04-0943-cv

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MAURICE CLARETT,
Plaintiff-Appellee,

v.

NATIONAL FOOTBALL LEAGUE,
Defendant-Appellant

On Appeal from the United States District Court for the
Southern District of New York, No. 03-CV-7441

BRIEF OF APPELLEE MAURICE CLARETT

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1. Whether the district court correctly found that the non-statutory labor exemption to the antitrust laws is inapplicable to the National Football League's ("NFL's") draft eligibility rule, because it (a) does not appear in the Collective Bargaining Agreement; (b) primarily affects strangers to the collective bargaining relationship; (c) does not concern a mandatory subject of collective bargaining; and (d) was not the product of arm's-length collective bargaining between the NFL and the Players' Association.

2. Whether the district court correctly found that the NFL's draft eligibility rule caused antitrust injury to Clarett, because it arbitrarily excluded him and other players in his position from selling their services to the NFL, which is the only buyer in the market, where this Court has long recognized that "whatever other conduct the [antitrust] Acts may forbid, they certainly forbid all restraints of trade which were unlawful at common-law, and one of the oldest and best established of these is a contract which unreasonably forbids any one to practice his calling." *Gardella v. Chandler*, 172 F.2d 402, 408 (2d Cir. 1949) (Learned Hand, J.)

3. Whether the district court correctly found that the NFL's draft eligibility rule constitutes an unreasonable restraint of trade, which is unlawful

under a "quick look" rule of reason analysis because it has no legitimate pro-competitive justification and there are less restrictive alternatives to it.

STATEMENT OF THE CASE

The NFL, The NFLPA And The Eligibility Rule(s).

At issue in this case is the NFL's concerted refusal to allow a player to be eligible for the draft unless three full college seasons have elapsed since that player's high school graduation.

An eligibility rule "has been in existence … for fifty years," although it originally required the player either to complete four years of college or have five NFL seasons elapse since his high school graduation. A-329. The original version was "adopted after Illinois's star running back, Harold 'Red' Grange, stunned the sports world by leaving school at the end of the 1925 college season and joining the Chicago Bears of the five-year-old NFL for a reported $50,000.00." SPA-9. The rule, however, is not now, and never has been, in the Collective Bargaining Agreement ("CBA").

The NFL enjoys a monopoly over professional football in the United States. The League and its member teams generate billions of dollars in revenue each year from various sources, including ticket sales, television broadcasting contracts and merchandising. SPA-4 to SPA-6. NFL franchises are extremely valuable, selling for hundreds of millions of dollars. Likewise, NFL players are

compensated handsomely for their services, often earning millions of dollars, not just in salary and bonuses, but in endorsements and appearances as well. SPA-5 to SPA-6. As the district court stated, though there are other professional leagues in North America, "the NFL dominates." SPA-4.

The League began operating in 1920 as the American Professional Football Association, an unincorporated association comprised of twenty-three member clubs. SPA-3. At present, the NFL is comprised of thirty-two separately incorporated clubs in cities throughout the United States. SPA-3. Representatives of each of the clubs form the NFL Management Committee ("NFLMC"), which performs various administrative functions such as organizing and scheduling games and promulgating rules. SPA-6. The clubs appoint a Commissioner who is responsible for the day-to-day operations of the NFL. SPA-6.

It was not until 1968 that the NFL recognized the National Football League Players Association ("NFLPA") as the players' collective bargaining representative. *See* www.nflpa.org. 1968 was also the year of the first CBA negotiated between the NFL and its players. SPA-7. Nowhere in that first Agreement did the rule appear. The current CBA, which has been extended three times, was negotiated in 1993 and will not expire until the 2007 season. This agreement comprises 292 pages, 61 articles, appendices from A through N, and

357 sections; but, like its predecessors, it does not contain the rule. A-338 to A-549.

In 1990, the first season the current NFL commissioner assumed office, the NFL announced in a February 16th press release that it was modifying the eligibility rule so that:

> Applications for eligibility will be accepted only from college players as to whom three full college seasons have elapsed since their high school graduation.

See Akron Beacon Journal, *NFL Draft Eligibility Policy*, at www.ohio.com/mld/beaconjournal/news/state/6843042.html. On that same day, the NFL issued a memorandum to Club Presidents, General Managers and Head Coaches – but not the NFLPA – which stated that "[a]pplications for special eligibility for the 1990 draft will be accepted only from college players as to whom three full college seasons have elapsed since their high school graduations." A-330.

Nothing in the press release or memorandum, and no document produced by the NFL or made part of the record, in any way suggests that the NFLPA was involved in the reformulation of the eligibility rule. Indeed, as with the original four-year rule, adopted decades before the players' union came into existence, the new rule was unilaterally drafted and adopted by the NFL outside of the collective bargaining process and without any negotiations with the NFLPA.

The NFL changed the eligibility rule in October 1992. A-171; 249; SPA-10. This version of the rule appears in the 1992 Constitution and Bylaws of the NFL (the "Bylaws"), a document drafted and approved only by the NFL member teams. A-207 to A-327. Section 12.1(E) of the Bylaws provides:

> For college football players seeking special eligibility, at least three NFL seasons must have elapsed since the player was graduated from high school.

A-171; 249. The rule as stated in the 1992 Bylaws references "NFL seasons," not "college seasons" and does not include the word "full."

On the same day as the execution of the 1992 CBA, counsel for the NFL sent a letter to counsel for the NFLPA with a copy of the 1992 Bylaws attached. This so called "side letter" states: "This letter confirms that the attached documents are the presently existing provisions of the Constitution and Bylaws of the NFL referenced in Article IV, Section 2, of the Collective Bargaining Agreement." A-550; SPA-10. The referenced CBA Article is entitled "No Suit" and provides, in pertinent part, simply that "neither the NFLPA nor any of its members . . . will sue . . . the NFL . . . relating to the presently existing provisions of the . . . Bylaws." A-157. The Second Declaration of Peter Ruocco submitted by the NFL recited the *ipse dixit* conclusion that "the eligibility rule itself was the subject of collective bargaining," but did not offer any facts to support this assertion. A-140 ¶ 8.

Thus, rather than demonstrating that the eligibility rule was somehow expressly bargained over, the "side letter" merely provides a copy of the 1992 Bylaws as to which the NFLPA had agreed that neither it nor any of its members would bring suit. Obviously, Clarett is not a member of the NFLPA, nor is he represented by that labor organization.

In 2003, the NFL revised and replaced the 1992 Bylaws. A-560. These current Bylaws are the only Bylaws applicable to this dispute. Moreover, these Bylaws eliminate the section of the 1992 Bylaws setting forth the eligibility rule. Instead, on pages A-144 and A-562, directly beneath a narrow rule relating to high school players who do not attend college, the following indented reference appears:

> See NFLNet Memorandum, February 16, 1990, establishing policy and procedure pursuant to Article VII, Section 8.5, permitting college players to apply for special draft eligibility if at least three football seasons have elapsed since their graduation from high school.

The NFL identifies these five lines as the rule at issue. But the provision merely refers to a memorandum from the Commissioner dated three years before the CBA and issued pursuant to his power to establish policy and procedure with respect to the Bylaws. The NFLNet Memorandum is titled "Special Draft Eligibility Policy and Procedure Announced February 16, 1990." A-570. This document merely states: "Applications for special eligibility for the 1990 draft will be accepted only

from college players as to whom three full college seasons have elapsed since their high school graduations." A-570.

The rule announced in this document, by its clear language, applies only to the 1990 draft. Indeed, every year thereafter, right up to the present, the NFL has issued a similar memorandum titled "Eligibility Rules" with the identical phrase "three full college seasons" with only a date change to reflect the respective year. A-572 to A-618. The 2004 Eligibility Rules memorandum is in the record at A-572 to A-574. This document contains the rule at issue here because this is the only document that relates to the draft for which Clarett seeks eligibility. This memorandum is not part of the NFL Bylaws; as with each of the memoranda released yearly, it is simply a document generated by the Commissioner pursuant to his power to establish policy and procedure which describes the eligibility rules and the filing dates for the upcoming draft.

Accordingly, the current Bylaws do not contain the rule. The NFL is basing its defense on an inexplicable, almost *non sequitur*, reference to a policy that applies to college athletes and only to the 1990 draft with a rule on non-college athletes. While an eligibility rule appeared in the 1992 Bylaws, which the NFL maintains were somehow incorporated by way of the "side letter," this rule required only that three NFL seasons have elapsed since the player's high school

graduation. But these Bylaws were revised and replaced in 2003. Today neither the CBA nor the Bylaws contain any eligibility rule.[1]

Maurice Clarett

Maurice Clarett was born on October 29, 1983. A-197. While in high school, he became a nationally known football player, receiving many accolades. A-197. He graduated high school on December 11, 2001, two-thirds of the way through the 2001 NFL season, and enrolled in classes at Ohio State University ("Ohio State") in January 2002. A-197.

On August 24, 2002, Clarett became the first true freshman tailback since 1943 to start a football game for Ohio State. A-197. With Clarett leading the way, Ohio State achieved complete success during the 2002-2003 college football season, going undefeated during the regular season by winning 13 games. A-198. It then defeated the University of Miami in the Fiesta Bowl and won the undisputed national championship, Ohio State's first national championship in 34 years. A-198.

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[1] In the wake of the district court's ruling in this case, the NFL is reportedly in discussions with the NFLPA to insert language into the current CBA that would require any player who wishes to enter the draft to be "three years removed from his high school graduation." *See* http://sports.espn.go.com/espn/print?id=1762509&type=story.

Clarett also achieved great success that year, rushing for an Ohio State freshman record 1,237 yards and scoring 18 touchdowns. A-198. He was named to several 2003 preseason All-America teams, voted the No. 1 running back in college football by the Sporting News, named a first-team All-Big Ten pick, and was named the Big Ten Freshman of the Year. A-198.

Clarett, who is 6 feet tall and weighs 230 pounds, will be about eight weeks shy of his 21st birthday at the start of the 2004 NFL season. SPA-16. In the last few years, there have been several players in the NFL who were as young as or younger than Clarett will be at the start of the 2004 NFL season. Emmitt Smith, who rushed for more yards than any player in the history of the NFL, was 20 years old when drafted in 1990, and weighs less and is shorter than Clarett. *See* www.nfl.com/players/playerpage. Clarett is as tall as or taller and weighs as much as or more than NFL running back legends Walter Payton, Barry Sanders, and Gale Sayers when they played football. SPA-16 to SPA-17.

The Effects Of The Rule.

The NFL is the only major sports organization that prohibits players from entering its draft until a prescribed period after high school graduation. The National Basketball Association, Major League Baseball and the National Hockey League have no such restrictions. By virtue of the eligibility rule, the NFL member teams have agreed with one another not to hire players until three seasons

have elapsed since the players graduated from high school. Because of the NFL teams' concerted refusal to deal with this segment of the talent pool, these players are absolutely and unreasonably restricted from competing for positions in the NFL and are unlawfully delayed or prevented from earning a livelihood in their chosen profession, a profession where an entire career on average is only three to five years.

By forcing prospective players to wait until three seasons have elapsed before becoming eligible for its draft, the NFL is able to maintain a free and efficient "farm" system for developing players. College football acts in effect as a minor league, for which the NFL incurs no expenses. While Major League Baseball teams each spend an average of nine million dollars annually for the minor league system, the NFL teams spend virtually nothing on a player development system; instead, the only such costs incurred by NFL teams are for their scouts, to whom the NCAA grants easy and ready access. Under the current system, NFL teams take no financial risks of investing in players while they are in college. Indeed, if a player suffers an injury while in the NCAA, or does not develop as expected, which reduces his value or renders him unable to play professionally, the NFL teams lose nothing. All the risk is on the player. College football is a willing partner in this arrangement, as it generates millions of dollars for the colleges without their having to incur the expense of player salaries.

Players who are otherwise able to compete with the best in their profession must bide their time on the farm working for nothing.

For extremely talented players like Maurice Clarett, who are otherwise able to compete for a position at the professional level, there are no comparable options. Not only are members of this segment of the talent pool arbitrarily foreclosed from earning a salary from their trade for three seasons, they are also prevented during that time from enjoying the opportunity to reap other financial rewards attendant upon becoming a professional athlete, such as endorsement and appearance income. Moreover, if these players suffer career-ending injury while playing at the college level, their opportunity for financial rewards in football will be forever lost.

The NFL has not enforced any of its versions of the eligibility rule in a consistent manner. In 1964, for example, Andy Livingston, a nineteen-year-old running back, signed a contract with the Chicago Bears after only one season of junior college football. *See* web posting of the Edge Talent Advisory Board Members at www.edgetalent/advisoryboard. In 1988, the NFL allowed Craig "Ironhead" Heyward into the draft even though he had not yet graduated from college (four-year requirement at the time). In 1989, before the revision of the rule from four years to three, the NFL allowed Barry Sanders into the draft after he suggested he would challenge the rule, although he was a true junior with only

three NFL seasons having elapsed since his high school graduation. In 1991, the Arizona Cardinals selected Eric Swann as the sixth pick of the first round of the draft. Swann had never played college football and, at the time, only two NFL seasons had elapsed since his high school graduation. A-332 to A-337.

After the decision below, Clarett hired an agent, as did Mike Williams, another talented true sophomore projected to be one of the top five prospects in this year's draft. Thus, neither Clarett nor Williams can now play as an amateur in the NCAA. If they are not allowed to compete as professionals, they will be football players without a game.

SUMMARY OF ARGUMENT

1. The district court properly granted Clarett's motion for summary judgment on the non-statutory labor exemption (and denied the NFL's motion on this same issue) because the NFL's draft eligibility rule affects only strangers to the collective bargaining relationship, does not concern a mandatory subject of bargaining, and is not the product of bona fide, arm's-length collective bargaining. First, the direct and only objects of the restraint are Clarett and other similarly situated athletes who are *excluded* from the bargaining unit and cannot, therefore, be bound by the terms and conditions of employment they are prevented from obtaining. Second, unlike the draft itself, which governs the method by which players *enter* the bargaining unit, the rule precludes certain non-employees from

applying for employment in the first place and does not "vitally affect" the jobs of veteran players or their wages. Finally, the NFL has presented no evidence whatsoever that the parties bargained over the rule. The rule does not appear in the parties' Collective Bargaining Agreement or in the 2003 NFL Constitution and Bylaws and has never been subject to any "give and take" or *quid pro quo* between the parties.

2. The district court correctly held that Clarett suffered antitrust injury, since the arbitrary exclusion of all players in his position from selling their services to the only buyer, the NFL, constitutes "injury of the type the antitrust laws were intended to prevent." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977). Indeed, this Court has long recognized that the antitrust laws prohibit a contract "which unreasonably forbids any one to practice his calling." *Gardella v. Chandler*, 172 F.2d 402, 408 (2d Cir. 1949) (Learned Hand, J.)

3. The district court correctly found that the rule represents an unreasonable restraint of trade, because it denies market entry to a group of sellers. Applying the "rule of reason," the court properly concluded that the NFL had not proffered any legitimate pro-competitive justification for the rule, and less restrictive alternatives to the rule exist. The court's utilization of a "quick look" analysis was proper because such an analysis may be employed where, as here, "a

practice has obvious anticompetitive effects." *Law v. National Collegiate Athletic Ass'n*, 134 F.3d 1010, 1020 (10th Cir. 1998).

ARGUMENT

I. THE DISTRICT COURT PROPERLY RULED THAT THE NON-STATUTORY LABOR EXEMPTION DOES NOT SHELTER THE RULE FROM ANTITRUST REVIEW.

The non-statutory labor exemption, formulated by the Supreme Court and the lower federal courts, was designed to reconcile conflicting antitrust policies and national labor policies.[2] The primary purpose of antitrust legislation is to promote freedom of competition in the marketplace.[3] The primary purpose of labor legislation, on the other hand, is to protect certain union or concerted employee activities and the process of collective bargaining.[4]

Courts, and this Circuit in particular, have identified the issue critical to the reconciliation of these competing policies as whether the plaintiff's antitrust claim threatens to subvert or destroy any of the fundamental principles of this nation's labor laws, including the freedom to contract and protection of the

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2 *See Brown v. Pro Football, Inc.*, 518 U.S. 231 (1996) (purpose of the exemption is to give effect to federal labor laws and to allow meaningful collective bargaining).

3 *See, e.g., Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 4 (1958).

4 *See Connell Constr. Co. v. Plumbers and Steamfitters Local Union No. 100*, 421 U.S. 616, 622 (1975) (goal of federal labor law is to eliminate competition over wages and working conditions through collective bargaining).

collective bargaining process.[5] In *Wood* and *Caldwell*, the plaintiffs sought a better deal than that negotiated by the unit's bargaining representative, a claim that would destroy the fundamental principle that no one in the bargaining unit, even the highly skilled or most treasured employee, can negotiate individually once a representative is chosen. In *Williams*, the claim was that the teams could not join together to impose the terms of a recently expired CBA, a claim that would destroy the fundamental principle of multiemployer bargaining.

Accordingly, in this matter, one issue for this Court is whether any such fundamental principle of our labor policies is threatened by Clarett's claim that the concerted refusal to allow him to compete for a place in the draft violates the antitrust laws.

Though it never raised this issue below, the NFL identifies the principle at risk by Judge Scheindlin's decision as that which allows multiemployer bargaining. But Clarett is not asserting that multiemployer bargaining is illegal, which this Court identified as the only claim asserted by the plaintiffs in *Williams*. Indeed, Clarett asserts no bargaining over the eligibility rule

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[5] *Caldwell v. American Basketball Ass'n, Inc.*, 66 F.3d 523, 527-28 (2d Cir. 1995); *NBA v. Williams*, 45 F.3d 684, 687 (2d Cir. 1995); *Wood v. NBA*, 809 F.2d 954, 961 (2d Cir. 1987); Michael S. Jacobs & Ralph K. Winter, Jr., *Antitrust Principles and Collective Bargaining by Athletes: Of Superstars in Peonage*, 81 Yale L.J. 1 (1971).

took place. And unlike in *Williams*, where the plaintiffs challenged imposition of terms which they admitted vitally affected their wages and conditions of employment, the challenged rule here has no such effects. Clarett's claim thus in no way threatens to subvert any such fundamental principles; indeed, he simply wants to be subject to those principles as they relate to any NFL player.

The district court properly analyzed the eligibility rule under the three-prong *Mackey* test, whereby the non-statutory labor exemption applies only if the restraint: (1) primarily affects only the parties to the collective bargaining relationship; (2) concerns a mandatory subject of collective bargaining; *and* (3) is the product of bona fide arm's-length collective bargaining.[6] This exemption must be narrowly construed.[7] Although Clarett prevails on this issue if the rule fails to satisfy any *one prong* of this test, the district court reached the correct conclusion that the rule fails on *all three prongs* for the reasons set forth below.

The NFL claims that "the exemption has been applied to restraints – regardless of whether they directly addressed mandatory subjects – (a) to which the union had agreed, (b) that were 'intimately related' to 'legitimate objects' of

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6 *Mackey v. National Football League*, 543 F.2d 606, 614 (8th Cir. 1976); *see also McCourt v. Calif. Sports, Inc.*, 600 F.2d 1193, 1197-98 (6th Cir. 1979).

7 *See, e.g., Group Life & Health Insur. Co. v. Royal Drug Co.*, 440 U.S. 205, 231 (1979) ([i]t is well settled that exemptions from the antitrust laws are to be narrowly construed").

collective bargaining, and (c) that principally affected labor, rather than the output, market." NFL Br. at 14. The three cases the NFL cites for this erroneous three-part standard, however, do not support it.

The issue in *Local Union No. 189, Amalgamated Meat Cutters & Butcher Workmen of North Am. v. Jewel Tea Co.* was whether the subject matter of the restriction was "*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."[8]

The district court properly acknowledged that this Court has relied upon the alternative, but consistent, *Jewel Tea* standard. In *Berman Enters., Inc. v. Local 333, United Marine Div. Int'l Longshoremen's Ass'n*, for example, this Court held that the disputed clauses contained in the parties' collective bargaining agreement, "represented *legitimate union objectives* because they dealt either with

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[8] 381 U.S. 676, 689-90 (1965) (emphasis added). The first prong of *Mackey* (requiring that the restraint affect only parties to the collective bargaining relationship) did not come into play because there was no question that the restriction affected only bargaining unit members as it dictated "particular hours of the day and the particular days of the week during which employees shall be required to work." *Id.* at 691.

working conditions … or job preservation."[9] This Court also considered whether the clauses "impose[d] any requirements on any nonparty to the collective bargaining agreement" and whether they "vitally affected working conditions and wages of the Union members."[10] Likewise, in *Home Box Office, Inc. v. Directors Guild of Am., Inc.* the court held as follows:

> [t]he nonstatutory exemption, *as interpreted by the Second Circuit*, protects the terms of collective bargaining agreements if those terms were agreed to at arm's length, apply only within the bargaining unit, and so concern legitimate union interests that they are sanctioned by labor law."[11]

Because the rule is *not* the product of arm's length bargaining, does *not* apply only within the bargaining unit, and does *not* concern legitimate union

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9 644 F.2d 930, 935 (2d Cir. 1981) (emphasis added) (citing *Jewel Tea* and *Intercontinental Container Trans. Corp. v. New York Shipping Ass'n*, 426 F.2d 884, 886-88 (2d Cir. 1970)).

10 644 F.2d at 935-36; s*ee also Local 210, Laborers' Int'l Union of North America v. Labor Relations Div*., 844 F.2d 69, 79 (2d Cir. 1988), where this Court analyzed the restraint at issue under the *Jewel Tea* standard because the facts of *Local 210* were in all relevant respects identical to those in *Jewel Tea*. *Local 210* also cites the *Mackey* test approvingly for the proposition that to be eligible for the non-statutory labor exemption, the agreement at issue must be "within the scope of traditionally mandatory subjects of bargaining." *Local 210*, 844 F.2d at 79.

11 531 F. Supp. 578, 604 (S.D.N.Y. 1982).

interests, it must *not* be shielded by the non-statutory labor exemption.[12] The Supreme Court has cautioned that the [non-statutory labor exemption] doctrine must not be used as "a cat's-paw to pull the employers' chestnuts out of the antitrust fires."[13] Here, the NFL seeks to do just that. Nowhere in its brief does the NFL set forth "legitimate union objectives"[14] embodied by the rule, and that is because there are none. This Court, like the district court, should reject the NFL's unfounded invocation of the narrow non-statutory labor exemption.

Additionally, the NBA, the WNBA, and the NHL (collectively, the "NFL Amici"), all of whom have filed amici briefs with the Court, profess concern about age, experience, and maturity based eligibility rules. Yet, the NBA and the WNBA have markedly different provisions based exclusively on whether a prospective player is a man or a woman. The NBA has determined that a man or woman is old enough, experienced enough and mature enough to be eligible when his or her high school class has graduated, yet the same woman is not old enough, experienced enough and mature enough to be eligible for the WNBA until she is at least 22 years old, essentially, until her class has graduated from college.

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12 We have filed a Motion to Strike the belatedly filed Amicus Brief of the National Football League Players' Association. Noticeably, however, even this brief fails to suggest that the rule was the product of bargaining.

13 *United States v. Women's Sportswear Mfg. Ass'n*, 336 U.S. 460, 464 (1948).

14 *Berman*, 644 F.2d at 935.

More significantly, like the NFL, the NFL Amici confuse a rule which unconditionally precludes a stranger to the contract from being eligible with the rules governing wages and terms and conditions of drafted players/employees. Also like the NFL, they confuse issues like subcontracting, which relates to work preservation, and the draft, which relates to the allocation of players, with a rule that precludes a person from joining the bargaining unit. Finally, like the NFL, the NFL Amici fail to offer a single legitimate reason why their unions believe the rule precluding a person from participating vitally affects the bargaining unit.[15]

A. The Rule Affects Only Strangers To The Collective Bargaining Relationship.

The non-statutory labor exemption does not apply here because the primary effect of the rule falls upon players like Clarett, who are complete strangers to the NFL-NFLPA collective bargaining relationship.[16] The district court properly concluded that the labor exemption does not apply to those who are *excluded* from the bargaining unit, reasoning that "those who are categorically

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15 The NFL Amici claim that it would be impossible to operate a player draft without rules that serve to identify the players eligible so that the teams have some basis on which to know who is eligible to be drafted in a given year. In doing so, they ignore the simple. They could require that those seeking to be drafted apply.

16 *See Mackey*, 543 F.2d at 614 ("First, 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.") (citing *Connell*, 421 U.S. at 622-23).

denied eligibility for employment, even temporarily, cannot be bound by the terms of employment they cannot obtain." SPA-35. The rule "does not deal with the rights of any NFL players or draftees;" rather, it affects only those individuals who are precluded from becoming NFL players or draftees. SPA-34 to SPA-35.

This reasoning is consistent with long-standing Supreme Court precedent on what has evolved into the first prong of the *Mackey* standard.[17] The agreements at issue in *Pennington*, *Allen Bradley* and *Connell*, were not protected by the labor exemption because, although directly concerning wages, hours or terms and conditions of employment, they sought "to prescribe labor standards outside the bargaining unit."[18] 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.

The NFL argues that the "primary affects" language laced throughout the labor exemption opinions protects only third-party employers injured as a result of a labor agreement that violates the antitrust laws. However, the cases do not support any distinction between different types of strangers to the collective

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17 *See United Mine Workers v. Pennington*, 381 U.S. 657 (1965); *Allen Bradley Co. v. Local 3, IBEW*, 325 U.S. 797 (1945); *Connell Constr. Co. v. Plumbers & Steamfitters Local 100*, 421 U.S. 616 (1975).

18 *Pennington*, 381 U.S. at 665-68.

bargaining agreement. First, *Mackey* requires that the restraint affect *only parties* to the collective bargaining agreement. And even *Zimmerman*, on which the NFL relies, provides that: "[t]he purpose of the first prong of the *Mackey* test … is to withhold the exemption from agreements that primarily affect competitors of the employer, *or, as in Connell, economic actors completely removed from the bargaining relationship*."[19] 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.

Unlike the players in *Wood*, *Williams*, and *Caldwell*, and the plaintiff in *Zimmerman*, Clarett is not a party (or even eligible to become a party) to the NFL-NFLPA collective bargaining relationship because the rule precludes him from applying for employment. All the players in these cases had either been drafted or were members of a professional team: Wood had been drafted by the Philadelphia 76ers and was challenging the NBA salary cap and draft provisions of the collective bargaining agreement; Williams was one of a group of NBA players challenging the imposition of the terms of an expired collective bargaining agreement; Caldwell was a former ABA player claiming that he had been

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[19] *Zimmerman v. National Football League*, 632 F. Supp. 398, 405 (D.D.C. 1986)

wrongfully discharged; and Zimmerman had already been drafted in the first round of the NFL supplemental draft.

The district court properly concluded that, "none of these cases involve job *eligibility*. The league provisions addressed [in these three cases] govern the terms by which those who *are drafted* are employed. The rule, on the other hand, precludes players from entering the labor market altogether." SPA-32 to SPA-33. Indeed, if *Zimmerman* had involved a negotiated rule that barred USFL players instead of placing them in a supplemental draft, the court would have certainly ruled otherwise on the issue of the labor exemption. Clarett is not seeking more favorable terms or conditions of employment. His only goal is to enter the draft and to become subject to the terms and conditions of employment set forth in the current CBA.

As the district court held in *Wood*, "At the time an agreement is signed between the owners and the players' exclusive bargaining representative, all players *within the bargaining unit* and those who *enter the bargaining unit during the life of the agreement* are bound by its terms."[20] Only those players who are eligible for the draft may "enter the bargaining unit," whereas the rule renders

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[20] *Wood v. National Basketball Ass'n*, 602 F. Supp. 525, 529 (S.D.N.Y. 1984).

Clarett *ineligible* to enter the bargaining unit.[21] Unlike Wood and Zimmerman, Clarett is not challenging "the method by which those outside [the bargaining unit] *enter it*."[22] He simply wants to be eligible to enter the draft in the first place.

We agree that "newcomers in the industrial context routinely find themselves disadvantaged vis-à-vis those already hired" and yet are bound by the terms of the CBA negotiated before their employment.[23] This is what is meant by the quote from *Zimmerman* that, "[n]ot only present but potential future players … are parties to the bargaining relationship."[24] It simply reflects the fundamental principle in our labor policies that the highly skilled or sought after employee cannot seek a better deal than others in the unit if a bargaining representative has been chosen. But Clarett is not seeking release from the terms of the CBA; he wants to be bound by it. He is not challenging the rules of the hiring hall; he just wants in the door. As in *Allen Bradley*, he is faced with a "combination to *exclude* entry by newcomers."[25]

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21 *Ford Motor Co. v. Huffman*, 345 U.S. 330, 337-39 (1953); Jacobs and Winter, *supra*, 81 Yale L.J. at 9.

22 Jacobs & Winter, *supra*, 81 Yale L.J. at 16 (emphasis added).

23 *Wood*, 809 F.2d at 960.

24 635 F. Supp. at 405.

25 Jacobs & Winter, *supra*, 81 Yale L.J. at 28.

B. The Rule Does Not Concern A Mandatory Subject Of Bargaining.

The rule also fails to satisfy the second prong of the *Mackey* test, as it does not concern a mandatory subject of bargaining within the meaning of the NLRA.[26] As the Supreme Court has observed, "employers and unions are required to bargain about wages, hours and working conditions, and this fact weighs heavily in favor of antitrust exemption for agreements on these subjects."[27] Only matters that concern current employees' terms and conditions of employment, or matters that "vitally affect" those terms, are mandatory subjects of bargaining.[28]

The district court properly concluded that the rule does not concern a mandatory subject of bargaining, reasoning that "[w]ages, hours, or working conditions affect only those who are employed or are eligible for employment." SPA-28 to SPA-29. Nor does application (or non-application) of the rule "vitally affect" terms and conditions of employment. The NLRB defines the concept as:

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[26] 29 U.S.C. § 158(d) (2000). *See also NLRB v. Borg-Warner Corp.*, 356 U.S. 343, 350 (1958) (Mandatory subjects of bargaining "regulate[] the relations between the employer and the employees").

[27] *Jewel Tea*, 381 U.S. at 689. *See also Allied Chemical & Alkali Workers, Local 1 v. Pittsburgh Plate Glass*, 404 U.S. 157, 178 (1971) (mandatory subjects of bargaining include "only issues that settle an aspect of the relationship between the employer and employees").

[28] *Johnson-Bateman Co.*, 295 NLRB 180, 182 (1989); *Pittsburgh Plate Glass*, 404 U.S. at 164-66, 179-80.

> [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.[29]

The NFL rests its "vitally affects" argument on the assertion that Clarett's entry into the draft would replace the job of a veteran player and that his salary would reduce the wages of players in the unit because it would count against the salary cap. We agree that the preservation of jobs for union members and their wages are legitimate union concerns, whether they arise in the context of a restriction on subcontracting out union jobs,[30] a reduction in the demand for labor,[31] or a demand that a minimum number of union workers be assigned a specific task.[32] But the NFL's argument starts with a false premise. Clarett's eligibility has no effect on the jobs of veteran players or their wages.

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29 *United Techs. Corp.*, 274 NLRB 1069, 1070 (1985), *enf'd*, 789 F.2d 121 (2d Cir. 1986).

30 *See Fibreboard Paper Prod. Corp. v. NLRB*, 379 U.S. 203, 210 (1964).

31 *Intercontinental Container*, 426 F.2d at 884. In this case, the court held that the labor exemption applied to an agreement between union and management because "the union here, acting solely in its own self-interest, forced reluctant employers to yield to certain of its demands" and because the "union activity" had "as its object the preservation of jobs for union members." *Id.* at 887-88.

32 *Berman*, 644 F.2d at 932.

If Clarett and other underclassmen are not eligible for the draft, each team will still draft and sign seven players who will show up at training camp and compete for the jobs of the veteran players. If Clarett were eligible to enter the draft, he would simply take the place of another draft eligible player. This is why the rule's only effect is on the competition in the market of players seeking entry into the NFL. Clarett's goal is to enter the competition against those college players for a place in the draft. To put it plainly, the only one who would be affected by Clarett entering the draft is the last player in the last round who would have otherwise been selected. And that individual would have no standing to bring an antitrust claim because he would be the classic example of a mere loser in competition, like the plaintiff in *Balaklaw v. Lovell*.[33]

Because Clarett cannot even apply for a position on an NFL team, the NFLPA does not, and cannot, represent him, and the NFL's duty to bargain does not encompass any matters involving him. We agree that the draft itself is a mandatory subject of bargaining. However, this dispute has nothing at all to do with the legality of the draft. Unlike a draft, which governs the method by which those "outside the bargaining unit *enter it*,"[34] the rule precludes certain non-

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[33] 14 F.3d 793, 797 (2d Cir. 1994).

[34] Jacobs & Winter, *supra*, 81 Yale L.J. at 16 (emphasis added).

employees from applying for employment. Thus, it does not follow *a fortiori* that because the draft constitutes a mandatory subject, the rule also must be sheltered.[35]

The United States Supreme Court and the NLRB have long held that matters exclusively concerning job applicants or former employees do not constitute mandatory subjects of bargaining.[36] "Applicants … are not 'employees' within the meaning of the collective-bargaining obligations of the Act," because "unlike the intermittent employment situation that gives rise to the need … for hiring halls, there is no economic relationship between the employer and an applicant, and the possibility that such a relationship may arise is speculative."[37] In Clarett's case, if the rule stands, it is a certainty, not mere speculation, that an employment relationship will not arise. Those who are challenging a rule that makes them ineligible for consideration are one step below an applicant.

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35 The NFL also contends that the rule is "one element of an integrated system," along with the draft itself. NFL Br. at 22. This argument is nonsensical. The rule has nothing to do with the "method by which players are allocated between bargaining units." Jacobs & Winter, *supra*, 81 Yale L.J. at 15.

36 *See Pittsburgh Plate Glass Co.*, 404 U.S. at 178; *Star Tribune*, 295 NLRB 543, 546. *See also NLRB v. USPS*, 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).

37 *Star Tribune*, 295 NLRB at 546-47.

The NFL relies heavily on *Wood*, *Williams* and *Caldwell* for the proposition that the rule is a mandatory subject of bargaining, yet as the district court found, these cases "involve practices that affect wages, hours or working conditions," and "[t]he league provisions addressed in *Wood*, *Williams*, and *Caldwell* govern the terms by which those who *are drafted* are employed. The 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." SPA-29, SPA-32 to SPA-33 (emphasis in original).

The NFL also claims that, "even if the eligibility rule did not constitute a mandatory subject, the labor exemption would plainly apply" and that the exemption would apply even if the rule were a permissive subject of bargaining.[38] Quite the contrary. That the rule at issue is a mandatory subject of bargaining is a necessary, but not a sufficient, element of the labor exemption standard.[39] Under any formulation, the restraint at issue must be "intimately related" to "legitimate union objectives" concerning wages, hours or terms and

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[38] NFL Br. at 16-17, 21. The NFL cites to mere dictum in *Feather v. United Mine Workers of Am.*, 711 F.2d 530, 542 & n.13 (3d Cir. 1983), in support of its assertion that the exemption applies even if the restraint concerns permissive subjects of bargaining. The Court in *Feather* held that to prevail, the union had to demonstrate that the contract provisions and steps taken to implement them were "intimately related to the object of collective bargaining thought at the time to be legitimate." *Id*. at 542.

[39] *See Mackey*, 543 F.2d at 614-15; *Pennington*, 381 U.S. at 664.

conditions of employment of unit employees.[40] No legitimate union objective has been offered here.

C. The Rule Is Not The Product Of Bona Fide Arm's-Length Collective Bargaining.

The district court properly concluded that the non-statutory labor exemption does not apply for a third reason: the NFL has failed to show that the rule is the product of bona fide, arm's-length negotiations between the NFLMC and the NFLPA. SPA-35. The question for this Court is whether bona fide bargaining took place such that the policies in favor of such bargaining should take precedence over antitrust concerns.[41]

The 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."[42] On one side of the issue are the decisions in *Zimmerman* and *McCourt*, where the courts applied the exemption because evidence demonstrated that actual bargaining took place over the restraint at issue. On the other side are the decisions in *Mackey* and *Philadelphia World*

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40 *Jewel Tea*, 381 U.S. at 689; *Home Box Office*, 531 F. Supp. at 590; *Wood*, 809 F.2d at 962; *Berman*, 644 F.2d at 935.

41 *Zimmerman*, 632 F. Supp. at 406.

42 *Id.*

Hockey, where the courts withheld the exemption based on the absence of "[s]erious, intensive, arm's-length bargaining."[43]

In *Zimmerman*, the record showed that a fair amount of "give and take" took place between the parties and that the union received benefits from the NFL in return for certain concessions. The court focused on the details of the exchanges made between the parties and found that they "bargained not only over what the NFL might exchange for the [supplemental] draft, but also over how many rounds would be allowed and other technicalities."[44] The NFL attempts to characterize *Zimmerman* as support for its assertion that the rule need not be in the CBA for the exemption to apply. *Zimmerman* involved a unique situation whereby a specific issue arose after execution of the CBA. Union and management met to negotiate at length over this extraordinary issue and reached an agreement, which, in effect, supplemented the CBA. This is certainly not the situation here where the eligibility rule actually predated the existence of the union.

Similarly, in *McCourt*, the court relied on a number of facts in reaching the conclusion that the exemption immunized the bylaw governing the reserve system from antitrust liability, including the fact that the NHLPA:

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43 *Philadelphia World Hockey v. National Hockey League*, 351 F. Supp. 462, 499 (E.D. Pa. 1972).

44 *Zimmerman*, 632 F. Supp. at 407.

developed an alternative reserve system that was ultimately rejected by the players; refused to attend meetings with the owners; threatened to strike; threatened antitrust litigation; and threatened to recommend that the players not attend training camp.[45] The court rejected the trial court's conclusion that the NHLPA never bargained for the bylaw at issue and found, instead, that the union "bargained '*against*' it, vigorously."[46]

In *Mackey*, on the other hand, no such bargaining took place. The restraint under scrutiny there, the Rozelle Rule, had been made part of the collective bargaining contract between the NFL and the NFLPA through incorporation by reference, and the League argued that this incorporation immunized it from antitrust scrutiny. The Court of Appeals disagreed, however, and held that the rule was not the product of "bona fide arm's length bargaining."[47] The court reviewed the bargaining history and affirmed the district court's finding

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45 *McCourt*, 600 F.2d at 1202.

46 *Id.* at 1203. The NFL mischaracterizes *McCourt* as confirming that the rule might still be sheltered by the exemption even if its origin predates the CBA. *McCourt* observed, however, that the union and the league bargained extensively over whether the bylaw at issue should be made part of the CBA and concluded that there was "give and take" between the parties over that inclusion. No such negotiations occurred here.

47 *Mackey*, 543 F.2d at 616.

that the union had received no *quid pro quo*[48] for the rule's inclusion in the collective bargaining contract.[49]

The restraint in this case falls squarely within the *Mackey/Philadelphia Hockey* side of the issue, although no bargaining whatsoever occurred here as opposed to the less than satisfactory bargaining in those cases. The rule was unilaterally promulgated by the NFL about fifty years ago – before the advent of the NFLPA – and there is no evidence that the parties engaged in arm's-length bargaining over any version of the rule since then.[50] The rule does not appear in the CBA or the most current version of the NFL Constitution and Bylaws, the only Bylaws applicable to this dispute. The 2003 Bylaws eliminate the section of the 1992 Bylaws that set forth a different version of the eligibility

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48 In *Zimmerman*, the court ruled that, "a quid pro quo is some evidence that the bargaining took place and that it was done at arm's length." 632 F. Supp. at 407.

49 The court further held that "the union's acceptance of the 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." *Mackey*, 543 F.2d at 616.

50 The district court noted that the rule was first adopted shortly after the 1925 draft and that the NFLPA did not become the players' exclusive bargaining agent until 1968. SPA-8 to SPA-9, SPA-35. *See Philadelphia World Hockey*, 351 F. Supp. at 498-99 (exemption inapplicable where reserve clause was created by NHL before Players' Association came into existence); *Smith v. Pro-Football*, 420 F. Supp. 738, 742 (1976) (similar facts and holding).

rule, which would not have barred Clarett. Instead, the current Bylaws inexplicably refer to a February 16, 1990 memorandum from the Commissioner dated three years before the CBA and issued pursuant to his power to establish policy and procedure with respect to the Bylaws. A-144, A-562.

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." SPA-35. The only "evidence" the NFL offers are: (1) CBA provisions in which the NFLPA agreed not to challenge, and waived its right to bargain over, any of the provisions in the NFL Constitution and Bylaws, A-155; and (2) a "side letter," which the NFL mischaracterizes as "confirm[ing] that the challenged eligibility rule was among the terms of the Constitution and Bylaws to which the foregoing CBA provisions applied." NFL Br. at 29-30. But the letter makes no reference to the rule; it simply confirms that the attached 1992 Bylaws are those referenced in the "No Suit" provision of the CBA.[51]

The district court correctly concluded that these "meager facts" demonstrate that the Constitution and Bylaw provisions, which include NFL

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[51] Even if the 1992 Bylaws were incorporated into the CBA – and they were not – what relevance would this have to the 2003 Bylaws, which replaced the earlier Bylaws and eliminated the eligibility provision?

governance provisions that are totally unrelated to wages, hours and working conditions, were *specifically excluded* from the parties' collective bargaining negotiations and were not the product of bona fide arm's-length bargaining. SPA-36-37.

The NFL cites *Brown v. National Football League*,[52] for the proposition that the NFL Constitution and Bylaws are incorporated by reference into the CBA. *Brown* is a negligence case, however, not an antitrust action. Moreover, the issue arose in the entirely different context of whether game day rules were also incorporated and could establish a standard of care for referees. Because the case did not involve the non-statutory labor exemption, the court did not make any finding as to whether the incorporation of the Bylaws was the subject of *bona fide* arm's-length bargaining. Under *Mackey* and *McCourt*, what is required is a showing that the specific term was bargained over, not simply a naked assertion that an entire document like the Bylaws was incorporated. The NFL offers no evidence whatsoever of such bargaining.

Like the league rules in *Philadelphia World Hockey Club*, the eligibility rule is not the product of actual bargaining but is, instead, the current version of a rule unilaterally adopted by the NFL decades before the NFLPA even

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[52] 219 F. Supp. 2d 372 (S.D.N.Y. 2002).

came into existence and repeatedly changed by the Commissioner pursuant to his power to establish policy and procedure with respect to the Bylaws. The non-statutory labor exemption was designed to benefit *labor*, not the employer, and applies only to "arm's-length, bargaining-unit-limited collective bargaining agreements on mandatory subjects,"[53] in which labor receives either a direct benefit from the term or something beneficial in exchange. As Judge Winter and Professor Jacobs wrote more than thirty years ago, "there may well be practices in professional sports which are not immunized by labor policy and which ought to be made to pass antitrust muster."[54] This is such a case.

II. CLARETT HAS ANTITRUST STANDING TO SUE FOR HIS EXCLUSION FROM COMPETING IN THE PLAYER MARKET BECAUSE HE HAS BEEN INJURED BY A CONCERTED REFUSAL TO DEAL WITH HIM.

A. The Rule's Exclusion Of A Class Of Sellers From The Marketplace Constitutes Antitrust Injury.

The cornerstone of the NFL's antitrust argument is the false premise that absent proof that the challenged conduct reduces output or adversely affects price, antitrust injury cannot be established. Not only is this not the law, it ignores the nature of the challenged conduct. In this case, the challenged conduct is

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53 *Home Box Office*, 531 F. Supp. at 593 (citing R. Gorman, Basic Text on Labor Law, Unionization, and Collective Bargaining 4-5, 399 (1976) (reaching such agreements is the primary objective of national labor policy).

54 Jacobs & Winter, *supra*, 81 Yale L.J. at 27.

concerted action designed to exclude a class of sellers from the marketplace. Its result – total exclusion of that class of sellers from the marketplace – constitutes antitrust injury.

To be sure, antitrust standing requires antitrust injury.[55] As the district court recognized: "[t]he Supreme Court has further explained the [antitrust injury] requirement as 'ensur[ing] that the harm claimed by the plaintiff corresponds to the rationale for finding a violation of the antitrust laws in the first place,' and more specifically, it 'ensures that a plaintiff can recover only if the loss stems from a competition-*reducing* aspect or effect of the defendant's behavior.'"[56] Here, Clarett suffers antitrust injury. Concerted action operates to exclude him from competing in the marketplace.

As to antitrust injury, the rule is a paradigm of the type of behavior that the antitrust laws were "intended to prevent."[57] As Judge Learned Hand stated so clearly:

> whatever other conduct the [antitrust] Acts may forbid, they certainly forbid all restraints of trade which were unlawful at common-law, and one of the oldest and best

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55 *See Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 537-545 (1983).

56 SPA-38 to SPA-39, quoting *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 342-44 (1990) (emphasis in original).

57 *Brunswick Corp. v. Pueblo Bowl-O-Mat*, 429 U.S. 477, 489 (1977).

> established of these is a contract which unreasonably forbids any one to practice his calling.[58]

This kind of forbidden restraint does not require a showing of an effect on price or output. Thus, the district court correctly concluded: "Clarett's injury – his exclusion from the NFL – flows directly from the anticompetitive effects of the rule, and thus constitutes antitrust injury. Accordingly, Clarett has antitrust standing." SPA-39 to SPA-40.

Brunswick, a decision the NFL acknowledges but fails to address, is the seminal case on antitrust injury.[59] In *Brunswick*, the Court focused not on the effect on prices, but on whether the alleged injury flowed from the kind of activity that the antitrust laws were "intended to prevent."[60] Because the antitrust laws were not intended to prevent market movement away from concentration, plaintiff suffered no antitrust injury. The Court stated that antitrust injury "should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation. It should, in short, be 'the type of loss that the claimed violations … would be likely to cause.'"[61] As two antitrust commentators

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58 *Gardella v. Chandler*, 172 F.2d at 408.

59 429 U.S. 477.

60 429 U.S. at 489.

61 *Id.* (quoting *Zenith Radio Corp. v. Hazeltine Research*, 395 U.S. 100, 125 (1969)).

observed: "The [*Brunswick*] Court found no antitrust injury, not because the plaintiff preferred an interpretation of the antitrust laws that would permit it to raise prices, but because the activity of which the plaintiff complained had increased rather than decreased competition."[62] *Brunswick* teaches that the proper focus of any antitrust injury analysis is on the challenged activity itself and whether the conduct is of the type that the antitrust laws were "intended to prevent."

While the primary object of many anticompetitive schemes is to fix prices or output, some illegal schemes have other objects. Even before *Brunswick*, courts recognized that a proper antitrust analysis focuses on the type of activity under challenge, and not on a rigid "price or output rule."[63] For example, as the court recognized in *United States v. New York Great Atlantic & Pac. Tea Co., Inc.*:

> The statute, thus interpreted, has no concern with prices, but looks solely to competition, and to the giving of competition full play, by making illegal and [sic] effort at restriction upon competition. Whatever combination has the direct and necessary effect of restricting competition

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62 Roger D. Blair and Jeffrey L. Harrison, *Antitrust Policy and Monopsony*, 76 Cornell L. Rev. 297, 337 (1991).

63 The NFL effectively concedes as much in arguing that there was no antitrust injury because plaintiff failed to prove that the rule had any actual adverse impact on *quality*. NFL Br. at 43, n. 16.

> is, within the meaning of the act as now interpreted, restraint of trade.[64]

Similarly, the Supreme Court teaches that, "[t]he Sherman Act was intended to secure equality of opportunity, and to protect the public against evils commonly incident to monopolies, and those abnormal contracts and combinations which tend directly to suppress the conflict for advantage called competition – the play of the contending forces ordinarily engendered by an honest desire for gain."[65]

The NFL rule embodies precisely the type of conduct that the antitrust laws condemn. The rule was designed, and operates, to decrease competition in the principal area where teams vie to gain advantage over each other – building their organizations. The rule codifies the teams' explicit agreement not to compete for a class of players. As a result of the teams' concerted action, these players are barred from entering the market. Both the individual players who are the object of the concerted refusal to deal and competition for positions in the league are harmed. Put differently, in a "but for" world without the rule, *i.e.*, in a market where competition has not been restrained, excluded players like Clarett would have the opportunity to compete with other draft eligible players for jobs.

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64 67 F. Supp. 626, 636 (E.D. Ill. 1946) (citations omitted).

65 *United States v. Am. Linseed Oil Co.*, 262 U.S. 371, 388 (1923). *See* 15 U.S.C. § 1.

B. The NFL's Position That Antitrust Law Imposes A Strict Requirement Of Showing An Effect On Price Or Output By Any Challenged Conduct Is Without Support In Both The Law And Common Sense.

The NFL once again claims support for its rigid effect on "price or output" argument in a sentence lifted from a Seventh Circuit case, *Chicago Prof'l Sports Ltd. P'ship v. NBA*, involving facts inapposite here.[66] The Seventh Circuit made it clear at the outset that "[a]ntitrust injury is one subject in particular that *has not* been presented for decision here."[67] As the district court correctly pointed out, the statement in *Chicago Prof'l Sports*, on which the NFL relies, is plain dicta.[68] The district court further noted the split in the Seventh Circuit on the question of whether impact on consumers – *i.e.*, an adverse effect on price or output – is, in fact, required to show antitrust injury and, of greater note: "none of the other Courts of Appeals has *ever* endorsed such a test." SPA-41 to SBA-42 (emphasis in original). As the district court explained:

> …changes in price or output are measures of effect on *consumers* of a questioned practice. But in a labor market – where the consumers of labor are also usually the antitrust defendants – it makes little sense to require

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66 961 F.2d 667 (7th Cir. 1992).

67 *Id.* at 669.

68 SPA-41 (quoting *Chicago Prof'l Sports*, 961 F.2d at 669 (emphasis added)).

> harm to consumers as a prerequisite for antitrust standing.[69]

Thus, "an effect on price or output is a sufficient but not necessary element of antitrust injury." SPA-43.[70] As an example, the district court pointed to the decision in *Klor's* and confirmed that "[t]he Supreme Court has long held that group boycotts are injurious to competition – and thus may give rise to a plaintiff's antitrust injury – when those barriers do *not* affect price or output, or even when they affect price or output in a way that is beneficial to competition."[71]

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69 SPA-42 (emphasis in original) (citation omitted). The NFL claims that *Todd v. Exxon Corp.*, 275 F.3d 191, 202 (2d Cir. 2001), holds otherwise, relying on a statement there that a plaintiff alleging a restraint in a labor market must demonstrate "from the perspective of an … employee" an injury to competition as a whole in the labor market. NFL Br. at 38. This statement in no way undercuts, and actually supports, the district court's holding.

70 For the NFL, in this case "price" is player salaries and "output" is jobs for players. But "price" here includes player-related costs beyond salaries – *e.g.*, scouting costs -- and the rule serves to limit these costs. The NFL conceded as much in stating its purpose for the rule and in urging a stay in the district court.

71 SPA-43 (*citing Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 212 (1959)) (emphasis in original). The NFL counters that *Nynex Corp. v. Discon, Inc.*, 525 U.S. 128 (1998), "made clear that the inference of antitrust injury allowed in *Klor's* was limited, at most, to boycotts among horizontal competitors that are *per se* illegal." NFL Br. at 38-39. *Nynex* involved a challenge to a buyer's decision to purchase from one supplier over another where there appeared to be no legitimate business reason for that decision. It plainly has no application here.

C. None Of The Authority Relied Upon By The NFL Supports Its Novel Claim That A Concerted Restraint On Market Entry Is Not An Antitrust Injury.

Although the NFL claims that this Circuit and others have held that a restraint that bars market entry does not constitute antitrust injury, none of the cases it cites supports that position. Indeed, the courts hold that such a restraint is what the antitrust laws were intended to prevent because of the resultant injury.

Nevertheless, the NFL, undaunted and without providing any context, seizes upon a partial quote from this Court's decision in *Virgin Atlantic, Ltd. v. British Airways PLC*[72] and says that a defendant's action which prevents a plaintiff from competing in a market "is not enough, standing alone" to satisfy plaintiff's initial burden of proof. The NFL's contention that it is permissible for those who control a market to agree to bar a group from selling in that market is not the law and is certainly not the holding in *Virgin Atlantic*. In that case, which the NFL never relied on below, Virgin Atlantic Airways, sued a competitor, British Airways, for allegedly using anti-competitive incentive agreements with travel agents to control the market for travel between London and certain U.S. cities. There was no indication that the challenged conduct harmed any other airline, or even that British had the market power to affect the market as a whole. This Court

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[72] 257 F.3d 256 (2d Cir. 2001).

simply held that Virgin had to show that the incentive agreements had an effect on the entire market, not just on Virgin.[73]

In the context of this case, the NFL's reliance on *Virgin Atlantic* is plainly misplaced. In fact, this Court stated that, had Virgin shown that British Airways "had sufficient market power to cause an adverse effect on competition," as the NFL plainly has here, Virgin *would have* satisfied its initial burden under a rule of reason analysis.[74]

The NFL's citation to this Court's decision in *Tops Market, Inc. v. Quality Markets, Inc.* is equally unavailing, as *Tops* actually supports plaintiff.[75] There, a supermarket chain alleged an antitrust violation against a competing chain for allegedly keeping it from entering a market at a particular site. This Court concluded that the plaintiff had failed to demonstrate a detrimental effect on competition as a whole, "despite having two independent means by which to satisfy the adverse-effect requirement."[76] Significantly, this Court highlighted that

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73 257 F.3d at 264.

74 257 F.3d at 265 (citation omitted).

75 142 F.3d 90 (2d Cir. 1998).

76 *Id.* at 96.

one such way would have been to show "*that other supermarkets were excluded from the market*."[77]

The NFL is also off-side in relying upon the Ninth Circuit decision in *Les Shockley Racing, Inc. v. National Hot Rod Association*[78] and the Sixth Circuit's decision in *National Hockey Players' Association v. Plymouth Whalers Hockey Club*.[79] As the district court properly noted, those cases "deal with the merits of the plaintiffs' respective antitrust claims, not antitrust standing" and, in any event, are "easily distinguished." SPA-47 to SPA-49.

In *Les Shockley*, plaintiff complained that he could not exhibit jet-powered trucks and motorcycles in defendant's drag racing venues. However, plaintiff could have competed in the market along with others offering drag racing events. More significantly, the Ninth Circuit explicitly acknowledged the point relevant to this case: only "[W]hen the restraining force of an agreement or other arrangement affecting trade becomes unreasonably disruptive of market functions such as … *market entry* …is a violation of the Sherman Act threatened."[80] Here,

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77 *Id.* (emphasis added).

78 884 F.2d 504 (9th Cir. 1989).

79 325 F.3d 712 (6th Cir. 2003).

80 884 F.2d at 508 (emphasis added).

the NFL agreement is more than unreasonably disruptive of market entry – it bars it completely.

Additionally, as the district court correctly pointed out, the possible "facial similarity" between the *Plymouth Whalers* case to this one is "misleading." SPA-50. There, plaintiffs' claims were dismissed because plaintiffs did not identify a market in which competition had been impaired. As the court below explained:

> In [*Plymouth Whalers*], plaintiffs identified a *product* market for amateur hockey, *i.e.*, a market where the Ontario Hockey League was the seller of amateur hockey to its fans. Thus the [*Plymouth Whalers*] plaintiffs alleged harm to the spectators who were deprived of the opportunity to see the best players. It is not surprising that the court found no anticompetitive effects in that market from the alleged age-based eligibility restriction. Such a rule could have affected the product of amateur hockey only by diminishing the quality of play – a concern of no relevance under the antitrust laws. Clarett, by contrast, seeks to sell *his* services in a *labor* market. Thus, the harm he alleges is to the market of players selling their services, not to the market of consumers viewing the players.

SPA-51 (footnotes omitted) (emphasis in original).

In contrast to the cases cited by the NFL, *Intellective, Inc. v. Massachusetts Mutual Life Insurance Co.*, provides further support that barriers to entry established through concerted action are sufficient to establish antitrust

injury.[81] Relying on *Brunswick*, the court held that the act of excluding firms from the market decreased competition and demonstrated antitrust injury, even though the challenged conduct did not appear to affect price or output.

Defendants moved to dismiss for lack of standing, arguing, like the NFL here, that plaintiff had not suffered "antitrust injury." The district court disagreed, stating in language particularly appropriate here:

> Intellective alleges that it, and all others, are prevented from competing in the relevant market by the Working Group's control of the data necessary to perform a competing study. *The prevention of this type of marketwide competition is an "injury of the type the antitrust laws were designed to prevent." Brunswick Corp*., 429 U.S. at 489, 97 S.Ct. 690. Further, Intellective's own injury – its inability to compete in this market – stems from defendants' activities, as required under *Atlantic Richfield*.[82]

In short, the NFL rule's prevention of marketwide competition in the market for player services is an "injury of the type the antitrust laws were designed to prevent" and the harm suffered by the excluded players flows directly from the NFL's collusive activity. The long line of professional sports restraint cases have

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81 190 F. Supp. 2d 600 (S.D.N.Y. 2002)

82 *Id*. at 613. (emphasis added) (footnote omitted).

explicitly or implicitly recognized that exclusion of players from the market damages competition and establishes antitrust injury.[83]

In a "Hail Mary" effort, the NFL argues for the first time that its restriction on competition for player services is not the type of restraint proscribed by the antitrust laws. The argument that the Sherman Act applies only to the business/output market and not to the labor market relies on comments of the Supreme Court in a wholly different context in *Apex Hosiery Co. v. Leader.*[84] This position was expressly rejected by the Eighth Circuit in *Mackey*[85] and implicitly rejected in the numerous professional sports cases cited above concerning challenges to owner imposed restraints.

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83 *See, e.g., Radovich v. National Football League*, 352 U.S. 445; *Smith v. Pro-Football, Inc.*, 593 F.2d 1173 (D.C. Cir. 1978); *Mackey v. NFL*, 543 F.2d 606 (8th Cir. 1976); *Boris v. USFL*, Civ. A. No. 83-4980 LEW, 1984 WL 894 (C.D. Cal. 1984); *Linseman v. WHA*, 439 F. Supp. 1315 (D. Conn. 1977); *Bowman v. NFL*, 402 F. Supp. 754 (D. Minn. 1975); *Kapp v. NFL*, 390 F. Supp. 73 (D. Cal. 1974), *aff'd*, 586 F.2d 644 (9th Cir. 1978), *cert. den*., 441 U.S. 907 (1979); *Blalock v. LPGA*, 359 F. Supp. 1260 (N.D. Ga. 1973); *Denver Rockets v. All-Pro Mgmt., Inc.*, 325 F. Supp. 1049 (C.D. Cal. 1971) ("*Haywood*").

84 310 U.S. 469 (1940).

85 543 F.2d at 617-618.

III. THE DISTRICT COURT CORRECTLY FOUND THAT THE RULE WHICH OPERATES TO EXCLUDE AN ENTIRE CLASS OF SELLERS FROM THE MARKET IS AN UNREASONABLE RESTRAINT ON TRADE.

The NFL offers little in urging that the district court erred in finding that the rule unreasonably restrains trade. The rule harms competition by arbitrarily excluding players from competing in the market. As set forth below, the district court's thorough and reasoned opinion is in accord with well-settled authority and common sense. Moreover, a modified rule of reason, or "quick look" approach, was appropriate because no detailed market analysis was required to determine that the rule is a naked restraint of trade.

A. The Rule Has An Anticompetitive Effect.

The district court correctly found that the rule has anticompetitive effects. The court first set out the three-step burden shifting test under a rule of reason analysis.[86]

Plaintiff's initial burden of demonstrating that the rule has an actual adverse effect on competition is easily met. Indeed, the rule restrains the player services market by restricting an athlete's ability to freely market his labor skills. As a result, the best college players are not able to utilize the free market system to

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[86] SPA-58 (*citing Capital Imaging Associates, P.C. v. Mohawk Valley Medical Associates, Inc.*, 966 F.2d 537, 543 (2d Cir. 1993)).

benefit from their talents as any American in another profession could. Because of an eligibility requirement unrelated to ability, the most skilled players must wait for an arbitrary date to pass to market their talents. This delay can cause irreparable harm to an athlete.[87] Football at the college level is a fast and dangerous game involving high-impact collisions. The longer an athlete is forced to stay in college, the greater the chance of injury and the possibility of harming the athlete's chance to profit from his talents.

The NFL's argument that any effect on competition is *de minimis* because the rule forbids players from entering the NFL only temporarily, borders on frivolous. Indeed, a football player can suffer irreparable injury while biding his time awaiting entry into the NFL. A lost year is particularly significant in the career of a professional football player, as the average NFL career spans only about three years.[88] As the district court aptly stated, "in any case, whether Clarett's exclusion is temporary or permanent goes to the extent of his injury, not the existence of that injury." SPA-54, n.153 (emphasis in original).

The district court properly recognized the longstanding authority in this Circuit that "whatever conduct the [antitrust] Acts may forbid, they certainly forbid all restraints of trade which were unlawful at common law, and one of the

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87 *See Linseman v. World Hockey Association*, 439 F. Supp. at 1320.

88 *See Haywood,* 325 F. Supp. at 1057.

oldest and best established of these is a contract which unreasonably forbids any one to practice his calling."[89] Because the rule is a naked restriction excluding players from the NFL, the district court correctly held the rule is "precisely the sort of conduct that the antitrust laws were intended to prevent" and that plaintiff met his initial burden under the rule of reason. SPA-58 to SPA-63.

The NFL's rhetoric about the district court's application of a *per se* analysis and its "exclusive reliance" on the three prior sports eligibility cases is not borne out by the record.

First, a review of the district court's decision leaves no doubt that it did not condemn the rule as a *per se* violation of the antitrust laws. *See, e.g.*, SPA-58 to SPA-69. In addition, the decision below thoroughly analyzed a wealth of sources and cannot credibly be described as "relying exclusively" on the *Haywood*[90], *Linseman*[91] and *Boris*[92] cases. Further, these prior sports eligibility cases are well reasoned and remain important authority in analyzing plaintiff's initial burden here.

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89 SPA-58 to SPA-59 (quoting *Gardella v. Chandler*, 172 F.2d at 408).

90 *Haywood*, 325 F. Supp. 1049 (C.D. Cal. 1971).

91 *Linseman v. World Hockey Ass'n.*, 439 F. Supp. 1315 (D. Conn. 1977).

92 *Boris v. United States Football League*, Civ. A. No. 83-04980, 1984 WL 894 (C.D. Cal. 1984).

Haywood, *Linseman* and *Boris* all involved challenges to a sports league's rule arbitrarily excluding a class of players from competing for positions in the league. In all three cases, courts found that entry barriers similar to the NFL's rule here violated the antitrust laws. In *Haywood*, the court considered a challenge to the NBA's rule barring players who were not four years removed from high school from playing in the league. The court struck down the rule, explaining:

> The harm resulting from a "primary" boycott such as this is threefold. First, the victim of the boycott is injured by being excluded from the market he seeks to enter. Second, competition in the market in which the victim attempts to sell his services is injured. Third, by pooling their economic power, the individual members of the NBA have, in effect, established their own private government. Of course, this is true only where the members of the combination possess market power in a degree approaching a shared monopoly. This is uncontested in the present case.[93]

The *Linseman* and *Boris* courts reached similar conclusions in striking down similar rules in professional hockey and professional football.

All three of the prior sports eligibility cases were decided before the Supreme Court decision in *NCAA v. Board of Regents of the University of*

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[93] *Haywood*, 325 F. Supp. at 1061 (quoted by district court at SPA-59-60).

Oklahoma[94] and employed a *per se* analysis. The Court in *NCAA*, in striking down an agreement to fix the price of certain television contracts for college football, simply determined that, in contrast to a strict *per se* approach, the analysis there had to consider defendant's alleged justifications for the restraint, if any. This shift to a modified rule of reason, or "quick look" was because the product, college football, required some cooperation if it were to be offered at all.[95] *NCAA* did not effectively overrule or, as the NFL tells this Court, discredit the prior sports eligibility decisions.[96] The reasoning in those cases remains valid on the issue of

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94 468 U.S. 85 (1984).

95 Weaving together phrases from three different sentences, the NFL claims that *NCAA* ruled that in the context of sports leagues, "naked restraints" – e.g. "a horizontal limitation on output or horizontal price fixing" – "'can be viewed as procompetitive' and 'may actually enhance marketwide competition.'" NFL Br. at 49 (citing *NCAA*, 468 U.S. at 100-02). This representation is simply not supported by the text in *NCAA*. The Supreme Court did not sanction "naked restraints" of trade by sports leagues; rather, it referred to those restraints necessary to market the product, *e.g.*, size of field, number of players, etc. 468 U.S. at 101. The NFL's tortured reading of *NCAA* is disingenuous.

96 The NFL's citation to the *Sports and the Law* article for this point is hardly independent authority. Indeed, it is a matter of public record that Gary R. Roberts, one of its co-authors, previously worked at Covington and Burling with, *inter alia*, Paul Tagliabue, the NFL commissioner, where his primary client was the NFL. *See* Transcript of Hearing before Subcomittee on Antitrust, Business Rights, and Competition, Senate Committee on the Judiciary, November 29, 1995 (http://www.heartland.org/pdf/congress4.pdf).

whether plaintiff has met his initial burden of demonstrating that the NFL rule is an unlawful restraint on competition, a burden that was clearly met.[97]

B. This Case Involves A Naked Restraint On The Market For Player Services And Is Properly Analyzed Under The Modified Rule Of Reason, Or "Quick Look," Approach.

Although the NFL argues that it was inappropriate for the district court to employ the modified rule of reason, or "quick look," in this case in determining that the NFL eligibility rule violates the antitrust laws, the district court followed the approach sanctioned by the Supreme Court in *NCAA*.[98] In *NCAA*, the only reason the Supreme Court did not apply a blanket, *per se*, condemnation of the restraint was because college football required some restraints if it were to market its product. The Court determined, however, that where a challenged practice has obvious anticompetitive effects, "no elaborate industry analysis is required" and an abbreviated rule of reason analysis or "quick look" approach is appropriate.[99] Indeed, in such cases, when a plaintiff meets his initial burden, the court may proceed directly to the question of whether the defendant

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97 The courts in each case did in fact consider each of the defendant league's purported purposes for their eligibility rules. Those purposes, which included the same as those proffered in defense of the NFL's rule, were all analyzed and rejected.

98 468 U.S. 85 (1984).

99 *Law v. NCAA*, 902 F. Supp. 1304, 1405 (D. Kan. 1995), *aff'd*, 134 F.3d 1010, 1019-20 (10th Cir. 1998) (citing *NCAA*, 468 U.S. at 109).

can meet its heavy burden of demonstrating that procompetitive justifications advanced for the restraint outweigh the anticompetitive evils.[100] If plaintiff's prima facie showing of an explicit restraint on trade is unrebutted, as is the case here, summary judgment may issue.[101] The "quick look" is not, as the NFL suggests, a "no-look."

In connection with Clarett's initial burden, the district court properly determined that a full-blown detailed market analysis was not necessary. It is indisputable that the NFL has control of the market for player services in its league and that its rule explicitly eliminates certain players from the market for such services. Relying on *Cal. Dental Ass'n v. F.T.C.*,[102] the district court stated: "Such a 'quick look' analysis, as the Supreme Court has recently explained, is appropriate where 'the great likelihood of anticompetitive effects can easily be ascertained,' and 'an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect.'" SPA-62 to SPA-63.

The NFL mischaracterizes *Cal. Dental* as "warning" against use of this "quick look" analysis. Although the competitive impact of the challenged

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100 *See id.*; *Chicago Prof'l Sports*, 961 F.2d at 674.

101 *See Capital Imaging*, 996 F.2d at 543.

102 526 U.S. 756, 770 (1999).

restrictions there were quite complicated and far less clear than here, the case made clear that a quick look approach is perfectly appropriate where the obvious anticompetitive effect that triggers the abbreviated analysis has been shown.[103]

The NFL quotes *NCAA* as permitting a quick look "*only* if the plaintiff alleges a 'naked restriction on price or output.'"[104] This is plainly wrong. The partial quote is from the Supreme Court's statement rejecting the petitioner's argument that it did not have the market power to affect the market with its television plan (the "absence of proof of market power does not justify a naked restriction on price or output.").[105]

NCAA did not limit the quick look "only" to price or output restraints, as the NFL states. It merely explained that *where there is such an agreement,* a quick look is justified.[106] In fact, in addition to the price and output restrictions there, the *NCAA* Court listed additional anticompetitive consequences as including the fact that "*[I]ndividual competitors lose their freedom to compete*."[107] Leaving no doubt that the quick look was appropriate here, the Supreme Court further

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103 *See id.* at 779.

104 NFL Br. at 51-52 (quoting *NCAA*, 468 U.S. at 109) (emphasis added).

105 468 U.S. at 109.

106 *Id.*

107 *Id.* at 106.

justified its use in *NCAA* for the additional reason that "the television plan eliminates competitors from the market… [and] many telecasts that would occur in a competitive market are foreclosed by the NCAA's plan."[108] In any event, here the NFL defines "output" as jobs and the challenged conduct is a blanket restriction on competing for jobs. So, even under the NFL's strained reading, *NCAA* permits a quick look here.

The NFL asserts that there are no authorities since *NCAA* suggesting that a modified rule of reason may be used if the defendant is a sports league. However, *Law v. NCAA* was such a case. There, the plaintiff challenged the defendant's rule setting a salary cap for entry level basketball coaches at its member institutions. Relying on *NCAA* to apply a rule of reason analysis, the district court granted summary judgment, holding that the defendant failed to meet its burden of showing that the restraint enhanced competition. The court stated that if an antitrust defendant "does not offer any legitimate justifications, the finding of adverse competitive impact or market power prevails, and 'the court condemns the practice without ado.'"[109] The Tenth Circuit agreed and flatly

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108 *Id.* at 107-08.

109 902 F. Supp. at 1404-05 (citing *U.S. v. Brown Univ.*, 5 F.3d 658, 668 (3d Cir. 1993) (quoting *Chicago Prof'l Sports*, 961 F.2d at 674)).

rejected defendant's argument, like the NFL's argument here, that there were genuine issues of fact about the market which precluded summary judgment.[110]

The NFL also claims, although without much vigor, that the quick look was inappropriate because it, as a sports league, "acts more like a single business organization than a collection of independent competitors." NFL Br. at 52-53. The NFL has previously attempted this "single entity" argument and each time it has been rejected.[111] That is because, as this Circuit found, to accept the NFL's reasoning "would permit league members to escape antitrust responsibility for any restraint entered into by them that would benefit their league or enhance their ability to compete even though the benefit would be outweighed by its anticompetitive effects."[112]

The district court addressed the rule's stated purposes, which were:

> [1] protecting younger and/or less experienced players – that is, players who are less mature physically and psychologically – from heightened risks of injury in NFL games; [2] protecting the NFL's entertainment product from the adverse consequences associated with such injuries; [3] protecting the NFL clubs from the costs and potential liability entailed by such injuries; and [4]

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110 *See Law v. NCAA*, 134 F.3d at 1020.

111 *See North Am. Soccer League v. NFL*, 670 F.2d 1249 (2d Cir. 1982); *Los Angeles Memorial Coliseum Comm'n v. NFL*, 726 F.2d 1381 (9th Cir. 1984).

112 *North Am. Soccer League*, 670 F.2d at 1257.

> protecting from injury and self-abuse other adolescents who would over-train – and use steroids – in the misguided hope of developing prematurely the strength and speed required to play in the NFL.[113]

It is obvious that none of these reasons demonstrate how the rule enhances competition in any market. As the district court stated, "[w]hile these may be reasonable *concerns*, none are reasonable *justifications* under the antitrust laws." SPA-64.

Clearly, the first and fourth justifications – a concern for the health of younger players – have nothing to do with promoting competition. As the Supreme Court stated in *NCAA*, "good motives will not validate an otherwise anticompetitive practice."[114]

The second and third justifications fare no better. The desire to protect the league from costs and liabilities may be rejected as a matter of law. The Supreme Court has stated, "[e]xclusion of traders from the market by means of combination or conspiracy is so inconsistent with the free-market principles embodied in the Sherman Act that it is not to be saved by reference to the need for

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[113] SPA-64 (quoting NFL Mem. in Opp. To Pl. Mot. for Sum J.). Before the district court, the NFL listed these purposes as background but never attempted to explain how they enhanced competition in the market.

[114] 468 U.S. at 101, n.23 (citations omitted).

preserving the collaborators' profit margins."[115] To the extent the NFL was arguing that the rule was necessary to improve the value of its entertainment product, it offered *no* explanation of this purpose or any evidence in that regard. Moreover, such a purported justification, even if true, is wholly unrelated to the market being restrained. As the district court properly noted, "the League may not enact a policy that effectively, 'determine[s] the respective values of competition in various sectors of the economy.'"[116]

In sum, this case involves a naked restraint on the market for player services and is properly analyzed under the modified rule of reason, or quick look, approach. The NFL utterly failed to meet its burden of demonstrating that the rule's procompetitive benefits outweigh its anticompetitive harms. Accordingly, the district court correctly granted summary judgment for plaintiff.

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115 *United States v. General Motors Corp.*, 384 U.S. 127, 146 (1966); *see also Law*, 134 F.3d at 1023.

116 SPA-66 (citing *United States v. Topco Assoc., Inc.*, 405 U.S. 596, 610-11 (1972).

CONCLUSION

For the foregoing reasons, the district court's judgment should be affirmed.

Respectfully submitted,

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CERTIFICATION OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B), I hereby certify that the foregoing Brief complies with the type-volume limitation of the above referenced Rule because it contains 13,983 words from the introductory paragraph through the conclusion. The word count was obtained from the word count tool contained in Microsoft Word® 2000.

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B), I hereby certify that the foregoing Brief complies with the typeface and type style requirements of the above referenced Rule because it has been prepared in proportionally spaced typeface using Microsoft Word® 2000 in 14 point font and font style Times New Roman.

Dated: April 13, 2004

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CERTIFICATE OF SERVICE

I, Amy L. Weiss, Esquire, hereby certify that on this 13th day of April 2004, I caused a true and correct copy of the foregoing Brief of Appellee Maurice Clarett to be served upon counsel for the defendant and amici as follows:

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