—$35 million in the above example—to avoid the loss in tax revenues and income from businesses that depend, at least in part, on the presence of a local team. The viable alternative locational threat thus can enable the owner to extract that higher-than-minimum efficient bid (Fort, 1997a, 1997b).

But that locational threat itself is viable only because teams have cooperated to artificially restrict the number of teams and to allow teams to make these locational threats. These are not the types of cooperation necessary to make league play happen. They allow the extension

of market power of owners into the location bargaining process, which in turn affects the welfare of residents in host cities.

By accepting this case, the Court has the opportunity to more definitively draw the line between cooperation among league members that enables leagues to exist at all and cooperation that extends beyond that minimum. Conversely, if the Court does not allow Oakland to proceed with this matter, then all existing and potential host cities for the NFL and other professional sports league franchises will be exposed to future anticompetitive cooperation by professional leagues without legal recourse to obtain compensation that, in turn, helps prevent this anticompetitive behavior.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that the Court grant certiorari in this case.

Respectfully submitted,

Daniel W. Walker
Robert E. Litan
Counsel of Record
Berger Montague PC
2001 Pennsylvania Avenue, NW
Suite 300
Washington, DC 20006
Phone: (202) 559-9745
dwalker@bm.net

Counsel for Amici Curiae
Sports Economists

April 13, 2022

Appendix

Appendix: List of *Amici Curiae*

Nola Agha, University of San Francisco
Robert Baade, Lake Forest College
David Berri, Southern Utah University
Roger Blair, University of Florida
Stacey Brook, DePaul University
Robert Brown, Texas State University
Dennis Coates, University of Maryland Baltimore County
Craig Depken II, University of North Carolina Charlotte
Rodney Fort, University of Michigan
Brian Goff, Western Kentucky University
Brad Humphreys, University of Alberta
Leo Kahane, California State University, East Bay
Anthony Krautmann, DePaul University
Joel Maxcy, Drexel University
Allen Sanderson, University of Chicago
Raymond Sauer, Clemson University
John Solow, University of Iowa
Stefan Szymanski, University of Michigan
Jason Winfree, University of Idaho
Andrew Zimbalist, Smith College