First and Goal: How the NFL's Personal Conduct Complies with Federal Antitrust Law

Kelly M. Vaughan
NOTE

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INTRODUCTION

In April 2007, moments after suspending Tennessee Titans cornerback Adam "Pacman" Jones for the entire 2007 season and the late Chris Henry, wide receiver for the Cincinnati Bengals, for eight games, National Football League (NFL) Commissioner Roger Goodell announced a new league-wide disciplinary policy.¹ The new policy aimed to address persistent criminal behavior among NFL players,² a pattern that has continued to plague the NFL in the years since Goodell announced the policy, most noticeably with the arrest and imprisonment of star quarterback Michael Vick for federal dog-fighting charges and the arrest and sentencing of New York Giants wide receiver Plaxico Burress for a weapons charge.³

Under the NFL’s new personal conduct policy (Personal Conduct Policy or the Policy), Goodell possesses full authority to impose a variety of penalties on players, ranging from monetary fines to “banishment from the League” for various offenses, including (but not limited to) illegal activity.⁴ The NFL Collective Bargaining Agreement (the Collective Bargaining Agreement or the Agreement), the product of a lengthy collective bargaining process between the National

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² See Battista, supra note 1 (referring to “Goodell’s law-and-order campaign”).


Football League Players Association (NFLPA or Players' Association) and the NFL,\(^5\) typically sets forth the policies affecting NFL players. Goodell, nevertheless, imposed the NFL Personal Conduct Policy upon the NFL teams unilaterally without amending the Collective Bargaining Agreement through a formal negotiation process and agreement between the parties.\(^6\) However, the late executive director of the NFLPA, Gene Upshaw, publicly supported the policy, and Goodell also consulted with a small panel of NFL players prior to the announcement.\(^7\)

Although encouraging professional athletes to act responsibly on and off the field is undoubtedly a laudable goal, it is unclear whether the antitrust exemption that courts afford to the Collective Bargaining Agreement would apply to the Personal Conduct Policy as well because the parties did not amend the Collective Bargaining Agreement to incorporate the Personal Conduct Policy.\(^8\) Absent an applicable exemption from the antitrust laws, the NFL would have to demonstrate that the procompetitive effects of the Personal Conduct Policy outweigh its anticompetitive effects to avoid antitrust liability.\(^9\) Circuits disagree, however, on when to apply the nonstatutory labor exemption (the traditional exemption for collectively bargained agreements), and the Supreme Court has not expressed clear boundaries for the exemption's application.\(^10\) Due to this lack of clarity in


\(^8\) National labor policy favors free and private collective bargaining. Courts nationwide have consistently determined that antitrust law is inappropriate to resolve labor disputes and implied an exemption from the antitrust laws for collectively bargained labor agreements. See Brown v. Pro Football, Inc., 518 U.S. 231, 286-37 (1996); Clarett v. NFL, 369 F.3d 124, 142-43 (2d Cir. 2004) (holding that the NFL's eligibility rules are exempt from the antitrust laws because allowing antitrust scrutiny would subvert the collective bargaining process).

\(^9\) See infra notes 51-54 and accompanying text.

\(^10\) Compare Clarett, 369 F.3d at 138-43 (applying an open-ended test to determine whether antitrust scrutiny would "subvert fundamental principles of our federal labor policy," considering whether the policy at issue is a mandatory subject of collective bargaining, who the policy affects, and whether the policy resulted from collective bargaining, but finding no part dispositive (quoting Wood v. NBA, 809 F.2d 954, 959 (2d Cir. 1987)), with Mackey v. NFL, 545 F.2d 606, 614 (8th Cir. 1976) (finding that the nonstatutory labor exemption only applies where "the restraint on trade primarily affects only the parties to the collective bargaining relationship," "the agreement sought to be exempted concerns a mandatory subject of collective bargaining," and "the agreement sought to be exempted is the product of bona fide arm's-length bargaining"). The United States Court of Appeals for the Sixth Circuit and United States District Court for the District of Columbia have also applied the Mackey test in professional sport disputes. See McCourt v. Cal. Sports, Inc., 600
courts' application of the exemption, whether the nonstatutory labor exemption applies to the Personal Conduct Policy may depend on which court eventually hears a challenge to the Personal Conduct Policy.

From a strictly antitrust perspective, collective action among buyers (in this case, the teams) to prevent a seller (the player) from providing services typically constitutes a group boycott, an action that the Supreme Court has traditionally found per se illegal. However, because the NFL is a sports league structured as a joint venture, a court would likely not subject the organization to the per se rule. Rather, a court would likely analyze the Personal Conduct Policy under a rule of reason analysis, where the plaintiff would have to prove an anticompetitive effect and the NFL would have the opportunity to present business reasons to justify the Personal Conduct Policy's necessity.

This Note will argue that the Personal Conduct Policy would pass antitrust scrutiny, regardless of whether the nonstatutory labor exemption applied, because the NFL could present a legitimate business justification for imposing the Personal Conduct Policy collectively. Part I will provide a brief overview of the NFL, the Collective Bargaining Agreement, and the Personal Conduct Policy. Part II will briefly discuss applicable antitrust and labor laws. Part III will demonstrate that, even assuming the nonstatutory labor exemption does not apply, the Personal Conduct Policy does not run afoul of antitrust law.

I
THE WORLD OF PROFESSIONAL FOOTBALL

A. The National Football League

Established in 1920, the NFL is structured as an "unincorporated association comprised of member clubs which own and operate pro-

11 See Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 212–13 (1959) (finding that the plaintiff sufficiently alleged a group boycott where complaint alleged that defendants agreed among themselves not to sell goods to the plaintiff).
12 See, e.g., id. at 211–12 ("Group boycotts . . . have long been held to be in the forbidden category.").
13 See NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 100–01 (1984) ("[I]t would be inappropriate to apply a per se rule to this case. . . . [T]his case involves an industry in which horizontal restraints on competition are essential if the product is to be available at all.").
14 See id. at 113 (analyzing the NCAA television plan under the rule of reason); Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 692–96 (1978) (describing the proof that plaintiffs would need to present in light of the basic policy behind the Sherman Antitrust Act).
fessional football teams." Currently, the NFL operates with thirty-two independently owned teams located across the United States. The NFL is the only elite employer of professional football players in the United States and enjoys monopoly power over the professional football market. The NFL performs various administrative functions for the member teams, including organizing and scheduling games between the teams and promulgating league-wide rules. A league constitution and set of bylaws governs the activities of the NFL and the member teams. As Commissioner of the NFL, Roger Goodell acts as the League's chief executive officer and possesses wide-ranging oversight responsibility.

Originally, individual club owners unilaterally controlled the NFL's operations; however, in 1968, the National Labor Relations Board (NLRB) certified the NFLPA as a labor organization under the Labor–Management Relations Act, recognizing it as the exclusive bargaining representative of all NFL players. As a result of this relationship, the NFLPA and NFL are required to collectively bargain regarding employment terms such as wages, hours of employment, and working conditions. Due to the NFL players' collective decision to unionize and designate the NFLPA as their exclusive bargaining agent, labor law prevents a player from negotiating individually with a particular team regarding the terms and conditions of his employment. Additionally, any agreement that the NFLPA and the NFL teams reach through the collective bargaining process overrides any conflicting terms in the NFL Constitution and Bylaws. The most recent Collective Bargaining Agreement went into effect in 2006. The NFLPA and the NFL are currently in the midst of negotiating a new

15 Mackey, 543 F.2d at 610.
17 See Mackey, 543 F.2d at 610.
18 See id.
19 See id.
20 See id.; see also Constitution and Bylaws of the National Football League art. VIII (2006) (describing the duties of the NFL Commissioner).
21 See Mackey, 543 F.2d at 610; see also 29 U.S.C. § 152(5) (2008) (defining the term "labor organization"); id. § 159(a) (regulating "exclusive representatives" and "employees' adjustment of grievances directly with employer").
23 See NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 180 (1967) ("[National labor] policy therefore extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees."); Clarett v. NFL, 369 F.3d 124, 138 (2d Cir. 2004) ("P)rospective players no longer have the right to negotiate directly with the NFL teams over the terms and conditions of their employment.").
24 See Edelman, supra note 6, at 634.
25 See Collective Bargaining Agreement, supra note 5.
agreement that will come into effect after the 2010 season, as the current Agreement expires in March 2011.26

B. The Collective Bargaining Agreement

The current Collective Bargaining Agreement does not explicitly reference the Personal Conduct Policy. Additionally, the Agreement specifically states that no provisions of the Agreement “may be changed, altered or amended other than by a written agreement.”27 The NFLPA and NFL did not, however, enter into a written agreement regarding the Personal Conduct Policy. Rather, Goodell unilaterally imposed the Personal Conduct Policy as a regulation on the NFL teams collectively.28 Although Article XI of the Collective Bargaining Agreement does address Commissioner Discipline, even noting that the “Commissioner’s disciplinary action will preclude or supersede disciplinary action by any Club for the same act or conduct,”29 the Agreement does not address the same types of behavior that the Personal Conduct Policy concerns.30 Additionally, the NFL Player Contract—attached as an appendix to the Collective Bargaining Agreement—discusses discipline by the Commissioner but focuses on behavior such as gambling or steroid use; it does not contemplate discipline for violent behavior.31 Consequently, it is unclear whether

26 Id. at 240 (providing that either the NFLPA or the league may terminate the 2010 and 2011 capped years by providing notice to the other party by November 8, 2008). In 2008, the team owners opted out of extending the 2006 Collective Bargaining Agreement. See Goodell Sees No 2010 Cap, Bos. Globe, Sept. 4, 2009, at 9. As a result, salaries for the 2010 season are not subject to a salary cap. See Collective Bargaining Agreement, supra note 5, at 7, 240 (defining “Final League Year” to mean the final year of the Agreement, as well as to always mean an “Uncapped Year” in which the salary cap is not in effect, and specifying that if either the NFLPA or the league provides notice by November 8, 2008, the 2010 League Year will be the Final League Year). If the parties do not reach an agreement by March, 2011, many expect that a lock-out will occur during the 2011 season. See NFL Union Head: Owners Set For No Football in 2011, SportsIllustrated.com (Oct.5, 2010, 5:51 PM), http://sportsillustrated.cnn.com/2010/football/nfl/10/05/owners.2011.ap/index.html?eref=sircrc. There has been minimal public discussion of incorporating the Personal Conduct Policy into the new agreement. See Goodell Sees No 2010 Cap, supra; Dan Graziano, NFL Players Seek Role in Discipline Matters as CBA Negotiations Resume, Fanhouse (July 13, 2009, 4:25 PM), http://nfl.fanhouse.com/2009/07/13/nfl-players-to-seek-role-in-discipline-matters-as-cba-negotiation.

27 See Collective Bargaining Agreement, supra note 5, at 255.

28 See supra notes 6-7 and accompanying text.

29 See Collective Bargaining Agreement, supra note 5, at 35.

30 Compare id. at 34 (discussing the imposition of fines and suspensions for conduct on the playing field), with NFL Personal Conduct Policy, supra note 4, at 1-2 (referring to disciplinary measures for criminal offenses).

31 See Collective Bargaining Agreement, supra note 5, at 253 ("Player therefore acknowledges his awareness that if he accepts a bribe or agrees to throw or fix an NFL game; fails to promptly report a bribe offer or an attempt to throw or fix an NFL game; bets on an NFL game; knowingly associates with gamblers or gambling activity; uses or provides other players with stimulants or other drugs for the purpose of attempting to enhance on-field performance; or is guilty of any other form of conduct reasonably judged by the League"
a court would incorporate the Personal Conduct Policy into the Collective Bargaining Agreement and then apply the nonstatutory labor exemption to the Personal Conduct Policy as a part of the Collective Bargaining Agreement.

C. The Personal Conduct Policy

The most unique aspect of the Personal Conduct Policy is the breadth of activities to which the Policy applies. The Personal Conduct Policy is the NFL's latest attempt to control NFL players' off-the-field conduct, a process that began in 1998 when the NFL instituted a Violent Crime Policy allowing the Commissioner to suspend and possibly fine any athlete charged with a violent crime. In 2000, prompted by negative publicity resulting from several crimes that involved NFL players, the NFL superseded the Violent Crime Policy with a new personal conduct policy that prohibited a wide variety of violent behavior and allowed punishment at the Commissioner's discretion.

The 2008 Personal Conduct Policy strengthened the earlier conduct policy by allowing longer suspensions and the possibility of banishment and by giving the Commissioner the ability to suspend a player for behavior that does not result in a criminal conviction or even criminal charges. Additionally, the Personal Conduct Policy expanded its applicability beyond the players to include "all coaches; all game officials; all full-time employees of the NFL, NFL clubs, and all NFL-related entities." Finally, the Policy encourages NFL clubs to communicate the terms of the Policy to independent contractors and

33 See D. Orlando Ledbetter, NFL Pins Hopes on Conduct Policy to Deter Bad Behavior, Milwaukee J. Sentinel, June 24, 2000, at 2C.
34 See NFL Personal Conduct Policy, supra note 4, at 1 (noting that "the standard of conduct for persons employed in the NFL is considerably higher" than refraining from criminal activity and that "[i]t is not enough simply to avoid being found guilty of a crime. Instead, . . . employee[s] of the NFL . . . [and] member club[s] . . . are held to a higher standard and expected to conduct [themselves] in a way that is responsible, promotes the values upon which the League is based, and is lawful"). In late April 2010, Goodell suspended Steelers quarterback Ben Roethlisberger for violating the Personal Conduct Policy despite the fact that prosecutors declined to charge Roethlisberger after a woman accused him of sexual assault. See Michael David Smith, Ben Roethlisberger Suspended Six Games for Violating Personal Conduct Policy, Fanhouse (Apr. 21, 2010, 10:31 AM), http://nfl.fanhouse.com/2010/04/21/report-ben-roethlisberger-will-be-suspended-4-6-games. The Personal Conduct Policy also goes far beyond the type of conduct that typical player contracts prohibit. See Collective Bargaining Agreement, supra note 5, at 253 (citing gambling and the use of performance-enhancing drugs as conduct that may prompt disciplinary action).
35 See NFL Personal Conduct Policy, supra note 4, at 3; see also Ken Murray, Teams Choose To Be Pickyer; New Policy Might Steer NFL Clubs Away from Troublemakers, Balt. Sun, Apr.
consultants and "to make clear that violations of this policy will be grounds for terminating a business relationship."\textsuperscript{36}

The NFLPA and the NFL did not collectively bargain over the terms of the Personal Conduct Policy.\textsuperscript{37} In fact, the NFL did not adopt the Personal Conduct Policy after any formal bargaining process, and the NFLPA never formally signed the Policy to indicate their agreement to its terms.\textsuperscript{38} Despite the fact that then-NFLPA executive director, Gene Upshaw, publicly voiced support for the Personal Conduct Policy and that Goodell reportedly discussed the Policy with a panel of players,\textsuperscript{39} the Policy is not necessarily legally binding upon the NFL clubs.\textsuperscript{40}

\section*{II

ANTITRUST LAW AND LABOR LAW: THE BASICS

A. Antitrust Law

Section 1 of the Sherman Antitrust Act declares that "\[e\]very contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States . . . is declared to be illegal."\textsuperscript{41} Section 1 applies to labor markets as well as to product markets.\textsuperscript{42} It does not prohibit every contract in restraint of trade but only those contracts that unreasonably restrain trade or commerce.\textsuperscript{43} Consequently, to properly assert an antitrust claim under § 1, a plaintiff must demonstrate anticompetitive harm that results from the agreement.\textsuperscript{44} Addi-

\textsuperscript{36} See NFL Personal Conduct Policy, supra note 4, at 3.

\textsuperscript{37} See supra note 6 and accompanying text.

\textsuperscript{38} See Edelman, supra note 6, at 638 (explaining that there is no compelling argument that the Collective Bargaining Agreement's disciplinary provisions were intended to address off-the-field conduct and that the Personal Conduct Policy is not a legally binding amendment to the Collective Bargaining Agreement because the NFLPA did not agree to the terms of the Policy or sign it).

\textsuperscript{39} See Nancy Gay, Judgment Day: Commissioner Puts Foot Down, S.F. CHRON., Apr. 11, 2007, at D1; Goodell Unveils New Conduct Policy, supra note 7.

\textsuperscript{40} See Edelman, supra note 6, at 638.


\textsuperscript{42} See FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 422 (1990) (noting that the respondents' boycott clearly constituted a restraint of trade within the meaning of the Sherman Act); Radovich v. NFL, 352 U.S. 445, 451-52 (1957) (establishing that professional football is subject to the antitrust laws).

\textsuperscript{43} See, e.g., Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 60 (1911) ("[I]t was intended that the standard of reason which had been applied at the common law . . . in dealing with subjects of the character embraced by the statute[ ] was intended to be the measure used for the purpose of determining whether in a given case a particular act had or had not brought about the wrong against which the statute provided.").

\textsuperscript{44} See, e.g., Capital Imaging Assocs., P.C. v. Mohawk Valley Med. Assocs., Inc., 996 F.2d 537, 542 (2d Cir. 1993) ("If a § 1 plaintiff establishes the existence of an illegal contract or combination, it must then proceed to demonstrate that the agreement constituted an unreasonable restraint of trade either per se or under the rule of reason.").
tionally, a contract must affect interstate commerce and must be an agreement between separate entities for the Sherman Act to apply.\textsuperscript{45} In certain instances, however, the Supreme Court has determined that particular conduct is so harmful that a court may presume an anticompetitive effect once the plaintiff demonstrates the conduct has occurred. In those instances, the Supreme Court has held the conduct to be per se illegal.\textsuperscript{46} Group refusal to deal, also known as a boycott, is typically per se illegal; therefore, if a plaintiff can demonstrate that defendants acted collectively rather than independently in refusing to deal with the plaintiff, the court presumes an anticompetitive effect and does not examine any justifications that the defendants proffer.\textsuperscript{47} In \textit{NCAA v. Board of Regents of University of Oklahoma},\textsuperscript{48} however, the Supreme Court held that the per se rule should not apply to league sports because "horizontal restraints on competition are essential if the product is to be available at all."\textsuperscript{49} The same logic applies to the NFL because some horizontal restraints between the NFL clubs, such as the ability to agree on the rules of the game and set a schedule for the season, are necessary for the product of professional football to exist at all. Consequently, a court assessing a § 1 case against the

\textsuperscript{45} See 15 U.S.C. § 1 ("Every contract . . . in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."); Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 771 (1984) (finding that an agreement between a parent company and its wholly owned subsidiary does not constitute an "agreement" for Sherman Act purposes because a parent company and its wholly owned subsidiary must necessarily always have a "unity of purpose or a common design" (quoting Am. Tobacco Co. v. United States, 328 U.S. 781, 810 (1946))). The NFL has never been found to be a single entity for all purposes, and the Supreme Court recently held that even an agreement among the NFL teams to jointly license their intellectual property as a single product is not categorically exempt from § 1 because the teams remain independent actors. See Am. Needle, Inc. v. NFL, 130 S. Ct. 2201, 2212-13 (2010).

\textsuperscript{46} See United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 219–20 (1940) ("Proof that there was a conspiracy, that its purpose was to raise prices, and that it caused or contributed to a price rise is proof of the actual consummation or execution of a conspiracy under § 1 of the Sherman Act.").

\textsuperscript{47} See Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 212 (1959) ("Group boycotts, or concerted refusals by traders to deal with other traders, have long been held to be in the forbidden category. They have not been saved by allegations that they were reasonable in the specific circumstances, nor by a failure to show that they 'fixed or regulated prices, parcelled out or limited production, or brought about a deterioration in quality,'" (quoting Fashion Originators' Guild v. FTC, 312 U.S. 457, 466 (1941))).


\textsuperscript{49} Id. at 100–01; see also Smith v. Pro Football, Inc., 593 F.2d 1173, 1178–79 (D.C. Cir. 1978) (holding that the NFL player draft is "not the type of boycott that traditionally has been held illegal \textit{per se} . . . and that the draft, regardless of how it is characterized, should more appropriately be tested under the rule of reason" because the NFL teams "are not competitors in any economic sense" and "have not combined to exclude competitors or potential competitors from [the teams'] level of the market").
NFL would almost certainly not apply a per se analysis, even if the
conduct alleged would ordinarily warrant use of the per se rule.50

Because the Personal Conduct Policy is an agreement between
separate entities that affects interstate commerce, after a court deter-
mines that the Sherman Act applies, it would likely apply a rule of
reason analysis to assess the legality of the Policy under the antitrust
laws. Under a rule of reason analysis, the plaintiff must establish a
prima facie case by demonstrating the harmful anticompetitive effects
of the defendant's conduct.51 Common elements necessary to estab-
lish a prima facie case include (1) a showing of market power, (2) net
anticompetitive effects, and (3) anticompetitive harm.52 If a plaintiff
successfully establishes a prima facie case, the burden then shifts to
the defendant to justify its actions by showing a procompetitive justifi-
cation.53 The defendant's proffered justification must demonstrate
procompetitive economic effects in the sense that the restraint actu-
ally encourages competition within the defined market.54 In enacting

50 See, e.g., NCAA, 468 U.S. at 101–02 (finding that the NCAA, as a league, "mar-
ket[s] . . . competition itself," which "would be completely ineffective if there were no rules
on which the competitors agreed to create and define the competition to be marketed").
Setting aside the fact that the NFL is a sports league, the per se rule would probably not
apply because the NFL is a joint venture between the individual teams. The Supreme
Court has also refrained from applying the per se rule to a price-fixing arrangement
among a joint venture, likening it to "price setting by a single entity" rather than "a pricing
agreement between competing entities with respect to their competing products." See Tex-
aco Inc. v. Dagher, 547 U.S. 1, 5–6 (2006). This logic, as applied to price-fixing, would
probably extend to boycotts as well.

51 See, e.g., Bd. of Trade of Chi. v. United States, 246 U.S. 231, 238 (1918) ("The true
test of legality is whether the restraint imposed is such as merely regulates and perhaps
thereby promotes competition or whether it is such as may suppress or even destroy com-
petition."); Capital Imaging Assocs., P.C. v. Mohawk Valley Med. Assocs., Inc., 996 F.2d 537,
543 (2d Cir. 1993) ("[T]he plaintiff bears the initial burden of showing that the challenged
action has had an actual adverse effect on competition as a whole in the relevant market; to
prove it has been harmed as an individual competitor will not suffice."); see also 54 AM. JUR.
2d Monopolies, Restraints of Trade, and Unfair Trade Practices § 49 (2009) (noting that proof
of market power is a critical first step to demonstrating anticompetitive harm).

52 See Edelman, supra note 6, at 645.

53 See, e.g., Capital Imaging, 996 F.2d at 543 ("After the plaintiff satisfies its threshold
burden of proof under the rule of reason, the burden shifts to the defendant to offer
evidence of the pro-competitive 'redeeming virtues' of their combination." (quoting 7 PHILLIP E. AREEDA, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLI-
CATION ¶ 1502, at 371 (1986))); see also PHILLIP E. AREEDA & HERBERT HOVENKAMP, FUNDAMENTALS OF ANTITRUST LAW § 15.02b (3d ed. 2009) ("In a rule of reason case the plaintiff
must first allege and show that the challenged restraint is of a type reasonably calculated to
have anticompetitive effects, ordinarily measured by reduced output in a properly defined
market. Then, and only then, the burden shifts to the defendant to show that the restraint
in fact serves a legitimate objective.").

54 See Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 692 (1978) (noting
that analysis of the justification should be aimed at determining the "competitive signifi-
cance of the restraint"); Bd. of Trade of Chi., 246 U.S. at 239–41 (examining the positive
effect on competition as a justification for restraining trade); Smith, 593 F.2d at 1188–89
(finding that a justification can survive rule of reason scrutiny "only if it is demonstrated to
have positive, economically procompetitive benefits that offset its anticompetitive effects, or,
the Sherman Act, Congress made a fundamental policy decision that favored economic competition within industry.\textsuperscript{55} Consequently, alleged justifications that purport to restrict competition in the public's interest or for social welfare reasons are inadequate under antitrust analysis.\textsuperscript{56}

B. Labor Law

A fundamental tension exists between antitrust law, which forbids any agreement among competitors that unreasonably lessens competition in any way, and labor law, which condones potentially anticompetitive agreements that are conducive to harmony within industry.\textsuperscript{57} In order for the two doctrines to coexist efficiently, Congress and the courts have established a framework to determine when antitrust liability is appropriate and when imposing antitrust liability will do more harm than good. In this vein, Congress enacted the labor statutes to prevent the courts from using antitrust law to resolve labor disputes because antitrust law often provides inappropriate solutions to such disputes.\textsuperscript{58} Additionally, allowing the courts to address these issues would infringe upon the NLRB's authority to oversee labor disputes.\textsuperscript{59}

Antitrust laws are of particularly questionable efficacy in the area of collective bargaining. Congress has set forth a national labor policy in favor of free and private collective bargaining to promote workers' ability to organize their collective power and to designate a representative to negotiate the terms and conditions of their employment.\textsuperscript{60} In an effort to enact this policy, Congress delegated rulemaking and interpretative authority regarding the collective bargaining process to the NLRB.\textsuperscript{61} As a result of these policy decisions, the Supreme Court has implied an exception from the antitrust laws, known as the non-statutory labor exemption, to accommodate and encourage the collective bargaining process.\textsuperscript{62} In doing so, the Court has acknowledged

\textsuperscript{55} See \textit{Nat'l Soc'y of Prof'l Eng'rs}, 435 U.S. at 692.
\textsuperscript{56} See \textit{id.} at 679, 693–95 (rejecting petitioner's justification that a restraint on price competition was in the public interest as a "frontal assault on the basic policy of the Sherman Act"); \textit{Smith}, 593 F.2d at 1186 (finding that the "procompetitive" effects of balancing out competition on the playing field cannot be compared to the anticompetitive economic effect of limiting competition for players' services).
\textsuperscript{58} See \textit{id.} at 236.
\textsuperscript{59} See \textit{id.} at 236–37.
\textsuperscript{60} See \textit{29 U.S.C.} § 151 (2006).
\textsuperscript{61} See \textit{id.} § 156; \textit{Brown}, 518 U.S. at 242 ("The labor laws give the Board, not antitrust courts, primary responsibility for policing the collective-bargaining process.").
\textsuperscript{62} See \textit{Brown}, 518 U.S. at 236 ("The Court has implied this exemption from federal labor statutes, which set forth a national labor policy favoring free and private collective bargaining; which require good-faith bargaining over wages, hours, and working condi-
Congress's intent to ensure that the judiciary does not appropriate the NLRB's authority to determine reasonable labor practices and to police the collective bargaining process. As a result of this exemption, courts often hold that terms incorporated into a valid collective bargaining agreement fall outside the scope of antitrust liability. The issue of whether the nonstatutory labor exemption applies to the conduct in question is therefore a threshold question in an antitrust analysis where a central issue concerns a collective bargaining agreement. Accordingly, the legality of collective bargaining under labor law provides it with a safe harbor from antitrust law.

However, not all conduct that is lawful under labor law qualifies for an exemption from antitrust law. Any antitrust immunity implied from labor law or policy, including the nonstatutory labor exemption, only applies if the conduct at issue would normally violate the antitrust laws under a traditional antitrust analysis, but “antitrust condemnation would undermine or frustrate labor policy.” That particular conduct is merely lawful under labor law is insufficient to create antitrust immunity. Additionally, certain subjects of collective bargaining are merely “permissive” rather than “mandatory” due to labor law’s silence on the subject. Such “permissive” subjects may not warrant exemption from the antitrust laws. Likewise, conduct that violates labor law clearly does not advance labor policy; as a result, such conduct is not immune from antitrust scrutiny.

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63 See Brown, 518 U.S. at 237; Clarett, 369 F.3d at 131.
64 See Clarett, 369 F.3d at 141 (holding that the NFL and the NFLPA are entitled to collectively bargain regarding eligibility rules and that the product of this collective bargaining relationship will be "tolerated as a matter of antitrust law"); NBA v. Williams, 45 F.3d 684, 695 (2d Cir. 1995) (holding that a league may impose the terms of an expired collective bargaining agreement without running afoul of antitrust law when the parties had bargained to an impasse).
65 See Clarett, 369 F.3d at 130 (overturning the district court’s determination of antitrust liability because the district court incorrectly determined that the nonstatutory labor exemption did not apply).
66 See 1B PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF PRINCIPLES AND THEIR APPLICATION § 256e (3d ed. 2006); see also Clarett, 369 F.3d at 138 (determining that the test for whether to apply the nonstatutory labor exemption is whether subjecting the alleged conduct to antitrust scrutiny would "subvert fundamental principles of our federal labor policy" (quoting Wood v. NBA, 809 F.2d 954, 959 (2d Cir. 1987))).
67 See AREEDA & HOVENKAMP, supra note 66.
68 See id. § 256e1.
69 See id.
70 See id. § 256e1–e2.
Despite these guiding principles, the Supreme Court has never articulated precise boundaries regarding when courts should apply the nonstatutory labor exemption.\(^{71}\) In *Local Union 189, Amalgamated Meat Cutters v. Jewel Tea Co.*,\(^{72}\) the Court declined to defer to the NLRB's expertise but nonetheless held that a marketing-hours restriction was exempt from the Sherman Act by focusing on the fact that the restriction was closely related to a mandatory subject of collective bargaining.\(^{73}\) In *Brown v. Pro Football, Inc.*,\(^{74}\) however, the Supreme Court applied the exception more broadly, finding that the nonstatutory labor exemption may apply to employers' unilateral actions after the employers have bargained to an impasse with the employees' union.\(^{75}\) Specifically, the Court held that once the parties have bargained to an impasse yet failed to agree on a new collective bargaining agreement, the nonstatutory labor exemption may apply to a policy unilaterally imposed by the NFL teams when the policy implements the terms of the last-best good faith offer.\(^{76}\) The Court applied the exception even though the policy that the NFL unilaterally adopted was not a part of the expired collective bargaining agreement but was a new agreement among the NFL teams and had never been agreed upon by the NFLPA.\(^{77}\)

As a result of the Supreme Court's reluctance to define precisely the boundaries of the nonstatutory labor exemption as applied to collective bargaining agreements, various circuit courts have developed their own tests to determine when to apply the nonstatutory labor exemption to industries that engage in collective bargaining. In *Mackey v. NFL*,\(^{78}\) the Eighth Circuit addressed the issue of whether the nonstatutory labor exemption could apply to a rule incorporated into the

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\(^{71}\) See, e.g., Clarett, 369 F.3d at 131 ("The Supreme Court has never delineated the precise boundaries of the exemption, and what guidance it has given as to its application has come mostly in cases in which agreements between an employer and a labor union were alleged to have injured or eliminated a competitor in the employer's business or product market.").

\(^{72}\) 381 U.S. 676 (1965).

\(^{73}\) See id. at 689–90 ("[T]he issue in this case is whether the marketing-hours restriction, like wages, and unlike prices, is so intimately related to wages, hours and working conditions that the unions' successful attempt to obtain that provision through bona fide, arm's-length bargaining in pursuit of their own labor union policies, and not at the behest of or in combination with nonlabor groups, falls within the protection of the national labor policy and is therefore exempt from the Sherman Act. We think that it is." (footnote omitted)).

\(^{74}\) 518 U.S. 231 (1996).

\(^{75}\) See id. at 237 ("[W]here its application is necessary to make the statutorily authorized collective-bargaining process work as Congress intended, the exemption must apply both to employers and to employees.").

\(^{76}\) See id. at 238.

\(^{77}\) See id. at 234–35.

\(^{78}\) 543 F.2d 606 (8th Cir. 1976).
collective bargaining agreement by reference. In analyzing the applicability of the exemption, the court set forth a three-part test, determining that the nonstatutory labor exemption would apply to an alleged restraint on trade where (1) "the restraint on trade primarily affects only the parties to the collective bargaining relationship," (2) "the agreement sought to be exempted concerns a mandatory subject of collective bargaining," and (3) "the agreement sought to be exempted is the product of bona fide arm's-length bargaining." Under the Mackey test, all three conditions must be satisfied for the exemption to apply. The ultimate inquiry, however, turns upon "whether the relevant federal labor policy is deserving of pre-eminence over federal antitrust policy under the circumstances of the particular case." The Sixth Circuit has since adopted the Mackey test, and the United States District Court for the District of Columbia has also applied it.

The Second Circuit, however, analyzes the issue of whether to apply the nonstatutory labor exemption to the Personal Conduct Policy very differently. In Caldwell v. American Basketball Association, the court found that the nonstatutory labor exemption applied to a former basketball player's claims that the teams in the American Basketball Association had agreed to blacklist him by refusing to hire him due to his activities as president of the players' union. In its discussion, the court specifically noted that multiemployer bargaining with a common union does not violate the antitrust laws. Additionally, the court found that the conditions under which an employer may hire or discharge an employee are mandatory subjects of collective bargaining, and consequently, the NLRB has primary jurisdiction to adjudicate and remedy any breaches of the collective bargaining agreements.

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79 See id. at 613.
80 Id. at 614.
81 See id. at 615–16 (finding that the nonstatutory labor exemption does not apply to the Rozelle rule—which governs athletes who leave one team when their contract expires and join another team—because the rule was not adopted after any type of bona fide arm's-length bargaining, even though the court already found that the rule affected only the parties to the agreement sought to be exempted and was a mandatory subject of collective bargaining).
82 In re Detroit Auto Dealers Ass'n v. FTC, 955 F.2d 457, 462 (6th Cir. 1992) (quoting Mackey, 543 F.3d at 613).
83 See McCourt v. Cal. Sports, Inc., 600 F.2d 1193, 1198 (6th Cir. 1979) ("[I]t was proper to apply Mackey's standards; the issue is whether those standards were properly applied."); Zimmerman v. NFL, 632 F. Supp. 398, 403–04 (D.D.C. 1986) ("The parties are in agreement that [the Mackey] test should govern the Court's analysis . . . .").
84 66 F.3d 523 (2d Cir. 1995).
85 See id. at 527.
86 See id. at 528 ("[E]mployers are allowed to act jointly when they have a collective bargaining relationship with a common union. This joint conduct is nothing more than the quite familiar institution of multiemployer bargaining.").
agreement's conditions. Finally, the court found that an industry decision to institute a mandatory collective bargaining relationship extinguishes an employee's ability to seek the best individual bargain. As a result of these findings, the court determined that the nonstatutory labor exemption must apply to Caldwell's claims because the claims were essentially "the familiar case of an employee asserting a discharge based on union activities" and should be properly adjudicated by the NLRB pursuant to the National Labor Relations Act.

More recently, the Second Circuit expressly declined to adopt the Mackey test and applied a much more open-ended standard (the Clarett test) to determine whether the nonstatutory labor exemption applied to the NFL eligibility rules. The court looked at a variety of factors to determine "whether subjecting the NFL's eligibility rules to antitrust scrutiny would 'subvert fundamental principles of our federal labor policy.'" Although the court considered some of the same factors the Mackey court addressed, the court did not require that each factor be satisfied for the nonstatutory labor exemption to apply.

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87 See id. at 529.
88 See id. at 528.
89 Id. at 530 ("If the ABA and the Union had agreed in a collective agreement that Caldwell should be paid a fixed wage, or could be discharged for any reason not specifically prohibited by a federal law such as Title VII, he could not have challenged that agreement under the antitrust laws. Moreover . . . even in the absence of a collective bargaining agreement, Caldwell's right to challenge a discharge by the ABA had to be founded on labor rather than antitrust law." (citation and footnote omitted)). The court also addressed Congress's choice to designate the NLRB as the agency responsible for deciding employment issues rather than allowing federal courts, which may award treble damages and attorney's fees, to adjudicate employment claims. See id. ("[I]f Caldwell is allowed to proceed with the present action, employees in similar circumstances will either never resort to the NLRB or will institute parallel administrative and antitrust proceedings with the risk of inconsistent adjudications. Every employee who is locked out by a multiemployer group, every striker who is not reinstated, and every employee who is discharged could bring an antitrust action similar to Caldwell's. Clearly, Congress had no such intention.").
90 See Clarett v. NFL, 369 F.3d 124, 133-34 (2d Cir. 2004) ("We . . . have never regarded the Eighth Circuit's test in Mackey as defining the appropriate limits of the nonstatutory exemption."). Commentators disagree over whether the Clarett approach is a positive step towards a less rigid application of the factors discussed in Mackey or an impermissible extension of the nonstatutory labor exemption in a direction that will ultimately harm the collective bargaining process. Compare Case Comment, Antitrust Law—Nonstatutory Labor Exemption—Second Circuit Exempts NFL Eligibility Rule from Antitrust Scrutiny—Clarett v. National Football League, 118 Harv. L. Rev. 1379, 1385 (2005) ("[A] bona fide bargaining requirement for particular provisions during collective bargaining may defeat the policies and justifications originally giving rise to the nonstatutory exemption."), with Jocelyn Sum, Note, Antitrust: Clarett v. National Football League, 20 Berkeley Tech. L.J. 807, 826 (2005) ("While courts such as the Second Circuit in Clarett may claim that such a broad exemption is justified in order to protect the collective bargaining relationship, a look back at history demonstrates that it in fact only promotes the breakdown of relations between unions and employers.").
91 Clarett, 369 F.3d at 138 (quoting Wood v. NBA, 809 F.2d 954, 959 (2d Cir. 1987)).
92 See id. at 139-42 (finding that eligibility rules are mandatory bargaining subjects but that the nonstatutory labor exemption is not rendered inapplicable simply because the
Instead, the court considered the totality of the circumstances, examining the eligibility rules and the circumstances surrounding their adoption. Ultimately, the court determined that the eligibility rules were mandatory bargaining subjects because "they have tangible effects on the wages and working conditions of current NFL players." The court also found that the agreement regarding the eligibility rules may affect prospective players who were not a party to the agreement. Despite this finding, the court held that the nonstatutory labor exemption could nonetheless still apply to the eligibility rules. Additionally, the court did not consider the fact that the rules were not adopted through the collective bargaining process to be dispositive, especially because the rules were included in the NFL Constitution and were well known to the NFLPA during the negotiation period.

III

ANALYSIS

A. Threshold Issues

Before applying §1 of the Sherman Antitrust Act, a court must first address a number of threshold issues to determine whether the agreement is subject to antitrust scrutiny. Specifically, a court must find that an agreement exists between separate entities and that the agreement has an effect on trade or commerce between the states. Additionally, the agreement must not be exempt from the antitrust laws for other policy reasons.

The Personal Conduct Policy constitutes an agreement among multiple entities—the thirty-two NFL teams—to adhere to the disciplinary sanctions that the NFL Commissioner decided upon and

agreement has some effect on parties outside the agreement or because the rules were not bargained for through an arm's-length collective bargaining process).

93 See id.
94 See id. at 140.
95 See id. at 140-41.
96 See id. at 141 ("In the context of this collective bargaining relationship, the NFL and its players union can agree that an employee will not be hired or considered for employment for nearly any reason whatsoever so long as they do not violate federal laws such as those prohibiting unfair labor practices . . . ").
97 See id. at 142 ("The threat to the operation of federal labor law posed by Clarett's antitrust claims is in no way diminished by Clarett's contention that the rules were not bargained over during the negotiations that preceded the current collective bargaining agreement.").
98 See 15 U.S.C. § 1 (2006) ("Every contract . . . in restraint of trade or commerce among the several States . . . is declared to be illegal"); see also Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 769-71 (1984) (making clear that antitrust scrutiny only applies to agreements between separate entities and that agreements between officers of a single company, or a parent and its wholly owned subsidiary, do not warrant scrutiny under the antitrust laws).
posed. Although the NFL teams cooperate in a variety of ways to ensure that the league runs smoothly and efficiently, the teams are independently owned and operate, for the most part, as separate entities. Additionally, in previous cases involving the NFL, courts have almost exclusively considered NFL teams as separate entities and subject to antitrust constraints. Consequently, absent a dramatic change in how the courts view the business organization of the NFL, a reviewing court would likely consider the Personal Conduct Policy to be an agreement among separate entities and subject to § 1.

A court would also almost certainly find that the Personal Conduct Policy affects interstate commerce because the NFL supplies its product to consumers across the country. Courts have long held that professional sports leagues, including the NFL, engage in interstate commerce, and the analysis of the Personal Conduct Policy should not differ from past decisions.

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99 See Mackey v. NFL, 543 F.2d 606, 610 (8th Cir. 1976); see also Constitution and Bylaws of the National Football League, supra note 20, art. III, §§ 3.2-3.3 (detailing the conditions for membership in the NFL, including that "[t]he member club shall be held in a separate corporation, partnership, or trust[,] . . . the primary purpose of which shall at all times be and remain the operation of a professional football team as a member club of the League, which such primary purpose shall not be changed, and the only material asset of which shall be the member club."). Although the NFL teams occasionally divide revenue equally among the teams, this facet of the league has traditionally not interfered with the teams being considered separate entities. See, e.g., id. art. X, § 10.3 ("All regular season (and preseason network) television income will be divided equally among all member clubs of the League regardless of the source of such income, except that the member clubs may, by unanimous agreement, provide otherwise in a specific television contract or contracts.").

100 See, e.g., Am. Needle, Inc. v. NFL, 130 S. Ct. 2201, 2213 (2010) ("Although NFL teams have common interests such as promoting the NFL brand, they are still separate, profit-maximizing entities . . . ."); L.A. Mem'1 Coliseum Comm'n v. NFL, 726 F.2d 1381, 1388–89 (9th Cir. 1984) ("While the NFL clubs have certain common purposes, they do not operate as a single entity. NFL policies are not set by one individual or parent corporation, but by the separate teams acting jointly."); N. Am. Soccer League v. NFL, 670 F.2d 1249, 1252 (2d Cir. 1982) ("The NFL teams are separate economic entities engaged in a joint venture."); McNeil v. NFL, 790 F. Supp. 871, 878–79 (D. Minn. 1992) (noting that both the Ninth and Second Circuits have "expressly rejected" the single entity defense).

101 Recently, in a unanimous opinion, the Supreme Court held that the NFL is not categorically exempt from § 1 as a single entity where each team licenses its logo to a single corporate entity and the corporate entity then jointly licenses the logos of each team. See Am. Needle, 130 S. Ct. at 2212–13, 2216–17; see also Michael McCann, Why American Needle–NFL Is Most Important Case in Sports History, SPORTSILLUSTRATED.COM (Jan. 12, 2010, 11:33 AM), http://sportsillustrated.cnn.com/2010/writers/michael_mccann/01/12/americanneedle.nfl/index.html.

102 See Mackey, 543 F.2d at 616 n.19 ("It is undisputed that the NFL operates in interstate commerce."); Denver Rockets v. All-Pro Mgmt., Inc., 392 F. Supp. 1049, 1055 (C.D. Cal. 1971) ("The business of professional basketball as conducted by NBA and the NBA teams on a multi-state basis, coupled with the sale of rights to televise and broadcast the games for interstate transmission, is trade or commerce among the several States within the meaning of the Sherman Act.").
Additionally, §1 would not apply to the Personal Conduct Policy if the Policy is subject to the nonstatutory labor exemption, which exempts the mandatory subjects of collective bargaining from the antitrust laws. Despite the circuit split on assessing when to apply the nonstatutory labor exemption, a court applying either of the prevailing tests would not apply the nonstatutory labor exemption to the Personal Conduct Policy. Consequently, the Policy would be subject to §1.

The *Mackey* test, which the Eighth and Sixth Circuits adopt, sets forth three factors that must be present for the nonstatutory labor exemption to apply to a particular agreement. First, the agreement must primarily affect "only the parties to the collective bargaining relationship." 103 Second, the agreement must concern a "mandatory subject of collective bargaining." 104 Third, the agreement must be "the product of bona fide arm's-length bargaining." 105 In *Mackey*, the Eighth Circuit made clear that an agreement must meet all three factors to qualify for the nonstatutory labor exemption. 106 The Sixth Circuit has also adopted these factors as providing the correct analysis to determine whether the nonstatutory labor exemption applies to an agreement between a league and its players' association. 107

Given previous application of the *Mackey* test in both the Sixth and Eighth Circuits, neither court would find the NFL's Personal Conduct Policy to be the result of bona fide arm's-length bargaining. As previously noted, the NFL Commissioner unilaterally imposed the Personal Conduct Policy upon the NFL teams and the NFLPA. 108 The Players' Association and NFL have not engaged in any type of collective bargaining process regarding the terms of the Personal Conduct Policy and have not attempted to amend the Collective Bargaining Agreement to include the Policy. 109 Given these courts' strict interpretation of the bona fide arm's-length bargaining requirement, courts in either the Eighth or Sixth Circuit would almost certainly determine that the NFL and the NFLPA did not adopt the Personal Conduct Policy as a result of bona fide collective bargaining.

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103 *Mackey*, 543 F.2d at 614.
104 Id.
105 Id.
106 See id. at 616 (finding that although the *Rozelle* rule qualifies as a mandatory subject of collective bargaining, the nonstatutory labor exemption does not apply because the rule was not adopted as a result of a bona fide arm's-length bargaining process).
107 See *McCourt v. Cal. Sports, Inc.*, 600 F.2d 1193, 1198 (6th Cir. 1979). Although the Sixth Circuit found that the nonstatutory labor exemption applied to an instance where negotiations had failed, the court noted that the circumstances were very different from the *Mackey* situation and that the resulting agreement was the product of "good faith, arm's-length bargaining." See id. at 1203.
108 See supra notes 37–40 and accompanying text.
109 See supra note 38.
Additionally, the NFL's Personal Conduct Policy affects a large number of people outside the collective bargaining relationship between the NFL and the NFLPA, including coaches, owners, officials, and even independent contractors and consultants. Accordingly, given that the Personal Conduct Policy fails to meet two separate factors of the *Mackey* test—in that it was not adopted as a result of bona fide collective bargaining and it affects many individuals outside the collective bargaining relationship—it is likely that neither the Eighth nor the Sixth Circuit would apply the nonstatutory labor exemption to the Personal Conduct Policy, and the Policy would subsequently be subject to antitrust scrutiny in both circuits.

Similarly, the Second Circuit would also likely determine that the nonstatutory labor exemption does not apply to the Personal Conduct Policy. Rather than adopting the *Mackey* test, the Second Circuit developed its own test to address the application of the nonstatutory labor exemption. In *Clarett v. NFL*, the Second Circuit considered the totality of the circumstances to determine whether applying "antitrust scrutiny would 'subvert fundamental principles of our federal labor policy.'" Though it considered many of the same factors included in the *Mackey* test, the Second Circuit ultimately applied the nonstatutory labor exemption to the NFL's eligibility rules despite the facts that the rules affected individuals outside the Players' Association and the NFL did not adopt the rules through a collective bargaining process with the NFLPA. Though these circumstances would not have satisfied the *Mackey* test, the Second Circuit noted that eligibility rules were well known to the NFLPA through the NFL Constitution and Bylaws, and the NFLPA could have forced collective bargaining regarding the eligibility rules if the Players' Association felt such a process was necessary. Additionally, as part of the collective bargaining agreement, the NFLPA had agreed to waive any challenge to the NFL Constitution and Bylaws. Though the NFLPA and the NFL had not gone through the collective bargaining process regarding the eligibility rules, the parties had indirectly addressed the rules at issue in *Clarett*.

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110 See NFL PERSONAL CONDUCT POLICY, supra note 4, at 3.
111 Clarett v. NFL, 369 F.3d 124 (2d Cir. 2004).
112 Id. at 138 (quoting Wood v. NBA, 809 F.2d 954, 959 (2d Cir. 1987)).
113 See id. at 140-42.
114 See id. at 142 ("The eligibility rules, along with the host of other NFL rules and policies affecting the terms and conditions of NFL players included in the NFL's Constitution and Bylaws, were well known to the union, and a copy of the Constitution and Bylaws was presented to the union during negotiations. Given that the eligibility rules are a mandatory bargaining subject . . . the union or the NFL could have forced the other to the bargaining table if either felt that a change was warranted.").
115 See id.
The circumstances surrounding the adoption of the Personal Conduct Policy differ significantly from the facts of the *Clarett* case. As a result, the Second Circuit would probably not apply the nonstatutory labor exemption to the Personal Conduct Policy, and the Policy would be subject to antitrust scrutiny. Although the Personal Conduct Policy probably constitutes a mandatory subject of collective bargaining, the court would probably not consider this fact sufficient to apply the nonstatutory labor exemption because the Policy has a clear effect on the wages and working conditions of players affected by disciplinary measures.116 As previously noted, Goodell imposed the Personal Conduct Policy in 2008,117 two full years after both the latest revision of the NFL Constitution and Bylaws and when the most recent Collective Bargaining Agreement took effect.118 Thus, unlike *Clarett*, where the Players' Association knew of the eligibility rules during the collective bargaining process, the Personal Conduct Policy in its current form did not even exist during the last round of collective bargaining negotiations, and consequently, the Players' Association was not in a position to force collective bargaining on the issue if it felt negotiations were necessary. Finally, in contrast to the eligibility rules that were included in the NFL Constitution and Bylaws, the League's main governing document, the Personal Conduct Policy, is an entirely separate document that the Commissioner unilaterally set forth.119 Neither the NFLPA nor the NFL teams have ever formally assented to the Personal Conduct Policy.120 Given the significant differences in the underlying facts that distinguish the Personal Conduct Policy from the situation surrounding the eligibility rules in *Clarett*, the Second Circuit would probably determine that the nonstatutory labor exemption should not apply to the Personal Conduct Policy, and the Policy would therefore be subject to the antitrust laws.

The Personal Conduct Policy would thus meet the threshold requirements necessary for § 1 to apply. Consequently, a court would then proceed to a full antitrust analysis to determine whether the Policy in fact violates federal antitrust law or whether the procompetitive effects of the Policy justify the agreement.121

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116  See id. at 140 (finding that the eligibility rules "constitute a mandatory bargaining subject because they have tangible effects on the wages and working conditions of current NFL players").
117  See NFL Personal Conduct Policy, supra note 4.
118  See Constitution and Bylaws of the National Football League, supra note 20; Collective Bargaining Agreement, supra note 5.
119  See supra Part I.B–C.
120  See supra Part I.C.
121  See supra Part II.A.
B. Rule of Reason Analysis

As previously discussed, rather than applying the per se analysis that courts typically apply to a boycott, a court examining the Personal Conduct Policy would almost certainly apply a rule of reason analysis to determine whether the Personal Conduct Policy violates antitrust law.122 Under a rule of reason analysis, a plaintiff challenging the Personal Conduct Policy under § 1 would have to establish a prima facie case by demonstrating that the NFL teams have market power and that the teams’ agreement regarding the Personal Conduct Policy has a net anticompetitive effect on the market.123 Here, the relevant market definition would almost certainly be the labor market for professional football within the United States. Given this market definition, a potential plaintiff could easily demonstrate the NFL’s market power because the NFL is the only elite employer of professional football players in the United States, and consequently, it has monopoly power over the relevant market.124 Even if the court were to define the market as professional football in North America or worldwide, the second most prominent professional football league, the Canadian Football League, refuses to employ any player suspended by the NFL.125 Given these facts, an examining court would easily find that the NFL holds market power in the professional football labor market.

After demonstrating the NFL’s market power, a plaintiff would next have to show anticompetitive harm resulting from the Personal Conduct Policy. Given the Commissioner’s ability to suspend a player from the NFL, potentially indefinitely, a plaintiff would probably allege that the Personal Conduct Policy harms competition by preventing otherwise capable players from participating in professional football.126 Additionally, by preventing eligible players from performing the service of competing in professional football games, the NFL teams essentially exclude an eligible seller from the market. Finally, a player’s suspension harms consumers by restricting their ability to express a choice in which players to support and by lessening the quality

122 See id.
123 See supra notes 51–52 and accompanying text.
124 See Edelman, supra note 6, at 645–46; see also Clarett v. NFL, 369 F.3d 124, 126 (2004) (describing the NFL as “by far the most successful professional football league in North America”). The Supreme Court has defined monopoly power as “the power to control prices or exclude competition.” See United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 391 (1956).
125 See Edelman, supra note 6, at 646.
126 See id. at 647; see also Gardella v. Chandler, 172 F.2d 402, 408 (2d Cir. 1949) (Hand, J., concurring) (“[O]ne of the oldest and best established [restraints of trade which is unlawful at common law] is a contract which unreasonably forbids any one to practice his calling.”).
of the service provided.\textsuperscript{127} Though the NFL could question the strength of these arguments, a court would probably find them sufficient to demonstrate a prima facie case of anticompetitive harm.

After a plaintiff sets forth a prima facie case, the burden of proof shifts to the NFL to provide a procompetitive justification for the Personal Conduct Policy by demonstrating that its procompetitive effects outweigh its potentially anticompetitive effects.\textsuperscript{128} In setting forth procompetitive justifications for the Personal Conduct Policy, the NFL must demonstrate that the Policy actually improves economic competition within the professional football labor market.\textsuperscript{129} The NFL cannot justify the Personal Conduct Policy by arguing that the Policy contributes to social welfare by suspending NFL players who commit crimes or engage in other types of wrongdoing.\textsuperscript{130}

Despite these limitations, however, the NFL may justify the Personal Conduct Policy by arguing that, to protect the viability of the joint venture, the teams who make up the league must be able to collectively impose a meaningful disciplinary policy. Under this procompetitive justification, the NFL can persuasively argue that in order for the teams in the league to viably produce the product of professional football, they must be able to collectively agree on the qualities that render a player ineligible to play for any team.\textsuperscript{131}

It is necessary for the NFL teams to enact a disciplinary policy collectively because, without the agreement of every team, the purpose and effect of the policy would be diminished and perhaps even completely negated. If the NFL teams are not permitted to collectively agree to enforce a suspension that the Commissioner imposes, no individual team has any incentive to adhere to the limitations of the suspension. If one team decided individually to honor the suspens-

\textsuperscript{127} See Nichols v. Spencer Int'l Press, Inc., 371 F.2d 332, 336 (7th Cir. 1967) ("[T]he service supplied to the public by a professional football club is highly dependent upon the ability of the players employed by the club, and a black-listing agreement . . . is, from the point of view of the public, an impairment of competition as to the quality of the service supplied, even though, as between player and club it is only a restriction on freedom to employ.").

\textsuperscript{128} See supra note 53 and accompanying text.

\textsuperscript{129} See supra note 54 and accompanying text.

\textsuperscript{130} See FTC v. Ind. Fed'n of Dentists, 476 U.S. 447, 462 (1986) ("The Federation is not entitled to pre-empt the working of the market by deciding for itself that its customers do not need that which they demand."); Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 695–96 (1978) (holding that safety concerns do not justify an agreement between competitors to refrain from competitive bidding); United States v. Brown Univ., 5 F.3d 658, 669 (3d Cir. 1993) ("A restraint on competition cannot be justified solely on the basis of social welfare concerns.").

\textsuperscript{131} Under this logic, the NFL could argue that the Personal Conduct Policy is an agreement that "merely regulates, and . . . thereby promotes, competition." See Bd. of Trade of Chi. v. United States, 246 U.S. 231, 238 (1918); see also Molinas v. NBA, 190 F. Supp. 241, 243–44 (S.D.N.Y. 1961) ("Every league or association must have some reasonable governing rules, and these rules must necessarily include disciplinary provisions.").
sion while another did not, the first team runs the risk of competitive players signing on with competing teams. Although the law requires this type of individual decision making and risk assessment of typical competitors, it does not require entities engaged in a joint venture to risk their own success on their partners' cooperation.\textsuperscript{132} Given the necessity of securing each team’s agreement to adhere to the Personal Conduct Policy to ensure that the Policy has the desired effect, a court should find that the procompetitive effect of allowing the NFL teams to collectively set disciplinary rules to ensure that the product of professional football remains viable outweighs the anticompetitive effect on the few individuals who face commissioner suspensions or other disciplinary measures.

**Conclusion**

Given the popularity of the NFL and the star status of professional athletes in American culture today, the NFL should be able to set rules that address the growing number of disciplinary issues that professional football teams face. In doing so, however, the NFL Commissioner and the NFL teams must tread carefully, ensuring that they address disciplinary problems efficiently but also within the constraints of the law.

Outside the restrictions of the antitrust laws, the Personal Conduct Policy seems to be a positive change in the NFL. Given the swift and harsh responses to recent criminal incidents involving NFL players, players will likely consider the possible ramifications of their actions before engaging in criminal behavior. Additionally, Goodell has demonstrated reluctance to employ the particularly harsh penalty of banishment, as exemplified through his choice to reinstate former star quarterback Michael Vick after Vick’s release from prison.\textsuperscript{133} Hopefully, the possibility of harsh punishments resulting from the Personal Conduct Policy will deter athletes and others who associate with the NFL from engaging in criminal behavior or otherwise sullying the NFL’s reputation and product.

Given the circumstances surrounding the NFL’s adoption of the Personal Conduct Policy, however, an affected player will eventually challenge the Policy under the antitrust laws, alleging that the Policy constitutes an unlawful agreement among competitors to boycott an eligible seller from providing a service and practicing his profession.

\textsuperscript{132} See Texaco Inc. v. Dagher, 547 U.S. 1, 7 (2006) (“[C]ourts must determine whether the nonventure restriction is a naked restraint on trade, and thus invalid, or one that is ancillary to the legitimate and competitive purposes of the business association, and thus valid.”).

\textsuperscript{133} See William C. Rhoden, After Reinstatement, Vick Has to Handle Teams and Public, N.Y. Times, July 28, 2009, at B14.
Although a potential plaintiff would likely be able to make out a prima facie case and avoid summary disposition, an examining court should find that the Personal Conduct Policy does not violate § 1 of the Sherman Act. The policy does not violate § 1 because allowing the NFL teams to collectively impose a disciplinary policy is the only way to ensure the policy's effectiveness and thereby ensure the continued viability of the product of professional football. Allowing the NFL teams to agree on reasonable constraints regarding a player's eligibility following a disciplinary violation will strengthen both the teams' and the NFL's product, resulting in a procompetitive effect that satisfies the antitrust laws.