No.

IN THE
SUPREME COURT OF THE UNITED STATES

Maurice Clarett,

Petitioner,

v.

National Football League,

Respondent.

On Petition For Writ Of Certiorari
To The Second Circuit Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Second Circuit properly invoke the nonstatutory labor exemption to shelter from antitrust review an otherwise naked restraint of trade, the NFL draft eligibility rule, where that rule impacted only strangers to the collective bargaining relationship, did not vitally affect the wages, hours, and terms and conditions of employment of NFL employees, and was not the product of bona fide bargaining?

2. Did the Second Circuit properly balance inherently conflicting antitrust and labor law policies by holding that the antitrust laws are extinguished whenever an anticompetitive agreement among a group of employers is imposed "on a labor market organized around a collective bargaining relationship"?

3. Did the Second Circuit properly conclude that employment eligibility rules fall within the meaning of "wages, hours, and other terms and conditions of employment" under the National Labor Relations Act?

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OPINIONS AND ORDERS BELOW

On February 5, 2004, a judge of the United States District Court for the Southern District of New York granted summary judgment in favor of plaintiff Maurice Clarett ("Clarett" or "petitioner"). The court's Opinion and Order are published at 306 F. Supp. 2d 379 (S.D.N.Y. 2004) and can be found in the Appendix (when abbreviated, "App.") at 1.

On May 24, 2004, a panel of the United States Court of Appeals for the Second Circuit reversed the Opinion and Order of the District Court. The court's decision is published at 369 F.3d 124 (2d Cir. 2004) and can be found in the Appendix at 61.

On October 15, 2004, the judges of the Second Circuit denied Clarett's Petition For Panel Rehearing And Rehearing En Banc. The court's Order incorporating its decision can be found in the Appendix at 98.

JURISDICTION

The Second Circuit's decision was entered on May 24, 2004. On October 15, 2004, the Circuit entered an Order denying the Petition For Panel Rehearing And Rehearing En Banc. This Court has jurisdiction over this matter under 28 U.S.C. § 1254.

STATUTORY PROVISIONS

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides in pertinent part that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal ... ."

Section 7 of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 157, provides that "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection ... ."

Section 8(d) of the NLRA, 29 U.S.C. § 158(d), defines collective bargaining as "the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment."

STATEMENT OF THE CASE

At issue in this case is whether the National Football League's ("NFL") draft eligibility rule ("Rule"), a concerted refusal to allow a prospective player to be eligible for the NFL player draft unless three full college seasons have elapsed since his high school graduation, is shielded from antitrust scrutiny because of the nonstatutory labor exemption to the antitrust laws. The District Court had jurisdiction over this case pursuant to 28 U.S.C. § 1331.

An NFL draft eligibility rule has been in existence for fifty years. It is not now, and it never has been, contained within any collective bargaining agreement ("CBA"). The NFL did not recognize the National Football League Players Association ("NFLPA") as the players' collective bargaining representative until 1968, when it negotiated its first CBA with that labor organization. App. at 6. Nowhere in that first agreement, or any subsequent agreement, did such a rule appear. The current CBA, negotiated in 1993 and extended three times, comprises 292 pages, 61 articles, appendices A

through N, and 357 sections, but, like its predecessors, does not contain the Rule. Record at Exhibit I.

Clarett, who is six feet tall and weighs 230 pounds, is as tall or taller than NFL running back legends Walter Payton, Barry Sanders, and Gale Sayers, and weighs as much as, or more than, they did during their careers. App. at 14. Clarett graduated high school in December 2001. The District Court described his subsequent achievements in detail. App. at 13-15.

Both Clarett and Michael Williams ("Williams"), a similarly situated and gifted football player, were twenty years old at the time of the 2004 draft. Throughout this litigation, the NFL has attempted to justify the Rule upon health and safety concerns and its desire to protect young players from injury. Nevertheless, just four days after the Court of Appeals stayed the District Court's decision in this case, NFL teams drafted five individuals the same age as Clarett and Williams, three of whom were among the first nine players selected. Indeed, several NFL players have been as young or younger than Clarett was at the start of the 2004 season, including Emmitt Smith, who has rushed for more yards than any player in NFL history, and was twenty years old when he was drafted in 1990.

After the District Court rendered its decision striking down the Rule, Clarett and Williams hired agents. For this reason, Clarett and Williams can no longer play as amateurs in the NCAA. Because of the Rule, they cannot play as professionals in the NFL either. They are players without a game who, as a result of the Second Circuit's decision in this case, have sustained losses in the millions of dollars.

REASONS FOR GRANTING CERTIORARI

Review in this case is not only warranted, it is necessary to preserve the primacy of this Court's previous decisions striking a balance between conflicting national policies of free

economic competition and the rights of employees to bargain collectively.

A review of the two contrasting opinions below yields clear reasons for granting certiorari. The District Court's decision is consistent with this Court's precedents and with the decisions of the Sixth, Eighth, and Ninth Circuits. The Second Circuit's decision, on the other hand, conflicts with the decisions of those Circuits and directly contravenes both this Court's previous decisions and its express instruction to the circuit courts in Brown v Pro Football, Inc., 518 U.S. 231 (1996).

I.

The District Court recognized that "Clarett's challenge to the Rule raises serious questions arising at the intersection of labor law and antitrust law, not to mention the intersection of college football and professional football." App. at. 1. In rejecting the NFL's argument that the Rule was immune from antitrust scrutiny because of the nonstatutory labor exemption to the antitrust laws, the District Court found that the Rule does not concern a mandatory subject of bargaining under the NLRA, restrains only non-employees, and "did not clearly result from arm's length negotiations." App. at. 1-2. Without the shield of the labor exemption to protect the Rule, the court found the Rule to be "blatantly anticompetitive" and determined that "Clarett has alleged the very type of injury – a complete bar to entry into the market for his services – that the antitrust laws are designed to prevent." App. at 2. Quoting Learned Hand, the court observed "that the antitrust laws will not tolerate a contract 'which unreasonably forbids any one to practice his calling.'" App. at 2.

The District Court observed that the Supreme Court had "implied [the nonstatutory labor] 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 conditions* ..." and that, like all exemptions to the antitrust laws, the nonstatutory labor exemption must be narrowly construed. App. at 19-21 (emphasis in original). Indeed, this Court has cautioned that the nonstatutory labor exemption must not be used as a "cat's-paw to pull the employer's chestnuts out of the antitrust fires." See United States v. Women's Sportswear Mfg. Ass'n, 336 U.S. 460, 464 (1948).

In deciding whether to invoke the exemption, the District Court used the three-pronged standard set forth by the Eight Circuit in Mackey v. National Football League, 543 F.2d 606 (8th Cir. 1976) ("Mackey standard") and followed by the Sixth and Ninth Circuits. In reversing the District Court, the Second Circuit expressly rejected the Mackey standard, thereby creating a split among the Circuits. The Mackey standard seeks to balance important, but inherently conflicting, antitrust and labor law considerations by requiring the presence of three elements before an agreement is immune from antitrust review. As the Eighth Circuit stated in Mackey,

> [f]irst, the labor policy favoring collective bargaining may potentially be given pre-eminence over the antitrust laws where the restraint on trade primarily affects only the parties to the collective bargaining relationship. ... Second, federal labor policy is implicated sufficiently to prevail only where the agreement sought to be exempted concerns a mandatory subject of collective bargaining. ... Finally, the policy favoring collective bargaining is furthered only where the agreement sought to be exempted is the product of bona fide arm's-length bargaining.

See Mackey, 543 F.2d at 614; accord Continental Maritime of San Francisco, Inc. v. Pacific Coast Metal Trades District Council, 817 F.2d 1391, 93 (9th Cir. 1987); McCourt v. California Sports, Inc., 600 F.2d 1193, 1197-98 (6th Cir. 1979). Because labor law mandates collective bargaining only over "wages, hours, and other terms and conditions of employment," the District Court reasoned, "only agreements on these subjects (and intimately related subjects) are exempt from the antitrust laws." App. at 23. In so doing, it looked to Brown, where this Court "reiterated that the exemption is limited to mandatory subjects of collective bargaining and covers only conduct that arises from the collective bargaining process." App. at 24.

Inasmuch as mandatory subjects of bargaining apply only to employees, the exemption may only be used to shield agreements that affect employees who will be bound by those actions. Clarett and similarly situated athletes are not employees within the meaning of the NLRA, nor does the NFLPA represent them in any capacity, including collective bargaining, nor are they even eligible for employment or inclusion in the collective bargaining unit.

In addressing whether the Rule falls within the meaning of "wages, hours, and other terms and conditions of employment" under the NLRA, the District Court observed that the Rule makes no reference to wages, hours, or conditions of employment of employees or persons eligible for employment. Instead, it renders a class of otherwise qualified persons who are not employees "*unemployable*." App. at 25 (emphasis in original). The court thus concluded that the NFL's reliance on three Second Circuit cases, Wood v. National Basketball Association, 809 F.2d 954 (2d Cir. 1987), National Basketball Association v. Williams, 45 F.3d 684 (2d Cir. 1994), and Caldwell v. American Basketball Association, 66 F.3d 523 (2d Cir. 1995), was misplaced. It observed that, in sharp contrast to

this case, the practices challenged in each of those cases involved the wages, hours, or working conditions of employees. Wood and Williams were NBA employees who were represented by the players association, but nevertheless challenged a salary cap agreement the league had negotiated with their union. See Wood, 809 F.2d at 956; cf. Williams, 45 F.3d at 686. Caldwell was a former player challenging his discharge. See Caldwell, 66 F.3d at 525-26.

The District Court distinguished these three cases, stating:

> In sum, none of the cases cited by the NFL involve job *eligibility*. The league provisions addressed in *Wood, Williams,* and *Caldwell* govern the terms by which those who *are drafted* are employed. The [draft eligibility rule], on the other hand, precludes players from entering the labor market altogether, and thus affects wages only in the sense that a player subject to the Rule will earn none. But the Rule itself ... does not concern wages, hours, or conditions of employment and is therefore not covered by the nonstatutory labor exemption.

App. at 28 (emphasis in original).

Having concluded that the Rule is not a mandatory subject of bargaining, the District Court could have ended its analysis. Prior to the Second Circuit's decision, no decision of this Court, or any other court, had ever found a labor-management agreement over a non-mandatory subject of bargaining eligible for immunity from antitrust scrutiny under the nonstatutory labor exemption.

Nevertheless, the District Court examined the two other

Mackey factors and found them similarly unavailing. First, the court found that the Rule "*only* affects players, like Clarett, who are complete strangers to the bargaining relationship." App. at 28 (emphasis in original). In this regard, the court stated that "[t]he labor laws cannot be used to shield anticompetitive agreements between employers and unions that affect only those outside of the bargaining unit." App. at 28.[1] While it is true that collective bargaining agreements apply to current employees as well as those entering the workforce, the District Court stated that Clarett's situation "is very different" because he is not an employee and, indeed, is not eligible for employment. App. at 29. The court observed:

> That the nonstatutory exemption does not apply in such a case is simply the flip side of the rule that the exemption only applies to mandatory subjects of collective bargaining, those governing wages, hours, and working conditions. Employees who are hired after the collective bargaining agreement is negotiated are nonetheless bound by its terms because they step into the shoes of the players who did engage in collective bargaining. But those who are categorically denied eligibility for employment, even temporarily, cannot be bound by the terms of employment they cannot obtain.

App. at 29. This reasoning is required by longstanding Supreme Court precedent on what has evolved into the first

[1] Accord Mackey, 543 F.2d at 614 (providing that "[t]he labor policy favoring collective bargaining may potentially be given pre-eminence over the antitrust laws where the restraint on trade primarily affects only the parties to the collective bargaining relationship").

prong of the Mackey standard. The agreements at issue in United Mine Workers v. Pennington, 381 U.S. 657 (1965), Allen Bradley Co. v. Local Union No. 3, 325 U.S. 797 (1945), and Connell Construction Co., Inc. v. Plumbers & Steamfitters Local Union No. 100, 421 U.S. 616 (1975) were all held not to be protected by the nonstatutory labor exemption because, although they directly concerned wages, hours, or terms and conditions of employment of employees, they sought "to prescribe labor standards outside the bargaining unit." Pennington, 381 U.S. 665-68. Like the small mine operators in Pennington, the non-New York City manufacturers in Allen Bradley, and the non-union subcontractors in Connell, Clarett and other similarly situated athletes, strangers to the collective bargaining relationship, are the direct and only object of the restraint.

Finally, the District Court found the nonstatutory labor exemption inapplicable because "the NFL has failed to demonstrate that the Rule evolved from arm's-length negotiations" between the NFL and the NFLPA. App. at 30. The Rule, the court observed, was adopted more than thirty years before the NFLPA was even formed and more than forty years before it became the players' exclusive bargaining agent. Indeed, the court found that the collective bargaining agreement never mentions the Rule. While the NFL attempted to rely on the NFLPA's statement that it "*waive[s]* ... its rights to bargain over any provision of the Constitution and Bylaws ... [and] to resolve any dispute ... involving the interpretation or application of the Constitution and Bylaws in accordance with the dispute resolution procedures of the CBA," the District Court read this language only to confirm that the NFLPA had merely waived its right to bargain and, consequently, that the Rule itself "was never the subject of collective bargaining between the league and the union, and did not arise from the collective bargaining process." App. at 31. Because the Rule did not evolve from the collective bargaining process, the NFL

could not shelter its anticompetitive agreement from antitrust review.

In short, the District Court concluded the Rule was not within the reach of the nonstatutory labor exemption for three separate reasons, each of which was independently sufficient to foreclose the exemption's applicability.

II.

The Second Circuit rejected each of the District Court's conclusions and found the Rule immune from antitrust challenge under the nonstatutory labor exemption because it was imposed "on a labor market organized around a collective bargaining relationship." App. at 79. Under the Second Circuit's standard, all anticompetitive agreements among employers who collectively bargain on a multiemployer basis are exempt from antitrust review if the restraint is upon a "labor" market. Indeed, under the Second Circuit's holding, it is immaterial whether the matter involves a mandatory subject of bargaining, restrains only strangers to the collective bargaining relationship, or has even been collectively bargained for at all. Rather, the mere presence of a union shelters all "labor" market restraints. This standard deviates far from the holdings of other Circuits as well as the holdings of this Court.

Like the District Court, the Second Circuit reviewed the relevant Supreme Court cases outlining the nonstatutory labor exemption, although its decision expanded the scope of the exemption far beyond anything this Court intended.

In Allen Bradley, "the New York City electrical workers union negotiated a series of agreements in which local manufacturers and contractors agreed to deal only with other manufacturers and contractors that employed the union's members." App. at 73. Allen Bradley Company, a non-New

York manufacturer, was excluded from the market by these agreements and alleged they violated the antitrust laws. App. at 73. Despite the fact that the union sought the agreements out of "a desire to get and hold jobs for themselves at good wages and under high working standards," the Supreme Court nevertheless held the nonstatutory labor exemption inapplicable. Failing to acknowledge that the anticompetitive arrangements in Allen Bradley also served to raise wages, enhanced employment opportunities for union members and thereby greatly affected the labor market, the Second Circuit found Allen Bradley applicable only "where unions 'combine with employers and with manufacturers of goods to restrain competition in, and to monopolize the marketing of, such goods.'" App. at 74.

In Pennington, "a small coal mine operator claimed that a ... union violated the antitrust laws by agreeing with large coal mine companies that the union would demand a higher wage scale from small coal mine operators in an effort to drive the small mine operators from the market." App. at 74. The Second Circuit again ignored the plain teaching of Pennington – that the anticompetitive effect of the labor-management agreement upon strangers to that collective bargaining relationship, strangers like Clarett, deprived the union and the companies of antitrust immunity despite the fact that their agreement involved wages and employment opportunities, mandatory subjects of bargaining under the NLRA. 381 U.S. 665-68.

In Local 189, Amalgamated Meat Cutters & Butcher Workmen v. Jewel Tea Co., 381 U.S. 676 (1965), a companion case to Pennington, this Court reached a different result. There, a multi-employer group of grocery stores agreed with the union representing its butchers to limit the operation of meat counters to certain hours. Jewel Tea, one of the stores that was a signatory to the agreement, challenged the hours restriction on

antitrust grounds. Justices White and Goldberg, writing collectively for six Justices, concluded that, for the nonstatutory labor exemption to be available, the labor-management agreement at issue must be both a mandatory subject of bargaining and the product of "bona fide, arm's-length bargaining." 381 U.S. at 689-90. These two criteria, absent here, represent the second and third elements of the Mackey standard. The Second Circuit, however, read Jewel Tea to mean that only "product" market restraints are outside the reach of the exemption, a reading wholly without justification. Nowhere in Jewel Tea did this Court state that only restraints on the "product" market were outside the reach of the exemption or that restraints on the labor market were automatically insulated.[2] Indeed, under the Second Circuit=s holding, the many cases in which player restraints have been challenged in situations when the players were contemporaneously represented by a union that negotiated on their behalf with teams that bargained on a multi-employer basis,[3] must have been wrongly reasoned because, under the Second Circuit=s paradigm, the antitrust laws have no

[2] In Jewel Tea, Justice White stated that application of the nonstatutory labor exemption required balancing "the interests of union members served by the restraint against its relative impact on the product market." See id. at 690 n.5. This formula, however, was designed to weigh the competing antitrust and labor law considerations at stake, not to establish that all labor market restraints fall automatically within the exemption, as the Second Circuit decided here.

[3] See, e.g., Brown, 518 U.S. at 231; Mackey, 543 F.2d at 614; McCourt, 600 F.2d at 1197-98; cf. Boris v. United States Football League, Civ. A. No. 83-4980 LEW, 1984 WL 894 (C.D.Cal. 1984); Linseman v. World Hockey Association, 439 F. Supp. 1315 (D.Conn. 1977); Denver Rockets v. All-Pro Management, Inc., 325 F. Supp. 1049 (C.D.Cal. 1971).

applicability whatsoever and are in effect extinguished under such circumstances.

In Connell Construction Co. v. Plumbers & Steamfitters Local Union No. 100, 421 U.S. 616 (1975), a union demanded that a contractor do business only with subcontractors employing union members, despite the fact that the union did not represent the contractor's employees and the agreement sought was not a collective bargaining contract. The contractor, which acquiesced in the demand only after the union picketed one of its sites, challenged the arrangement on antitrust grounds. This Court again denied antitrust immunity to this "kind of direct restraint on the business market [that] has substantial anticompetitive effects, both actual and potential, that would not follow naturally from the elimination of competition over wages and working conditions." Id. at 625.

The Second Circuit again misapplied precedent, misreading Connell to mean that only "product" market restraints fall outside the nonstatutory labor exemption. App. at 73. Connell stands for nothing of the sort. Nowhere in Connell did this Court limit its holding to "product" market restraints. In fact, Connell supports the conclusion, also present in Allen Bradley and Pennington, that it is the exclusion of strangers to the collective bargaining relationship that rendered the agreement subject to antitrust scrutiny. Clarett is no different than the subcontractors in Connell. He is an "economic actor" barred from selling his talent in the market for player services. Moreover, as in Connell, the union does not represent him.

Indeed, the Second Circuit's effort to distinguish "product" markets from "labor" markets is illusory and flies in the face of Supreme Court precedent. So-called "product" and "labor" markets are so intertwined and interconnected that they cannot be distinguished from one another. For example, in Connell, the agreement in question not only restrained

prospective subcontractors who could have bid upon jobs but for the restriction but also excluded employees of those employers who were likewise foreclosed from employment opportunities. 421 U.S. at 618-19. Likewise, in Jewel Tea, the restraint involved the stores= marketing hours. 381 U.S. at 679-80. Nevertheless, Justice White found the restriction "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" was "within the protection of national labor policy and ... therefore exempt from the Sherman Act." Id. at 689-90.[4]

The Second Circuit flatly rejected the District Court=s reliance on the standard announced in Mackey, stating that it had "never regarded the Eighth Circuit=s test in *Mackey* as defining the appropriate limits of the non-statutory exemption." App. at 78. The court stated:

> we disagree with the Eighth Circuit=s assumption in *Mackey* that the Supreme Court=s decisions in *Connell, Jewel Tea, Pennington,* and *Allen Bradley* dictate the appropriate boundaries of the non-statutory exemption for cases in which the only alleged anticompetitive effect of the challenged restraint is on a labor market organized around a collective bargaining relationship.

App. at 78-79. Thus, the Second Circuit plainly acknowledged that its decision created a split among the Circuits on the critically important parameters of the exemption. Its holding

[4] "The impact of wage costs on supply and price results in an inextricable connection between the two markets. As a result, the general objectives of the Sherman Act, ... can be frustrated by monopoly power exerted solely in the labor market." B. Meltzer, Labor Law 515 (2d ed. 1977).

directly and unabashedly contravenes the decision of the Eighth Circuit in Mackey, and the decisions of the Sixth Circuit in McCourt and the Ninth Circuit in Continental Maritime that the antitrust laws apply fully to anticompetitive agreements affecting the labor market in the context of a multi-employer collective bargaining situation. While these courts, consistent with the District Court's sound reasoning, would not allow the exemption automatically to shield plainly anticompetitive conduct that restrains the rights of prospective employees to practice their trade, the Second Circuit would invoke the exemption in every case unless it was "employers who asserted that they were being excluded from competition in the product market." App. at 79.

The Second Circuit claimed to find further support for its approach in this Court's most recent pronouncement on the reach of the nonstatutory labor exemption, Brown, a case establishing the duration of the exemption. With respect to Brown, the Second Circuit observed that "eight Justices agreed that the non-statutory exemption precludes antitrust claims against a professional sports league for unilaterally setting policy with respect to mandatory bargaining subjects after negotiations with the players union over those subjects reach impasse." App. at 85.

This case, of course, does not involve the duration of the exemption. More importantly, the plaintiff in Brown was an NFL employee and a member of the union. Clarett is neither. Instead, he is a stranger to the bargaining relationship because he is excluded from the league. Moreover, the subject at issue in Brown was wages, a mandatory subject of bargaining, while the subject here, an employment eligibility rule, is not a mandatory subject of bargaining. The subject at issue in Brown was bargained over extensively, indeed exhaustively, as demonstrated by the fact that the parties reached impasse as to that issue, while in this matter no bargaining at all took place

over the Rule.

In Brown, this Court noted that the NFL conduct at issue there "took place during and immediately after a collective-bargaining negotiation. It grew out of, and was directly related to, the lawful operation of the bargaining process. It involved a matter that the parties were required to negotiate collectively. And it concerned only the parties to the collective-bargaining relationship." See Brown, 518 U.S. at 250. Thus, the Brown decision is grounded on the very three factors relied upon by the Eighth, Sixth, and Ninth Circuits but rejected by the Second Circuit.

The Second Circuit not only misused Brown to extend the exemption far beyond what Brown or any other case decided by this Court would sanction, it did so in defiance of this Court's clear instruction to the contrary. Indeed, the Second Circuit acknowledged that the Court in Brown had "expressed some reservations about ... the broader holding of the court of appeals that the non-statutory exemption 'waiv[es] antitrust liability for restraints on competition imposed through the collective-bargaining process so long as such restraints operate primarily in a labor market characterized by collective bargaining.'" App. at 86. But this Court expressed far more than "reservations" about an expansive interpretation of the nonstatutory labor exemption. In Brown, it wrote, "we do not interpret the exemption as broadly as did the Appeals Court." 518 U.S. at 235. This Court must firmly establish that the nonstatutory labor exemption to the antitrust laws is not nearly so broad as that envisioned by the Second Circuit and is, instead, best defined by the limits adopted by the Eighth, Sixth, and Ninth Circuits.

The Second Circuit rejected Clarett's contention, and the District Court's finding, that the Rule is not a mandatory subject of bargaining under the NLRA. The court wrote that

"the eligibility rules for the draft represent a quite literal condition for initial employment and for that reason alone might constitute a mandatory subject of bargaining." App. at 90. For this proposition, the appeals court quoted Professor Gorman=s treatise Labor Law, which states, "[i]n accordance with the literal language of the Labor Act, the parties must bargain about the requirements or >conditions' of initial employment." App. at 90. This reference, however, has nothing to do with employment eligibility, but only with the initial terms and conditions of work for employees once they are hired. In addition, the Second Circuit stated, "eligibility rules constitute a mandatory bargaining subject because they have tangible effects on the wages and working conditions of current NFL players" and "affect the job security of veteran players." App. at 90. This conclusion, aside from being wrong factually,[5] is contrary to Supreme Court and National Labor Relations Board ("NLRB") precedent on this issue.

The NLRA protects "employees" and, only under rare circumstances that are not present here, non-employees. Thus, the heart of that NLRA, Section 7, states that "employees shall have the right of self-organization, to form, join or assist labor organizations for the purpose of collective bargaining or other mutual aid or protection." See 29 U.S.C. § 157. This language is natural, of course, because the purpose of the NLRA was to grant employees the right to form unions and to bargain collectively, rather than individually. Because the NLRA grants rights to employees, labor and management must bargain only over the "wages, hours and other terms and conditions of employment" of current employees, not applicants for

[5] As discussed infra, Clarett's eligibility for the draft would have had no effect at all on a veteran player's interest in job preservation because Clarett would simply have taken the place of the last player chosen in the draft.

employment like Clarett or retirees.

This Court and the NLRB have long held that matters exclusively concerning job applicants or former employees do not constitute mandatory subjects of bargaining. For example, in Star Tribune v. The Newspaper Guild of the Twin Cities, 295 NLRB 543 (1989), the NLRB addressed the question of whether drug testing for employment applicants was a mandatory subject of bargaining under the NLRA. There, the NLRB unambiguously declared that "[a]pplicants ... are not 'employees' within the meaning of the ... Act" and that, therefore, the issue was not a mandatory subject of bargaining under the NLRA. 295 NLRB at 556, As a consequence, the employer could unilaterally require job applicants to undergo drug screening and was not obligated to bargain with the union representing its current employees regarding that matter. See also NLRB v. United States Postal Service, 18 F.3d 1089, 1098 (3d Cir. 1994) (holding that an employer generally has no duty to bargain over practices that involve non-unit employees).

The significance of Star Tribune is illuminated by its companion case, Johnson-Bateman Co. v. International Ass'n of Machinists, 295 NLRB 180 (1989). There, the NLRB held that mandatory drug testing for current employees was a mandatory subject of bargaining and, thus, that the employer's unilateral adoption of such testing for current employees was a breach of its duty to bargain with the union in good faith over the "wages, hours, and other terms and conditions of employment" of its employees under the NLRA. See Johnson-Bateman, 295 NLRB at 180. These two cases, read together, clearly confirm that mandatory subjects of bargaining involve the wages, hours and terms and conditions of employment of current employees, not prospective employees.

Finally, in Allied Chemical & Alkali Workers, Local 1 v. Pittsburgh Plate Glass Co., 404 U. S. 157 (1971), this Court

established the parameters of the bargaining obligation under the NLRA. There, the question was whether the company was obligated to bargain with its employees' union over retirement benefits, including health insurance, for retirees. This Court's decision provided:

> Together, [Sections 1, 8(a)(5), 8(d) and 9(a)] establish the obligation of the employer to bargain collectively, 'with respect to wages, hours, and other terms and conditions of employment,' with 'the representatives of his employees' designated or selected by the majority 'in a unit appropriate for such purposes.' This obligation extends only to the 'terms and conditions of employment' of the employer's 'employees' in the 'unit appropriate for such purposes' that the union represents ... .

Pittsburgh Plate Glass, 404 U.S. at 164. In addition, this Court separately put to rest any argument that employers were obligated to bargain with the union representing their employees over persons who were not employed. This Court held:

> Section 9(a) of the [NLRA] accords representative status only to the labor organization selected or designated by the majority of employees in a 'unit appropriate' 'for the purposes of collective bargaining.' In this cause, in addition to holding that pensioners are not 'employees' within the meaning of the collective-bargaining obligations of the Act, we hold that they could not be 'employees' included in the bargaining unit.

Id. at 172.

The Second Circuit=s decision contravenes Star Tribune, Johnson-Bateman, and Pittsburgh Plate Glass. Those cases illuminate the bright line drawn between those persons who are employed and those who are either not yet employed or have ceased employment. The former may exercise the rights and enjoy the protections of the NLRA while the latter may not. Mandatory subjects of bargaining do not include matters applicable only to non-employees, like Clarett, any more than they did to the prospective employees in Star Tribune or the retirees in Pittsburgh Plate Glass. Like all other employers in the United States, the NFL has no duty to bargain with the NFLPA regarding employment eligibility rules for prospective employees. Such persons are not "employees" within the meaning of the NLRA and are plainly not members of the collective bargaining unit. Therefore, the employer's bargaining obligation does not extend to matters affecting only them and questions concerning their eligibility for employment are not, and cannot be, mandatory subjects of bargaining under the NLRA.

To be sure, there are rare circumstances where rules affecting non-employees may be deemed to "vitally affect" the terms and conditions of employment of current employees and, therefore, fall within the mandatory bargaining requirement. At the same time, however, "[a]n indirect or incidental impact on unit employees is not sufficient to establish a matter as a mandatory subject. Rather, mandatory subjects include only those matters that materially or significantly affect unit employees=terms and conditions of employment." See United Techs. Corp., 274 NLRB 1069, 1070 (1985), enf'd, 789 F.2d 121 (2d Cir. 1986). No such vital effects have been demonstrated here.

Of course eligibility rules, depending on their terms, may lessen a veteran player's risk of being replaced by an

entering player, but this is always true in any employment setting because limiting access to employment will always result in greater job security for incumbent employees. Such effect alone does not, and cannot, convert employment eligibility rules into mandatory subjects of bargaining or the exception would wholly swallow the rule and, contrary to Star Tribune, render eligibility rules mandatory subjects of bargaining under all circumstances. Like eligibility rules for prospective employees, retiree benefits may also have a substantial impact on terms and conditions for current employees, but that effect, of course, did not make such benefits a mandatory subject of bargaining in Pittsburgh Plate Glass. By expanding the duty to bargain to include employment eligibility rules, the Second Circuit~~s~~ opinion fundamentally alters the balance of power between employers and unions and broadens the bargaining obligation beyond anything envisioned by Congress, this Court, or the NLRB.

In any event, Clarett's eligibility would have had no effect whatsoever on the jobs of veteran players or their wages, let alone a "vital effect." The number of rounds in the NFL draft is limited to seven. Some 214 new players were drafted in the 2004 draft. Clarett's eligibility in that draft would have had no effect at all on a veteran player's interest in job preservation because Clarett would simply have taken the place of the last player chosen in the draft. Put differently, regardless of whether Clarett participated in the 2004 draft, the total number of new players eligible was fixed. Thus, Clarett's participation, or lack thereof, did not affect the job security of players already in the League, only the identity of the new players entering the League.

The Second Circuit asserted that Clarett "argues that the eligibility rules are an impermissible bargaining subject because they affect players outside of the union." App. at 92. Not true. Clarett has never taken this position. Quite to the

contrary, Clarett argues that eligibility rules are a permissive subject of bargaining. They are not "wages, hours or other terms and conditions of employment" for employees and, therefore, mandatory subjects of bargaining, but neither are they unlawful. The distinction is critical. While it is true that the draft profoundly affects players entering the unit by limiting the teams with which they may negotiate, the draft eligibility rule forecloses any employment opportunity for a class of otherwise qualified applicants. Clarett has never challenged the validity of the draft mechanism as a lawful and, indeed, mandatory subject of bargaining. Indeed, he seeks only to be part of that mechanism.

The Second Circuit cites as authority for the proposition that employment eligibility rules are mandatory subjects of bargaining the example of hiring hall arrangements in certain industries. App. at 92-93. This analogy highlights a fundamental flaw in the court's reasoning. Hiring halls exist "in certain industries – most notably maritime, longshoring and construction" where the "unions provide what is in effect a job-referral service and act as a clearinghouse between employees seeking work and employers seeking workers." See Cox, et al., Labor Law Cases and Materials (13th ed., Foundation Press 2001), 1125.

The NFLPA does not operate a hiring hall. It does not refer players for employment to NFL teams needing a player with particular skills for short-term employment. Put differently, the particular needs of employers, employees and unions which make hiring halls necessary in certain industries have no bearing on this case, and, while such arrangements constitute mandatory subjects of bargaining in those settings, nothing in this case suggests that an employment eligibility rule that excludes an otherwise qualified class of prospective employees is likewise mandatory. Instead, in this setting, like the vast majority of employment settings, the reach of the

union's bargaining authority is coextensive with the collective bargaining unit and does not include persons like Clarett who are neither employees, members of the union, nor part of the collective bargaining unit.

Indeed, in Pittsburgh Plate Glass, this Court foreshadowed, and rejected, this very argument advanced by the NFL and accepted by the Second Circuit. Rejecting the hiring hall analogy, this Court wrote,

> [t]he Board enumerated 'unfair labor practice situations where the statute has been applied to persons who have not been initially hired by an employer or whose employment has terminated. Illustrative are cases in which the Board has held that applicants for employment and registrants at hiring halls – who have never been hired in the first place – as well as persons who have quit or whose employers have gone out of business are 'employees' embraced by the policies of the Act.' ... Yet all of these cases involved people who, unlike the pensioners here, were *members of the active work force available for hire* and at least in that sense could be identified as 'employees.' No decision under the Act is cited, and none to our knowledge exists, in which an individual who has ceased work without expectation of further employment has been held to be an 'employee.'

404 U. S. at 168. So, too, a person not eligible for employment, like Clarett, is not an employee within the meaning of the NLRA.

The Second Circuit also noted that the NFL teams bargain with the NFLPA on a multi-employer basis, an entirely

permissible arrangement under the NLRA, as support for its conclusion that Clarett's position would undermine federal labor policy. The fact that employers bargain on a multi-employer basis, however, has no bearing upon the question whether an agreement among such employers and the union representing their employees is immune from antitrust scrutiny under the nonstatutory labor exemption. After all, Allen Bradley and Pennington both involved circumstances in which a group of employers, bargaining on a multi-employer basis, had reached anticompetitive arrangements with the unions representing their employees and, nevertheless, this Court reached the question of antitrust liability and, indeed, found such liability. As described earlier, Clarett does not challenge the multi-employer bargaining arrangement in professional football. The decision of the NFL and the NFLPA to bargain on that basis, however, cannot serve to insulate their anticompetitive conduct unless the other factors warranting such immunity are present. Here, not one of the factors supporting immunity is present.

Despite the fact that the rule appears nowhere in the CBA, the Second Circuit concluded that the draft eligibility rule was "well known to the union, and a copy of the Constitution and Bylaws was presented to the union during negotiations." App. at 94. Thus, the court reasoned, "the union or the NFL could have forced the other to the bargaining table if either felt that a change was warranted." First, this conclusion flows only from the court's erroneous holding that employment eligibility rules are mandatory subjects of bargaining and that management is obligated to bargain with the union representing its employees regarding the qualifications of the persons it seeks to employ. They are not mandatory subjects of bargaining and management is not so obligated. Moreover, even if such eligibility rules were mandatory subjects of bargaining, the court's holding that the conduct of the NFL and the NFLPA amounted to the level of arm's-length collective

bargaining necessary to shelter an anticompetitive agreement conflicts with the decisions of every Circuit that has considered the issue.

The correct standard is clear: there must be substantial evidence that "the parties bargained extensively over the [Rule] and that the [NFLPA] representatives concluded that it was in the best interest of the membership to agree to the [Rule] based on the concessions received from the NFL." See Zimmerman v. National Football League, 632 F. Supp. 398, 406 (D.D.C. 1986). In McCourt, as in Zimmerman, the courts applied the exemption because actual bargaining had taken place over the restraint at issue. In Mackey, as in Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc., 351 F. Supp. 462, 499 (E.D.P.A. 1972), the courts withheld the exemption based upon the absence of "[s]erious, intensive, arm=s-length bargaining." In Zimmerman, the court focused on the details of the exchanges between the parties, and, in McCourt, the court concluded that the union had bargained ... vigorously," against the restraint at issue. Zimmerman, 632 F. Supp. at 401-03; McCourt, 600 F.2d at 1203-04.

In Mackey, on the other hand, no such bargaining took place. The restraint under scrutiny, the so-called "Rozelle Rule," had been incorporated by reference into the collective bargaining contract between the NFL and the NFLPA, and the NFL argued that this incorporation immunized the restraint from antitrust scrutiny. 543 F.2d at 610. The Eighth Circuit disagreed, however, finding that the rule was not the product of "bona fide arm's length bargaining." Id. at 616. The court reviewed the bargaining history and affirmed the district court's finding that the union had received no quid pro quo for the rule=s inclusion in the collective bargaining contract.[6]

[6] The court further held that "the union's acceptance of the

III.

At bottom, the naked restraint here falls squarely within the view of bargaining set forth in Mackey and its progeny. Indeed, in this case, there was no bargaining whatsoever, while in those cases the bargaining was merely inadequate. For this reason, the District Court properly observed that the record "is peculiarly sparse in establishing the evolution of the rule. Indeed, what the record omits speaks louder than what it contains." App. at 30. The court thus determined that the Rule was not the product of arm's-length collective bargaining. On the same record, the Second Circuit held this evidence sufficient under Jewel Tea to invoke the exemption, virtually eliminating any requirement that the challenged agreement be the product of bona fide arm's-length bargaining. By eliminating actual bargaining as a requirement for invocation of the exemption, the Second Circuit again parted ways, and created a split in the Circuits, as to the role of actual bargaining in the invocation of the exemption.

The Second Circuit's decision as to the reach of the nonstatutory labor exemption is breathtaking. It requires Supreme Court review and rejection. Left standing, it would permit any and all anticompetitive agreements among employers restraining trade in the market for labor, so long as their employees are represented by a union with which they collectively bargain on a multi-employer basis. Indeed, under the Second Circuit's analysis, it would be immaterial whether or not the agreement involved a mandatory subject of bargaining, primarily affected only strangers to the collective bargaining arrangement, or was unilaterally imposed by the employers and not the product of arm's-length collective

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status quo by the continuance of the Rozelle Rule in the initial collective bargaining agreements ... [could not] serve to immunize the Rozelle Rule from the scrutiny of the Sherman Act." See id. at 616.

bargaining. The mere presence of a union, coupled with a multi-employer bargaining arrangement, would shelter any anticompetitive arrangements regarding labor. Nothing in American law suggests that policies underlying labor law warrant such a sweeping repeal of the antitrust laws.

The Second Circuit's decision, of course, does not address the District Court's conclusion that the Rule under challenge is a wholesale restraint on free economic competition. Instead, it permits the NFL to maintain the Rule upon the premise that the labor law principles at stake are so compelling that they extinguish any application of the antitrust laws. While the Supreme Court has granted limited antitrust immunity where labor and management agree through the collective bargaining process to restrain themselves as to "wages, hours and other terms and conditions of employment" for employees, it has never done so under any circumstances like those presented here.

This Court should preserve the delicate balance it has previously struck between conflicting national policies of free economic competition and protecting the rights of employees to bargain collectively. The decision of the Second Circuit has so fundamentally altered that balance that this Court must grant review.

Interest in this issue is of such exceptional importance that Representative John L. Conyers, Jr., of the Committee on the Judiciary United States House of Representatives, filed an amicus curiae brief in support of Clarett with the Circuit. Representative Conyers wrote:

> As the Ranking Democrat on the House Judiciary Committee, amicus has an overriding interest in preserving and protecting the antitrust laws. Amicus is concerned that the

> non-statutory labor exemption not be extended in a manner that would undermine the integrity of the antitrust laws or intrude on Congress= traditional purview in enacting such laws. In addition, amicus believes that Clarett, who has been foreclosed from being able to seek employment in the NFL, is precisely the type of party Congress envisioned being able to seek relief under the antitrust laws.

App. at 99.

This Honorable Court should grant Clarett review of the Second Circuit's decision not only because it is simply wrong, but also because it reflects a complete failure to follow this Court's teachings in Allen Bradley, Pennington, Connell, and Brown and so conflicts with the decisions of other Circuits as to create out of a narrow exemption not just a "cat's paw," but a lion=s broad swath.

CONCLUSION

For the foregoing reasons, petitioner respectfully requests that this Court grant the writ of certiorari.

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