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12-1-2023

## Too Many, Too Late: The NFL's Inverse Accessibility Issue and the New RPO

Scott M. Finney

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Scott M. Finney, *Too Many, Too Late: The NFL's Inverse Accessibility Issue and the New RPO*, 25 N.C. J.L. & TECH. 161 (2023).

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**TOO MANY, TOO LATE: THE NFL’S INVERSE ACCESSIBILITY  
ISSUE AND THE NEW RPO**

***Scott M. Finney\****

*Traditionally, the National Football League has enjoyed antitrust exemptions for sponsored telecasting of games. However, due to the incorporation of NFL content onto streaming services, questions have arisen as to whether fans’ access to professional football is being unfairly restricted. This Article suggests that because the League’s first ever exclusive agreements with streaming services have made it more difficult and expensive to watch games, the NFL and its distribution partners may be subject to antitrust liability. As a result, NFL fans have been unfairly forced to make a choice this Article terms the “New RPO.” Now, further analysis is required to determine whether modern streaming agreements violate antitrust law, and what suitable alternatives exist in order to keep pace with changing technology and streaming usage.*

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\* J.D. Candidate, University of North Carolina School of Law, 2025. The Author would like to thank the NC JOLT editors, his family, Betsy Baetjer, Heather Krause, Scott Hanson, Professor Barbara Osborne, and Professor Andrew Chin.

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## I. INTRODUCTION

For years, the National Football League (“NFL” or “the League”) has dominated American television viewership.<sup>1</sup> In 2022, the League had eighty-two of the top 100 most-watched television (“TV”) broadcasts in the United States (“U.S.”), including nine of the top ten and twenty-three of the top twenty-five.<sup>2</sup> In doing so, the

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<sup>1</sup> See Anthony Crupi, *2022 TV Recap: It's the NFL's World; the Rest of Us Just Live in It*, SPORTICO (Jan. 6, 2023, 5:55 AM), <https://www.sportico.com/business/media/2023/nfl-games-account-for-82-of-100-top-tv-broadcasts-1234700381/> [https://perma.cc/Y4CA-5XSR] (reporting Nielsen ratings data and the NFL's continued dominance of American television in 2022).

<sup>2</sup> See *id.*

NFL broke its own record of seventy-five top-100 broadcasts set in 2021.<sup>3</sup> NFL broadcasts “account[] for 10% of all live TV deliveries,”<sup>4</sup> and since 2010, the NFL regular season has averaged between 14.9 and 17.9 million viewers.<sup>5</sup> In fact, NFL games were so popular in 2022 that thirteen regular season games had more domestic viewers than the most watched major events in other popular sports, like U.S. College Football and the World Cup.<sup>6</sup>

Like many, if not all NFL games, the most popular contests draw not only fans who live within the two competing teams’ local geographic markets (“in-market-fans”), but also viewers across the country who live outside of the local TV broadcast zone (“out-of-market fans”).<sup>7</sup> Designating fans as in-market and out-of-market corresponds to which games are available on free, local television in a given geographic area. But because geographic broadcast zones differ week-by-week depending on the NFL schedule, the games available on local television on a given day are referred to as “local games.” As one may expect, games that are not broadcast on free local television within a given geographic area are therefore considered “non-local games.”

In addition to local and non-local games, there are also primetime games, which have traditionally been broadcast across the country, whether for free on over-the-air (“linear”) TV or via a

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<sup>3</sup> See *id.*

<sup>4</sup> See *id.*

<sup>5</sup> See Christina Gough, *Average Television Viewership of the NFL Regular Season from 2010 to 2023*, STATISTA (June 23, 2023), <https://www.statista.com/statistics/289979/nfl-number-of-tv-viewers-usa/#:~:text=In%20the%202023%20Super%20Bowl,calculated%20to%20be%2016.7%20million> [<https://perma.cc/NT46-8YQH>] (analyzing viewership trends in NFL regular season games, not including the more popular playoff games such as the Super Bowl).

<sup>6</sup> See Zach Koons, *NFL Had 82 of Top 100 U.S. TV Broadcasts in 2022*, SI (Jan. 6, 2023), <https://www.si.com/extra-mustard/2023/01/06/nfl-82-top-100-american-television-broadcasts-2022-nielsen-ratings> [<https://perma.cc/2THT-R89K>] (stating that thirteen regular season NFL games in 2022 had more viewers than both the college football national championship and the World Cup final).

<sup>7</sup> See Ben Moore, *The NFL’s Streaming Strategy Sidelines Fans*, PC MAG (Sept. 9, 2021), <https://www.pcmag.com/opinions/the-nfls-streaming-strategy-sidelines-fans> [<https://perma.cc/VB75-PEXY>] (presenting problems with the NFL’s “location-based broadcast restrictions”).

paid service.<sup>8</sup> Besides geographic location, the key distinction between in-market and out-of-market fans is that in-market fans can watch local games for free via linear TV.<sup>9</sup> This is a critical feature of the NFL's business model,<sup>10</sup> and as players are often quick to remind the general public regarding personnel decisions and salary negotiations—the NFL *is* a business.<sup>11</sup> And like any business, the League has begun to respond to changes in technology by changing the ways fans can access their much-wanted content.<sup>12</sup>

At a time when media consumption habits are rapidly changing, many Americans continue to cut the cord and switch from free linear, cable, or satellite TV, to streaming platforms, and as a result, the NFL has begun to alter the way it structures deals with its broadcast partners.<sup>13</sup> In doing so, the League has adopted an

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<sup>8</sup> See Stephen James, *The NFL's Anti-Trust Problem in the Streaming Era*, 46 IOWA J. CORP. L. 813, 819 (2021).

<sup>9</sup> “Linear TV” refers to traditional, pre-scheduled program television. See Moore, *supra* note 7; see also *NFL Completes Long-Term Media Distribution Agreements Through 2033 Season*, NAT’L FOOTBALL LEAGUE, (Mar. 18, 2021, 4:06 PM), <https://www.nfl.com/news/nfl-completes-long-term-media-distribution-agreements-through-2033-season> [<https://perma.cc/8B5Q-UDJH>].

<sup>10</sup> See Moore, *supra* note 7; see also *NFL Completes Long-Term Media Distribution Agreements Through 2033 Season*, *supra* note 9.

<sup>11</sup> See e.g., Kevin Patra, *Chiefs DT Chris Jones Opens up on Holdout: ‘All I’m Doing is Asking for a Raise’*, NAT’L FOOTBALL LEAGUE (Sept. 6, 2023, 1:26 PM), <https://www.nfl.com/news/chiefs-dt-chris-jones-opens-up-on-holdout-all-i-m-doing-is-asking-for-a-raise> [<https://perma.cc/37QR-ZCAN>] (“The 29-year-old said it’s just business.”).

<sup>12</sup> See generally *NFL Completes Long-Term Media Distribution Agreements Through 2033 Season*, *supra* note 9 (describing the 11-year media rights agreements between the NFL and their distribution partners which began in 2023, and for the first time ever included an exclusive streaming agreement).

<sup>13</sup> See *id.* at 819 (citing Brandon Katz, *Will Netflix Ever Win Broadcast Rights to the Super Bowl? Maybe Sooner Than You Think.*, OBSERVER (Feb. 1, 2019, 8:00 AM), <https://observer.com/2019/02/nfl-tv-nbc-cbs-fox-espn-netflix-amazon-apple/> [<https://perma.cc/ZR6Z-ECHU>] (predicting the future of media rights licensing between the NFL, networks, and other corporations based on technology and media consumption trends)); see generally Alex Kirshner, *Sports Streaming Makes Losers of Us All*, ATLANTIC (Aug. 25, 2022), <https://www.theatlantic.com/technology/archive/2022/08/sports-streaming-makes-losers-us-all/671231/> [<https://perma.cc/5DCJ-5GHH>] (discussing how “[b]eing a fan is now more annoying and expensive than ever” because watching

approach which “spreads the wealth” by selling the same number of games to a greater number of distributors, thus making it more complicated and difficult to watch all of one team’s games.<sup>14</sup> To give the League the benefit of the doubt, their addition of more distributors could demonstrate a good-faith attempt at providing “fans with more ways to watch NFL games than ever before.”<sup>15</sup> This reflects the reality that Americans today have far more options—usually via streaming—to access their desired content than ever before.<sup>16</sup>

However, having more distributors does not unconditionally equate to more access. Instead, accessibility may enable, but does not imply, usage in a world where “[c]ord cutting is reaching an all-time high.”<sup>17</sup> Viewers have been moving away from linear, cable, and satellite television for years, and in 2022, “streaming viewership exceeded cable usage for the first time.”<sup>18</sup> The two most cited reasons for this shift are cost and convenience, and the bottom line is that streaming services provide perks that traditional television

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professional sports now requires previously unneeded subscriptions to multiple different platforms).

<sup>14</sup> See generally Nathaniel Meyersohn, *It Will be More Confusing Than Ever to Watch an NFL Game this Season*, CNN BUS. (Sept. 8, 2023, 9:40 AM), <https://www.cnn.com/2023/09/07/business/nfl-viewing-schedule-2023/index.html> [<https://perma.cc/ZSY3-W87H>] (listing the multifarious platforms which will host NFL games this season).

<sup>15</sup> *NFL Completes Long-Term Media Distribution Agreements Through 2033 Season*, *supra* note 9.

<sup>16</sup> See Daniel de Visé, *Cable TV ‘Cord-cutters’ Became the Majority in 2022*, THE HILL (Apr. 26, 2023, 6:00 AM), <https://thehill.com/homenews/media/3971232-cable-tv-cord-cutters-became-the-majority-in-2022/> [<https://perma.cc/8ZGP-E9W3>] (“The good thing is that consumers have more options than they ever had. The bad thing is that consumers have more options than they ever had.”).

<sup>17</sup> Kayla Wassell, *Almost Half of Americans Have Ditched Cable TV & Only Watch On-Demand Streaming as Cable Executives Start to Worry*, CORD CUTTERS NEWS (July 20, 2023), <https://cordcuttersnews.com/almost-half-of-americans-have-ditched-cable-tv-only-watch-on-demand-streaming-as-cable-executives-start-to-worry/> [<https://perma.cc/W625-3G4V>].

<sup>18</sup> See Lauren Forristal, *Linear TV Viewing Sinks Below 50% as Streaming Soars to New Heights*, TECH CRUNCH (Aug. 15, 2023, 12:02 PM), <https://techcrunch.com/2023/08/15/linear-tv-viewing-sinks-below-50-nielsen-july-2023-report/?guccounter=1#:~:text=In%20a%20first%20for%20linear,%25%20C%20down%205.4%25%20YoY> [<https://perma.cc/LZU7-S98A>].

options simply cannot match.<sup>19</sup> Some streaming platforms—the aptly named “cable replacement streaming service[s]”—even provide live TV access.<sup>20</sup> One example is Hulu, which features an optional live TV add-on, enabling cord-cutters to stream content while retaining access to traditional TV offerings. The inclusion of streaming services in NFL media deals is of course not a bad thing *per se*, and in some ways, it will increase accessibility to NFL games. However, if the NFL’s goal was really to provide fans greater access, the addition of more distributors, especially those with whom the League signed exclusive contracts, seems to rebut their stated intent. In some cases, by signing these deals, the League took games which were previously available for free on linear television and made them accessible only with a subscription to other carriers.

For instance, when the NFL finalized its most recent media rights distribution deals in 2021, they included provisions restricting certain regular and postseason games to out-of-market fans, making them only accessible with a subscription to a streaming service.<sup>21</sup> The paradigmatic example of this is the blockbuster deal which made Amazon Prime Video (“Prime Video”) the exclusive home of Thursday Night Football (“TNF”). Since 2022, TNF—a slate of fifteen regular season games—has only been accessible to out-of-market fans with an Amazon Prime (“Amazon”) subscription.<sup>22</sup> Another example is the NFL’s international games,

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<sup>19</sup> See Kayte Korwitts, *How Do Consumers Feel About Streaming Services vs. Cable?*, SURVEY MONKEY (Oct. 2, 2023), <https://www.surveymonkey.com/curiosity/how-do-consumers-feel-about-streaming-services-vs-cable/> [<https://perma.cc/4RWW-SAXS>] (“Cost and convenience . . . [are] the top two reasons people use streaming services.”).

<sup>20</sup> See James K. Willcox, *How to Stream NFL Games Without Cable*, CONSUMER REPS. (Sept. 11, 2023), <https://www.consumerreports.org/electronics-computers/streaming-media/how-to-stream-nfl-games-a8686490273/> [<https://perma.cc/9RWF-VK4J>].

<sup>21</sup> See Lillian Rizzo, *NFL Games Are Shifting Away from Traditional TV. Are You Ready to Stream Some Football?*, CNBC (Sept. 6, 2023, 10:22 AM), <https://www.cnbc.com/2023/09/06/football-nfl-shift-toward-streaming-away-from-regular-tv.html> [<https://perma.cc/3G4Z-3Q9A>] (describing the increasing amount of NFL games accessible, sometimes exclusively, on streaming services as opposed to TV).

<sup>22</sup> Thursday Night Football was previously broadcast nationwide on free TV by Fox, and later simulcast by Fox, Amazon, and NFL Network prior to the 2021

which only aired on select streaming services, like NFL+ and ESPN+.

By way of illustration, the Baltimore Ravens took on the Tennessee Titans in London during Week 6 of the 2023 regular season.<sup>23</sup> For fans outside of Nashville and Baltimore, the game was only available via the NFL Network or on a mobile device with NFL+.<sup>24</sup> Although this allowed fans in the participating teams' cities access to the game on linear TV, the vast majority of viewers were treated as out-of-market fans.<sup>25</sup> Thus, exclusive games on NFL Network and NFL+ streaming demonstrate the NFL taking a novel approach to an old idea by keeping local games available to in-market fans, but requiring additional subscriptions for (a much larger number of) out-of-market fans.<sup>26</sup>

Changes such as the Amazon TNF deal and the restriction of international games have been accompanied by controversy, and in many cases, confusion and chagrin.<sup>27</sup> Exclusive streaming deals, like the TNF deal, have left American football fans with the perception that the NFL is "raising the bar for entry."<sup>28</sup> However,

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exclusive Amazon agreement. *See NFL Completes Long-Term Media Distribution Agreements Through 2033 Season*, *supra* note 9.

<sup>23</sup> *See* 506 SPORTS, *NFL TV Schedule and Maps: Week 6, 2023* (Oct. 15, 2023), <https://506sports.com/nfl.php?yr=2023&wk=6> [<https://perma.cc/Y8C2-ETGS>].

<sup>24</sup> *See id.* (explaining that the geographic broadcast zones for the Ravens-Titans game in London were limited to the Baltimore and Nashville metropolitan areas but showing that the other Week 6 games all had larger broadcast zones because they were not exclusive to NFL Network and NFL+).

<sup>25</sup> *See id.*; *see also NFL Completes Long-Term Media Distribution Agreements Through 2033 Season*, *supra* note 9. The Amazon agreement marks the first time that out-of-market fans have been required to pay for non-local games which they previously had free access to via linear TV. This is because the TNF deal requires out-of-market fans to have a subscription to Amazon Prime in order to watch TNF.

<sup>26</sup> *See* Rizzo, *supra* note 21.

<sup>27</sup> *See* Colin D'Cunha, "Won't be watching, f\*\*k Bezos" – NFL Fans Left Stunned by League's Decision to Pull TNF from TV, SPORTSKEEDA (Nov. 8, 2022, 11:48 AM), <https://www.sportskeeda.com/nfl/news-nfl-fans-left-stunned-league-decision-pull-tnf-tv> [<https://perma.cc/5K3B-FKXY>].

<sup>28</sup> *See* Tim Baysinger, *Do You Know Where Your TV Sports Are?*, AXIOS (Sept. 17, 2023), <https://www.axios.com/2023/09/17/nfl-mlb-football-baseball-nbc-abc-espn-amazon-streaming> [<https://perma.cc/7YV8-UR78>] (highlighting the confusing nature of watching NFL and other professional sports leagues' games in 2023).



this is less of a perception and more of an unfortunate reality for fans; whether a fan wants to watch a specific game, a certain team, or as much football as they possibly can, there are new hoops to jump through, in the form of accounts and subscriptions, which are now required.<sup>29</sup> This type of limiting access hardly feels like the hallmark of a well-intentioned business trying to maximize output for its consumers.

Over the years, broadcasts of NFL games have evolved alongside advances in technology and increased availability of linear, cable, and satellite TV. From its first cable deal in 1987, satellite deal in 1994, and streaming deal in 2021, the League has consistently implemented changes to adapt to the times. These most recent changes have been largely unpopular. The NFL has not only drawn the ire of fans for such changes but has also subjected itself to antitrust scrutiny by virtue of restricting output and limiting fans' access via exclusive deals with streaming services.<sup>30</sup> While the NFL intended to provide "fans even greater access to the games they love," this Article posits that the League has created an inverse accessibility issue: games are actually *less accessible* due to increased device and subscription requirements.

Part II of this Article explores how the relevant history of the NFL and its past brushes with antitrust law have shaped the way the League distributes its content. Part III examines the most recent set of media rights distribution agreements made by the NFL and their partners in 2021. This Part also highlights key differences between the NFL's past and current media rights deals, which have raised antitrust concerns. Part IV coins the term "The New RPO," and explains the negative impacts of the League's first ever exclusive streaming deal with Amazon. Part V then illustrates how the current behavior of the League and its partners can be perceived as

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<sup>29</sup> See *id.*

<sup>30</sup> See Drew Nathanson, *The NFL-Amazon Agreement vs. Antitrust Legislation: The Future of the National Football League in OTT Services*, AM. BAR ASS'N (Apr. 28, 2023), [https://www.americanbar.org/groups/entertainment\\_sports/publications/entertainment-sports-lawyer/esl-39-01-spring-23/the-nflamazon-agreement-vs-antitrust-legislation-future-the-national-football-league-ott-services/#79](https://www.americanbar.org/groups/entertainment_sports/publications/entertainment-sports-lawyer/esl-39-01-spring-23/the-nflamazon-agreement-vs-antitrust-legislation-future-the-national-football-league-ott-services/#79) [<https://perma.cc/H6NX-SLXA>] (proposing that the NFL and Amazon's *Thursday Night Football* deal violates § 1 of the Sherman Act).

anticompetitive and suggests that exclusive streaming deals subject the NFL and its distributors to antitrust liability. Finally, Part VI recommends adjustments to the NFL's business model to account for antitrust concerns arising from society's increasing reliance on streaming services while still giving fans what they really want: more access to more football.

## II. THE HISTORY OF NFL MEDIA RIGHTS DISTRIBUTION AGREEMENTS

### A. *The Early Days of League Broadcasting*

The NFL was founded in 1920 with just fourteen charter teams.<sup>31</sup> The League began broadcasting games over linear TV in 1939 and has done so ever since, providing ad-sponsored games to viewers for free.<sup>32</sup> In the 1950s, each of the teams negotiated its own broadcasting agreements directly with networks, including the Columbia Broadcasting System ("CBS") and the National Broadcasting Company ("NBC").<sup>33</sup> The teams were thus competing against one another for viewers of their respective telecasts.

In 1951, however, the NFL became "[c]oncerned that too much competition between the teams in the market for broadcast rights might drive some teams out of business." Therefore, the League required each team to refrain "from telecasting its games into another team's local market whenever that local team was either playing at home or broadcasting an away game in its local territory."<sup>34</sup> That same year, the U.S. Department of Justice sued the NFL for federal antitrust law violations, alleging "the collusion among the teams unreasonably restrained trade."<sup>35</sup> The court

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<sup>31</sup> See NFL, *Original Towns*, (Sept. 9, 2023), <https://www.nfl.com/100/original-towns/> [<https://perma.cc/6B9T-V8M8>] (describing the founding and early history of the NFL).

<sup>32</sup> See Nathanson, *supra* note 30.

<sup>33</sup> See *In re Nat'l Football League's Sunday Ticket Antitrust Litig.*, 933 F.3d 1136, 1144 (9th Cir. 2019).

<sup>34</sup> *Sunday Ticket*, 933 F.3d at 1144–45 (citing *United States v. Nat'l Football League*, 116 F. Supp. 319, 321 (E.D. Pa. 1953), *superseded by statute*, Sports Broadcasting Act, 15 U.S.C. § 1291, *as recognized in* *Shaw v. Dallas Cowboys Football Club, Ltd.*, 172 F.3d 299 (3d Cir. 1999)).

<sup>35</sup> *Id.*

deemed the broadcast limit illegal under the Sherman Antitrust Act of 1890 (“Sherman Act”) with the exception of allowing NFL teams to only restrict game telecasts “in another team’s territory when that team had a home game.”<sup>36</sup> This protected teams from losing out on their largest revenue source: tickets.<sup>37</sup> This first brush with antitrust law thus labeled “all other competitive restrictions of telecasts” illegal for impermissibly restraining trade.<sup>38</sup> This was partially because the NFL’s attempt to limit competition between its member teams ran contrary to the “basic objective” of antitrust law—“to protect the process of competition for the benefit of consumers.”<sup>39</sup> Over the next ten years, this type of collusive behavior became a theme within the NFL, which has persisted to this day.

In 1959, a new competitor came to the gridiron in the form of the American Football League (“AFL”).<sup>40</sup> This posed a significant threat to the NFL’s financial stability, given the AFL’s policy “to pool television rights and revenues,” which the NFL was prevented from doing, as a result of their previous lawsuit.<sup>41</sup> This legal disparity did not deter the NFL. In 1961, they signed a pooling agreement that equally shared revenue among their member teams.<sup>42</sup> Then, they petitioned the U.S. District Court for the Eastern District of Pennsylvania to uphold the deal. The court not only declined the NFL’s petition, but also issued a second injunction against the pooling agreement.<sup>43</sup>

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<sup>36</sup> *See id.*; *see also* 15 U.S.C. § 1.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *The Antitrust Laws*, FED. TRADE COMM’N, <https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/antitrust-laws> [<https://perma.cc/VU47-APMR>] (last visited Nov. 18, 2023).

<sup>40</sup> *See James, supra* note 8, at 816.

<sup>41</sup> *U.S. Football League v. Nat’l Football League*, 842 F.2d 1335, 1346 (2d Cir. 1988).

<sup>42</sup> *See Sunday Ticket*, 933 F.3d at 1145.

<sup>43</sup> *See James, supra* note 8, at 817.

*B. The Sports Broadcasting Act Exemption of 1961*

Unable to obtain the relief they sought, the NFL decided to forgo an appeal and instead approached the Legislature.<sup>44</sup> Because the NFL was “the only [professional] league specifically precluded from entering into a league-wide television contract,”<sup>45</sup> Congress enacted the Sports Broadcasting Act<sup>46</sup> of 1961 (“SBA”), in part to “establish parity between” the AFL and the NFL.<sup>47</sup> The SBA states, in relevant part:

The antitrust laws as defined in [the Sherman Act] . . . shall not apply to any joint agreement . . . by which any league of clubs participating in professional football . . . contests sells or otherwise transfers all or any part of the rights of such league’s member clubs in the *sponsored telecasting* of the games . . .<sup>48</sup>

As a result, the SBA allowed “professional sports teams to create joint agreements with networks” which permitted the NFL to sell the broadcast rights of every game on behalf of the teams rather than each individual team selling its own rights.<sup>49</sup> This was to prevent the establishment and/or furtherance of a power imbalance wherein teams in major TV markets would get wealthier and gain a competitive advantage over other teams.<sup>50</sup> The following year, the NFL signed a \$4.65 million TV network deal which called for revenue to be split evenly between its fourteen teams.<sup>51</sup> Since 1962, the NFL and its partners have continued to broadcast games over linear TV even as the number of teams has more than doubled to thirty-two. The nature of NFL broadcast rights distribution agreements have also changed along with media consumption habits.<sup>52</sup>

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<sup>44</sup> *See id.*; *see also* United States v. Nat’l Football League, 116 F. Supp. 319 (E.D. Pa. 1953).

<sup>45</sup> H.R. REP. NO. 93-483, at 2036 (1973).

<sup>46</sup> 15 U.S.C. § 1291.

<sup>47</sup> *See Sunday Ticket*, 933 F.3d at 1146.

<sup>48</sup> 15 U.S.C. § 1291 (emphasis added).

<sup>49</sup> *See James*, *supra* note 8, at 817.

<sup>50</sup> *See Sunday Ticket*, 933 F.3d at 1145.

<sup>51</sup> *See id.*

<sup>52</sup> *See NFL Completes Long-Term Media Distribution Agreements Through 2033 Season*, *supra* note 9.

### C. *Evolving Media Deals: No Money Left on the Table*

America's move from linear TV to streaming services is no secret, and certainly is a fact of which content distributors are well aware.<sup>53</sup> The NFL is no stranger to such paradigm shifts, however, and even though they have not always been the first league to do so,<sup>54</sup> the NFL has made media deals over the years reflecting availability and usage changes in technology.<sup>55</sup> For example, in 1987, the NFL became the last of the major American sports leagues to sign its first cable television deal.<sup>56</sup> This agreement, which was between the NFL and the Electronic Sports Programming Network ("ESPN"),<sup>57</sup> provided the network the ability to distribute certain primetime NFL games across the country to out-of-market viewers who—for the first time ever—could access those games, if they had a paid cable subscription.<sup>58</sup>

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<sup>53</sup> See generally Lillian Rizzo, *Broadcast and Cable Make Up Less than Half of TV Usage for the First Time Ever*, CNBC (Aug. 15, 2023, 5:05 PM), <https://www.cnbc.com/2023/08/15/traditional-tv-usage-drops-below-50percent-for-first-time-ever.html> [<https://perma.cc/V9NX-W83G>] (discussing how linear and paid television services continue to drop even as streaming services raise prices and attempt to cut costs among decreasing growth rates); see generally Benjamin Mullin, *One of the Biggest Cable Companies Says Cable TV Isn't Working*, N.Y. TIMES (Sept. 1, 2023), <https://www.nytimes.com/2023/09/01/business/charter-disney-cable-fight.html> [<https://perma.cc/4HMQ-XXK7>] (reporting on the ongoing decline of cable TV subscriptions).

<sup>54</sup> See Don Pierson & Skip Myslenski, *NFL Finally Opens the Door to Cable*, CHICAGO TRIBUNE (Mar. 16, 1987), <https://www.chicagotribune.com/news/ct-xpm-1987-03-16-8701210017-story.html> [<https://perma.cc/CJW6-YAA2>] (describing the NFL's first cable TV deal with ESPN in 1987).

<sup>55</sup> See Brandon Katz, *Will Netflix Ever Win Broadcast Rights to the Super Bowl? Maybe Sooner Than You Think.*, OBSERVER (Feb. 1, 2019, 8:00 AM), <https://observer.com/2019/02/nfl-tv-nbc-cbs-fox-espn-netflix-amazon-apple/> [<https://perma.cc/ZR6Z-ECHU>]; see also Implementation of Section 26 of the Cable Television Consumer Protection & Competition Act of 1992, 9 FCC Rcd. 1649, 1651–52 (1992).

<sup>56</sup> See Pierson & Myslenski, *supra* note 54.

<sup>57</sup> *Id.*; see also Dave Nagle, *1987 Marks ESPN's Biggest Year Yet*, ESPN PRESS ROOM (Jan. 2, 1988), <https://espnpressroom.com/us/press-releases/1988/01/1987-marks-espn-s-biggest-year-yet/> [<https://perma.cc/UQE7-7WNT>] (“[1987] was arguably the most successful and dramatic year ever for cable television.”).

<sup>58</sup> See Pierson & Myslenski, *supra* note 54.

Much to ESPN's disappointment, however, the NFL continued to allow local TV networks to show the same primetime games that were being broadcast nationally by ESPN on cable.<sup>59</sup> This represented "a critical concession" by ESPN, who had been staunchly opposed to "allowing a commercial outlet to simulcast games in the areas of the two competing teams" during their national broadcasts.<sup>60</sup>

By continuing to allow "[in-market] fans without cable"<sup>61</sup> to tune in as usual, the NFL cemented precedent into principle which still exists today, regardless of the medium.<sup>62</sup> In doing so, the NFL avoided antitrust scrutiny, while other professional sports leagues did not.<sup>63</sup> As a result, it became unmistakably clear that the SBA did not protect leagues who wish to sell their broadcast rights to distributors to the extent that such agreements prevent viewers from retaining free access to the same games over linear TV.<sup>64</sup>

Whether they knew it at the time, the NFL had dodged a bullet, and continued to adapt to meet rising demand, when they signed a set of 4-year agreements with media distributors in 1990, worth over

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<sup>59</sup> *See id.*

<sup>60</sup> *Id.* ("Obviously they would have preferred to have people buy cable.") (internal quotation marks omitted).

<sup>61</sup> *See id.* (noting ESPN was "bound by the same blackout rules as the networks").

<sup>62</sup> *See Chi. Pro. Sports Ltd. P'ship v. Nat'l Basketball Ass'n*, 754 F. Supp. 1336, 1351 (N.D. Ill. 1991) (contrasting the NBA's approach to the NFL's which from 1961-1991 was to "transfer rights in all of its games and guarantee that all of them would be televised").

<sup>63</sup> *See generally Chi. Pro. Sports Ltd. P'ship v. Nat'l Basketball Ass'n*, 808 F. Supp 646, 650 (N.D. Ill. 1992) (finding that the definition of sponsored telecasting was limited to free over-the-air TV by entities such as national broadcast networks and local over-the-air stations and therefore the SBA of 1961 and its exemption for professional sports leagues from antitrust scrutiny under § 1 of the Sherman Act did not extend to cable networks like TNT and ESPN. As a result, the NBA was not allowed to let cable networks black out local games on linear TV, thus requiring in-market fans to purchase cable).

<sup>64</sup> *See id.* at 648 ("[T]he Sports Broadcasting Act applies only when the league has 'transferred' a right to 'sponsored telecasting.'" (quoting *Chi. Pro. Sports Ltd. P'ship v. Nat'l Basketball Ass'n*, 961 F.2d 667, 671 (7th Cir. 1992))).

\$3.6 billion.<sup>65</sup> This included adding TNT as the League's second cable provider.<sup>66</sup> As with the ESPN deal, the NFL-TNT cable deal did not allow TNT to broadcast NFL games to in-market fans, once again ensuring the availability of local games over free linear TV.<sup>67</sup> Out-of-market fans, however, were still required to have a cable subscription to watch any non-local games.<sup>68</sup>

Today, out-of-market fans are still unable to watch non-local games for free over linear TV. For years the NFL and its media partners have divided broadcasts by geography so that fans in each region can watch local games via free linear TV.<sup>69</sup> For out-of-market fans hoping to watch non-local games, relief was on the horizon, but it did not come cheap. This too is an identifiable trend in NFL broadcast accessibility over the years and is the possible result of an overly aggressive strategy by the NFL to expand its output.<sup>70</sup>

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<sup>65</sup> See Bill Carter, *New TV Contracts for N.F.L.'s Games Total \$3.6 Billion*, N.Y. TIMES (Mar. 10, 1990), <https://www.nytimes.com/1990/03/10/business/new-tv-contracts-for-nfl-s-games-total-3.6-billion.html> [<https://perma.cc/H5D5-KLB5>].

<sup>66</sup> Implementation of Section 26 of the Cable Television Consumer Protection & Competition Act of 1992, 8 FCC Rcd. 4875, 4880 (1993).

<sup>67</sup> All fans had access to nationwide primetime games on Monday nights via ABC. All postseason games were broadcast free nationally on CBS, Fox, or ABC. See *id.* at 4879.

<sup>68</sup> See *id.*

<sup>69</sup> See *In re Nat'l Football League's Sunday Ticket Antitrust Litig.*, 933 F.3d 1136, 1148 (9th Cir. 2019) ("[F]ans . . . have access to, at most, two to three local games each Sunday afternoon, in any given geographic area" despite up to ten games being played at once); see e.g., Ben Rolfe, *NFL Coverage Map Week 2: TV Schedule for FOX, CBS Broadcasts*, PRO FOOTBALL NETWORK (Sept. 13, 2023, 9:56 AM), <https://www.profootballnetwork.com/nfl-coverage-map-week-2-info-2023/> [<https://perma.cc/YZ63-P9LQ>] (showing where each NFL Week 2 day game will be broadcast on Sunday, September 17, 2023); See generally *Shaw v. Dallas Cowboys Football Club*, 172 F.3d 299, 300 (3d Cir. 1999) (providing background on how NFL broadcasts over free TV vary across different local markets).

<sup>70</sup> See generally Christine Brennan, *In '90s, NFL Brings New Meaning to the Term the Buck Stops Here*, WASH. POST (Aug. 28, 1990), <https://www.washingtonpost.com/archive/sports/1990/08/28/in-90s-nfl-brings-new-meaning-to-the-term-the-buck-stops-here/a7d8c6aa-bb9b-4772-8340-77d744b1d756/> [<https://perma.cc/9S79-TGQH>] ("Whenever there has been an opportunity to make money, enhance a reputation or try an innovation, the National Football League has been on top of it.").

Supporting this theory is the fact that prior to 1987, the NFL sold a single package of media rights to networks<sup>71</sup> worth \$420 million annually.<sup>72</sup> In 1987, the League began making individual deals with distributors rather than one blanket contract; these deals totaled \$476 million per year.<sup>73</sup> Just three years later, in 1990, the value increased by 93% to \$900 million annually.<sup>74</sup> Another four years later, in 1994, the League's media contracts were worth \$1.12 billion per year.<sup>75</sup> Even with the addition of ESPN and TNT, however, fans sought the ability to watch more games, and burgeoning technology provided the means to grant out-of-market fans' wishes.<sup>76</sup> This rapid expansion of media rights deals was capped off when the NFL signed its first ever exclusive satellite TV deal in 1994 with DirecTV,<sup>77</sup> and thus, NFL Sunday Ticket was born.<sup>78</sup> Not for the first

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<sup>71</sup> See James, *supra* note 8, at 817.

<sup>72</sup> See generally *ESPN, NFL Agree to Four-Year Deal*, WASH. POST (Feb. 28, 1990), <https://www.washingtonpost.com/archive/sports/1990/03/01/espn-nfl-agree-to-four-year-deal/379859c4-8437-4a0d-8d3d-31e4f654f4a8/> [<https://perma.cc/9G7B-VVFA>] (“[T]he 1982 contract was for \$2.1 billion over five years; the 1987 contract was for \$1.428 over three.”).

<sup>73</sup> See *id.*

<sup>74</sup> See Carter, *supra* note 65.

<sup>75</sup> See generally Jim Benson, *NBC, NFL Shut Out CBS*, VARIETY (Dec. 20, 1993), <https://variety.com/1993/tv/news/nbc-nfl-shut-out-cbs-116661/> [<https://perma.cc/T4MM-5CMS>] (estimating the value of the 1994 NFL media deals with ABC, NBC, Fox, ESPN, and TNT to be worth \$4.5 billion over 4 years).

<sup>76</sup> See Implementation of Section 26 of the Cable Television Consumer Protection & Competition Act of 1992, 8 FCC Rcd. 4875, 4890 (1993) (“[E]merging technologies such as wireless cable and direct broadcast satellites have the potential to offer substantially more programming choices to consumers.”).

<sup>77</sup> See *In re Nat'l Football League's Sunday Ticket Antitrust Litig.*, 933 F.3d 1136, 1147 (9th Cir. 2019).

<sup>78</sup> See *id.*; see also Jimmy Traina, *Despite Some Issues, NFL Sunday Ticket on YouTube Was a Solid Success*, SPORTS ILLUSTRATED (Sept. 11, 2023), <https://www.si.com/extra-mustard/2023/09/11/nfl-sunday-ticket-youtube-review> [<https://perma.cc/2KGT-JNGN>]; for more information on the League's decision to switch *NFL Sunday Ticket* to a platform where it is exclusively available via streaming, see Alex Sherman & Julia Boorstin, *NFL Will Select New Sunday Ticket Partner by Fall, Commissioner Roger Goodell Says*, CNBC (July 8, 2022, 1:17 PM), <https://www.cnbc.com/2022/07/08/nfl-will-select-new-sunday-ticket-partner-by-fall-commissioner-roger-goodell-says.html> [<https://perma.cc/6W67-CXUM>] (quoting NFL Commissioner Roger Goodell) (“I clearly



time and not for the last, the NFL had made a new distribution deal to keep pace with changing technology. Amidst this change, one thing is for certain: the NFL's media deals "didn't leave any money on the table."<sup>79</sup>

*D. NFL Sunday Ticket's Ongoing Antitrust Litigation*

For out-of-market fans hoping to watch non-local games, a potential solution presented itself with the advent of NFL Sunday Ticket in 1994.<sup>80</sup> NFL Sunday Ticket is a package which includes every Sunday afternoon game<sup>81</sup> that subscribers can watch almost anywhere in the country. The traditional caveat still applies: local games are not shown on NFL Sunday Ticket to in-market fans.<sup>82</sup> Despite the newly added capability to watch non-local games, NFL Sunday Ticket was not immune to skepticism. Just four years after its conception, in 1998, NFL Sunday Ticket was challenged in the U.S. District Court for the Eastern District of Pennsylvania in *Shaw v. Dallas Cowboys Football Club*.<sup>83</sup>

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believe we'll be moving to a streaming service [because] . . . I think that's best for consumers at this stage.").

<sup>79</sup> Larry Stewart, *NFL TV Package Hits \$3.637 Billion*, L.A. TIMES (Mar. 10, 1990, 12:00 AM), <https://www.latimes.com/archives/la-xpm-1990-03-10-sp-1852-story.html> [<https://perma.cc/2K2F-P8P5>] (quoting an unidentified network official about the new four-year media distribution agreements between the NFL and its partners in 1990).

<sup>80</sup> See *Sunday Ticket*, 933 F.3d at 1147.

<sup>81</sup> *DirecTV Strikes Long-Term Deal for NFL Sunday Ticket*, YAHOO ENT. (Oct. 1, 2014), <https://www.yahoo.com/sports/news/directv-strikes-long-term-deal-nfl-sunday-ticket-040028958.html> [<https://perma.cc/LB7G-XCSA>] (discussing the original deal from 1994 and the contract extension between the League and DirecTV for NFL Sunday Ticket made in 2014).

<sup>82</sup> See Jimmy Traina, *Changes, Problems Coming to NFL Sunday Ticket This Season*, SPORTS ILLUSTRATED (Aug. 25, 2023), <https://www.si.com/extra-mustard/2023/08/25/nfl-sunday-ticket-youtube-multiview-blackouts> [<https://perma.cc/A4BV-NVCZ>].

<sup>83</sup> *Shaw v. Dallas Cowboys Football Club, Ltd.*, No. 97-5184, 1998 WL 419765 (E.D. Pa. June 23, 1998), *aff'd*, 172 F.3d 299 (3d Cir. 1999). *Shaw* was a class-action antitrust against several NFL teams and the League itself.

### 1. *Trouble in Football Paradise? The Original NFL Sunday Ticket Litigation*

In *Shaw*, the plaintiffs alleged that the NFL and its teams violated the Sherman Act by entering into an agreement to sell the collective teams' broadcast rights for distribution on satellite TV.<sup>84</sup> The SBA exemption allows the NFL to pool the rights of its teams which eliminates the need for them to compete amongst themselves, but only insofar as the rights are being sold for distribution on sponsored telecasting and "provided [for] free to the general public."<sup>85</sup> This collusion to eliminate competition for media rights between teams would otherwise be illegal,<sup>86</sup> which is what the plaintiffs in *Shaw* argued.<sup>87</sup> Additionally, they also alleged the League, its teams, and DirecTV conspired "to fix, raise, maintain, or stabilize the price for satellite broadcasts of . . . NFL games" which created "artificially high and noncompetitive prices for NFL satellite broadcasts."<sup>88</sup>

### 2. *Setting the Stage for Future Conflict*

Section 1 of the Sherman Act specifically proscribes "[e]very contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce."<sup>89</sup> However, the statute "has been interpreted as 'outlaw[ing] only unreasonable restraints' of trade."<sup>90</sup> Such unreasonable restraints may take the form of a "horizontal agreement," or one "between competitors in the same

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<sup>84</sup> *Shaw*, 1998 WL 419765, at \*1.

<sup>85</sup> See *Sunday Ticket*, 933 F.3d at 1148 (quoting *Shaw v. Dallas Cowboys Football Club, Ltd.*, 172 F.3d 299, 301 (3d Cir. 1999)).

<sup>86</sup> See *In re Musical Instruments Equip. Antitrust Litig.*, 798 F.3d 1186, 1191 (9th Cir. 2015) ("The Supreme Court has recognized that certain horizontal agreements 'always or almost always tend to restrict competition and decrease output' " including agreements among competing businesses which "fix prices, divide markets, and refuse to deal" and "[s]uch inherently anticompetitive horizontal agreements violate the Sherman act *per se*." (internal citations omitted).

<sup>87</sup> See *id.* at 1147–48 (citing *Shaw v. Dallas Cowboys Football Club, Ltd.*, 172 F.3d 299, 301, 303 (3d Cir. 1999)).

<sup>88</sup> *Shaw*, 1998 WL 419765, at \*1.

<sup>89</sup> 15 U.S.C. § 1.

<sup>90</sup> *Sunday Ticket*, 933 F.3d at 1149–50 (quoting *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997)).

market.”<sup>91</sup> In *Shaw*, the plaintiffs alleged that the NFL had created a horizontal agreement by pooling the rights of its teams and negotiating the deal for NFL Sunday Ticket on their behalf. As a result, the plaintiffs alleged that the NFL was effectively curbing competition between the teams and was therefore able to set whatever price the League desired.<sup>92</sup> In ruling on the NFL’s motion to dismiss, the District Court found “that the defendants’ conduct [was] not exempt from antitrust liability under the SBA.”<sup>93</sup> This was because the SBA’s “special-interest exemption upon the normal prohibition on monopolistic behavior” only allowed rights pooling agreements<sup>94</sup> like the NFL’s for free television broadcasts, not for satellite broadcasts that viewers paid for.<sup>95</sup> The Third Circuit affirmed the District Court’s decision,<sup>96</sup> but before the case could go further, the parties settled for \$7.5 million,<sup>97</sup> and DirecTV’s NFL Sunday Ticket lived on. That is hardly the end of the story, however. *Shaw* has quietly set the stage for conflicts which have arisen in the past decade over NFL Sunday Ticket and more recently over the NFL’s 2021 media distribution agreements which have resurrected past issues with a new twist—streaming. These issues further illustrate the NFL’s indifference to operating outside of the SBA’s sponsored telecasting exemption.

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<sup>91</sup> See *Brantley v. NBC Universal, Inc.*, 675 F.3d 1192, 1198 (9th Cir. 2012); see also *Am. Needle, Inc. v. Nat’l Football League*, 560 U.S. 183, 196 (2010) (identifying each of the thirty-two NFL teams as “a substantial, independently owned, and independently managed business” which “compete with one another, [and] not only on the playing field”).

<sup>92</sup> See generally *Shaw*, 172 F.3d at 300 (“[The NFL] entered into a pooled agreement to sell jointly their rights in all football games broadcast nationwide to a satellite broadcast distributor (DirecTV) which in turn offers those games as an all-or-nothing package (the ‘NFL Sunday Ticket’) to individual viewer-subscribers at a fixed cost per season.”).

<sup>93</sup> *Shaw v. Dallas Cowboys Football Club, Ltd.*, No. 97-5184, 1998 WL 419765, at \*5 (E.D. Pa. June 23, 1998).

<sup>94</sup> *Brantley*, 675 F.3d at 1198.

<sup>95</sup> *Shaw*, 1998 WL 419765, at \*5.

<sup>96</sup> See *Shaw*, 172 F.3d at 303 (“[W]e find that the subscription satellite broadcast of NFL games is not a part of the NFL’s rights to the sponsored telecasting of those games and therefore not with the Sports Broadcasting Act’s exemption to the antitrust laws . . .”).

<sup>97</sup> *Shaw*, 1998 WL 419765, at \*3.

### III. THE MODERN NFL MEDIA RIGHTS LANDSCAPE

The NFL completed its most recent set of media distribution agreements in 2021 when the League signed new eleven-year TV licensing contracts with Amazon, CBS, FOX, NBC, and Disney.<sup>98</sup> The CBS, FOX, and NBC deals are estimated to be worth over \$2 billion per year, with ESPN's valued at \$2.7 billion, and Amazon's worth close to \$1 billion annually.<sup>99</sup> All in all, the total valuation of the NFL's media rights comes in at over \$100 billion,<sup>100</sup> dwarfing the previous agreements made in 2011, which were valued at \$27 billion.<sup>101</sup> These new long-term media agreements are not entirely unlike prior agreements, but unsurprisingly, the contracts feature NFL content distribution not just on free linear TV or cable channels, but also on streaming platforms.<sup>102</sup> The ease and accessibility of streaming<sup>103</sup> combined with "all-time high" cord-cutting is a perfect storm for the addition of streaming options to watch NFL games. However, problems have arisen from the League's spread-the-wealth approach.<sup>104</sup>

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<sup>98</sup> See *id.*

<sup>99</sup> See Vinnie Iyer, *NFL's New TV Rights Deals, Explained: What \$100 Billion Package Means for Fans in 2023 and Beyond*, SPORTING NEWS (Mar. 19, 2021), <https://www.sportingnews.com/us/nfl/news/nfl-tv-rights-deals-explained/z4rlycwog3jz1f6pqdqogbxf> [<https://perma.cc/FS7U-657V>] (discussing the implications of the NFL's most recent media distribution contracts).

<sup>100</sup> See Joe Flint & Andrew Beaton, *NFL's Media Deals Bring Thursday Night Football to Amazon, Super Bowl to ABC*, WALL ST. J. (March 18, 2021, 6:32 PM), <https://www.wsj.com/articles/nfl-feeds-streaming-platforms-with-media-deals-valued-at-over-100-billion-11616097902> [<https://perma.cc/HCN2-4P54>] (reporting on the NFL's media rights distribution deals made in 2021).

<sup>101</sup> See Kurt Badenhausen, *The NFL Signs TV Deals Worth \$27 Billion*, FORBES (Dec. 14, 2011, 6:13 PM), <https://www.forbes.com/sites/kurtbadenhausen/2011/12/14/the-nfl-signs-tv-deals-worth-26-billion/?sh=7675b1a522b4> [<https://perma.cc/LQ4X-X2BH>] (reporting on the 9-year broadcast TV extensions the NFL signed with Fox, NBC, and CBS in 2011 which ran from 2013 through the 2022 season).

<sup>102</sup> See *NFL Completes Long-Term Media Distribution Agreements Through 2033 Season*, *supra* note 9.

<sup>103</sup> See Korwitts, *supra* note 19.

<sup>104</sup> See Traina, *supra* note 82.

A. *The Impacts of Antitrust Law on the NFL*

According to the Federal Trade Commission (“FTC”), antitrust laws exist “to protect the process of competition for the benefit of consumers, making sure there are strong incentives for businesses to operate efficiently, keep prices down, and keep quality up.”<sup>105</sup> One of the main mechanisms by which Congress intended to further these goals is the Sherman Act.<sup>106</sup> As previously mentioned, Section 1 of the Sherman Act was designed to prevent restraints on trade.<sup>107</sup> The Supreme Court has since interpreted the Act to only prohibit unreasonable restraints on trade.<sup>108</sup> However, the 1961 SBA exempted the NFL from antitrust liability under a narrow category of TV deals.<sup>109</sup>

Perhaps the most notable part of the SBA<sup>110</sup> is the phrase “sponsored telecasting.”<sup>111</sup> One would be forgiven for not noticing those two words originally, but the weight they carry places them at the heart of every NFL broadcasting antitrust dispute since 1961. The reason those two words carry such great power is simple: they limit the scope of the SBA exemption to linear TV.<sup>112</sup> Simply put, the SBA allows the NFL to pool the media rights of its thirty-two teams and license those rights to networks in order “to preserve the availability of NFL games on free broadcast television.”<sup>113</sup> However, the NFL’s business model has not been limited to free TV since 1987, and has only continued to expand beyond linear television. Accordingly, the importance of the SBA’s built-in limitation cannot be understated.

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<sup>105</sup> See *The Antitrust Laws*, *supra* note 39.

<sup>106</sup> For a brief history and overview of the Sherman Act, see *Sherman Antitrust Act*, CORNELL L. SCH.: LEGAL INFO. INST., [https://www.law.cornell.edu/wex/sherman\\_antitrust\\_act](https://www.law.cornell.edu/wex/sherman_antitrust_act) [<https://perma.cc/9QEU-RABS>] (last visited Sept. 29, 2023).

<sup>107</sup> See *The Antitrust Laws*, *supra* note 39.

<sup>108</sup> See *Arizona v. Maricopa Cnty. Med. Soc’y*, 457 U.S. 332, 343 (1982) (citing *United States v. Joint Traffic Ass’n*, 171 U.S. 505 (1898)).

<sup>109</sup> See *James*, *supra* note 8, at 820.

<sup>110</sup> 15 U.S.C. § 1291.

<sup>111</sup> *Id.*

<sup>112</sup> See *Shaw v. Dallas Cowboys Football Club, Ltd.*, 172 F.3d 299 (3d Cir. 1999).

<sup>113</sup> See *Nathanson*, *supra* note 30 (citing *In re Nat’l Football League’s Sunday Ticket Antitrust Litig.*, 933 F.3d 1136, 1147 (9th Cir. 2019)).

*B. The Narrow Sidelines of the SBA Exemption*

In *Shaw*, the class-action suit arose based on claims that the NFL and its teams had violated the Sherman Act by entering into an agreement to sell the collective teams' broadcasting rights for distribution on satellite TV and "to fix, raise, maintain, or stabilize the price for satellite broadcasts of . . . NFL games."<sup>114</sup> The plaintiffs alleged that this created "artificially high and noncompetitive prices for NFL satellite broadcasts."<sup>115</sup> In response, the defendants—the NFL and its thirty-two teams—claimed that the SBA completely exempted them from antitrust liability, and that the agreement to sell the bundle of games to DirecTV was lawful.<sup>116</sup> The Court in *Shaw* faced an issue "of apparent first impression," because although cable networks like TNT and ESPN had been found to not constitute sponsored telecasting<sup>117</sup> and therefore did not fall under the SBA,<sup>118</sup> the question of whether the SBA's definition of "sponsored telecasting" extended to satellite television had never been litigated.<sup>119</sup>

In *Shaw*, the District Court put a fine point on the purpose of the SBA's sponsored telecasting exemption, being sure to convey its outer limits:

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<sup>114</sup> *Shaw v. Dallas Cowboys Football Club, Ltd.*, No. 97-5184, 1998 WL 419765, at \*1 (E.D. Pa. June 23, 1998).

<sup>115</sup> *See id.*

<sup>116</sup> *See id.*

<sup>117</sup> *Chi. Pro. Sports Ltd. P'ship v. Nat'l Basketball Ass'n*, 808 F. Supp 646, 650 (N.D. Ill. 1992) ("[W]e conclude that TNT, like ESPN, falls outside the statutory meaning of 'sponsored telecasting.'").

<sup>118</sup> *See Shaw v. Dallas Cowboys Football Club, Ltd.*, 172 F.3d 299, 302 n.12 (3d Cir. 1999) (citing Letter from Charles F. Rule, Asst. Atty. Gen., Antitrust Div., U.S. Dep't of Justice, to the Hon. Howard M. Metzenbaum, Chairman, Senate Subcomm. on Antitrust, Monopolies, and Bus. Rights, March 30, 1988, *reprinted in* Antitrust Implications of the Recent NFL Television Contract: Hearing Before the Subcomm. on Antitrust, Monopolies, and Bus. Rights of the Comm'n on the Judiciary, 100th Cong., 1st Sess. 67 (1987) (citing legislative history and concluding—as did the FTC—that the SBA provides no antitrust immunity to the NFL for its contract with ESPN, a cable operator, as that programming is not within the "sponsored telecasting" exemption)).

<sup>119</sup> *Shaw v. Dallas Cowboys Football Club, Ltd.*, No. 97-5184, 1998 WL 419765 (E.D. Pa. June 23, 1998), *aff'd*, 172 F.3d 299 (3d Cir. 1999).

The Sports Broadcasting Act did not pronounce a broad, sweeping policy, but rather engrafted a *narrow*, discrete, special-interest exemption upon the normal prohibition on monopolistic behavior. In the SBA, the NFL got what it lobbied for [in 1961]. It cannot now stretch that law to cover other means of broadcast.<sup>120</sup>

Despite a clear indication that satellite TV would not fall under the SBA, the parties in *Shaw* settled and NFL Sunday Ticket lived to fight another day—another 22 years and counting, actually.<sup>121</sup>

Since 2015, however, there has been another ongoing class-action suit against the NFL, its teams, and DirecTV in *In re National Football League's Sunday Ticket Antitrust Litigation* (“*Sunday Ticket*”).<sup>122</sup> This case was similar to *Shaw* in that it featured controversial agreement between the NFL and its teams (“the Teams-NFL agreement”).<sup>123</sup> This case differed from *Shaw* in that DirecTV was a defendant and that there was a second agreement at issue: one between the NFL and DirecTV (“the NFL-DirecTV agreement”).<sup>124</sup> The plaintiffs’ main claim was that these “interlocking agreements” injured competition.<sup>125</sup>

The case came to the Ninth Circuit in 2018 on appeal following the District Court for the Central District of California’s finding that the plaintiffs had not stated a cause of action under the Sherman Act.<sup>126</sup> The Ninth Circuit reversed the District Court’s decision.<sup>127</sup> In their 2019 opinion denying the NFL’s motion to dismiss, the Ninth Circuit stated “[i]t is significant here that the defendants do not argue on appeal that the SBA applies to the Teams-NFL or NFL-DirecTV Agreements.”<sup>128</sup> The court went on to reason that “[b]ecause the defendants do not argue that the SBA applies to

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<sup>120</sup> *Shaw*, 1998 WL 419765, at \*5 (emphasis added).

<sup>121</sup> *Sunday Ticket* is still broadcast every Sunday of the NFL Regular Season. See *NFL Completes Long-Term Media Distribution Agreements Through 2033 Season*, *supra* note 9.

<sup>122</sup> *In re Nat’l Football League’s Sunday Ticket Antitrust Litig.*, 933 F.3d 1136, 1149 (9th Cir. 2019).

<sup>123</sup> *Id.*

<sup>124</sup> See *id.* at 1144.

<sup>125</sup> See *id.*

<sup>126</sup> See *id.*

<sup>127</sup> See *id.*

<sup>128</sup> *Id.* at 1149.

satellite broadcasting, [the court] assume[s] (without deciding) that [the SBA's antitrust exemption] *is not applicable* to the Teams-NFL or NFL-DirecTV Agreements.”<sup>129</sup> If this is the final outcome reached by the Ninth Circuit, or later on appeal, then the NFL and DirecTV would be subject to antitrust scrutiny under the Sherman Act.

Although it did not issue a formal ruling on the subject, the Ninth Circuit clearly does not believe satellite television falls under the SBA exemption.<sup>130</sup> Given the presumptive forecast of the Ninth Circuit in *Sunday Ticket*, and the unequivocalty of the Third Circuit in *Shaw*, it seems abundantly clear that the NFL cannot pool and sell the collective rights of its teams for distribution on any platform other than free television.<sup>131</sup> As a result, NFL streaming deals are subject to antitrust scrutiny.

### C. *The Existing League Sports Antitrust Framework*

Because it does not fall under the SBA exemption, a recent agreement has now been thrown into the mix: one between the NFL and Amazon (“the Amazon agreement”), which grants Amazon exclusive streaming rights to TNF. Given the holding in *Sunday Ticket*, the Amazon agreement stands to meet the same fate, and must be considered in light of the Supreme Court’s 1984 decision in *National Collegiate Athletic Association (“NCAA”) v. Board of Regents of the University of Oklahoma*. The Ninth Circuit relied on *Board of Regents* in *Sunday Ticket* because there, the Court “analyzed a similar league sport broadcasting agreement under the Sherman Act.”<sup>132</sup> But to fully understand the gravity of these two decisions, and how their analysis is relevant to the Amazon agreement, the implications of the NFL’s foray into the world of exclusive streaming deals must be examined first.

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<sup>129</sup> See *id.* at 1147–48 (emphasis added).

<sup>130</sup> See *id.* at 1147 (citing *Shaw v. Dallas Cowboys Football Club, Ltd.*, 172 F.3d 299, 303 (3d Cir. 1999)).

<sup>131</sup> *Shaw v. Dallas Cowboys Football Club, Ltd.*, 172 F.3d 299, 302 (3d Cir. 1999) (stating that the SBA exemption does “not apply to subscription television”).

<sup>132</sup> *Sunday Ticket*, 933 F.3d at 1149.



#### IV. THE NEW RPO

##### A. *Options as Opposed to Access*

Much to the League's credit, the 2021 media agreements echo past NFL distribution deals by continuing to provide non-local games to out-of-market fans.<sup>133</sup> In-market NFL viewers with linear TV or a substitute<sup>134</sup> can still access their local games, while out-of-market fans hoping to watch non-local games must still resort to an alternative to watch their desired content.<sup>135</sup> In the history of NFL broadcasting, this has almost<sup>136</sup> always been the case, and will presumably continue to be, at least through 2033.<sup>137</sup> Providing local games for free to in-market fans helps facilitate the current NFL League Commissioner Roger Goodell's stated purpose of providing "fans even greater access to the games they love."<sup>138</sup> However, the new rights distribution agreements—"highlighted by broad distribution across linear and digital platforms"—showcase the specious nature of the League's claim that the "new media agreements provide fans with more ways to watch NFL games than ever before."<sup>139</sup> While that is true, the NFL's implementation of exclusive streaming deals is problematic. Although broader

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<sup>133</sup> See *id.* at 1148.

<sup>134</sup> See e.g., *Watch NFL Games with Hulu + Live TV*, HULU, <https://www.hulu.com/live-sports> [<https://perma.cc/N3RU-D3K7>] (last visited Nov. 4, 2023) (explaining how Hulu + Live TV subscribers can watch in-market NFL games on broadcast networks such as Fox, CBS, and NBC, with ESPN and NFL network included and NFL RedZone available with the purchase of the sports add-on).

<sup>135</sup> See *In re Nat'l Football League's Sunday Ticket Antitrust Litig.*, No. ML1502668BROJEMX, 2017 WL 3084276, at \*3 (C.D. Cal. June 30, 2017).

<sup>136</sup> See generally Chris Isidore, *NFL Drops TV Blackout Rule*, CNN BUSINESS (Mar. 23, 2015, 5:26 PM), <https://money.cnn.com/2015/03/23/media/nfl-blackout-rule/> [<https://perma.cc/R3NT-KP7F>] (reporting on a 2015 NFL broadcasting rule change which eliminated a blackout policy preventing local fans from watching free televised games including their local team when tickets to a game did not sell out).

<sup>137</sup> See *NFL Completes Long-Term Media Distribution Agreements Through 2033 Season*, *supra* note 9 ("The NFL continues to be the only sports league that delivers all of its games—regular-season and playoffs—on free, [linear] television.").

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

distribution logically facilitates greater access to NFL games, streaming services are neither free nor limited in number.

The reality is, the League has provided more options for fans to view NFL games but has raised the bar for entry. As a result, the NFL's exclusive streaming deals have created an inverse accessibility issue: providing a greater number of ways to watch NFL games *does not* result in greater access. A greater number of options means nothing when those options are not created equal. Exclusive streaming deals, like the Amazon agreement, leave fans with two unsatisfactory alternatives to choose from. This Article terms that decision “The New RPO.”

*B. The Implications of Unchecked Streaming Deals and the New RPO*

The acronym “RPO” may be familiar to fans, as it is often heard on football broadcasts, on the sidelines, and on the field. RPO typically stands for a Run-Pass Option, a type of offensive play call where the quarterback has the option to throw the ball, hand it off, or even run it himself.<sup>140</sup> However, the New RPO provides only two choices for NFL fans: run or pay. Thus, the New RPO stands for the “Run-Pay Option,” which modern NFL fans are faced with.

The New RPO gives in- and out-of-market fans who want to watch both local and non-local games one of two unsatisfactory choices: (1) run—choosing not to pay the higher prices and watch only the games available in their geographic market; or (2) pay—for subscriptions to services they may not otherwise want or need but are now required to have in order to watch games which were previously available to them. As a result of the New RPO, this Article explores whether a plaintiff could plausibly allege that the Amazon agreement constitutes an “unreasonable restraint[] of trade”<sup>141</sup> under the Sherman Act.

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<sup>140</sup> See Steven Ruiz, *A Casual Fan's Guide to RPOs*, FOR THE WIN (Sept. 6, 2018), <https://ftw.usatoday.com/2018/09/nfl-falcons-eagles-what-is-an-rpo-run-pass-option-guide> [<https://perma.cc/N6C2-X3FD>].

<sup>141</sup> *In re Nat'l Football League's Sunday Ticket Antitrust Litig.*, 933 F.3d 1136, 1149–50 (9th Cir. 2019) (quoting *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997)).

## V. THE NFL AND AMAZON: PARTNERS IN CRIME?

### A. *Establishing an Unreasonable Restraint on Trade Against the NFL and Amazon*

Evaluating the fortitude of a hypothetical complaint against the NFL and Amazon on the basis of the *Sunday Ticket* and *Board of Regents* decisions requires analogizing the facts of those two cases to those of the Amazon agreement. Analysis must begin with an examination of the legal landscape and relevant antitrust framework applied to claims alleging a Sherman Act violation.<sup>142</sup>

#### 1. *Per Se Section 1 Violations*

According to the Ninth Circuit, “some restraints of trade, such as horizontal agreements among competitors to fix prices, restrict output, and divide markets, are generally deemed to be *per se* unreasonable” under Section 1 of the Sherman Act, and thus antitrust violations.<sup>143</sup> In *Board of Regents*, the Supreme Court provided that designating a practice “illegal *per se*” ordinarily occurs because of the high probability that practice is anticompetitive, as it “always or almost always tend[s] to restrict competition and reduce output.”<sup>144</sup> As previously stated, the Teams-NFL agreement is an example of a horizontal agreement, but special rules apply to league sports and the Teams-NFL agreement is not a *per se* antitrust violation.<sup>145</sup> In light of this, the Amazon agreement is evaluated using the rule of reason test.<sup>146</sup>

#### 2. *The Rule of Reason Test*

“The Supreme Court has concluded that the *per se* rule does not apply to agreements involving teams engaged in league sports”

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<sup>142</sup> See 15 U.S.C. § 1; see also *Sunday Ticket*, 933 F.3d at 1149–50 (quoting *Khan*, 522 U.S. at 10).

<sup>143</sup> *Id.* at 1150. See also *NCAA v. Board of Regents of the Univ. of Okla.*, 468 U.S. 85, 103–04 (1984) (“*Per se* rules are invoked when surrounding circumstances make the likelihood of anticompetitive conduct so great as to render unjustified further examination of the challenged conduct.”).

<sup>144</sup> *NCAA v. Board of Regents of the Univ. of Okla.*, 468 U.S. at 100.

<sup>145</sup> See *id.* at 103–04 (“Therefore, when considering agreements among entities involved in league sports . . . a court must determine whether the restriction is unreasonable under the rule of reason.”).

<sup>146</sup> See *Sunday Ticket*, 933 F.3d at 1150.

because some degree of cohesion between teams is indispensable.<sup>147</sup> Therefore, in such cases, “a court must determine whether the restriction is unreasonable,” using the rule of reason test.<sup>148</sup> Because of this, the rule of reason is the appropriate test to determine whether a plausible Sherman Act claim exists against Amazon and the NFL as a result of the harm to competition stemming from the Amazon agreement. The Supreme Court has acknowledged that “what is required to assess whether a challenged restraint harms competition can vary.”<sup>149</sup> “The whole point of the rule of reason” is to carefully analyze “a restraint [on trade] to ensure that it unduly harms competition before a court declares it unlawful.”<sup>150</sup>

The rule of reason test examines “the facts peculiar to the business, the history of the restraint, and the reasons why [the agreement] was imposed to determine the effect on competition in the relevant product market.”<sup>151</sup> Additionally, the test evaluates “whether [an agreement’s] anticompetitive effects outweigh its procompetitive effects:” a useful indicator that can be the difference between a Section 1 violation and a lawful agreement.<sup>152</sup>

In order to accomplish these goals in recent years, the Supreme Court has utilized “a three-step, burden-shifting framework” which aids in the distinction of “restraints with anticompetitive effect[s] that are harmful to the consumer and restraints stimulating competition that are in the consumer’s best interest.”<sup>153</sup> However, the Ninth Circuit’s analysis in *Sunday Ticket* differs due to a procedural variation.<sup>154</sup> There, the Ninth Circuit laid out four factors:

- (1) a contract, combination or conspiracy among two or more persons or distinct business entities; (2) by which the persons or entities

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<sup>147</sup> *Id.* at 1150 n.5.

<sup>148</sup> *NCAA v. Board of Regents of the Univ. of Okla.*, 468 U.S. at 100.

<sup>149</sup> *NCAA v. Alston*, 141 S. Ct. 2141, 2160 (2021).

<sup>150</sup> *Id.* (quoting *Cal. Dental Ass’n v. F.T.C.*, 526 U.S. 756 (1999)).

<sup>151</sup> *Sunday Ticket*, 933 F.3d at 1150 (quoting *Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 692 (1978)).

<sup>152</sup> *Atlantic Richfield v. USA Petroleum Co.*, 495 U.S. 328, 342 (1990).

<sup>153</sup> *Alston*, 141 S. Ct. at 2160 (quoting *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2284 (2018)).

<sup>154</sup> *See generally Sunday Ticket*, 933 F.3d at 1149 (“We review . . . a Rule 12(b)(6) motion to dismiss for failure to state a claim de novo.”).

intended to harm or restrain trade or commerce among the several States, or with foreign nations; (3) which actually injures competition. Additionally, the plaintiffs must plead antitrust standing, meaning they must allege that (4) they are the proper parties to bring the antitrust action because they were harmed by the defendants' contract, combination, or conspiracy, and the harm they suffered was caused by the anti-competitive aspect of the defendants' conduct.<sup>155</sup>

Just as these four factors were present in *Sunday Ticket*, they are also identifiable in the matter of the Amazon agreement. Because these four factors can be found within the Amazon agreement, they should be applied in conjunction with the Supreme Court's framework. Accordingly, analysis proceeds by utilizing the four-factor test seen in *Sunday Ticket* to establish the plausibility of a Section 1 claim and concludes by applying the Supreme Court's burden-shifting framework to demonstrate that the Amazon deal's harm to competition outweighs any procompetitive benefits.

*B. Into the . . . Rainforest: Establishing a Section 1 Claim Against the NFL and Amazon*

In *Sunday Ticket*, the Ninth Circuit applied the four factors which a plaintiff must plead in "order to state a Section 1 claim under the rule of reason."<sup>156</sup> Because the question of whether the Amazon agreement violates Section 1 is also determined using the rule of reason test, the same four factors must be present to state a claim.

*1. Exclusive Streaming Deals and Restraints on Trade*

In order to establish the first factor of the rule of reason test, plaintiffs must only allege the existence of a "contract, combination, or conspiracy among two or more persons or distinct business entities."<sup>157</sup> Clearly, this requirement is established via the NFL-DirecTV agreement in *Sunday Ticket*, as well as by the Amazon agreement.

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<sup>155</sup> *Sunday Ticket*, 933 F.3d at 1150 (quoting *Brantley v. NBC Universal, Inc.*, 675 F.3d 1192, 1197 (9th Cir. 2012)).

<sup>156</sup> *Id.*

<sup>157</sup> *Id.* (quoting *Brantley v. NBC Universal, Inc.*, 675 F.3d 1192, 1197 (9th Cir. 2012)).

## 2. *Intentional Restraints on Trade and Harm to Consumers*

The second factor, whether the agreement intended to harm or restrain trade,<sup>158</sup> are also satisfied by the DirecTV and Amazon agreements. The defendants in *Sunday Ticket* did not dispute that the class-action plaintiffs had alleged the agreement to air NFL Sunday Ticket exclusively on satellite television intended to harm or restrain trade. Because of this, the Ninth Circuit did not go into great detail regarding this factor. However, the Supreme Court has provided guidance in this area.

In *Standard Oil Co. of New Jersey v. United States*,<sup>159</sup> the Supreme Court expressed a desire to prevent the existence of agreements which “were of such a character as to give rise to the inference or presumption that they had been entered into or done with the intent to do wrong . . . thus restraining the free flow of commerce.”<sup>160</sup> To establish a permissible inference that an agreement was intended to harm or restrain trade, the Court only considers the impacts on competition.<sup>161</sup>

When examining the facts of *Board of Regents*, the impacts on competition are clear—the NCAA’s contracts eliminated competition for the televising of college football.<sup>162</sup> The NCAA’s television agreement demonstrated intent to restrain trade because the Association knowingly limited “the total amount of televised intercollegiate football and the number of games *that any one team may televise*.”<sup>163</sup> As a result, no member institution could sell any “television rights except in accordance” with the NCAA’s rules.<sup>164</sup> By design, the NCAA’s plan reduced the output of televised college

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<sup>158</sup> See *Brantley v. NBC Universal, Inc.*, 675 F.3d 1192, 1197 (9th Cir. 2012).

<sup>159</sup> *Standard Oil Co. v. United States*, 221 U.S. 1 (1911).

<sup>160</sup> *Id.* at 58.

<sup>161</sup> See generally *Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 690 (1978) (citing *Standard Oil Co. v. United States*, 221 U.S. 1, 55 (1911)) (explaining that evaluating whether the circumstances of a case allow the presumption or inference that agreements were intended to restrain trade “is confined to a consideration of impact on competitive conditions”).

<sup>162</sup> See *NCAA v. Board of Regents of the Univ. of Okla.*, 468 U.S. 85, 106 (1984) (“The anticompetitive consequences of this arrangement are apparent. Individual competitors lose this freedom to compete.”).

<sup>163</sup> *Id.* at 94 (emphasis added).

<sup>164</sup> *Id.* at 94.

football and eliminated competition within the market, demonstrating that the NCAA's television broadcast agreements "operated to raise prices and reduce output."<sup>165</sup> Notably, the Supreme Court added that "[r]estrictions on price and output are the paradigmatic examples of restraints of trade that the Sherman Act was intended to prohibit."<sup>166</sup>

The Ninth Circuit also found "similar restrictions" in the *Sunday Ticket* allegations, as the NFL and DirecTV's prohibition on independent telecasts expressly prevented the teams from competing with each other and DirecTV.<sup>167</sup> Other "analogous limitations" between the NFL and NCAA in each case also included limiting the amount of televised football and restricting "the number of telecasts made to a single telecast for each game."<sup>168</sup> Not only does the Amazon agreement do this, but the practical effects on fans are readily apparent because the agreement decreases output: Thursday Night games that were once accessible by everyone will now only be available to consumers who pay a subscription fee to Amazon.<sup>169</sup>

### 3. *Actual Injury to Competition in Relevant Markets*

To plead injury to competition, plaintiffs must identify an agreement which has an anticompetitive effect such as "raising price, reducing output, [or] dividing markets."<sup>170</sup> This typically first requires a plaintiff to demonstrate that "defendants have market power within a relevant market."<sup>171</sup> In *Board of Regents*, the relevant market was defined as "live college football television."<sup>172</sup> In

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<sup>165</sup> See *id.* at 109 (citing *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 692 (1978)).

<sup>166</sup> *Id.* at 107 (citing *Standard Oil Co. v. United States*, 221 U.S. 1, 52–60 (1911)).

<sup>167</sup> See *In re Nat'l Football League's Sunday Ticket Antitrust Litig.*, 933 F.3d 1136, 1151 (9th Cir. 2019).

<sup>168</sup> *Id.* (citing *NCAA v. Board of Regents of the Univ. of Okla.*, 468 U.S. 85, 94, 104 (1984)).

<sup>169</sup> See D'Cunha, *supra* note 27.

<sup>170</sup> *Sunday Ticket*, 933 F.3d at 1158 (citing *Cal. Dental Ass'n v. FTC.*, 526 U.S. 756 (1999)).

<sup>171</sup> *Id.* at 1151 (citing *Newcal Indus., Inc. v. Ikon Office Sol.*, 513 F.3d 1038, 1044 (9th Cir. 2008)).

<sup>172</sup> See *NCAA v. Board of Regents of the Univ. of Okla.*, 468 U.S. 85, 95 (1984).

*Sunday Ticket*, however, no relevant market was required to be alleged. This was because the NFL and DirecTV created a naked constraint on output because their agreement “restrain[ed] the production and sale of telecasts,” such that it placed “an artificial limit on the quantity of televised football that is available [for sale] to broadcasters and consumers.”<sup>173</sup>

Additionally, “the same type of agreement” in *Board of Regents* was alleged in *Sunday Ticket*.<sup>174</sup> As a result, the plaintiffs would only need to allege an anticompetitive effect that harms competition without first identifying a relevant market.<sup>175</sup> The Amazon agreement is analogous to *Sunday Ticket* in this respect, but if a market needs to be established, it would be telecasts of Thursday Night Football games.<sup>176</sup>

Because a reduction in output is sufficient to demonstrate harm to competition and the Amazon agreement necessarily “limits the total amount of televised . . . football,” this satisfies the third factor.<sup>177</sup> In sum, the Amazon agreement restrains competition by pooling the rights of individual teams and limiting the amount of televised football available. This not only reduces output but is also antithetical to antitrust law as one of the paradigmatic restraints the Sherman Act was designed to prevent.<sup>178</sup>

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<sup>173</sup> See *Sunday Ticket*, 933 F.3d at 1152 (citing *NCAA v. Board of Regents of the Univ. of Okla.*, 468 U.S. 85, 99 (1984)) (“Just as the University of Oklahoma was forbidden from increasing the number of telecasts made of its games, so too are the Seattle Seahawks forbidden from selling their telecast rights independently from the NFL.”).

<sup>174</sup> See *id.* at 1151–52.

<sup>175</sup> See *id.* at 1152 (“[T]he plaintiffs were not required to establish a relevant market.”).

<sup>176</sup> In *Sunday Ticket*, the plaintiffs initially did identify a relevant market when presenting their claim to the district court—“the live video presentation of regular season NFL games.” See *In re Nat’l Football League’s Sunday Ticket Antitrust Litig.*, No. ML1502668BROJEMX, 2017 WL 3084276 at \*3 (June 30, 2017) *rev’d*, 933 F.3d 1136 (9th Cir. 2019).

<sup>177</sup> *Id.* (quoting *NCAA v. Board of Regents of the Univ. of Okla.*, 468 U.S. 85, 94 (1984)).

<sup>178</sup> See *NCAA v. Board of Regents of the Univ. of Okla.*, 468 U.S. 85, 107–08 (1984).



#### 4. *Injury Stemming from Anticompetitive Behavior*

In order to demonstrate the fourth and final factor of a Section 1 claim, plaintiffs must plead “antitrust injury” by alleging facts “that if taken as true would allow them to recover for ‘an injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants’ acts unlawful.’”<sup>179</sup> Therefore, plaintiffs pursuing a Section 1 claim against Amazon would need to establish that the Amazon agreement specifically harms viewers via anticompetitive conduct. Because output is restricted, the fourth factor is satisfied.

The Ninth Circuit compared the NFL’s conduct to that in *Board of Regents*, noting:

By participating in an association which prevents member institutions from competing against each other on the basis of price or kind of television rights that can be offered to broadcasters, the NCAA member institutions have created a horizontal restraint—an agreement among competitors on the way in which they will compete with one another. Such an arrangement violated Section 1 of the Sherman Act because “[i]ndividual competitors lose their freedom to compete,” and “[p]rice is higher and output lower than they would otherwise be, and both are unresponsive to consumer preference.”<sup>180</sup>

The same was true in *Sunday Ticket* and is evident in the Amazon agreement. Thus, both clearly establish plausible Section 1 claims against the League and its distributors.

#### 5. *Handing Off the Burden: A Double Reverse*

Because a plaintiff could plausibly allege a Section 1 unreasonable restraint of trade against Amazon and the NFL, the next step is to evaluate the strength of the claim using the Supreme Court’s burden-shifting framework. The Court described the three steps in *NCAA v. Alston*:<sup>181</sup> (1) the plaintiff must prove the challenged restraint of trade has a substantial anticompetitive effect;

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<sup>179</sup> *Brantley v. NBC Universal, Inc.*, 675 F.3d 1192, 1196–97 (9th Cir. 2012) (quoting *Big Bear Lodging Ass’n v. Snow Summit, Inc.*, 182 F.3d 1096, 1102 (9th Cir. 1999)).

<sup>180</sup> *In re Nat’l Football League’s Sunday Ticket Antitrust Litig.*, 933 F.3d 1136, 1146–47 (9th Cir. 2019) (quoting *NCAA v. Board of Regents of the Univ. of Okla.*, 468 U.S. 85, 106–07 (1984)).

<sup>181</sup> *NCAA v. Alston*, 141 S. Ct. 2141 (2021).

(2) the defendant must then demonstrate procompetitive rationale for the restraint; and (3) the plaintiff must then show that the defendant's presented procompetitive effects could reasonably be achieved through less anticompetitive means.<sup>182</sup>

This can be accomplished using the facts borne out by the Ninth Circuit's Section 1 factors. In short, plaintiffs can demonstrate a contract exists between the NFL and Amazon from which the businesses intended to restrict the output of TNF by making Thursday Night NFL games exclusively available to stream on Prime Video.<sup>183</sup> The Supreme Court in *Board of Regents* established that this type of agreement harms competition by limiting the amount of televised football games available to broadcasters and fans.<sup>184</sup> The NFL and Amazon would then be required to argue that the exclusive deal has procompetitive benefits, perhaps in the form of "increased digital distribution" for the purpose of broadcasting TNF "across hundreds of compatible digital devices."<sup>185</sup> However, the *Board of Regents* Court established the difficulty of justifying a naked restriction on output, which the Amazon agreement effectuates by limiting the amount of televised football. Therefore, the alleged procompetitive effect of increasing accessibility would likely not withstand scrutiny.<sup>186</sup> Accordingly, this agreement not to compete, and the NFL's justification for using Amazon as the exclusive home of TNF, could be defeated by the presentation of a simple, less anticompetitive alternative by the plaintiffs—simulcasting. While not perfect from the League's point of view, it is difficult to argue against this alternative. This is because of the NFL's agreement with Disney, which is currently responsible for the simulcasting of Monday Night Football across linear TV, cable, and

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<sup>182</sup> *Id.* at 2160.

<sup>183</sup> See *NFL Completes Long-Term Media Distribution Agreements Through 2033 Season*, *supra* note 9.

<sup>184</sup> See *NCAA v. Board of Regents of the Univ. of Okla.*, 468 U.S. 85, 99 (1984).

<sup>185</sup> See *NFL Completes Long-Term Media Distribution Agreements Through 2033 Season*, *supra* note 9.

<sup>186</sup> See *NCAA v. Board of Regents of the Univ. of Okla.*, 468 U.S. at 109 ("the absence of proof of market power does not justify a naked restraint . . . no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement.").

streaming.<sup>187</sup> As a result, there is a demonstrably suitable alternative and the procompetitive benefits of Amazon's output restriction do not outweigh the harm to consumers. Therefore, potential plaintiffs have a cognizable claim under Section 1 of the Sherman Act.

## VI. CONCLUSION

By instituting the New RPO, the NFL has created an inverse accessibility issue. There are more ways than ever for fans to watch NFL games in 2023, but, ironically, fewer choices left to consumers. This not only runs contrary to the NFL's stated goals,<sup>188</sup> but is illustrative of a "paradoxical stance" that allows the NFL and its teams to engage in "monopolistic collusion [that does not] favor[] consumer welfare."<sup>189</sup> As previously discussed, the League's choice to do business with more distributors harms fans, and invites antitrust liability under Section 1 of the Sherman Act, most notably for output restriction.

The basic implications of the NFL making exclusive streaming deals may have far-reaching consequences if the League and its partners are allowed to continue as they currently stand. For the past three decades, every live Sunday afternoon game has been broadcast on NFL Sunday Ticket, despite the clear indication from multiple courts that the NFL is not allowed to pool its teams' television rights for distribution on any platform besides linear TV. The only case to address this question head on was *Shaw*, but because that case settled, the NFL and DirecTV largely escaped antitrust liability.<sup>190</sup>

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<sup>187</sup> See generally Derek Volner, *Record Breaker: With More Than 22.6 Million Viewers, ESPN Delivers Its Most-Watched Monday Night Football Game Ever*, ESPN PRESS ROOM (Sept. 14, 2023), <https://espnpressroom.com/us/press-releases/2023/09/record-breaker-with-more-than-22-6-million-viewers-espn-delivers-its-most-watched-monday-night-football-game-ever/> [<https://perma.cc/ME7Z-6R33>] (explaining Monday Night Football's availability across different Disney-owned platforms and noting ESPN set a MNF record in Week 1 of 2023).

<sup>188</sup> *NFL Completes Long-Term Media Distribution Agreements Through 2033 Season*, *supra* note 9.

<sup>189</sup> James, *supra* note 8, at 821 n.90.

<sup>190</sup> The NFL took in \$4.28 billion in total revenue in 2001, making the *Shaw* settlement ~0.18% of the League's annual revenue. See Christina Gough, *Total Revenue of All National Football League (NFL) Teams from 2001 to 2022*,

NFL Sunday Ticket was not challenged again until 2015.<sup>191</sup> If the period between *Shaw* and *Sunday Ticket* is any indication, the Amazon agreement may be around for a long time before facing challenges of its own. As a result, modern NFL fans are left with the New RPO.

In fairness to the NFL, there is an argument to be made that adding more platforms increases accessibility for viewers. However, if providing greater accessibility to fans is a priority, then the League's steps to expand digital distribution are steps in the wrong direction.<sup>192</sup> By instituting output restrictions and forcing the New RPO on fans, the NFL is counteracting its own purported agenda. If media deals like the Amazon agreement actually make it easier to watch football, why are there more exclusive games and hoops to jump through than ever before?<sup>193</sup>

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STATISTA (Sept. 5, 2023), <https://www.statista.com/statistics/193457/total-league-revenue-of-the-nfl-since-2005/> [<https://perma.cc/5RZF-RURM>].

<sup>191</sup> In re Nat'l Football League's Sunday Ticket Antitrust Litig., 933 F.3d 1136, 1149 (9th Cir. 2019).

<sup>192</sup> See Rizzo, *supra* note 21.

<sup>193</sup> See generally *NFL Completes Long-Term Media Distribution Agreements Through 2033 Season*, *supra* note 9 (explaining that starting in 2023, there will be more exclusive NFL games than ever before, including on platforms such as Amazon, Peacock, NFL+, and ESPN+).