Casenote

BRADY V. NFL: HOW THE EIGHTH CIRCUIT "SAVED" THE 2011 NFL SEASON BY SUPPORTING NEGOTIATION, NOT LITIGATION

I. Introduction

Until March 11, 2011, the National Football League ("NFL"), and its thirty-two privately owned organizations, operated under a collective bargaining agreement ("CBA") with the National Football League Players Association ("NFLPA").[1] At the time, the NFLPA was the exclusive bargaining representative for the NFL's professional football players (the "Players").[2] During the weeks leading up to March 11, 2011 the NFLPA and the NFL owners unsuccessfully negotiated a new CBA, and the owners threatened to lockout the Players if the two sides did not reach an agreement.[3]

On March 11, 2011, just hours before the expiration of the CBA, the NFLPA decertified as a union and disclaimed further exclusive representation of the Players.[4] Shortly thereafter, nine current NFL players and one prospective professional football player filed an antitrust lawsuit in the United States District Court for the

1. *See Preliminary Injunction Enjoining NFL Lockout Vacated*, Class Action Law Monitor, July 31, 2011, at 11 (summarizing events leading up to lockout between players and NFL owners). For a more detailed discussion on the CBA between both parties, see *infra* notes 114-118 and accompanying text.

2. *See Preliminary Injunction Enjoining NFL Lockout Vacated*, *supra* note 1 (describing role of NFLPA in collective bargaining talks between Players and NFL owners). The NFLPA was the exclusive bargaining authority for all 1,800 or more NFL football players. *See id.* (acknowledging how many NFL players NFLPA is responsible for representing).

3. *See id.* (discussing weeks leading up to expiration of CBA and unsuccessful negotiating attempts by both parties). During a lockout, players would not be paid or permitted to use team facilities. *See id.* (explaining negative aspects of lockout for players). For a more detailed discussion on lockouts, see *infra* notes 37-44 and accompanying text.

4. *See Preliminary Injunction Enjoining NFL Lockout Vacated*, *supra* note 1 (indicating NFLPA's collective bargaining strategy to decertify as Players' exclusive bargaining authority in order to gain leverage); *see also* Timothy Epstein, *NFL Players' Decertification: Hail Mary or a Smart Play?*, 157 Chi. Daily L. Bull. 66, April 5, 2011 (covering NFL lockout legal issues as well as discussing facts of case). For a more detailed discussion on the decertification strategy utilized by the Players, see *infra* notes 45-53 and accompanying text.

District of Minnesota.[5] The Players sought a preliminary injunction enjoining the NFL owners from locking out the Players.[6] The CBA later expired at 11:59 p.m. on March 11, 2011.[7] On March 12, 2011, the NFL owners followed up on their threat, instituting a league-wide lockout effective immediately.[8]

Over the years, the NFL has dealt with multiple labor disputes, and has previously overcome work stoppages.[9] Generally, the NFL and the Players have engaged in collective bargaining to resolve these disputes.[10] Furthermore, given the recent economic success of the NFL in the United States, it was fair to assume at the time of the suit that the two sides would be able to find a middle ground through collective bargaining.[11]

The role that antitrust laws play in labor disputes between professional sports leagues and player unions, however, is not widely known to the general public.[12] In an attempt to gain leverage

5. *See generally* Brady v. Nat'l Football League, 779 F. Supp. 2d 992 (D. Minn. 2011) [hereinafter *Brady I*] (*overturned by* Brady v. Nat'l Football League, 644 F.3d 661, 663 (8th Cir. 2011)) (discussing facts of case and prior relationship between NFL and Players). The nine NFL players that filed the lawsuit were Tom Brady, Drew Brees, Vincent Jackson, Ben Leber, Logan Mankins, Peyton Manning, Brian Robison, Osi Umenyiora, and Mike Vrabel. *See* Brady v. Nat'l Football League, 644 F.3d 661, 661 (8th Cir. 2011) [hereinafter *Brady II*] (listing NFL players who were plaintiffs in *Brady* suit). The prospective player was Von Miller. *See id.* (acknowledging which plaintiff was "rookie" player in *Brady*). For a more detailed discussion on the Players' lawsuit, see *infra* notes 125-129 and accompanying text.

6. *See Brady II*, 644 F.3d at 663 (detailing what Players sought in their complaint). The complaint alleged violations of antitrust, contract, and tort law. *See id.* (acknowledging alleged violations in Players' complaint filed in *Brady*). For a more detailed discussion on the Players' complaint to the district court in *Brady*, see *infra* notes 125-129 and accompanying text.

7. *See Brady I*, 779 F. Supp. 2d at 1003 (stating when NFL CBA was set to expire).

8. *See id.* at 1004 (stating NFL's response to NFLPA's decertification of their union and subsequent lawsuit). For a more detailed discussion on lockouts, see *infra* notes 37-44 and accompanying text.

9. *See* Kevin W. Wells, *Labor Relations in the National Football League: A Historical and Legal Perspective*, 18 SPORTS LAW. J. 93, 94 (2011) (discussing historical background between NFL owners and Players and pointing out that this is not new territory for either party). For a more detailed discussion on the history of labor disputes between the NFL and the Players, see *infra* notes 80-110 and accompanying text.

10. *See* Wells, *supra* note 9, at 94 (pointing to fact that in past, both sides have turned to collective bargaining, not litigation, to resolve majority of labor disputes and work stoppages).

11. *See id.* (offering inference that given large success of NFL recently, it is fair to assume owners and Players should be able to figure out this issue without court's assistance). "Given the current success of the NFL, one can infer that the Players and owners have usually found ways to resolve their disputes." *Id.*

12. *See id.* (acknowledging significant role that antitrust law plays in labor disputes and work stoppages). For a more detailed discussion on the role of antitrust laws in prior NFL labor disputes, see *infra* notes 80-110 and accompanying text.

within collective bargaining negotiations in prior labor disputes, the Players have used antitrust laws to their advantage.[13] This strategy has previously persuaded NFL owners to cave in to various player demands.[14] Interestingly, however, in the dispute in *Brady* it was the owners, not the Players, who sought to turn the table and receive more favorable terms.[15] Thus, the owners were forced to lock out the Players in order to gain collective bargaining leverage in response to the Players' demands.[16]

At the time the Players commenced this suit, the question of whether the Players' decertification strategy would be enough to prevent a lockout and put the Players back on the football field was unsettled.[17] However, whether a lockout is subject to antitrust litigation was distinguishable from consideration as to whether anticompetitive practices instituted by the NFL violate section 1 of the Sherman Act.[18]

In the past, courts have held the NFL to be in violation of anticompetitive practices.[19] By decertifying, the Players attempted "to

13. *See* Wells, *supra* note 9, at 94 (illustrating reason for Players' use of antitrust laws to their advantage in collective bargaining). For a more detailed discussion on prior use of the antitrust laws to the Players' advantage, see *infra* notes 80-110 and accompanying text.

14. *See* Wells, *supra* note 9, at 94 (indicating antitrust laws have significantly affected collective bargaining demands and results of prior labor disputes between NFL and Players). For a more detailed discussion on Players using antitrust laws to gain more favorable terms in collective bargaining with the NFL, see *infra* notes 80-110 and accompanying text.

15. *See* Wells, *supra* note 9, at 94 (recognizing how labor dispute at issue here is distinguishable because it is NFL owners, not Players, seeking change in CBA structure). For a more detailed discussion on the terms the owners sought in the new CBA, see *infra* note 117 and accompanying text. For a more detailed discussion on how the Players, not the owners, normally seek more favorable terms and conditions of employment during prior NFL labor disputes, see *infra* notes 80-110 and accompanying text.

16. *See* Wells, *supra* note 9, at 94 (referring to owners' weapon in response to Player demands and labor disputes, which is to lock out Players in order to seek their desired terms in a new CBA structure). For a more detailed discussion on lockouts, see *infra* notes 37-44 and accompanying text.

17. *See* Epstein, *supra* note 4, at 66 (illustrating during NFLPA's decertification, it remained to be seen whether decertification is sufficient to overcome legal hurdles such as Norris LaGuardia Act and Sherman Antitrust laws).

18. *See id.* (discussing how lockout issue is distinguishable from issue of whether NFL rules are subject to Sherman Act violation). This highlights how the Players' suit in *Brady I* can be distinguishable from prior case law and labor disputes between the two parties involved. *See id.* (illustrating unique significance of issue in *Brady I*).

19. *See id.* (presenting evidence that U.S. federal courts have previously held certain NFL rules to be in violation of section 1 of Sherman Act); *see also* Mackey v. Nat'l Football League, 543 F.2d 606, 614 (8th Cir. 1976) (holding "Rozelle Rule," requiring teams to compensate player's former team if it chose to sign that player as free agent, was per se violation of Sherman Act because rule denied players'

place previously bargained-for policies on an even plane with unilaterally imposed conditions," such as the lockout imposed by the owners.[20] Additionally, the Supreme Court recently ruled that the thirty-two NFL teams are separate entities and, as such, cannot circumvent scrutiny under section 1 of the Sherman Act by acting as a joint venture, unlike the immunity offered to Major League Baseball.[21] Thus, the Players' theory was that upon decertification of their union, the teams cease to be a "single entity" and become thirty-two separate entities, which likely subjects them to antitrust scrutiny under section 1 of the Sherman Act.[22]

Although case law indicates that the NFL and its operating rules seem subject to antitrust scrutiny, granting an injunction enjoining the lockout would seem to undermine the future bargaining relationship between the NFL and the Players, which would be in itself, anti-competitive.[23] The collective bargaining relationship between the NFL and the Players, which is protected by the nonstatutory labor exemption, would be at odds if the lockout were enjoined and NFL owners were required to operate their teams with

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access to competitive market). For a more detailed discussion on *Mackey*, see *infra* notes 86-90 and accompanying text.

20. *See* Epstein, *supra* note 4, at 66 (demonstrating NFLPA's strategy by choosing to decertify). For a more detailed discussion on decertification, see *infra* notes 46-53 and accompanying text.

21. *See* Epstein, *supra* note 4, at 66 (discussing Court's ruling in *American Needle* that NFL teams are separate entities and thus, subject to Sherman Act restrictions); *see also* Am. Needle v. Nat'l Football League, 130 S.Ct. 2201, 2216 (holding that NFL activity is subject to antitrust analysis under section 1 of Sherman Act). For a more detailed discussion on Supreme Court case where Court refused to offer NFL immunity from antitrust scrutiny that is offered to Major League Baseball, see *infra* notes 81-82 and accompanying text. For a more detailed discussion on *American Needle*, see *infra* notes 107-110 and accompanying text. For a more detailed discussion on Major League Baseball's exemption from antitrust scrutiny, see *infra* notes 81-83 and accompanying text. *See generally* Constantine J. Avgiris, Comment, *Huddle Up: Surveying the Playing Field on the Single Entity Status of the National Football League In Anticipation of American Needle v. NFL*, 17 VILL. SPORTS & ENT. L.J. 529 (2010) (discussing antitrust laws in professional sports).

22. *See* Maxwell Kennerly, *NFL Lockout Injunction Reversal: Using Labor Law Against Employees*, LITIGATIONANDTRIAL.COM (July 11, 2011), http://www.litigationandtrial.com/2011/07/articles/attorney/antitrust/nfl-lockout-lawsuit-injunction-reversal (indicating Players' theory regarding how decertification will allow NFL teams to become vulnerable to antitrust scrutiny as separate entities). For a more detailed discussion on implications for Players' decertification strategy and the nonstatutory labor exemption, see *infra* notes 54-72 and accompanying text.

23. *See* Epstein, *supra* note 4, at 66 (presenting fact that federal district court may hesitate to enjoin NFL owners from locking out Players because of anti-competitive effect of such holding). This precise issue is what the nonstatutory labor exemption seeks to protect. *See id.* (explaining that nonstatutory labor exemption protects desired goal of collective bargaining process). For a more detailed discussion on the nonstatutory labor exemption, see *infra* notes 54-72 and accompanying text.

no CBA in place.[24] Thus, it seemed that the Players' chances of enjoining the lockout were slim, and if the Players wanted to increase their bargaining leverage, they would have to pursue lengthy litigation on the merits of their antitrust claim against the league.[25] Ideally, for the 2011 NFL season to begin on time, both sides needed to reach a new CBA at the negotiating table, not in the courtroom.[26]

On April 25, 2011, Judge Susan Nelson granted the Players' request for an injunction, which forced the owners to stop the lockout that "ground the sport to a halt."[27] On July 11, 2011, weeks after the NFL owners appealed the district court's ruling, the Eighth Circuit issued a two to one decision holding that the district court lacked jurisdiction to issue an injunction with respect to the players, and did not follow procedural requirements by issuing an injunction that covered non-employees.[28] The Eighth Circuit chose not to rule on whether the nonstatutory labor exemption applied to the Players' antitrust claim after the union's disclaimer, thus leaving the door open for the Players to continue their claim on the merits.[29] As a result, on July 25, 2011, after nearly five months of litigation and strenuous negotiation, the NFL owners and the Players

24. *See* Epstein, *supra* note 4, at 66 (discussing how collective bargaining relationship between NFL owners and Players would be in jeopardy if lockout were enjoined); *see also* Brown v. Pro Football, Inc., 518 U.S. 231, 233-34 (1996) (citing leading case for nonstatutory labor exemption analysis for NFL and NFLPA collective bargaining relationship). For a more detailed discussion on the nonstatutory labor exemption, see *infra* notes 54-72 and accompanying text.

25. *See* Epstein, *supra* note 4, at 66 (explaining Players' chances of successfully enjoining lockout were slim heading into litigation). If the Players had elected the lengthy antitrust lawsuit as their strategy, the chance of a return to NFL football would have been slim. *See id.* (illustrating that antitrust litigation would have shut down NFL's operations for extended period of time).

26. *See id.* (explaining best way for 2011 NFL season to start on time was for both sides to get back to bargaining table and negotiate new CBA).

27. *See How the Eight Circuit's Republican Shift Has Changed the Playing Field for the NFL Players Association*, ALLIANCE FOR JUST. (June 2, 2011), http://afjjusticewatch.blogspot.com/2011/06/how-eighth-circuits-republican-shift.html (discussing District Court ruling). For a more detailed discussion on Judge Nelson's decision, see *infra* notes 133-138 and accompanying text.

28. *See Preliminary Injunction Enjoining NFL Lockout Vacated*, *supra* note 1, at 11 (summarizing events leading up to lockout between players and NFL owners). For a more detailed discussion on the Eighth Circuit's opinion in *Brady*, see *infra* notes 142-193 and accompanying text.

29. *See* Brady v. Nat'l Football League (*Brady II*), 644 F.3d 661, 682 (8th Cir. 2011) (indicating narrowness of Eighth Circuit's ruling and how court left open possibility for Players to litigate their antitrust claims on merits at later time). For a more detailed discussion on the Eighth Circuit's decision not to address the nonstatutory labor exemption and the Players' decertification strategy, see *infra* note 192 and accompanying text.

rendered their claims moot and saved the 2011 NFL season upon settling on a new ten-year collective bargaining agreement.[30]

This Casenote will evaluate how *Brady v. NFL* "saved" the 2011 NFL season. Section II discusses relative legal terms and legislative materials that were significant in the *Brady* litigation.[31] This section also includes a historical overview of the relationship between both parties and briefly analyzes prior labor disputes in the NFL.[32] Section III narrates the events leading up to the appeal of *Brady* to the Eighth Circuit, including a brief account of the District Court's decision.[33] Section IV examines the Eighth Circuit's opinion in *Brady*, and specifically details the court's reasoning for upholding the NFL lockout.[34] Section IV also provides a critique of the Eighth Circuit's holding and exposes the court's strengths and weaknesses.[35] Finally, Section V discusses how *Brady* will affect future labor disputes in professional sports and addresses the role *Brady* had in the recent labor dispute between the National Basketball Association and its professional basketball players.[36]

II. BACKGROUND

A. Lockout

A lockout is the "withholding of employment by an employer from its employees for the purpose of either resisting their demands or gaining a concession from them."[37] U.S. labor law pro-

30. *See* Donna Walter, *Three Lawsuits That Saved the NFL Season*, ALLBUSINESS.COM (July 26, 2011), http://www.allbusiness.com/legal/trial-procedure-suits-claims/16626527-1.html (analyzing NFL lockout litigation and commenting on settlement between NFL owners and Players). For a more detailed discussion on the impact of *Brady*, see *infra* notes 233-275 and accompanying text.

31. For a more detailed discussion on the background section explaining legal terms and legislative materials, see *infra* notes 37-79 and accompanying text.

32. For a more detailed discussion on the background section providing a historical overview of the relationship between both parties in *Brady*, see *infra* notes 80-110 and accompanying text.

33. For a more detailed discussion on the facts section, see *infra* notes 111-141 and accompanying text.

34. For a more detailed discussion on the narrative analysis section, see *infra* notes 142-193 and accompanying text.

35. For a more detailed discussion on the critical analysis section, see *infra* notes 194-232 and accompanying text.

36. For a more detailed discussion on the impact section, see *infra* notes 233-275 and accompanying text.

37. Gabriel A. Feldman, *NFL Lockout: The Legal Issues Behind the NFL-CBA Negotiations*, HUFFINGTON POST (Feb. 9, 2011, 9:22 AM), http://www.huffingtonpost.com/gabriel-a-feldman/the-legal-issues-behind-t_b_820579.html. In other words, a lockout is when an employer refuses to let workers work, and therefore get paid as a form of leverage. *See id.* (explaining alternate definition of lockout). During a lockout, NFL owners are permitted to hire temporary employees as long as the

hibits a lockout if it is motivated by an attempt to discourage union membership or if it interferes with employees' organizational rights.[38] Lockouts can be issued by an employer, such as the NFL, before or after a bargaining impasse has been reached.[39]

A leading case supporting employer issued lockouts for the sole purpose of bringing economic pressure to bear in support of the employer's collective bargaining position is *American Ship Building Co. v. National Labor Relations Board*.[40] The issue presented to the Court in *American Ship Building Co.* was whether an employer commits an unfair labor practice under the National Labor Relations Act ("NLRA") when that employer temporarily lays off or "locks out" employees during a labor dispute to bring economic pressure in support of the employer's collective bargaining position.[41] Section 158 of the NLRA sets out provisions for unfair labor

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harm to the NFL players is "comparatively slight," and the decision is motivated by a legitimate business purpose. *See id.* (explaining circumstances under which NFL owners can exercise their right to hire replacement players).

38. *See id.* (detailing scope of lockout strategy for employers against employees and indicating certain restrictions on how lockout strategy can be utilized by employers during collective bargaining impasse). For a more detailed discussion on the leading Supreme Court case discussing employer lockouts in relation to NLRA restrictions on employer conduct during a collective bargaining impasse, see *infra* note 40 and accompanying text.

39. *See* Feldman, *supra* note 37 (indicating duration that employers have to decide whether or not to lockout their employees for collective bargaining purposes). Lockouts can occur before or after a bargaining impasse has been reached, which is the expiration of a CBA or failed collective bargaining negotiations. *See id.* (indicating when lockouts can occur during bargaining impasse).

40. *See* Am. Ship Bldg. Co. v. N.L.R.B., 380 U.S. 300 (1965) (citing to *American Ship Building Co.* opinion). In *American Ship Building Co.*, the employer, American Ship Building Company, was primarily engaged in collective bargaining with their employees, a group of eight unions. *See id.* at 302 (explaining employer's activity in case). The employees primarily based the collective bargaining negotiations on demands for increased fringe benefits and some unspecified wage increase demands. *See id.* (explaining demands of employee within collective bargaining negotiations). Although the union negotiator consistently insisted that it was the employees' intention to reach an agreement without calling for a strike, the employer remained apprehensive about the potential of such a strike, and chose to lock out the employees. *See id.* at 304 (explaining employer's strategy in response to potential threat of strike by employees). Negotiations would resume shortly after the lockout and after two months, the parties agreed upon a new two-year collective bargaining agreement. *See id.* (noting parties came to agreement after execution of lockout by employer).

41. *See id.* at 302-03 (presenting question put before Court and how issue should be resolved under federal labor law, specifically NLRA). The employees in *American Ship Building. Co.* argued that the employer-issued lockout was an "unfair labor practice" under the NLRA, and thus a violation of the statute. *See id.* at 304 (citing employer's argument for why its conduct did not constitute unfair labor practice); *see also* 29 U.S.C. § 158 (2006) (defining term "unfair labor practice" for labor purposes and describing unfair labor practices for employees and employers during collective bargaining impasses).

practices based on employer conduct and illustrates how employers that interfere with or discourage union membership by employees are in violation of the Act.[42] Additionally, section 157 of the Act lays out employees' rights within the collective bargaining relationship with their employer.[43]

Upon concluding that the employer did not violate either part of section 158 of the NLRA, the Court held that it is not an unfair labor practice for an employer to lockout their employees after a bargaining impasse has been reached for the sole purpose of bringing economic pressure to bear in support of the employer's legitimate bargaining position.[44]

B. Decertification

A union is decertified when employees formally revoke the authority of their union to engage in collective bargaining on their

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42. *See* 29 U.S.C. § 158 (a)(1) (2006) (detailing unfair labor practices by employers in regards to conduct with unionized employees during collective bargaining impasse). "[I]t shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [s]ection 157." *Id; see also* 29 U.S.C. § 158 (a)(3) (indicating violation of NLRA for employers to discourage union membership in any labor organization). "[I]t shall be an unfair labor practice for an employer by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." *Id.*

43. *See id.* § 157 (presenting employees rights within collective bargaining relationship with their employer or potential employer(s)).

> [E]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in § 158(a)(3) of [the NLRA].

Id.

44. *See Am. Ship Bldg. Co.*, 380 U.S. at 318 (ruling that lockout is not unfair labor practice when utilized to further employer's collective bargaining position by pressuring employees to collectively bargain and potentially agree to terms favorable to employer). The Court held that the employer lockout at issue did not violate section 158 (a)(1) because the lockout did not have the effect of interfering with the employee union's rights or ability to collectively bargain with the employer; the lockout was merely an attempt by the employer to increase its bargaining leverage at impasse. *See id.* at 310-11 (presenting Court's reasoning for upholding lockout in *American Ship Building Co.*). The Court held an employer lockout does not violate section 158 (a)(3) either, because a "lockout does not carry with it any necessary implication that the employer acted to discourage union membership or otherwise discriminate against union members as such." *Id.* at 312 (explaining further justification for upholding validity of lockout under NLRA).

behalf.[45] The process for decertifying a union involves multiple steps on behalf of the union's member employees.[46] First, thirty percent of the employees must sign a petition indicating that the employees no longer want their union to exclusively represent them in collective bargaining.[47] Second, the petition must be filed with the National Labor Relations Board ("N.L.R.B.").[48] From there, the N.L.R.B. must verify the petition request and then schedule an election, where at least fifty percent of the union members are required to approve of the decision to decertify the union.[49]

Once decertified, the NFLPA becomes a voluntary trade association.[50] As a result, each of the 1,800 NFL players is free to deal directly with the owners without union representation.[51] The Players therefore gain the ability to bring an antitrust lawsuit against the NFL challenging any rule that the league has in place that restricts an individual player's ability to make money or otherwise impacts

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45. *See* Feldman, *supra* note 37 (defining labor term decertification for union purposes). In other words, a decertification strategy successfully dissolves the union of employees. *See id.* (providing alternate explanation of decertification). The Players have decertified their union only once before in 1989. *See id.* (explaining only prior decertification of NFL player union). For a more detailed discussion on the Players' 1989 decertification and the subsequent case law, see *infra* notes 97-104.

46. *See* Feldman, *supra* note 37 (indicating details and steps in process for decertification by union member employees).

47. *See id.* (describing first step in process for union employees to successfully decertify their union by petitioning for union to no longer represent them in collective bargaining negotiations). In the case of the NFL, thirty percent of the current NFL Players must sign a petition indicating that they no longer want to be represented in collective bargaining with NFL owners by the NFLPA. *See id.* (explaining first step of decertification process specifically for NFLPA). For a more detailed discussion on the NFL players' decertification of their union, see *infra* note 122 and accompanying text.

48. *See* Feldman, *supra* note 37 (presenting second step in decertification process, which is to file petition from step one with N.L.R.B.). For a more detailed discussion of the petition the Players filed with the N.L.R.B., see *infra* note 122 and accompanying text.

49. *See* Feldman, *supra* note 37 (indicating final step in process for employees to successfully decertify their union). In essence, fifty percent of the estimated 1,800 NFL players would have to affirm the decision to decertify in order for the process to be complete. *See id* (explaining how many NFL players are required to affirm decertification process).

50. *See* Sam Farmer, *NFL Talks Break Down Union Decertifies, League Imposes Lockout and a Group of Players Files Antitrust Lawsuit*, L.A.TIMES, Mar. 12, 2011, at 1 (illustrating lasting result going forward once NFLPA successfully decertifies as union).

51. *See* Miriam L. Rosen, *The NFL Lockout: Is There a "Hail Mary" in Sight?*, EMPLOYERLEGALADVOCATE.COM (Mar. 9, 2011), http://www.employerlegaladvocate.com/labor-law/the-nfl-lockout-is-there-a-hail-mary-in-sight/ (analyzing decertification process along with other labor law strategies involved in 2011 NFL lockout).

the Player's working conditions.[52] Thus, decertification is a significant weapon for the Players to gain leverage in collective bargaining negotiations.[53]

C. Nonstatutory Labor Exemption

Decertification of a union demonstrates the juxtaposition between labor and antitrust laws.[54] Often, certain rules and conditions that would be considered anti-competitive are essential to the functionality of the collective bargaining process.[55] For the collective bargaining process to be effective, labor law affords employers a doctrine known as the nonstatutory labor exemption.[56] In short, the nonstatutory labor exemption "protects the product of collective bargaining from attack under antitrust law."[57]

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52. *See* Feldman, *supra* note 37 (pointing out reasoning for decertification in regards to Players bringing antitrust lawsuit against NFL owners). For example, the players would be able to challenge rules such as the NFL's salary cap restrictions, the NFL player draft, franchise tags, and many other player and free agency restrictions that are stipulated by the NFL and its member clubs. *See id.* (providing examples of NFL rules Players could potentially challenge under antitrust laws). The Players have to decertify their union in order to bring their anti-trust suit as a result of the nonstatutory labor exemption. *See id.* (explaining significant obstacle nonstatutory labor exemption poses to Players' legal strategy). For a more detailed discussion on the nonstatutory labor exemption and its application to collective bargaining, see *infra* notes 54-72 and accompanying text.

53. *See* Rosen, *supra* note 51 (asserting bargaining leverage gained by Players decertifying). The decertification weapon utilized by the Players is in response to the NFL owners' strategy to lockout the Players. *See id.* (explaining significance of decertification as defense mechanism to NFL's lockout). Each party is attempting to bully the other, except the Players' weapon has more firepower because it has potential to result in a long, nasty lawsuit with the NFL. *See id.* (indicating decertification strategy has more implications than employer lockout).

54. *See* Epstein, *supra* note 4 (illustrating connection and close ties between labor law and antitrust law in relation to NFL lockout). Both the antitrust laws and labor laws concur within the scope and protection issued by the nonstatutory labor exemption. *See id.* (illustrating coincidence surrounding nonstatutory labor exemption).

55. *See id.* (discussing how NFL's anti-competitive rules are functional to CBA process, even though considered antitrust violations). Such "rules and conditions" being referred to include, but are not limited to, the NFL Player Draft, NFL free agency rules, "franchise tags," and the NFL salary cap restrictions. *See id.* (providing examples of NFL rules and conditions within juxtaposition of antitrust scrutiny and successful collective bargaining).

56. *See id.* (providing reasoning behind existence of nonstatutory labor exemption). The NFL is an employer under the use of the term "employer" for the application of the exemption. *See id.* (acknowledging NFL fits into scope of labor exemption). The nonstatutory labor exemption affords the NFL protection from antitrust scrutiny. *See id.* (explaining protection labor exemption offers to NFL).

57. *See* Feldman, *supra* note 37 (indicating purpose of nonstatutory labor exemption in protecting collective bargaining process between employers and employees). As a result, any agreed-upon terms of a CBA between the NFL owners

Even in the absence of a current CBA, however, the exemption applies "as long as the bargaining relationship still exists."[58] In order for the Players to lower this protective shield, they must effectively end their collective bargaining relationship with the NFL owners.[59] By decertifying, the Players can argue that their collective bargaining relationship has expired, which could open up the NFL and its member clubs to antitrust scrutiny.[60]

A leading case detailing the nonstatutory labor exemption in reference to the NFL is *Brown v. Pro Football, Inc.*[61] The question before the Court was whether federal labor laws shield the NFL from antitrust attack by the nonstatutory labor exemption.[62] When

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and the Players are "immunized from attack under antitrust law." *See id.* (illustrating scope of labor exemption to NFL CBA negotiations).

58. *See id.* (presenting that extent of statutory protection exists as long as collective bargaining relationship remains intact). The "bargaining relationship" refers to the present collective bargaining negotiations or relationship between the NFL owners and the Players. *See id.* (explaining "bargaining relationship" in *Brady*). Thus, by decertifying their union, the Players are attempting to "expire" any existence of a collective bargaining relationship between the two parties. *See id.* (explaining Players' desired result of their decertification strategy).

59. *See id.* (indicating importance for Players to successfully end their collective bargaining relationship with NFL owners).

60. *See id.* (explaining strategy of decertification by Players in reference to eliminating Player's collective bargaining relationship with NFL owners, and thus lifting nonstatutory labor exemption shield). If the Players successfully removed the shield and ended their collective bargaining relationship with NFL owners, then the Players would be able to bring their antitrust claim against the league, challenging all of the rules restricting player movement and limiting Players' ability to make money. *See id.* (illustrating strategic goals of Players' decision to decertify their union and eliminate scope of labor exemption to their antitrust claim). For a more detailed discussion on which NFL rules could be attacked under antitrust laws, see *supra* note 55 and accompanying text.

61. *See* Brown v. Pro Football, Inc., 518 U.S. 231, 233-34 (1996) (citing *Brown* as leading case for nonstatutory labor exemption because *Brown* specifically discusses circumstances surrounding former labor dispute and subsequent antitrust litigation between NFL and Players). In *Brown*, a group of "developmental squad" professional football players brought an antitrust suit against the NFL and its member clubs. *See id.* at 235 (explaining facts of *Brown* case). The players claimed that "Resolution G-2", a program adopted by the NFL that permitted each club to establish a "developmental squad" of up to six rookie or first-year players who, as free agents, had failed to secure a position on a regular player roster, was in violation of section 1 of the Sherman Act. *See id.* at 234-35 (explaining players' antitrust claim in *Brown*). Squad members would play in practice games and sometimes in regular season games as substitutes for injured players. *See id.* (explaining "Resolution G-2" system at issue in *Brown*). Resolution G-2 required all club owners to pay these squad players the same weekly salary without compensation for benefits, and if any club owner paid squad players more or less than the set $1,000 per week salary, the NFL would take disciplinary action. *See id.* (discussing uniform contract of "Resolution G-2").

62. *See id.* at 234 (indicating issue presented in *Brown*). More specifically, the issue before the Court was whether the NFL's implementation of "Resolution G-2" was in violation of the Sherman Act, or whether the nonstatutory labor exemption

examining the purpose of the exemption, the Court pointed out that the exemption was implied from federal labor statutes to "set forth a national labor policy favoring free and private collective bargaining," to require "good faith bargaining over wages, hours, and working conditions," and to "delegate rulemaking and interpretive authority to the National Labor Relations Board."[63] Moreover, the exemption applies to both employers and employees because it sets out to create effective collective bargaining relationships.[64]

The nonstatutory labor exemption allows for labor statutes to be interpreted as limiting an antitrust court's authority to determine what is or what is not a reasonable collective bargaining practice.[65] Thus, "the implicit exemption recognizes that to give effect to federal labor laws and policies and to allow meaningful collective bargaining, some restraints on competition imposed through the [collective] bargaining process must be shielded from antitrust laws."[66] To subject such practices to antitrust laws would require

protected the league from antitrust scrutiny. *See id.* (providing alternate explanation of issue in *Brown*).

63. *See id.* at 236 (quoting origin of exemption and Court's policy behind existence of non-statutory labor exemption in collective bargaining relationships). The Court also highlights that Congress enacts labor statutes with intent of preventing judicial use of antitrust law to resolve labor disputes. *See id.* (indicating Court's stand regarding Congress's intent behind enacting labor statutes).

64. *See id.* at 238 (noting applicability of non-statutory exemption to both employers and employees in order for collective bargaining process to be successful). The Court also reasoned that there is no satisfactory basis for distinguishing football players from other organized workers, and professional athletes must abide by same legal standard as all other workers. *See id.* at 249-50 (explaining Court's disagreement with offering athletes special treatment under labor exemption). The Court acknowledged the Players possess "special" talents, but concluded it would be odd to fashion an antitrust exemption that gave additional advantages to professional athletes but not to all union workers involved in labor disputes. *See id.* (furthering Court's firm stand on not offering athletes special protection under labor exemption).

65. *See id.* at 236-37 (explaining limit on antitrust court's authority for labor disputes). Such a limitation on the federal courts from determining antitrust violations will result in more reasonable and thorough collective bargaining relationships between employers and their employees. *See id.* at 237 (explaining justification for limit on federal courts power to determine antitrust violations).

66. *See id.* at 237 (describing purpose of non-statutory labor exemption to allow meaningful collective bargaining between employers and employees to be shielded from antitrust law). If there were no labor exemption, then the courts would have to constantly decide whether NFL rules are antitrust violations. *See id.* (illustrating difficulty courts would face without labor exemption's protection). The Players and NFL owners would struggle to have meaningful collective bargaining negotiations if the exemption did not exempt such antitrust scrutiny. *See id.* (explaining implications on CBA negotiations in NFL if courts did not enforce labor exemption); s*ee also* Connell Constr. Co., Inc. v. Plumbers and Steamfitters Local Union No. 100, 421 U.S. 616, 622 (1975) (stating, "federal labor law's 'goals' could 'never' be achieved if ordinary anticompetitive effects of collective bargaining were held to violate the antitrust laws").

antitrust courts to determine a host of important practical questions regarding collective bargaining negotiations that the nonstatutory labor exemption seeks to avoid.[67] As a result, the N.L.R.B., not the antitrust courts, retains primary responsibility of policing collective bargaining relationships; as such, it is required to determine "what is socially or economically desirable [CBA] policy."[68]

Furthermore, *Brown* agreed that the labor exemption does not terminate at the point of impasse.[69] Generally, conduct that takes place during or immediately after a collective bargaining negotiation or grows out of, and is directly related to, the lawful operation of collective bargaining is open to the nonstatutory labor exemption.[70] Unless the imposition of terms is sufficiently distant in time and in circumstances from the CBA process, the labor exemption will apply.[71] Thus, decertification is an attempt by the Players to end their collective bargaining relationship with the NFL and bring an antitrust lawsuit challenging the NFL's rules and bargaining tactics under the Sherman Act.[72]

D. Norris-LaGuardia Act

The Norris-LaGuardia Act ("NLGA") is laid out in 29 U.S.C. § 101, and the operative term, "labor dispute," is defined by section 113 of the Act.[73] To understand the purpose of the NLGA, an anal-

67. *See Brown*, 518 U.S. at 240-41 (noting fear of Court to allow antitrust to control over labor laws and how purpose of this exemption is to avoid such antitrust determinations).

68. *See id.* at 242 (laying out scope of labor exemption and how N.L.R.B. primarily controls all CBA-related labor disputes, not antitrust courts).

69. *See id.* at 244-47 (summarizing Court's ruling on whether impasse terminates application of nonstatutory labor exemption). Allowing antitrust courts to determine an appropriate line of impasse has adverse consequences because employers who prematurely conclude the existence of an impasse risk unfair labor practice charges under the labor laws and employers who erroneously conclude there is no such impasse would risk antitrust liability. *See id.* at 246.

70. *See id.* at 250 (stating final ruling of Court for when nonstatutory labor exemption applies to collective bargaining labor disputes).

71. *See id.* (concluding application of labor exemption unless practice is distant from CBA negotiations).

72. *See* Feldman, *supra* note 37 (explaining significance of decertification in eliminating Player's collective bargaining relationship with NFL owners); *see also* Epstein, *supra* note 4 (discussing reasoning behind Players' strategy to decertify in relation to disqualifying NFL from nonstatutory labor exemption). A successful decertification would essentially disqualify the NFL rules from the nonstatutory labor exemption, thus allowing the NFL's rules restraining trade, free agency, and the NFL Draft to be subject to antitrust scrutiny under the Sherman Act. *See id.* (explaining result of successful decertification strategy by Players in regards to scope of labor exemption).

73. *See* 29 U.S.C. § 101 (2006) (citing NLGA's main provision eliminating power of federal court to issue injunction in case involving or growing out of labor

ysis of the history behind its enactment is of significance.[74] "From 1914 and continuing into the New Deal, Congress passed a series of statutes designed to protect organized labor [and the nature of the collective bargaining process] against repeated efforts by courts to order injunctions preventing strikes and other activities by labor unions."[75] Each time Congress attempted to pass a law that precluded courts from entering into injunctions against unions, the courts would find a way around the law and continue to enter injunctions.[76] Thus, Congress enacted the NLGA to fix this problem by expressly prohibiting federal courts from entering injunctions, which effectively shifted some power to employees.[77] There is the view, however, that the NLGA was meant to protect employees and workers, not employers, due to the context of its enactment.[78] Nevertheless, the NLGA does not expressly state its purpose as only to protect employees and workers, so the NLGA's scope hinges upon

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dispute). "No court of the United States, as defined in this chapter, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this chapter." *Id*; *see also* 29 U.S.C. § 113 (citing NLGA's definition of "labor dispute"). The term "labor dispute" includes "any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee." *See id.* (providing definition of "labor dispute" under NLGA).

74. *See* Kennerly, *supra* note 22 (explaining that purpose of Norris LaGuardia Act can be purported from historical context surrounding its enactment). For a more detailed discussion on the Players' use of this argument in *Brady*, see *infra* notes 178-180 and accompanying text.

75. *See* Kennerly, *supra* note 22 (detailing historical context surrounding Act's enactment by Congress). The New Deal is "known to historians as the Progressive Era and to legal historians as the Lochner Era." *See id.* (explaining New Deal in two competing contexts); *see also Norris LaGuardia Act*, AMERICANBUSINESS.ORG (Feb. 2, 2010), http://american-business.org/601-norris-laguardia-act.html (discussing enactment of NLGA). Until the passage of the NLGA, actions by groups of employees such as picketing, strikes, or boycotts were considered criminal and subject to prosecution. *See id.* (explaining legal standard prior to NLGA).

76. *See* Kennerly, *supra* note 22 (describing how courts were working around laws issued by Congress in order to continue entering injunctions against striking unions). One law that courts would navigate around was the Clayton Act. *See id.* (providing example of how labor law courts would work their way around prior to enactment of NLGA).

77. *See id.* (explaining purpose behind Congress's enactment of Norris LaGuardia Act); *see also Norris-LaGuardia Act*, *supra* note 75 (indicating NLGA was major change, reducing industrial managers' use of federal courts to seek injunctions against union activity).

78. *See* Kennerly, *supra* note 22 (asserting that Act was meant to protect employees, not employers). For a more detailed discussion of the Players' argument that NLGA only extends protection to employees in labor dispute, *see infra* notes 176-179 and accompanying text.

the court's determination of whether a "labor dispute" exists or not.[79]

E. History between NFLPA and NFL Owners and Related Case Law with Respect to Prior NFL Labor Disputes

The history between the NFL and the NFLPA is long, and consists of multiple, complex disputes.[80] The first labor dispute between the NFL and the NFLPA occurred in 1957, which was resolved by the Court in *Radovich v. National Football League*.[81] In *Radovich*, the Court held that professional football, unlike Major League Baseball, is not categorically exempt from United States antitrust laws.[82] Under Supreme Court precedent, Major League Baseball enjoys an exemption from the antitrust laws, which no other professional American sports league receives, and the exemption can only be remedied by congressional action, not by judicial

79. *See* Kennerly, *supra* note 22 (indicating, however, that application of Act revolves around whether the court determines case grew out of or involves existence of "labor dispute"). For a more detailed discussion on whether Brady involved or grew out of a "labor dispute," see *infra* notes 146-163 and accompanying text. For a more detailed discussion of the Eighth Circuit's decision on the NLGA's application in *Brady*, see *infra* notes 142-193 and accompanying text.

80. *See Brady I*, 779 F. Supp. 2d 992, 998 (D. Minn. 2011) (discussing longstanding history of labor disputes between NFL and Players); *see also* Donna Walter, *NFL Lockout Can Continue as 8th Circuit Reverses Judge*, MO. LAW. MEDIA (July 8, 2011), molawyersmedia.com/blog/2011/07/08/nfl-lockout-can-continue-as-8th-u-s-circuit-court-reverses-judge/ (discussing both district and Eighth Circuit's opinions in *Brady*); Brady v. Nat'l Football League (*Brady II*), 644 F.3d 661, 664 (8th Cir. 2011) ("Some historical background will place this case in context").

81. *See* Radovich v. Nat'l Football League, 352 U.S. 445 (1957) (presenting first case of labor dispute between both parties). In *Radovich*, Bill Radovich, an NFL player for the Detroit Lions, wanted to move to play in California because of an illness in his family. *See id.* at 448-49 (discussing facts of *Radovich*). The NFL did not allow Radovich to switch teams at his own wish because the NFL assumed they would receive the same exemption from antitrust law that is offered to Major League Baseball. *See id.* (explaining false assumption NFL relied upon when league denied Radovich access to switch teams); *see also Brady II*, 644 F.3d at 664 (presenting historical background of *Brady* and discussing first labor dispute between two parties in *Radovich*).

82. *See Radovich*, 352 U.S. at 452 (holding NFL should not receive categorically exempt antitrust status that Court offers to Major League Baseball); *see also* U.S. v. Int'l Boxing Club of N.Y., 348 U.S. 236, 243-45 (1955) (holding professional boxing is not exempt from antitrust violations under Sherman Act); U.S. v. Shubert, 348 U.S. 222, 228-31 (1955) (declining to extend antitrust exemption beyond business of professional baseball to "every business based on the live presentation of local exhibitions"); Fed. Baseball Club v. Nat'l League, 259 U.S. 200, 209 (1922) (citing Supreme Court case holding business of baseball is exempt from antitrust scrutiny). The business of baseball is confined to sporting events, which are wholly state affairs and are not interstate commerce. *See id.* at 208 (explaining brief reasoning by Court for baseball's antitrust exemption); Flood v. Kuhn, 407 U.S. 258, 282-83 (1972) (acknowledging Supreme Court case holding baseball enjoys level of antitrust exemption that other sports do not).

holdings.[83] In 1968, the National Labor Relations Board recognized the NFLPA as a union, which made it the exclusive bargaining representative for all NFL professional football players.[84] Also in 1968, the NFLPA and the NFL owners entered into their first CBA.[85]

Subsequently, in 1972, several NFL Players filed an antitrust lawsuit against the NFL, which the Eighth Circuit resolved in *Mackey v. National Football League*.[86] In *Mackey*, the Players challenged the NFL's "Rozelle Rule," which governed free agency and restricted player movement.[87] The Eighth Circuit did not apply the nonstatutory labor exemption to the dispute in *Mackey* and decided to strike down the Rozelle Rule.[88] As a result, the *Mackey* decision forced the

83. *See Flood*, 407 U.S. at 282 (explaining limited scope of antitrust exemption to baseball only); *see also* Major League Baseball v. Crist, 331 F.3d 1177, 1183 (11th Cir. 2003) (holding antitrust exemption applies to "business of baseball," which offers broad application of exemption). The Eleventh Circuit held under the Supremacy Clause that the federal antitrust exemption the MLB enjoys precludes the application of state antitrust law to the business of baseball. *See id.* at 1186 (explaining preclusion of MLB exemption from state antitrust laws).

84. *See History*, NFLPLAYERS.COM, https://www.nflplayers.com/about-us/History/ (last visited Jan. 29, 2012) (presenting history of NFLPA and significant court rulings regarding NFLPA's existence and powerful growth). It is interesting to note that the NFLPA was formed in 1956, but not recognized as the NFL Players union by the N.L.R.B. until later on in 1968. *See id.* (explaining when NFLPA were recognized by N.L.R.B. as exclusion union representative of NFL Players).

85. *See Brady II*, 644 F.3d at 663-64 (presenting detailed narration of collective bargaining relationship between NFLPA and NFL owners from its inception in 1956). Since then, the relationship between the League and its Players has been punctuated by both CBA and antitrust lawsuits. *See id.* at 664 (describing ongoing relationship between both parties since first CBA agreement).

86. *See id.* at 664 (explaining *Mackey* case plays significant role in *Brady*). The Players alleged that the NFL's policy with respect to free agents violated the Sherman Act. *See id.* (explaining Players' complaint in *Mackey*); *see also* Mackey v. Nat'l Football League, 543 F.2d 606, 615 (8th Cir. 1976) (citing *Mackey* case, which considered antitrust violation claims by Players regarding NFL-imposed rules restricting player movement in free agency); *History*, *supra* note 84 (detailing history of NLFPA and prior labor disputes with NFL). John Mackey, who was the President of the NFLPA at the time of the suit, was the Plaintiff in *Mackey*. *See id.* (naming John Mackey as plaintiff in *Mackey*).

87. *See Mackey*, 543 F.2d at 609 (stating facts of *Mackey* case). The Players in *Mackey* argued that the rule was "significantly more restrictive than necessary" to serve any legitimate purpose of maintaining the competitive balance of the NFL. *See id.* at 622 (explaining NFL rule at issue in *Mackey*); *see also Brady II*, 644 F.3d at 664 (discussing *Mackey* and its significance).

88. *See Mackey*, 543 F.2d at 614 (stating Eighth Circuit's holding and three-prong test for application of nonstatutory labor exemption). The NFL defended the claim by arguing that the league was participating under a collective bargaining relationship with the NFLPA, and thus, their actions should have been protected by the nonstatutory labor exemption. *See id.* at 611-12 (explaining NFL's argument in *Mackey*). The court held an application of the nonstatutory labor exemption required: (1) that the restraint "primarily affects only the parties to the collective bargaining relationship," (2) that the agreement subject to the protec-

NFL owners in 1977 to negotiate for a new CBA, which substantially benefitted the Players.[89] Thus, the lasting effect of *Mackey* was a substantial increase in collective bargaining leverage for the Players.[90]

In 1982, the Players chose to engage in a fifty-seven day strike before agreeing on a new CBA with the owners, which again modified the free agency system in the Players' favor.[91] The CBA then expired in 1987, and as negotiations for a new CBA stalled, the Players conducted another strike.[92] This dispute was resolved through another antitrust lawsuit in *Powell v. National Football League*.[93] The Eighth Circuit, unlike *Mackey*, applied the nonstatutory labor exemption, and protected the NFL from the Players' antitrust claims.[94] The court concluded that the nonstatutory labor exemp-

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tion of the exemption "concerns a mandatory subject of collective bargaining relationship," and (3) that the agreement "is the product of bona fide arm's length bargaining." *See id.* at 614 (presenting Eighth Circuit's three-prong test for application of nonstatutory labor exemption in *Mackey*). Although the Rozelle Rule satisfied prongs one and two, the Eighth Circuit found that the third prong, product of bona fide arm's-length bargaining, was not satisfied. *See id.* at 615-16 (explaining holding of *Mackey* with respect to scope of nonstatutory labor exemption to "Rozelle Rule").

89. *See* Wells, *supra* note 9, at 96-97 (detailing effect of *Mackey* on 1976 CBA negotiations between NFL owners and NFLPA). The new CBA after *Mackey* implemented a revised system of free agency known as "right of first refusal/compensation." *See id.* (explaining subsequent effect on NFL free agency following *Mackey*); *see also Brady I*, 779 F. Supp. 2d at 992 (indicating NFL settled dispute with NFLPA for $13 million in damages after Eighth Circuit knocked out Rozelle Rule in *Mackey*); *Brady II*, 644 F.3d at 664 (detailing background history of relationship between NFLPA and NFL owners).

90. *See* Wells, *supra* note 9, at 97 (arguing Players' strategy to file antitrust lawsuit was successful in that it increased their bargaining power in collective bargaining negotiations with NFL in 1976, and led to better deal for Players); *see also* 15 U.S.C. § 15 (2006) (referring to Clayton Act, which allows for antitrust suits to be powerful weapon for employees, or players in case of sports litigation, because Act provides for treble damages upon successful suit).

91. *See Brady II*, 644 F.3d at 664 (narrating events leading up to *Brady* litigation). The result was a modification of the "right of first refusal" system that was implemented after *Mackey*. *See id.* (explaining modification to free agency system in NFL).

92. *See id.* (detailing facts leading up to *Powell* suit). The strike lasted until October 1987; again, the dispute was over modifications to the NFL's free agency system. *See id.* (presenting facts of *Powell* case).

93. *See id.* (discussing how *Powell* case was another stepping block in labor relationship between NFL owners and Players). In *Powell*, the Players alleged, among other things, that the NFL's free agency restrictions violated the Sherman Act. *See id.* (discussing Players' complaint in *Powell*); *see also* Powell v. Nat'l Football League, 930 F.2d 1293, 1295 (8th Cir. 1989) (citing decision by Eighth Circuit in *Powell*); Wells, *supra* note 9, at 98 (acknowledging *Powell* case was brought in name of Marvin Powell, President of NFLPA at time of lawsuit).

94. *See Brady II*, 644 F.3d at 664 (explaining Court's application of nonstatutory labor exemption to Players' antitrust claims under *Powell*); *see also* Brown v. Pro

tion is applicable beyond an impasse in collective bargaining negotiations, and that the exemption was appropriate because the parties could resolve their issues through use of labor law.[95] The court declined, however, to determine a suitable termination point for the labor exemption's scope.[96]

In 1989, just days after the *Powell* holding was issued, the Players elected to decertify.[97] As a result, in 1990, eight individual professional football players brought a new antitrust action in *McNeil v. National Football League*.[98] A jury sided with the Players, and rendered a verdict awarding substantial damages in their favor.[99]

Football, Inc., 518 U.S. 231, 236-37 (1996) (citing another case where Court analyzed and applied nonstatutory labor exemption to NFL labor dispute). For a more detailed discussion on the *Mackey* decision by the Eighth Circuit, see *supra* notes 86-90 and accompanying text. For a more detailed discussion on *Brown* and the nonstatutory labor exemption, see *supra* notes 61-72 and accompanying text.

95. *See Brady II*, 644 F.3d at 664 (presenting Court's reasoning for its application of nonstatutory labor exemption under *Powell*). The court, when referring to use of labor law, meant the parties could still resolve their differences through use of "offsetting" strategies such as strikes, lockouts, and petitions for review by the N.L.R.B. *See id.* (explaining *Powell* court's use of term "labor law").

96. *See id.* (noting Court's unwillingness to decide on suitable termination point for application of nonstatutory labor exemption). The Court failed to determine a termination point for the nonstatutory exemption's scope under a collective bargaining relationship. *See id.* (detailing court's unwillingness to determine termination point for labor exemption in *Powell*); *see also Powell*, 930 F.2d at 1302-03 (detailing court's application of nonstatutory labor exemption and decision to avoid any determination of termination point for exemption's scope after impasse).

97. *See Brady II*, 644 F.3d at 665 (discussing NFLPA's strategy to decertify as union and its reasoning for utilizing such strategy). By decertifying, the NFLPA was no longer the Players' exclusive collective bargaining representative. *See id.* (explaining result of successful NFLPA decertification). The NFLPA subsequently enacted its bylaws, prohibiting the NFLPA from engaging in collective bargaining with the NFL. *See id.* (detailing subsequent enactment of NFLPA's bylaws following decertification). The Players were hopeful this strategy would successfully eliminate the NFL's nonstatutory labor exemption from the Players' antitrust attack. *See id.* (explaining Players' desired result following decertification).

98. *See id.* (detailing how eight players, in attempt to get around nonstatutory labor exemption, brought antitrust suit as individuals, not as NFLPA); *see also* McNeil v. Nat'l Football League, No. 4-90-476, 1992 WL 315292, at *1 (D. Minn. 1992) (citing *McNeil* holding). The players contended that the NFL's player restraints during the 1990-91 season violated Section 1 of the Sherman Act. *See id.* at *1 (citing Players' complaint in *McNeil*). Specifically, the Players claimed that the Right of First Refusal/Compensation rules under Plan B free agency limited the movement of football players after their contracts expired and this constituted an agreement by the NFL teams to unreasonably restrain Player movement. *See id.* (detailing Players' complaint in regards to NFL free agency rules).

99. *See Brady II*, 644 F.3d at 665 (presenting jury verdict of *McNeil*); *see also McNeil*, 1992 WL 315292, at *1 (indicating jury's verdict to award players substantial damages in recognition of NFL's rules violating section 1 of Sherman Act).

McNeil opened the floodgates for the Players, who immediately filed two more antitrust suits: *Jackson v. National Football League,*[100] and *White v. National Football League.*[101] In January 1993, both parties resolved the *White* class action suit, and all other related cases, through a tentative "Stipulation and Settlement Agreement" ("SSA").[102] The Players subsequently collected authorization cards, which re-certified the NFLPA as the exclusive collective bargaining representative of the Players, and the NFL voluntarily recognized the NFLPA as the Players' union.[103] The NFLPA and the owners then amended the SSA to conform to the provisions of a new CBA, and the terms of the SSA were incorporated by a consent decree.[104]

Moreover, the Supreme Court has decided two significant cases regarding the NFL and its vulnerability to antitrust scrutiny.[105]

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100. 802 F. Supp. 226 (D. Minn. 1992) (citing *Jackson* opinion). The ten NFL players who brought this suit were Keith Jackson, D.J. Dozier, Thomas Everett, Louis Lipps, Stephone Paige, Joseph Phillips, Webster Slaughter, Natu Tuatagaloa, Garin Veris, and Leon White. *See id.* (listing plaintiffs in *Jackson*). The NFL Players brought suit alleging that the NFL's free agency restrictions were in violation of the Sherman Act. *See id.* at 228-29 (detailing allegations included in players' complaint in *Jackson*).

101. *See* White v. Nat' Football League, 822 F. Supp. 1389, 1389 (D. Minn. 1993) (citing *White* decision by District Court in Minnesota). The *White* suit was brought by five NFL players: Reggie White, Michael Buck, Hardy Nickerson, Vann McElroy, and Dave Duerson. *See id.* (listing plaintiffs in *White*). These players filed this class action suit alleging that various practices of the NFL, including free agency restraints, the college Player draft, and the use of standard NFL player contracts violated the antitrust laws. *See id.* at 1395 (detailing players' complaint against NFL in *White*). The Players filed these two antitrust suits within a two-week period following the *McNeil* decision in the District Court in Minnesota, which falls under the jurisdiction of the Eighth Circuit Court of Appeals. *See id.* (explaining Eighth Circuit's ties to both *Jackson* and *White*); *see also Brady II*, 644 F.3d at 665 (discussing how *McNeil* decision allowed for more Players to attack NFL's free agency rules under Sherman Act in order to further increase Players' collective bargaining leverage with NFL owners).

102. *See Brady II*, 644 F.3d at 665 (discussing resolution of *White* lawsuit and other related antitrust lawsuits by Players through Stipulation and Settlement Agreement by both parties); *see also White*, 836 F. Supp. at 1458 (D. Minn. 1993) (citing opinion of District Court of Minnesota that granted amendment and approval of Stipulation and Settlement Agreement between both parties).

103. *See Brady II*, 644 F.3d at 665 (acknowledging Players' decision to authorize the NFLPA as their exclusive bargaining representative, which allowed NFLPA to once again form as union and collectively bargain new CBA with owners on behalf of Players).

104. *See id.* (indicating both sides agreed on new CBA and incorporated terms of court approved SSA into new CBA); *see also White*, 836 F. Supp. at 1508 (citing consent decree entered into by District Court of Minnesota approving terms of SSA).

105. *See Brady II*, 644 F.3d at 665-66 (indicating importance of these two Supreme Court rulings on antitrust vulnerability of NFL in regards to collective bargaining and immunity from antitrust scrutiny); *see also* Meir Feder, *Is there Life After Death for Sports League Immunity? American Needle and Beyond*, 18 VILL. SPORTS & ENT.

First, as noted, the Court decided *Brown v. Pro Football, Inc.*[106] The second case, decided in 2010, was *American Needle, Inc. v. National Football League.*[107] In *American Needle*, the Court held that when the NFL teams cooperated together to market their intellectual property, their conduct was "concerted action not categorically beyond the coverage of [section] 1 of the Sherman Act."[108] Even though all NFL teams share collective interests in making the league successful and profitable, no justification for treating NFL teams as a "single entity" for purposes of section 1 of the Sherman Act.[109] As a result, *American Needle* clarified that it is possible for the NFL teams

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L.J. 407, 407 (detailing significance of *American Needle* to future of professional sports leagues and their potential for antitrust attack).

106. *See Brady II*, 644 F.3d at 665 (detailing importance of *Brown* decision in NFL's scope of nonstatutory labor exemption); *see also* Brown v. Pro Football, Inc., 518 U.S. 213, 250 (1996) (citing Court's four-prong test regarding scope of nonstatutory labor exemption). The Court issued a four-prong test that limited the applicability of the nonstatutory labor exemption to employer conduct, which:

> (1) [T]ook place during and immediately after a collective bargaining negotiation, (2) grew out of, and was directly related to, the lawful operation of the bargaining process, (3) involved a matter that the parties were required to negotiate collectively, and (4) concerned only the parties to the collective bargaining relationship.

Id. (presenting Court's four-prong test regarding scope of nonstatutory labor exemption). For a more detailed discussion on *Brown* and its application of the nonstatutory labor exemption, see *supra* notes 61-72 and accompanying text.

107. *See* Am. Needle, Inc. v. Nat'l Football League, 130 S. Ct. 2201, 2201 (2010) (citing *American Needle* opinion); *see also Brady*, 644 F.3d at 666 (discussing *American Needle* case and its relation to *Brady* litigation); Feder, *supra* note 105 (detailing how prior to *American Needle*, various professional sports leagues for decades pursued variation on "special characteristics" argument for antitrust immunity for sports leagues); *see generally* Gregory J. Werden, *American Needle and the Application of the Sherman Act to Professional Sports Leagues*, 18 VILL. SPORTS & ENT. L.J. 395, 395-406 (illustrating implications of *American Needle* to future of professional sports leagues).

108. *See Brady II*, 644 F.3d at 666 (indicating holding of *American Needle* and significance of Court's decision); *see also Am. Needle*, 130 S.Ct. at 2216 (citing *American Needle* opinion issued by Court); Feder, *supra* note 105, at 408 ("[T]hese leagues argued that the inherent need for cooperation to produce league sports made league members effectively a 'single entity'"). The leagues and their member clubs argue they are not subject to section 1 scrutiny, which addresses only agreements among multiple actors combining to suppress competition. *See id.* (explaining argument made by NFL in *American Needle*). "Where a venture is controlled by independent entities with potentially distinct interests, any agreement among them represents the joining together of potentially independent economic forces and, therefore, constitutes concerted action subject to section 1." *Id.* at 420.

109. *See Brady II*, 644 F.3d at 666 (summarizing Court's holding in *American Needle* regarding NFL teams' vulnerability to attack under section 1 of Sherman Act); *see also Am. Needle*, 130 S.Ct. at 2216-17 (citing holding of Court in *American Needle*); Feder, *supra* note 105, at 408 (presenting *American Needle* opinion). "Unanimously rejecting any special sports league exemption from antitrust scrutiny, the [C]ourt held that an agreement among separately owned and controlled sports teams, like all other concerted conduct, must be judged by its competitive effects." *Id.*

to be sued under antitrust laws as independently owned and independently managed businesses.[110]

III. FACTS

A. Narration of Events Directly Leading Up to *Brady v. NFL* Litigation

The Plaintiffs in *Brady v. National Football League*[111] were nine professional football players and one prospective professional football player who have been or seek to be employed by the defendants, the NFL.[112] The plaintiffs filed suit on behalf of themselves and similarly situated players, seeking a declaratory judgment, monetary damages, and injunctive relief enjoining the NFL owners from locking them out for the 2011-2012 football season.[113]

Since 1993, the Players and the NFL have operated under the SSA from *White*, with the District Court in Minnesota overseeing and approving all amendments and disputes.[114] In 2006, the SSA was amended when the NFL and the Players reached a new CBA that was supposed to last through the 2012-2013 season.[115] The 2006 SSA and CBA, however, allowed each side to opt out of the

110. *See* Kennerly, *supra* note 22 (articulating narrow holding of *American Needle* Court and how it is legally possible to sue individually owned teams under antitrust laws); *see also* Feder, *supra* note 105, at 407-08 (examining *American Needle* opinion and effect on professional sports leagues' antitrust immunity). "In short, *American Needle* appeared to be the end of the line for what one commentator aptly termed the 'holy grail' of professional sports leagues – the prospect of immunity from section 1 scrutiny." *Id.* at 408.

111. 779 F. Supp. 2d 992 (*Brady I*) (D. Minn. 2011) (citing district court opinion in *Brady*); *see also* Brady v. Nat'l Football League, 644 F.3d 661 (*Brady II*) (8th Cir. 2011) (citing Eighth Circuit's decision in *Brady I*).

112. *See Brady I*, 779 F. Supp. 2d at 992 (stating names of parties in lawsuit). The suit was filed by Players Tom Brady, Drew Brees, Vincent Jackson, Ben Leber, Logan Mankins, Peyton Manning, Vonn Miller, Brian Robison, Osi Umenyiora, and Mike Vrabel. *See id.* (listing plaintiffs in *Brady*). Vonn Miller was the prospective professional football player in the group; the rest were current NFL players. *See id.* at 1037 (explaining NFL status of players involved in *Brady*).

113. *See id.* at 1004 (providing Players' claims against NFL owners). The Players in *Brady* alleged antitrust violations and breach of contract in response to the lockout imposed by the Defendants, the owners. *See id.* (detailing players' complaint in *Brady*).

114. *See Brady II*, 644 F.3d at 666 (discussing how Players and NFL owners have operated CBA and SSA amendments and settlements over past eighteen years). "Whenever the NFL and the [Players] have agreed to change a provision in the CBA, a conforming change has also been made to the SSA." *Id.* "The SSA has been amended several times over the past eighteen years, most recently in 2006, when the NFL and the NFLPA reached an agreement on a new CBA . . . ." *Id.*

115. *See id.* (recounting 2006 CBA and amendment to SSA by both parties).

final two years of both agreements pursuant to written notice.[116] In May 2008, the NFL owners chose to exercise their right to opt out, "citing concerns about operating costs and other elements of the agreements."[117] The SSA and CBA were then set to expire in March 2011.[118] Although both sides negotiated for more than two years, an agreement was not imminent as that expiration deadline approached.[119] As a result, the NFL filed an unfair labor practice charge with the N.L.R.B. in February 2011.[120] The Players, as expected, claimed that the charge was meritless.[121]

On March 11, 2011, as the deadline approached, the NFLPA notified the NFL at 4:00 p.m. that it chose to decertify as a union, thus disclaiming interest as the Players' collective bargaining representative.[122] The NFL responded by filing an amended unfair labor practice charge with the N.L.R.B., asserting that the NFLPA's dis-

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116. *See id.* (explaining opt-out clause in 2006 CBA, which provided each party with ability to opt-out of CBA as long as written notice was provided to opposing party).

117. *See id.* (noting NFL owners' strategy to opt out of 2006 CBA in 2008, referencing operating costs and other reasons for decision); *see also* Wells, *supra* note 9, at 101 (detailing issues between NFL and NFLPA at time NFL owners opted out of agreement). The first concern of the NFL owners was that the players were receiving too high of a percentage of league revenue. *See id.* (explaining one concern of NFL owners at time of *Brady*). At the time, the Players were receiving 59 percent of the revenues, which the owners felt was too high in order for the league to grow because costs incurred by the owners were increasing at a faster rate than league revenues. *See id.* (reiterating why NFL owners wanted to alter revenue split with Players). Owners also felt that they were bearing the brunt of costs of financing new stadiums, whereas the Players were not presently affected. *See id.* (expressing NFL owners' concern regarding increased stadium costs).

118. *See id.* (declaring expiration of 2006 SSA and CBA following NFL owners' decision to opt out).

119. *See id.* at 666-67 (explaining that both sides engaged in over two years of negotiations but failed to reach compromise). The agreement was set to expire at 11:59 p.m. on March 11, 2011. *See id.* 668 (stating specifics of CBA expiration).

120. *See id.* at 667 (discussing NFL's unfair labor practice charge against NFLPA to N.L.R.B. for failing to bargain collectively in good faith). In this charge, the owners asserted "that the [NFLPA] failed to confer in good faith." *See id.* (detailing owners' complaint to N.L.R.B.).

121. *See id.* (asserting Players' response to N.L.R.B. charge and resulting tension between both parties).

122. *See id.* (presenting Players' strategy to decertify as union and disclaim all future exclusive collective bargaining interest with NFL owners). The SSA and CBA were set to expire at 11:59 p.m. on March 11, 2011. *See id.* at 668 (stating SSA and CBA expiration time). The union's actions went as follows:

> The NFLPA also amended its bylaws to prohibit collective bargaining with the League or its agents, filed a labor organization termination with the Department of Labor, asked the Internal Revenue Service to reclassify the NFLPA as a professional trade association rather than a labor organization, and notified the NFL it would no longer represent players bringing grievances against the League.

Id. at 667.

claimer "was a 'sham' and that the combination of a disclaimer by the union and the subsequent antitrust litigation was . . . an unlawful subversion of the collective bargaining process."[123] The NFLPA then responded directly to the N.L.R.B. claim.[124]

The Players commenced this action on March 11, 2011 in the District Court of Minnesota, asserting four claims against the league.[125] First, the nonstatutory labor exemption did not apply because the Players "have ended the role of the NFLPA as their collective bargaining representative and no longer have a collective bargaining relationship with the NFL."[126] Second, the NFL's planned lockout was "an illegal group boycott and price-fixing arrangement that violated [section] 1 of the Sherman Act."[127] Third,

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123. *See id.* (commenting on NFL's response to NFLPA's disclaimer strategy and league's assertion that disclaimer was "sham").

124. *See id.* (recognizing NFLPA's memorandum discussing disclaimer strategy and reason why it should be upheld against NFL's "sham" assertion); *see also* Pittsburgh Steelers, Inc., No.6-CA-23143, 1991 WL 144468, at *2 n.8 (N.L.R.B. G.C. June 26, 1991) (citing memorandum of associate general counsel of N.L.R.B. that concluded NLFPA's 1989 disclaimer was valid and "it was irrelevant whether the disclaimer was motivated by 'litigation strategy' . . . so long as the disclaimer was otherwise unequivocal and adhered to"). The NFLPA's response cited a previous memorandum of an associate general counsel of the N.L.R.B., which upheld the validity of its 1989 decertification, and that it was "irrelevant whether [its] disclaimer was motivated by litigation strategy." *See id.* (detailing NFLPA's response requesting its motive for decertification to be irrelevant under N.L.R.B. review).

125. *See Brady II*, 644 F.3d at 667 (acknowledging NFLPA's role in funding Players' lawsuit against NFL when suit was commenced and fact that it was commenced in District Court in Minnesota – same district where all prior NFL lawsuits have been commenced). The Plaintiffs were funded by the "disclaimed" NFLPA in their lawsuit against the league. *See id.* (addressing how Players funded their lawsuit against NFL). Of the ten Plaintiffs listed to the action, four are under contract with an NFL team, five are free agents, and one is a prospective player who participated in the 2011 NFL draft and was ultimately selected by an NFL team. *See id.* (listing NFL status of plaintiffs in *Brady*). For a more detailed discussion on the plaintiffs in *Brady* and allegations in their complaint, see *supra* notes 111-113 and accompanying text.

126. *See Brady II*, 644 F.3d at 667 (stating Players' complaint that collective bargaining relationship between NFL and Players no longer exists). The Players specifically asserted that under *Brown*'s test determining the proper applicability of the labor exemption, the exemption should no longer protect the NFL from antitrust liability because the Players have successfully ended their collective bargaining relationship with the league. *See id.* (providing Players' argument for why Eighth Circuit should not apply nonstatutory labor exemption in *Brady*). For a more detailed discussion on *Brown* and the court's test for applying the nonstatutory labor exemption, see *supra* notes 61-72 and accompanying text.

127. *See Brady II*, 644 F.3d at 667 (expressing Players' complaint against NFL owners' planned lockout and how it violated section 1 of Sherman Act). The Plaintiffs argued that the owners worked together to boycott the Players through their lockout strategy in an attempt to ensure their own individual financial objectives. *See id.* (explaining Players' argument for why lockout was "illegal group boycott" by NFL owners).

the planned lockout violated state contract and tort laws.[128] Fourth, the NFL planned to institute or continue several anticompetitive practices that were in violation of the Sherman Act.[129]

The SSA and CBA expired at 11:59 p.m. on March 11, 2011.[130] At 12:00 a.m. on March 12, the NFL instituted a league-wide lockout of its players.[131] The lockout prohibited players from entering NFL club facilities, receiving compensation or benefits, and performing any employment duties such as playing, working out, attending meetings, making promotional appearances, and consulting league medical and training personnel.[132]

On April 25, 2011, Judge Susan Nelson rejected the NFL's defenses and granted the Players' motion to enjoin the lockout.[133]

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128. *See id.* (detailing Players' reasoning behind assertion in complaint that NFL owners' planned lockout also violated state contract and tort laws). The Players argued that the lockout violated contract law by depriving NFL players of "contractually owed compensation," and that it also violated tort law by interfering with existing player contracts as well as opportunities to enter into new contracts with NFL teams. *See id.* (explaining Players' contract and tort claims in *Brady*).

129. *See id.* at 667-68 (indicating that Players' complaint reaches farther than just owners' planned lockout; complaint alleges antitrust violations regarding NFL rules that owners plan to institute or continue to uphold throughout its thirty-two member clubs). The practices alleged included limits on compensation to recently drafted "rookie" players, a salary cap on current players, and "franchise player" and "transition player" labels that restrict the ability of free agents to play for any team other than their former team. *See id.* (detailing planned practices NFL teams were considering, which were alleged by Players to be in violation of antitrust laws).

130. *See id.* at 668 (indicating expiration of SSA and CBA followed by immediate league-wide lockout imposed by NFL owners).

131. *See id.* (describing lockout imposed by NFL owners and which individuals' lockout affected for employment purposes). "The lockout included professional football players under contract, free agents, and prospective players who have been drafted by or entered into negotiations with an NFL club." *Id.* (explaining scope of NFL lockout). For a more detailed discussion on employer-imposed lockouts, see *supra* notes 37-44 and accompanying text.

132. *See Brady II*, 644 F.3d at 668 (illustrating extent of lockout and its prohibition on almost all contact between NFL players and member clubs). The NFL "also notified the players they could be required to report back to work immediately 'once a new labor agreement is reached,'" which hindered the Players' ability to seek other employment outside of football. *Id.* (noting how lockout harmed Players' ability to secure alternative employment).

133. *See id.* (stating Judge Nelson's ruling to enjoin lockout, and denial of NFL's three main points in opposition). The NFL had argued in defense that the district court lacked jurisdiction to enter the injunction, the district court should defer to the primary jurisdiction of the N.L.R.B. for this matter, and the NFL is immune from antitrust attack under the nonstatutory labor exemption. *See id.* (expressing NFL's defenses to claims made by Players in *Brady*); *see also* Brady v. Nat'l Football League (*Brady I*), 779 F. Supp. 2d 992, 1042-43 (D. Minn. 2011) (citing Judge Nelson's decisions to enjoin NFL owners from further locking out NFL Players, not apply nonstatutory labor exemption to Players' antitrust claims, and that district court had jurisdiction to enter injunction under circumstances presented).

The court concluded the Norris LaGuardia Act ("NLGA") was inapplicable because the term "labor dispute" connotes a dispute between an employer and a union, and the Act does not apply "absent the existence of a union."[134] In the court's view, once the Players decertified their union, the dispute between the league and the Players ceased to be a "labor dispute" for purposes of the NLGA.[135] Furthermore, the district court refused to apply the nonstatutory labor exemption because the exemption applies only to agreements concerning "mandatory subjects of collective bargaining," which does not encompass an employer lockout.[136] The court distinguished this case from *Brown* on the basis that the parties "have left the collective bargaining framework entirely."[137] Finally, the court "declined to stay the action pending the N.L.R.B.'s resolution of the League's unfair labor practice charges . . . because the delay could cause significant hardship for the plaintiffs."[138]

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134. *See Brady II*, 644 F.3d at 668 (quoting district court's ruling and analysis relating to appropriate circumstances for applying Norris LaGuardia Act only to "labor dispute(s)" and defining term). The NLGA restricts the power of federal courts to issue injunctions in cases "involving or growing out of a labor dispute." *See id.* (explaining scope of NLGA in federal courts); *see also Brady I*, 779 F. Supp. 2d at 1026-32 (citing district court opinion and reasoning behind court's conclusion to apply Norris LaGuardia Act only to "labor dispute(s)" and analyzes court's definition of term "labor dispute" under facts of specific case). For a more detailed discussion on the history and context of the Norris-LaGuardia Act, see *supra* notes 73-79 and accompanying text.

135. *See Brady II*, 644 F.3d at 668 (recounting district court's application of Norris LaGuardia Act to specific facts presented in *Brady* and why NLGA did not apply); *see also Brady I*, 779 F. Supp. 2d at 1031-32 (citing district court's opinion regarding why Norris LaGuardia Act did not apply to facts in *Brady*). For a more detailed discussion on NLGA's definition of operative term "labor dispute," see *supra* note 73 and accompanying text.

136. *See Brady II*, 644 F.3d at 668-69 (detailing district court's reasoning for holding that nonstatutory labor exemption does not apply to labor dispute in *Brady*); *see also Brady I*, 779 F. Supp. 2d at 1039-42 (citing district court opinion with same holding). For a more detailed discussion on the nonstatutory labor exemption and its scope, *see supra* notes 54-72 and accompanying text.

137. *See Brady II*, 644 F.3d at 669 (quoting district court's view as to why *Brown* is distinguishable from facts presented in *Brady*); *see also Brady I*, 779 F. Supp. 2d at 1040-41 (distinguishing *Brady* from *Brown* on basis that parties in *Brady* are no longer within collective bargaining framework because of Players' decertification). For a more detailed discussion on the nonstatutory labor exemption and *Brown*, see *supra* notes 54-72 and accompanying text.

138. *See Brady II*, 644 F.3d at 668 (acknowledging district court's decision to decline to stay action pending N.L.R.B. resolution of NFL's pending charge against Players for unfair labor practices). The significant hardship articulated was the harm that the Players would suffer if the owners could bar them from playing or practicing football for an extended period of time. *See id.* at 669 (explaining harm to Players); *see also Brady I*, 779 F. Supp. 2d at 1019 (citing district court's decision to decline to stay action regardless of N.L.R.B.'s decision). The district court also declined the NFL's motion for a stay pending appeal. *See id.* at 1042 (summarizing overall findings). For a more detailed discussion on the NFL's un-

The district court's order posed serious implications on the operation of the NFL.[139] The NFL immediately appealed to the Eighth Circuit Court of Appeals, and the Eighth Circuit granted the NFL's motion to expedite the appeal and its motion for a stay of the district court's order pending appeal.[140] Ultimately, the Eighth Circuit vacated the district court's motion granting the lockout.[141]

IV. ANALYSIS OF THE EIGHTH CIRCUIT'S DECISION IN *BRADY*

A. Narrative Analysis

1. *Is this a Labor Dispute?*

The Eighth Circuit's opinion initially considered whether the Norris-LaGuardia Act deprived the district court of jurisdiction to enjoin the NFL lockout.[142] The court indicated that Congress, in enacting the NLGA in 1932, "was intent upon taking the federal courts out of the labor injunction business except in the very limited circumstances left open for federal jurisdiction under the [NLGA]."[143] Although "[t]he impetus for the NLGA was dissatisfaction with injunctions entered against workers in labor disputes

fair labor practice charges to the N.L.R.B., see *supra* note 123 and accompanying text.

139. *See Brady II*, 644 F.3d at 669 (stating that "the [district] court's order meant that the League must allow the Players under contract to play football, attend practice sessions, and collect compensation, and that the League had to provide free agents and rookies with an opportunity to market their services to potential employers.").

140. *See id.* (explaining NFL's decision to appeal, objecting to district court's application of Norris LaGuardia Act, nonstatutory labor exemption, and primary doctrine of jurisdiction to Eighth Circuit); *see also* Brady v. Nat'l Football League, 640 F.3d 785 (8th Cir. 2011) (granting NFL's motion for stay of district court's order pending appeal).

141. *See Brady II*, 644 F.3d at 682 (referencing Eighth Circuit's final holding in *Brady*). For a more detailed discussion on the Eighth Circuit's opinion in *Brady*, see *infra* notes 142-193 and accompanying text.

142. *See Brady II*, 644 F.3d at 669 (detailing first issue Eighth Circuit discussed in *Brady* opinion). For a more detailed discussion of the district court's opinion on the Norris LaGuardia Act, see *supra* notes 133-138 and accompanying text.

143. *See Brady II*, 644 F.3d at 669 (describing that Congress's intent in enacting Norris-LaGuardia Act was to curtail federal court authority to issue injunctions in labor disputes); *see also* Marine Cooks & Stewards, AFL v. Panama S.S. Co., 362 U.S. 365, 369 (1960) (quoting Congress's intent behind Norris LaGuardia Act's enactment regarding labor disputes and issuing injunctions). The Supreme Court has determined the NLGA responded directly to the Court's construction of section 20 of the Clayton Act. *See id.* at 371 (evaluating purpose behind NLGA's enactment); Duplex Printing Press Co. v. Deering, 254 U.S. 443, 478-79 (1921) (exemplifying firm decision where federal court entered into or upheld injunction in labor dispute); Burlington N. R.R. Co. v. Bhd. of Maint. of Way Emps., 481 U.S. 429, 453 (1987) (presenting example of decision where federal court entered into or upheld injunction in labor dispute).

. . . the statute also requires that injunctions against an employer participating in a labor dispute must conform to the [NLGA]."[144] Thus, the first issue to be decided was whether the NLGA applied to the district court's injunction against the lockout.[145]

In order to make this determination, the court began with the text of section 1 of the NLGA.[146] As noted, the district court had concluded that section 1 was inapplicable in *Brady* because the disagreement was not one that involved or was growing out of a "labor dispute."[147] The Eighth Circuit stated that the operative term here, "labor dispute," is defined by section 13(c) of the NLGA.[148]

In applying section 13(c), the Eighth Circuit disagreed with the district court's conclusion that this case did not "involve or grow out of a labor dispute."[149] The court reasoned that this lawsuit was a controversy concerning terms of employment and that the Players sought "broad relief that would affect the terms or conditions of employment for the entire industry of professional football."[150] In

144. *See Brady II*, 644 F.3d at 670 (illustrating requirement under NLGA that injunctions against employers, such as injunction district court granted against NFL, must be in conformity with provisions of NLGA). For a more detailed discussion on the impetus and context behind the NLGA's enactment, see *supra* notes 73-79 and accompanying text.

145. *See Brady II*, 644 F.3d at 670 (noting Eighth Circuit's next step in analyzing whether NLGA applies to district court's injunction).

146. *See id.* (explaining that Eighth Circuit began with text of NLGA in order to determine first issue); *see also* 29 U.S.C. § 101 (2006) (citing textual language of section 1 of NLGA). "No court of the United States . . . shall have jurisdiction to issue any . . . temporary or permanent injunction in a case involving or growing out of a labor dispute, except in strict conformity with the provisions of this chapter . . . ." *Id.*

147. *See Brady II*, 644 F.3d at 670 (reciting district court's reasoning for not applying NLGA to facts presented in *Brady*). For a more detailed discussion on district court's conclusion that issue in *Brady* was not a "labor dispute" under the NLGA, see *supra* notes 134-135 and its accompanying text.

148. *See Brady II*, 644 F.3d at 670 (discussing statutory definition Congress offered under NLGA for operative term "labor dispute"); *see also* 29 U.S.C. § 113(c) (listing statutory language of section 13 of NLGA, which defines operative term "labor dispute"). "The term 'labor dispute' includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relations of employer and employee." *Id.* (defining "labor dispute" under section 13 of NLGA).

149. *See Brady II*, 644 F.3d at 670 (disapproving of district court's conclusion). The Eighth Circuit claimed that the *Brady* lawsuit is a controversy concerning terms or conditions or employment, which falls into section 13 of NLGA's definition of "labor dispute." *See id.* (explaining how *Brady* meets definition of "labor dispute" under section 13 of NLGA); *see generally* 29 U.S.C. § 113 (citing statutory language of section 13(c) of NLGA, which defines "labor dispute").

150. *See Brady II*, 644 F.3d at 670 (discussing how Players specified relief affects future employment relationship between NFL and Players such that relation-

particular, the Players sought to enjoin several features of their relationship with the league, and the Eighth Circuit disagreed with the district court's conclusion that these features were "a dispute over commodities" rather than "a controversy over terms and conditions of employment."[151]

The Eighth Circuit also denied the Players' contention that section 13(a), not section 13(c), should be the operative definition of "labor dispute."[152] The Eighth Circuit indicated that in section 13(a), the language provides that "labor dispute" is "defined in this section," and that the Supreme Court has consistently appointed section 13(c) as the "definition of labor dispute."[153] The Supreme

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ship falls within language of section 13's definition of labor dispute); *see also Preliminary Injunction Enjoining NFL Lockout Vacated*, *supra* note 1 ("The lawsuit and the collective bargaining prior to the filing of the lawsuit concerned the terms and conditions of employment."); *see generally* 29 U.S.C. § 113 (defining "labor dispute" under NLGA).

151. *See Brady II*, 644 F.3d at 670 (explaining features of relationship that Players sought to enjoin, including compensation paid to rookies, salary cap, "franchise player" and "transition player" designations, all of which Players assert are anticompetitive restraints on trade violating section 1 of Sherman Act); *see also* Brady v. Nat'l Football League (*Brady II*), 779 F. Supp. 2d 992, 1028 (D. Minn. 2011) (articulating district court conclusion that NLGA does not govern dispute).

152. *See Brady I*, 644 F.3d at 670-71 (illustrating Players' argument that because section 13(c) uses term "includes" rather than "means" to introduce substance of "labor dispute," Congress did not fully define term). The Players urged that section 13(c) merely expanded in one respect a preexisting definition of "labor dispute" – a definition that was not codified and according to the players – extended only to disputes involving organized labor. *See id.* (explaining Players' rationale for why section 13(c) was not proper definition of "labor dispute"). Thus, since there was no organized labor existent here, the definition should not apply to *Brady* dispute. *See id.* (explaining Players' conclusion for requesting section 13(a) as controlling definition of "labor dispute"); *see also* 29 U.S.C. § 113 (a), (c) (citing statutory language of both definitions at issue regarding operative term "labor dispute"). § 113(a) states:

> A case shall be held to involve or grow out of a labor dispute when the case involves persons who are engaged the same industry, trade, craft, or occupation; or have direct or indirect interests therein; or who are employees of the same employer; or who are members of the same or an affiliated organization of employers or employees . . . or when the case involves any conflicting or competing interests in a "labor dispute" (as defined in this chapter) of "persons participating or interested" therein (as defined in this section).

29 U.S.C. § 113(c).

153. *See Brady II*, 644 F.3d at 671 (illustrating Eighth Circuit's response to Players' argument and clarifying reasoning for holding § 113(c) as operative definition of labor dispute in *Brady*). The language states in section 13(a), however, that "labor dispute" is defined in this chapter, which as the Eighth Circuit agrees, shows Congress's intent for the language of section 13(c) to be controlling as definition of term throughout chapter. *See id.* (explaining Eighth Circuit's reasoning for choosing section 13(c) as controlling definition); *see also* Burlington N. R.R. Co. v. Bhd. of Maint. of Way Emps., 481 U.S. 429, 443 (1987) (referencing Supreme Court case that Eighth Circuit cites to in *Brady* as illustration of § 113(c) to

Court has observed the statutory definition of labor dispute itself to be "extremely broad," and Congress specifically desired for the NLGA's scope of labor dispute resolution to be far-reaching.[154] Nevertheless, the Eighth Circuit indicated that the requirements of section 13(a) are met, as *Brady* involves persons engaged in the same industry of professional football.[155] Furthermore, section 13(a) requires that the dispute is between "one or more employers" and "one or more employees," and both the NFL and the Players meet this requirement.[156]

Moreover, since the district court departed from the text of section 13(a), the Eighth Circuit determined that the district court improperly concluded that the phrase "one or more employees or associations of employees" means only "unionized" employees.[157]

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be operative definition of labor dispute for NLGA purposes); 29 U.S.C. § 113(a) (citing statutory language that Players desire as definition of labor dispute).

154. *See Brady II*, 644 F.3d at 671 (explaining NLGA's operative term "labor dispute" was intended by Congress to have broad scope); *see also* Jacksonville Bulk Terminals, Inc. v. Int'l Longshoremen's Ass'n, 457 U.S. 702, 712 (1982) (citing Supreme Court decision holding "statutory definition itself is extremely broad"); Order of R.R. Tel.'s v. Chi. & Nw. R.R. Co., 362 U.S. 330, 335-36 (1960) (holding that "Congress made the definition [of section 13(c)] broad because it wanted it to be broad").

155. *See Brady II*, 644 F.3d at 671 (indicating even if section 13(a) was applicable definition, *Brady* still adheres to requirements set forth in statute); *see also* 29 U.S.C. § 113(a) (listing simple text of statute that allows court to further conclude case is within operative term labor dispute). The requirement met here is "[a] case shall be held to involve or grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation." *Id.* (quoting language Eighth Circuit utilizes to determine *Brady* was within operative term labor dispute).

156. *See Brady II*, 644 F.3d at 671 (presenting further textual language from NLGA that allows Eighth Circuit to conclude that case involves or grows out of labor dispute); *see also* 29 U.S.C. § 113(a) (citing textual support to strengthen conclusion that case involves or grows out of labor dispute). The statutory requirement under section 13(a) discussed is that such a case "shall be held to involve or grow out of a labor dispute" when "such dispute . . . is between one or more employers or associations of employers or associations of employers and one of more employees." *See id.* (referencing statutory language of NLGA).

157. *See Brady II*, 644 F.3d at 671 (presenting district court's argument in response to § 113(a)). The district court added an extra requirement that the employees be unionized: because the Players were no longer a union, there was no labor dispute. *See id.* (explaining extra requirement of unionization district court added); *see also* Brady v. Nat'l Football League (*Brady I*), 779 F. Supp. 2d 992, 1027 (D. Minn. 2011) (citing district court opinion where "unionization" requirement is discussed); *see generally* New Negro Alliance v. Sanitary Grocery Co., 303 U.S. 552, 560 (1938) (citing Supreme Court holding in reference to section 13(a) of NLGA). The Court explained that under section 13(a) a case shall be held to involve or grow out of a labor dispute "when the case involves any conflicting or competing interests in a labor dispute . . . of persons participating or interested therein." *Id.* (explaining Court's application of section 13(a) of NLGA). "If [section] 13(a) were limited to controversies involving unions or unionized employees, then the Court could not have reached this conclusion." *Id.*

The Eighth Circuit refused to add such a requirement of unionization to the text of section 13(a).[158] Contrary to the Players' argument that section 2 of the NLGA is used as an interpretive guide to declare the meaning of labor dispute, the Eighth Circuit concluded that section 2 does not warrant a finding that an employee has to be organized or unionized in order for a case to involve or grow out of a labor dispute.[159] Employees may engage in activities for the purpose of "mutual aid or protection" without the existence of a union.[160]

Therefore, for purposes of interpreting the term "labor dispute," the court held there is no requirement of a present existence of a union.[161] Before the CBA expired, the NFL and the Players were parties to a CBA for over eighteen years, and were engaged in collective bargaining over the terms and conditions of employment for approximately two years before suit was filed.[162] Regardless of

158. *See Brady II*, 644 F.3d at 671 (indicating that Eighth Circuit, in conformity with *New Negro Alliance*, concluded that § 113(a) analysis did not warrant additional requirement of unionization in order for case to be involving or growing out of labor dispute); *see also New Negro Alliance*, 303 U.S. at 560 (discussing and denying "unionized" requirement).

159. *See Brady II*, 644 F.3d at 672 (detailing Players' contention that section 2 of NLGA should be used as interpretive guide for Act based on its declaration of "public policy in labor manners"). Players tried to argue that "concerted labor activity" by "collectively organized employees" was sufficient to establish a labor dispute under NLGA. *See id.* at 673 (explaining reasoning behind Players' contention that employees need to be unionized to constitute labor dispute); *see also* 29 U.S.C. § 102 (specifying section 2 of NLGA to present Players' contention that section 2 should be interpretive guide for determination of labor dispute). Section 2 states, among other things, that the "individual unorganized worker" shall be from the interference of employers in "the designation of . . . representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." *See id.* (citing language of section 2); *see generally* Ozark Air Lines v. Nat'l. Mediation Bd., 797 F.2d 557 (8th Cir. 1986) (expressing Players' viewpoint that text of section 2 declares that labor dispute has to encompass collectively organized employees, which Players are not anymore upon decertifying as union). The Eighth Circuit alluded to the fact that the *Ozark* case "involved an employee's disability retirement claim arising under the Railway Labor Act, which includes specific provisions that take precedence over the more general provisions of the NLGA." *See id.* at 563 (distinguishing *Orzark* case from *Brady*).

160. *See Brady II*, 644 F.3d at 672 (expressing conclusion that unionization is not requirement for labor dispute); *see also* 29 U.S.C. § 102 (quoting phrase "mutual aid or protection" from section 2 of NLGA).

161. *See Brady II*, 644 F.3d at 673 ("Whatever the precise limits of the phrase 'involving or growing out of a labor dispute,' this case does not press the outer boundary.").

162. *See id.* (illustrating relationship between NFL and Players over past eighteen years and highlighting that both parties collectively bargained for terms and conditions of employment for past two years). Such a relationship is a "classic 'labor dispute' by [even] the Players' own definition [of the operative term]." *See id.* (providing factual justification for why *Brady* is labor dispute). Just because one

the effect of the union's disclaimer on the NFL's antitrust protection, the court held "the labor dispute did not just suddenly disappear because the Players elected to pursue antitrust litigation rather than collective bargaining."[163]

2. *Injunction Within Provisions of Norris-LaGuardia Act?*

The second issue decided by the Eighth Circuit required an analysis of two sub-issues: (1) whether the district court's injunction was in conformity to the provisions of the NLGA, and (2) even if the district court had authority to enjoin a lockout under certain circumstances, whether the district court complied with the procedural requirements set forth in section 7 of the NLGA.[164]

a. Whether the District Court's Injunction Was in Conformity with the Provisions of the Norris-LaGuardia Act

In response to the NFL's argument that section 4(a) of the NLGA forbids federal courts from enjoining an employer lockout, the Eighth Circuit began with the text of section 4(a).[165] The NFL

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day the Players suddenly chose to decertify does not disqualify their prior collective bargaining relationship. *See id.* (furthering court's determination).

163. *See id.* (holding that Players antitrust claim against league's anticompetitive rules still has potential; but Players' decertification has no effect of terminating "labor dispute" under NLGA). The court refuses to address the scope of the nonstatutory labor exemption because it has no effect on the applicability of the NLGA to *Brady*. *See id.* (explaining Eighth Circuit's refusal to address nonstatutory labor exemption). Due to the fact that the court found the existence of a labor dispute, the NLGA therefore blocked the district court from issuing the injunction, and there is no need to address the nonstatutory labor exemption in *Brady*. *See id.* (providing justification for not addressing nonstatutory labor exemption in *Brady*). For a more detailed discussion on the nonstatutory labor exemption, see *supra* notes 54-72 and accompanying text.

164. *See Brady II*, 644 F.3d at 673 (presenting separate parts of second issue decided by Eighth Circuit in *Brady*). The Players argued alternatively that even if this case does involve or grow out of a labor dispute, the district court's injunction conforms to the provisions of the NLGA, and should be affirmed on this alternative ground. *See id.* (presenting Players' alternative argument). The League countered that section 4 of the NLGA includes a flat prohibition against a lockout, and, alternatively, that even if the court has authority to enjoin a lockout under the circumstances, the district court did not comply with the procedural requirements set forth in section 7. *See id.* (presenting NFL's counterargument).

165. *See id.* at 674 (indicating NFL's lead argument as to why district court's injunction was not in conformity to provisions set forth by NLGA); *see also* 29 U.S.C. § 104(a) (citing textual language of section 4(a) of NLGA, in reference to NFL's argument that district court had no jurisdiction to enjoin lockout). §104(a) states:

> No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute from doing, whether singly or

maintained that by locking out the Players, it was "refusing to . . . remain in any relation of employment," which expressly cannot be enjoined under section 4(a).[166] The Players relied on Supreme Court precedent because the Court understood the legislative history of section 4(a) to conclude that section 4(a) does not apply to employer injunctions.[167] The Players urged that section 4(a) only applies to employees, with the phrase "perform any work" directed to employee work stoppages, and "remain in any relation of employment" aimed solely at permanent work stoppages.[168]

The Eighth Circuit resolved this issue by analyzing the text of section 4(a).[169] The court reasoned that when language in a subsection is applicable to both employers and employees on its face,

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> in concert, any of the following acts: (a) [c]easing or refusing to perform any work or to remain in any relation of employment.

Id.

166. *See Brady II*, 644 F.3d at 674 (illustrating NFL is performing action that NLGA expressly prohibits courts from enjoining). Thus, the district court's order to enjoin NFL lockout goes against express provisions of NLGA and should be denied. *See id.* (explaining justification for why district court's order should have been vacated).

167. *See id.* at 674-75 (illustrating Players' response to NFL that section 4(a) only refers to employees, not employers, and therefore, NLGA provisions do not prohibit court from enjoining NFL lockout); *see also* de Arroyo v. Sindicato de Trabajadores Packinghouse, 425 F.2d 281, 290-91 (1st Cir. 1970) (citing case Players relied on in their argument for section 4(a) applying only to employees, not employers). In *de Arroyo*, the First Circuit rejected a "literal" application of section 4(a) sought by an employer because the court understood the legislative history of section 4(a) to conclude that it was not intended to protect employers. *See id.* (explaining holding of *de Arroyo*). Rather, the court stated:

> The 'remain in any relation of employment' language in [s]ection 4(a), . . . was used, . . . simply to make clear that employee strikes could not be enjoined either if the employees claimed to have ceased or refused to work temporarily or if they claimed to have completely ended their employment relation with their employer.

Id. at 291. The court cited section 4(b) of the NLGA, which proscribes an injunction to prohibit "[b]ecoming or remaining a member of any labor organization or of any employer organization," in order to reason that the drafters of the NLGA specifically included the term "employer" when protection was intended for them. *See id.* (illustrating drafters used "employee" when protection was intended for them). Thus, on these grounds, the court in *de Arroyo* held that section 4(a) was specifically intended to only protect employees, not employers, because the term "employer" was not included in the statutory language. *See id.* (presenting holding of case).

168. *See Brady II*, 644 F.3d at 675 (noting Players' argument in regards to holding and analysis of *de Arroyo*). The first clause of section 4(a) is "perform any work," and the second clause is "remain in any relation of employment." *See id.* (presenting first two clauses of section 4(a) of NLGA).

169. *See id.* (noting court's decision to begin analysis with text of NLGA section 4(a)). The court stated, "[W]e think it better to begin the analysis with the text of [section] 4(a)." *Id.* (explaining Eighth Circuit's desire to begin analysis with text).

there is no need to specifically mention "employers."[170] Thus, the court concluded that employers fit within the introductory clause of section 4(a) because the phrase "remain in any relation of employment" may apply on its face to both employers and employees.[171]

Continuing its textual analysis, the Eighth Circuit reasoned that it would be odd to apply a narrow construction of "any relation of employment" because the term "any" is an expansive modifier, and the Supreme Court has emphasized the breadth of the NLGA's scope.[172] Moreover, the Eighth Circuit utilized the plain meaning of "remain" to interpret its meaning in the phrase to "remain in any relation of employment," as encompassing non-permanent work stoppages.[173] Thus, the phrase "refusing . . . to remain in any rela-

170. *See id.* (illustrating court's reasoning toward concluding that employer is protected and applicable under section 4(a)). "If language in a particular subsection is applicable on its face to employees and employers alike (or to employers alone), then there is no need for a specific mention of employers." *Id.*

171. *See id.* at 676 (holding disputed language in section 4(a) may apply to both employers and employees). The introductory clause of section 4(a) forbids a court to issue an injunction to prohibit "any person or persons participating or interested" in a labor dispute from doing any of the acts set forth below, including those in section 4(a). *See id.* (presenting introductory language of section 4(a)). Employers, of course, are among the persons participating in labor disputes. *See id.* (indicating employers fall within statutory language of section 4(a)). Thus, the introductory clause encompasses employers. *See id.* (concluding employers are included in statutory language); *see also* Local Union No. 884, United Rubber, Cork, Linoleum & Plastic Workers of Am. v. Bridestone/Firestone, Inc., 61 F.3d 1347, 1352 (8th Cir. 1995) (citing Eighth Circuit opinion recognizing that section 4(a) of NLGA applies against employers); 29 U.S.C. § 103(b) (2006) (citing language that makes clear both employers and employees can be in "relation of employment"). Section 3(b) of NLGA states that either party to a labor agreement may "withdraw from an employment relation." *See id.* (presenting language of section 3(b) of NLGA).

172. *See Brady II*, 644 F.3d at 676 (indicating court's reasoning for concluding that "any relation of employment" should be expansive, encompassing both permanent and non-permanent work stoppages). The term "any" should naturally read to mean refusing to remain in any particular relation of employment, whether or not the refusal is temporary or permanent. *See id.* (discussing term "any" within section 4(a)). Such a reading of section 4(a) corresponds to the meaning of "any" in the first clause, which refers to a refusal "to perform any work." *See id.* (illustrating expansive reading of "any" to rest of section 4(a)). Thus, the prohibition applies to any refusal to perform any particular work, including a certain type or amount of work, even when there is not a complete work stoppage. *See id.* (explaining amount of work or type of work does not matter within analysis). The term "any" should be given the same meaning in both clauses of section 4(a). *See id.* (explaining "any" should be applicable to both clauses); *see also* Ali v. Fed. Bureau of Prisons, 552 U.S. 214, 219-20 (2008) (citing Supreme Court case that Eighth Circuit acknowledges for emphasizing breadth of NLGA's prohibition on injunctions).

173. *See Brady II*, 644 F.3d at 676 (utilizing plain meaning of term "remain" to conclude that while strike or lockout does not permanently change relation of employment, it certainly changes the character or condition of that relationship); *see also* Webster's New International Dictionary 1802 (1932) (presenting dictionary

tion of employment" includes lockouts and strikes because both are non-permanent refusals to remain in any relation of employment.[174] The Eighth Circuit did conclude, however, that section 4(a) is not symmetrical.[175]

Nevertheless, in an attempt to step outside of section 4(a), the Players argued that the policy expressed in section 2 supports their position that section 4(a) offers no protection to employers.[176] The court, however, presented sufficient evidence to conclude that section 2 does not go against the court's prior textual analysis of section 4(a).[177] Moreover, the Players argued that the legislative

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used by Eighth Circuit to define term "remain" under its plain meaning). To "remain" is "[t]o continue unchanged in place, form, or condition." *Id.*

174. *See Brady II*, 644 F.3d at 677 (presenting court's argument that "refusing . . . to remain in any relation of employment" encompasses any non-permanent work stoppage, such as strike or lockout). The Eighth Circuit relied on judicial decisions to show strikes and lockouts are a sufficient "refusal" to remain in any relation of employment because such work stoppages change the previous employment relationship. *See id.* (illustrating strikes and lockouts are sufficient "refusal" to remain in any relation of employment). The Eighth Circuit utilized these opinions, which were in context of the Clayton Act, and believed that a reasonable legislator in 1932 would have understood a strike or lockout of employees as a "refusal" to "remain in [a] relation of employment." *See id.* (discussing reasonableness of concluding strike or lockout as "refusal"); *see also* Duplex Printing Press Co. v. Deering, 254 U.S. 443, 488 (1921) (Brandeis, J., dissenting) (noting that during lockout or strike, relationship between employer and employee is not general relation of employer and employee); Canoe Creek Coal Co. v. Christinson, 281 F. 559, 561-62 (W.D.Ky. 1922) (noting striking workers were no longer "employees" for purposes of Clayton Act, either at the outset or after some duration of strike).

175. *See Brady II*, 644 F.3d at 677 (explaining employers can only invoke second clause, while employees can invoke either clause of section 4(a)). While employers may fit into the second clause "refusing . . . to remain in any relation of employment," the employer does not perform any work, so employers may invoke only the second clause of section 4(a). *See id.* (explaining how section 4(a) is not symmetrical). Employees, however, may invoke either clause of section 4(a), as employees may refuse to "perform any work," or they may refuse "to remain in any relation of employment." *See id.* (explaining employees may invoke either clause). That the terms of section 4(a) afford employers less protection than they afford employees does not mean that Congress gave employers no protection at all. *See id.* at 678 (explaining employers still have protection, although it is not symmetrical under section 4(a)).

176. *See id.* at 678 (indicating Players' attempt to coerce court to stray from its strict, textual analysis of section 4(a)). The policy stated in section 2 is that the individual unorganized worker should be free from interference, restraint, or coercion of employers in the designation of representatives, self-organization, or other concerted activities. *See id.* (discussing section 2's policy); *see also* 29 U.S.C. § 102 (citing section 2 of NLGA).

177. *See Brady II*, 644 F.3d at 678 (noting Eighth Circuit's evidence and conclusion that policy of NLGA did not go against court's textual analysis of section 4(a)); *see also* Bhd. of R.R. Trainmen v. Chi. River & Ind. R.R. Co., 353 U.S. 30, 40 (1957) (indicating that Supreme Court has observed that while NLGA was designed to protect workingmen, broader purpose was "to prevent . . . injunctions of . . . federal courts from upsetting . . . natural interplay of . . . competing economic forces of labor and capital"); *Duplex Printing*, 254 U.S. at 485-86 (Brandeis, J., dis-

history of the NLGA indicates that section 4(a) prohibits only injunctions against employees.[178] However, the Eighth Circuit disagreed with the Players, and concluded that, as is often the case, "the legislative history offers something for both parties, but it does not [offer a] convincing basis to depart from our [textual analysis]."[179] Lastly, the court concluded, in reference to the Players' final argument, that for purposes of the NLGA, the Act did not sufficiently incorporate any settled judicial interpretation that section 20 of the Clayton Act applied only to employees.[180]

For these reasons, the Eighth Circuit concluded that section 4(a) deprives a federal court of the power to issue an injunction prohibiting a party to a labor dispute from implementing a lockout

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senting) (quoting Justice Brandeis as stating, labor dispute were an "area of economic conflict that had best be left to economic forces and the pressure of public opinion and not subjected to the judgment of the courts"); Marine Cooks & Stewards, AFL, v. Panama Steamship Co., 362 U.S. 365, 369 (1960) (quoting Court's analysis of NLGA section 4(a), a one way interpretation of section 4(a) – prohibiting injunctions against strikes but not against lockouts – would be in tension with the purposes of the [NLGA] to allow free play of economic forces and "to withdraw federal courts from a type of controversy for which many believed they were ill-suited and from participation in which, it was feared, judicial prestige might suffer").

178. *See Brady II*, 644 F.3d at 679 (indicating Players' argument that legislative history illustrates that employers were not intended to be protected by section 4(a) and attempts to include them in Act were denied).

179. *See id.* at 679-80 (presenting Eighth Circuit's refusal to accept Players' argument that legislative history of NLGA affords evidence that section 4(a) prohibits only injunctions against employees). The Eighth Circuit held the legislative history the Players cited, which was a House Committee Report and a treatise, did not address the specific question whether section 4(a) also prohibits injunctions against employees. *See id.* at 679 (discussing legislative history of NLGA presented by Players). The materials the NFL presented to the court, which suggested Members of Congress did contemplate that employers could invoke plain meaning of section 4(a), also did not address the precise question either. *See id.* at 679-80 (discussing legislative history materials presented by NFL).

180. *See id.* at 680 (discussing court's refusal of Players' final argument that section 4(a) applies only to employees, not employers). The Players argued that the Supreme Court authoritatively construed a portion of section 20 of the Clayton Act as applying only to employees and that Congress should be understood to have incorporated this meaning when it enacted the NLGA. *See id.* (explaining Players' argument for scope of NLGA as applying to employees only). The Players also attempted to draw attention of legislative history of the Clayton Act. *See id.* (discussing Players' attempt to present legislative history of Clayton Act); *see also* Am. Steel Foundries v. Tri-City Cent. Trades Council, 257 U.S. 184 (1921) (citing case that Players relied upon as judicial settlement that was incorporated into NLGA as applying only to employees, not employers). The Court in *American Steel Foundries*, however, only addressed the narrow question of how the Clayton Act applied to employees, and there was no question presented about how the Act applied to employers. *See id.* (discussing narrow issue in case).

of its employees.[181] Therefore, the court held that the NLGA prohibited the district court from issuing an injunction against the NFL for locking out the Players, and thus the district court's order could not stand.[182]

b. Whether The District Court Complied With The Procedural Requirements Of The Norris-LaGuardia Act

The Eighth Circuit determined that there were two groups of players that were locked out because the district court enjoined not only the league's lockout of employees—players under contract—but also the league's non-employees, such as free agents and prospective players.[183] As to the latter group, the court indicated that section 4(a) of the NLGA does not apply because the refusal of the NFL and its member clubs to deal with free agents and rookies is not a refusal "to remain in any relation of employment," for there is no relationship "to remain."[184] Thus, because this was a "labor dispute," an injunction with respect to the NFL's actions toward free agents and rookies cannot be issued unless in strict conformity with section 7 of the NLGA.[185] When applying section 7, the court held

181. *See Brady II*, 644 F.3d at 680-81 (presenting Eighth Circuit's final ruling on whether section 4(a) of NLGA prohibits federal courts from enjoining employer lockouts of their employees).

182. *See id.* at 681 (holding district court's order, enjoining NFL from locking out Players, cannot stand under provisions set forth in section 4(a) of NLGA).

183. *See id.* (introducing second issue Eighth Circuit ruled on regarding section 7 of the NLGA and whether district court followed procedural requirements for issuing injunction). There are two portions of the injunction issued by the district court: (1) locking out the NFL's employees, which are all the Players under contract, and (2) locking out the NFL's non-employees, which are the free agents and prospective players or "rookies." *See id.* (explaining two portions of injunction issued by district court).

184. *See id.* (describing reason why lockout of non-employees is not protected under language of section 4(a) of NLGA); *see also* 29 U.S.C. § 4(a) (presenting language of section 4(a) of NLGA for analysis of this issue).

185. *See Brady II*, 644 F.3d at 681 (indicating injunction with respect to NFL's non-employees could not be issued by district court unless court was acting in strict conformity with section 7 of NLGA). An injunction with respect to the league's actions toward free agents and rookies is a case "involving or growing out of a labor dispute." *See id.* (explaining labor dispute extends even to "non-employees" of NFL); *see also* 29 U.S.C. § 101, 107 (noting injunction with respect to NFL's non-employees has to be in strict conformity with section 7 because this "case [is] growing or involving . . . [a] labor dispute"). Section 7 provides that a court has no authority to issue an injunction "except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto." *Id.* (citing language of section 7).

that the present injunction did not conform to section 7 provisions, and therefore, could not be issued.[186]

Under section 7, the NFL was entitled to a hearing to test the facts presented by the Players on cross-examination, and to have the district court analyze the relative harms to the Players.[187] The district court decided that it was unnecessary to address section 7 because the court was affected by its view that the entire lockout could be enjoined.[188] Therefore, the Eighth Circuit concluded that the injunction as a whole must be vacated because the district court did not conform to the procedural requirements set forth in section 7.[189]

3. *Eighth Circuit's Final Holding*

The Eighth Circuit concluded that the preliminary injunction did not conform to the provisions set forth in the Norris-LaGuardia Act.[190] In addition, the court expressed no views on whether the NFL's nonstatutory labor exemption from the antitrust laws continues after the Players' disclaimer.[191] Both the NFL and the Players

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186. *See Brady II*, 644 F.3d at 681 (indicating court's conclusion that injunction to rookies and free agents did not conform to provisions of section 7 of NLGA).

187. *See id.* (detailing court's view that NFL was entitled to hearing under section 7 of NLGA). Although a hearing is not required where the party enjoined does not contest on appeal that the relevant facts are undisputed, the NFL does contest the facts in this case, and it is entitled to test the credibility of the Players' evidence by cross-examination. *See id.* (explaining how district court did not conform to requirements under section 7); *see also* 29 U.S.C. § 7 (citing language of section 7 of NLGA). Section 7(c) required the court to evaluate the relative harms to the parties. *See id.* (explaining section 7 requirement).

188. *See Brady II*, 644 F.3d at 681 (noting district court's reasoning for not addressing section 7 of NLGA in its analysis of *Brady*). The court's calculus with respect to free agents and rookies was undoubtedly affected by its view that the entire lockout could be enjoined. *See id.* (explaining how district court's view of injunction was improperly altered). Whether to enter an injunction requiring the NFL to deal with free agents and rookies, only to have these players locked out as soon as they enter into any new contract of employment, was not considered by the district court. *See id.* (explaining aspect of injunction district court did not consider).

189. *See id.* at 681-82 (presenting Eighth Circuit's holding of issue relating to whether district court followed procedural requirements set forth by section 7 of NLGA).

190. *See id.* at 682 (presenting Eighth Circuit's final holding on issues brought on appeal by NFL). For a more detailed discussion on the Eighth Circuit's analysis of how the injunction did not conform to the provisions of the NLGA, see *supra* notes 142-189 and accompanying text.

191. *See Brady II*, 644 F.3d at 682 (indicating court did not decide issue on whether nonstatutory labor exemption applies after Players decertified as union). "Given our conclusion that preliminary injunction did not conform to the provisions of the [NLGA], we need not reach the other points raised by the NFL on

agree that the NLGA's provisions on equitable relief are not coextensive with the substantive rules of antitrust law, and the Eighth Circuit reached its conclusion based on that understanding.[192] Thus, the district court's order granting a preliminary injunction was vacated, and the case was remanded for further proceedings.[193]

B. Critical Remarks

The Eighth Circuit's opinion in *Brady*, which held that the preliminary injunction issued by the district court did not conform to the provisions set forth in the NLGA, signified the role of collective bargaining in the NFL.[194] Seemingly, the Eighth Circuit properly decided *Brady* through a strict, textual application of the Norris LaGuardia Act to the facts presented.[195] Nevertheless, the court's analysis in reaching this conclusion contains some weaknesses.[196]

In part of one of the Eighth Circuit's opinion, the court attempted to illustrate the policy behind the NLGA and presents Congress's initial intent when enacting the statute.[197] Although this strategy indicates the importance behind the strict provisions set forth in the NLGA before a federal court can issue an injunction, the court failed to offer a sufficient analysis of the NLGA's

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appeal." *Id.* For a more detailed discussion on the nonstatutory labor exemption, see *supra* notes 54-72 and accompanying text.

192. *See Brady II*, 644 F.3d at 682 (detailing that both parties to suit understand that issues regarding NLGA were not coextensive with substantive rules and issues brought on appeal relating to antitrust laws). Eighth Circuit reached their decision on this understanding. *See id.* (presenting understanding of Eighth Circuit when court made its final holding in *Brady*).

193. *See id.* (presenting court's decision to vacate district court's order for preliminary injunction and remand case to district court for further proceedings).

194. *See id.* (citing to Eighth Circuit's final decision in *Brady* to vacate district court's ruling to enjoin NFL lockout). For a more detailed discussion on the Eighth Circuit's final holding, see *supra* notes 190-193 and accompanying text; *see also* Walter, *supra* note 30 (presenting analysis of Eighth Circuit's decision and implications if court decided to affirm district court's ruling enjoining NFL lockout). "Had the [Eighth] Circuit upheld an injunction against the lockout, 'it would have had a very significant effect on negotiations because it would have opened up the possibility of collusion claims, or there would have been actions by the teams disrupting the league's labor position.'" *Id.* "That would have been a fairly major matter and would have put a lot of pressure on the league to move and to move more quickly." *Id.*

195. For a more detailed discussion on the court's decision in *Brady*, see *infra* notes 142-193 and accompanying text.

196. For a more detailed discussion on the weaknesses of the Eighth Circuit's opinion in *Brady*, see *infra* notes 197-214 and accompanying text.

197. *See Brady II*, 644 F.3d at 669 (presenting Congress's intent for enacting NLGA was to curtail authority of federal courts to issue injunctions in labor disputes). For a more detailed discussion of Congress's intent for enacting the NLGA and the impetus for the NLGA, see *supra* notes 143-145 and accompanying text.

legislative history.[198] As the dissenting opinion points out, the legislative history reveals House Committee Reports in which the purpose of the NLGA was intended to be the protection of rights of labor, and the defeat of one senator's attempt to include employer protection in the Act.[199] This line of reasoning is essentially the crux of the Players' argument that section 4(a) only extends protection to employees, not employers.[200]

In *Jacksonville Bulk Terminals, Inc. v. International Longshoremen's Ass'n*,[201] the Supreme Court acknowledged that the legislative history of the NLGA provides that the Act was enacted in response to federal court intervention on behalf of employers through the use of injunctive powers against unions and other associations of employees.[202] These interventions caused the federal courts to fall into disrepute among the nation's population at the time of enactment.[203] Thus, the Court in *Jacksonville Bulk Terminals* considered

198. *See supra* note 144 and accompanying text ("[T]he impetus for the NLGA was dissatisfaction with injunctions entered against workers in labor disputes, 'but the statute also requires that injunctions against an employer participating in a labor dispute must conform to the [NLGA]'"). *But see supra* note 179 and accompanying text (presenting Eighth Circuit's opinion where court ignores Players' legislative history argument that affords evidence to prove section 4(a) only prohibits injunctions against employees, not employers).

199. *See Brady II*, 644 F.3d 661, 690-91 (8th Cir. 2011) (Bye, J., dissenting) (indicating majority's interpretation of NLGA fails to give effect to Congress's intent in passing statute). "The NLGA was enacted in response to federal court intervention on behalf of employers." *Id.* at 690. "[I]t is clear that Congress wished to forbid the use by the federal courts of their equity arm to prevent peaceable persuasions by employees, discharged or expectant, in promotion of their side of the dispute." *Id.* at 691. Senator Herbert proposed language to section 2 of the NLGA to protect "both the employer and the employee," and was "defeated soundly." *See id.* at 692 (presenting Senator Herbert's proposed language and its sound denial). When viewing the legislative history in its entirety and the express policy of the NLGA, Congress did not intend to protect employers under the provision. *See id.* at 693 (presenting Justice Bye's dissenting opinion); *see also* Walter, *supra* note 80 (presenting brief discussion of Justice Bye's dissenting opinion in *Brady*).

200. For a more detailed discussion on the Players' argument that section 4(a) only extends to employees, not employers, see *supra* notes 176-180 and accompanying text.

201. 457 U.S. 702, 715-20 (1982) (citing Supreme Court case where legislative history of NLGA was considered in labor dispute).

202. *See id.* at 715 (citing Court's acknowledgment of NLGA's legislative history in order to illustrate that Eighth Circuit's refusal to consider these materials to be inappropriate when there is high evidentiary value of these materials to Players in *Brady*). The Court in *Jacksonville Bulk Terminals* concluded that "[c]ongress believed that the [NLGA] applies to work stoppages instituted for political reasons can be found in the legislative history of the 1947 amendments to the NLRA." *Id.* at 717 (presenting holding in case).

203. *See id.* at 716 (illustrating background of NLGA's enactment and that NLGA was enacted for purpose of protecting employees' rights). Federal courts were falling into disrepute with the Nation's population because prior to the

this evidence and declined to adopt an interpretation of the NLGA that Congress specifically rejected when enacting the Act.[204]

Yet, the Eighth Circuit chose to ignore the value of these legislative materials because they merely offered something for both parties, which was not a convincing-enough basis to depart from its strictly textual analysis.[205] Unlike the Court in *Jacksonville Bulk Terminals*, the Eighth Circuit failed to offer a complete analysis of the NLGA and its legislative history when determining the scope of the Act.[206] This case did, however, pose potentially severe implications on the business of the NFL.[207] If the court affirmed the injunction, the NFL owners would have been forced to operate their organizations and honor the Players' contracts with no CBA in place.[208] In the event that the NFL operated with no CBA, the league would have to unilaterally impose the terms of its business, and those terms would be subject to antitrust litigation because the nonstatutory labor exemption only immunizes collectively bargained rules.[209] Thus, it is fair to assume that the court's decision to avoid

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NLGA, federal judges could enter injunctions "based on their disapproval of the employees' objectives, or on the theory that these objectives or actions, although lawful if pursued by a single employee, became unlawful when pursued through . . . concerted activity." *Id.* (explaining reputation of federal courts prior to enactment of NLGA).

204. *See id.* at 720 (illustrating Court would not adopt any application of NLGA that Congress did not agree with upon enacting NLGA).

205. For a more detailed discussion of the Eighth Circuit's refusal to give effect to legislative history when interpreting section 4(a) of NLGA, see *supra* note 179 and accompanying text.

206. *See supra* note 179 and accompanying text (indicating Eighth Circuit's refusal to consider NLGA's legislative history in *Brady*); *see also supra* notes 201-204 and accompanying text (explaining Court's use of NLGA's legislative history in *Jacksonville Bulk Terminals*).

207. *See* Walter, *supra* note 30 (discussing potential implications on lockout if Eighth Circuit had enjoined lockout and affirmed district court's opinion). "Had the [Eighth] U.S. Circuit upheld an injunction against the lockout, 'it would have had a very significant effect on negotiations because it would have opened up the possibility of collusion claims, or there would have been actions by the teams disrupting the league's labor position." *Id.*

208. *See* Walter, *supra* note 30 (discussing significant implications if court upheld injunction of league's right to lockout its Players). "That would have been a fairly major matter and would have put a lot of pressure on the league to move and to move more quickly." *Id.*

209. *See* Michael McCann, *Path To NFL Normalcy Begins With Players' Board Approving Deal*, SPORTSILLUSTRATED.COM (July 24, 2011, 7:51 PM), http://sportsillustrated.cnn.com/2011/writers/michael_mccann/07/24/nfl.cba.situation/index.html (detailing ramifications if NFL were operated without CBA in place). Without antitrust immunity, individual NFL players would file antitrust claims against the league and conceivably challenge rules such as the salary cap and the NFL Draft. *See id.* (explaining struggles NFL would face if league operated with no CBA in place). Alternatively, the NFL could allow individual teams more autonomy to create their own rules, but that would go against the concept of a unified league of

addressing the legislative materials was driven by these policy implications to the NFL, rather than an attempt to remain neutral to both parties.[210]

Moreover, the Eighth Circuit expressed no view on the scope of the nonstatutory labor exemption, which posed an interesting obstacle to the potential success of the Players' antitrust claim.[211] Unfortunately, the court only spoke to the narrow issue on appeal regarding the scope of the NLGA, which left the issue of whether the Players' antitrust lawsuit would have withheld the protection offered by the labor exemption unanswered.[212] In the event the Players continued with their antitrust lawsuit, there would have been an argument as to whether *Powell* or *McNeil* would control as precedent in the Eighth Circuit.[213] In order for the Players to overcome *Powell*, they would need to prove that the collective bargaining relationship with the league ended upon their decertification, which would

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teams. *See id.* (explaining option to allow NFL teams to unilaterally implement their own rules).

210. For a more detailed discussion on the Eighth Circuit's refusal to address the legislative history of the NLGA and the policy implications *Brady* posed on the NFL's business, see *supra* notes 197-209 and accompanying text.

211. For a more detailed discussion on the Eighth Circuit's refusal to address the nonstatutory labor exemption, *see supra* note 191 and accompanying text; *see also* Walter, *supra* note 80 (discussing Eighth Circuit's explicit refusal to address nonstatutory labor exemption). The Players argued before the Eighth Circuit that the exemption ended when the union decertified in March, but the owners argued that some period of time must pass first. *See id.* (presenting arguments for both sides regarding scope of labor exemption). The court declined to weigh in on the issue in its opinion in *Brady*. *See id.* (explaining Eighth Circuit's refusal to address labor exemption in *Brady*). *But see* Walter, note 30 (quoting St. Louis University law professor Matthew Bodie regarding how long nonstatutory labor exemption would last based on judges discussion at *Brady* oral argument). "It seemed to me the judges on the panel were saying [the exemption ends within] six months to a year." *Id.* "If it's only six months, sometime in September the league is going to start racking up these antitrust violations." *Id.*

212. *See supra* notes 190-192 (detailing how Eighth Circuit avoided these issues and it was understood by both parties that "NLGA's provisions on equitable relief are not coextensive with the substantive rules of antitrust law"). Most notably, the court failed to address whether or not the Players' decertification strategy effectively eliminated the potential application of the nonstatutory labor exemption to *Brady*. *See id.* (explaining court's failure to address whether Players' decertification strategy was successful or not in regards to avoiding labor exemption); *see also* Walter, *supra* note 30 (discussing court's decision to make clear that nonstatutory labor exemption issue would not be addressed in its opinion). "The court made clear that the Norris-LaGuardia Act prohibited the injunction, but it explicitly did not say anything about whether the antitrust exemption still applied or whether the NFL might be liable for damages." *Id.*

213. *See supra* notes 91-99 and accompanying text (detailing *Powell* and *McNeil* cases, facts surrounding each case, and implications on relationship between both parties).

trigger antitrust scrutiny for the NFL under *McNeil*.[214] Due to the court's willingness to side with the collective bargaining process in its *Brady* opinion, it is fair to assume that the Eighth Circuit here would immunize the NFL from antitrust scrutiny by the Players and hold that collective bargaining is the proper forum to resolve these differences.[215]

Nevertheless, the Eighth Circuit's textual analysis of section 4(a) of the NLGA was proper, and its conclusions were justified within the text of the statute.[216] First, the facts in *Brady* reasonably led to the conclusion that the two parties were involved in a case "growing out of or involving a labor dispute."[217] The lawsuit and the collective bargaining prior to the filing of the lawsuit concerned the terms and conditions of the Players' employment.[218] It was also reasonable to conclude from the text that section 13(c), not section

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214. *See supra* notes 91-99 and accompanying text (illustrating implications *Powell* and *McNeil* holdings).

215. *See supra* notes 206-209 (explaining Eighth Circuit's willingness to side with collective bargaining process due to implications of litigation on NFL's business).

216. *See supra* notes 146-189 and accompanying text (citing to complete textual analysis by Eighth Circuit of NLGA to *Brady* facts); *see also Preliminary Injunction Enjoining NFL Lockout Vacated*, *supra* note 1 (discussing and analyzing Eighth Circuit opinion in *Brady*). The Eighth Circuit held that the district court's preliminary injunction did not conform to the express provisions set forth in the NLGA. *See id.* (presenting Eighth Circuit's ruling).

217. *See supra* notes 142-163 and accompanying text (presenting court's analysis surrounding whether this issue is one growing out of or involving "a labor dispute"); *see also Preliminary Injunction Enjoining NFL Lockout Vacated*, *supra* note 1 (summarizing procedural history leading up to *Brady* decision by Eighth Circuit). Section 4(a) of the NLGA limits the power of a district court to issue an injunction in a case that involves or grows out of a labor dispute. *See id.* (explaining limiting power of section 4(a) of NLGA). The district court determined that it had jurisdiction because no labor dispute existed, and that the Players made an adequate showing of irreparable harm to warrant a preliminary injunction. *See id.* (explaining district court's ruling). The Act defines a labor dispute as any controversy concerning the terms and conditions of employment, and the Eighth Circuit found that a labor dispute existed. *See id.* (explaining NLGA's definition of labor dispute); 29 U.S.C. § 104(a) (citing section 4(a) of NLGA). For a more detailed discussion on section 4(a) of the NLGA, see *supra* note 165 and accompanying text.

218. *See Preliminary Injunction Enjoining NFL Lockout Vacated*, *supra* note 1 (discussing reasoning behind Eighth Circuit's determination that *Brady* was involving labor dispute concerning terms and conditions of employment); *see also Appellate Court: NFL Lockout Remains in Place*, SPORTSNETWORK.COM (July 8, 2011, 1:29 PM), http://www.sportsnetwork.com/merge/tsnform.aspx?c=sportsnetwork&page=nfl/news/newstest.aspx?id=4418580 (detailing Eighth Circuit's opinion in *Brady* and collective bargaining relationship between NFLPA and NFL before lockout was issued). Both parties "were engaged in collective bargaining over terms and conditions of employment for approximately two years" prior to the expiration of the CBA in March, 2011. *See id.* (explaining length of collective bargaining negotiations by both parties prior to expiration of CBA).

13(a), is the operative definition of the term "labor dispute," both parties are within the same industry of professional football, and there is no such requirement that employees be unionized in order for a labor dispute to occur.[219] Given that both parties have been under a collective bargaining relationship for the past eighteen years, the fact that the Players chose to pursue antitrust laws over collective bargaining did not erase their long-standing labor relationship with the league.[220]

Furthermore, the court's textual analysis and eventual decision of the second issue in *Brady* was appropriate.[221] In sub-issue one, the court fittingly held that federal courts are prohibited from issuing an injunction in *Brady* because the NFL lockout encompassed "any relation of employment."[222] On its face, section 4(a) of the NLGA may apply to both employers and employees, and the Eighth Circuit followed Supreme Court precedent by applying a broad application of the NLGA to encompass non-permanent work stoppages.[223] The inclusion of the term "remain" in section 4(a) allows for the statute to encompass the NFL's work stoppage because the owners refused to remain in an employment relationship with the Players under the terms of the former CBA.[224] Thus, under section 4(a), the district court did not have jurisdiction to issue the Players'

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219. *See supra* notes 149-163 and accompanying text (indicating court's reasoning for holding that this case is growing out of "a labor dispute" and presenting strong evidence in favor of this conclusion); *see also Preliminary Injunction Enjoining NFL Lockout Vacated*, *supra* note 1 and accompanying text (explaining that Eighth Circuit concluded, "the district court erred in adding a requirement of unionization into the statutory text [of section 4(a) of the NLGA]").

220. *See supra* notes 161-163 and accompanying text (citing to Eighth Circuit opinion in which court concludes that fact that Players chose antitrust law over labor law does not suddenly destroy relationship of both parties).

221. *See supra* note 164 and accompanying text (illustrating second issue of Eighth Circuit's opinion and how court broke down issue into two separate sub-issues). The two sub-issues were: (1) whether the district court's injunction was in conformity to the provisions set forth by the NLGA; and (2) even if the district court had authority to enjoin a lockout under the circumstances presented, whether the district court complied with the procedural requirements set out in section 7 of the NLGA. *See id.* (presenting sub-issues of issue two in *Brady*).

222. *See supra* notes 165-182 and accompanying text (illustrating court's complete reasoning for holding that NFL lockout fit into express statutory language of section 4(a) of NLGA, which sets out strict limitations for federal courts attempting to issue injunctions in labor disputes).

223. *See supra* notes 165-182 and accompanying text (detailing Eighth Circuit's reasoning for holding that section 4(a) of NLGA applied to NFL work stoppage).

224. *See supra* notes 172-175 and accompanying text (acknowledging Eighth Circuit's logistical reasoning for concluding that "remain" in section 4(a) encompasses non-permanent work stoppages).

injunction in *Brady*.[225] In sub-issue two, the court accurately addressed the text of section 7 of the NLGA.[226] Certainly, the NFL was entitled to a hearing to challenge the testimony presented by the Players, and the district court's decision was materially affected by its view that the entire lockout could be enjoined.[227]

In general, the Eighth Circuit came to the correct conclusion by vacating the district court's decision to enjoin the NFL lockout.[228] Seemingly, the court erred in ignoring the legislative history of the NLGA, which provided some interesting insight and difficult obstacles for the court to overcome.[229] Yet the decision to stand by the express language of the NLGA and analyze the scope of the statute under a strict, textual interpretation led to the most reasonable resolution in *Brady*.[230] As noted, this labor dispute posed many implications that would have affected each individual member organization of the NFL.[231] By vacating the injunction and upholding the lockout, it is fair to assume that the court decided the proper forum for curing these issues was the negotiating table, not the federal courtroom.[232]

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225. *See supra* notes 181-182 and accompanying text (citing to Eighth Circuit's reversal of district court's decision to enjoin NFL lockout because section 4(a) was applicable under facts in *Brady*, thus eliminating district court's jurisdiction to issue such injunctions).

226. *See supra* notes 183-189 and accompanying text (illustrating brief analysis of sub-issue two by Eighth Circuit).

227. *See supra* notes 183-189 and accompanying text (illustrating district court's unwillingness to follow procedural requirements in section 7 of NLGA, which allowed for Eighth Circuit to successfully vacate district court's opinion); *see also* 29 U.S.C. § 7 (2006) (citing language of section 7 of NLGA because language entitles NFL to hearing challenging evidence presented by Plaintiffs).

228. *See infra* notes 229-232 and accompanying text (detailing reason why court made proper decision to vacate district court's decision in *Brady*).

229. *See supra* notes 197-210 and accompanying text (detailing court's reasoning for ignoring legislative history of NLGA and implications that decision had on outcome of *Brady*).

230. *See supra* notes 216-227 and accompanying text (detailing critical analysis of court's textual analysis of NLGA).

231. *See supra* notes 207-210 and accompanying text (describing implications posed by *Brady* to NFL business entirely and each individually-owned member organization).

232. *See* Walter, *supra* note 30 (presenting opinion of Duke law professor Paul Haagen regarding decision of Eighth Circuit in relation to implications on NFL season). "If you are the league, [by not negotiating] you're running some level of risk that the collective bargaining relationship ended when the collective bargaining agent went away." *Id.* The risk of having to pay treble damages in the antitrust litigation was incentive for the owners to keep negotiating with the Players, instead of standing their ground and challenging the merits of the Players' antitrust lawsuit. *See id.* (explaining risk of threat of treble damages for NFL owners).

V. IMPACT OF *BRADY* ON FUTURE LABOR DISPUTES IN AMERICAN PROFESSIONAL SPORTS

The Eighth Circuit's decision in *Brady* is a significant development in the law surrounding professional sports.[233] The decision is especially important because it should affect future labor disputes between professional sports leagues and player unions, as shown by the recent lockout in the NBA.[234] Although there is criticism that the Eighth Circuit's holding is too narrow, the decision comes to no surprise to the legal community.[235] Furthermore, *Brady* can be interpreted as a positive holding for both parties.[236]

For the NFL, *Brady* was a major victory and validation of its legal strategy.[237] First, *Brady* upheld the use of lockouts for employers, such as a professional sports league, as a means of pressuring its employees into accepting worse terms in collective bargaining.[238] Going forward, professional sports leagues will likely rely on *Brady* to validate their legal strategy of locking out their athletes during a

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233. *See* Kennerly, *supra* note 22 and accompanying text (indicating *Brady* opinion was big news in sports and antitrust litigation worlds).

234. *See* Howard Beck, *Two Lockouts, Each With A Different Playbook*, N.Y. TIMES, July 10, 2011, at 8 (detailing how *Brady* will affect strategy of parties to current NBA lockout); *see also* Michael McCann, *Court's Ruling Validates NFL's Legal Strategy, Puts Players In Tough Spot*, SPORTS ILLUSTRATED.COM (July 8, 2011, 12:18 PM) http://sportsillustrated.cnn.com/2011/writers/michael_mccann/07/08/8th-circuit-nfl-lockout-ruling/index.html (illustrating briefly how *Brady* will affect current NBA lockout). For a more detailed discussion on *Brady*'s influence on the NBA lockout, *see infra* notes 254-272 and accompanying text.

235. *See* Beck, *supra* note 234 (indicating "several legal experts said, the decision merely affirmed the Eighth Circuit's conservative reputation, and underscored why the NBA players union should seek a different court if it files an antitrust lawsuit"). The ruling was narrowly focused and not considered surprising. *See id.* (explaining how *Brady* was not surprising to legal community); *see also* McCann *supra* note 234 (indicating that previous comments by *Brady* panel made decision predictable).

236. *See* Kennerly, *supra* note 22 (indicating *Brady* had benefits for both parties involved, though NFL had more benefits than Players).

237. *See* McCann, *supra* note 234 (indicating *Brady* is major victory and validation of the league's legal strategy). The NFL successfully argued that the NLGA applies, thus upholding its lockout. *See id.* (explaining success of NFL's legal strategy).

238. *See* Kennerly, *supra* note 22 (illustrating *Brady* was terrible ruling for Players). *Brady* means that any and every employer in the Eighth Circuit, not just the NFL, can lockout employees, even in violation of other federal laws (e.g. antitrust), to pressure the employees into accepting worse terms. *See id.* (explaining significance of *Brady* for employers). A company can lockout employees and not pay wages, in violation of the Wage and Hour laws, and a court cannot order them to pay until the end of the lawsuit. *See id.* (illustrating how negative *Brady* was for employees).

collective bargaining impasse.[239] Second, the NFL successfully eliminated the injunction, the Players' most effective weapon and collective bargaining chip.[240] As a result, the Players had to decide whether to pursue the merits of their antitrust claim or surrender to various demands from the NFL owners and settle on a new CBA.[241] Ultimately, this was an easy decision for the Players because an antitrust suit would have resulted in one or more years of litigation.[242] The length of an antitrust trial would have been undesirable because the Players would have lost significant compensation and older players would have lost value as their skills diminished, plus the suit would still be subject to the jurisdiction of the same Eighth Circuit Court of Appeals that decided *Brady*.[243]

Nevertheless, *Brady* does offer some positive attributes on the Players' side in future labor disputes.[244] First, the Eighth Circuit did not speak on the merits of the Players' antitrust claims, leaving the option open going forward.[245] Second, the Eighth Circuit may not have spoken directly on the nonstatutory labor exemption, but as one commentator pointed out, the panel said in oral argument that the exemption ends within six months to a year.[246] Thus, the

239. For a more detailed discussion on why professional sports leagues should rely on *Brady* to validate a legal strategy of locking out their professional unionized athletes, see *supra* notes 237-239 and accompanying text.

240. *See* Kennerly, *supra* note 22 (illustrating Players' lost biggest weapon in losing injunction). It seems more than a little strange that both sides could feel "emboldened by the order," because the Players lost one of their most valuable bargaining chips with the district court order enjoining the lockout. *See id.* (illustrating negative impact of *Brady* for Players).

241. *See id.* (indicating Players antitrust suit can still go forward after *Brady*); *see also* McCann, *supra* note 234 (illustrating that *Brady* posed tough decision for Players concerning their antitrust suit going forward).

242. *See* Kennerly, *supra* note 22 (detailing how Players would not have wanted to stomach long antitrust suit for years); *see also* McCann, *supra* note 234 (indicating that timing of antitrust litigation often takes "years").

243. *See* McCann, *supra* note 234 (illustrating negative effects antitrust claim would have on Players). Winning a trial in 2012 or 2013 probably would not mean much to the Players if they hadn't been paid for a year, particularly for older players whose skills have diminished, and the win would be subject to appeal to the Eighth Circuit. *See id.* (explaining reasoning for why following through with antitrust suit may not have been wise decision by Players).

244. *See* Kennerly, *supra* note 22 (indicating there is light at end of tunnel for Players after *Brady*).

245. *See id.* (acknowledging "the court did not rule on any of the antitrust allegations made by the Players"). The antitrust case by the Players can continue to go forward. *See id.* (illustrating one way *Brady* was positive for Players); *see also* McCann, *supra* note 234 (indicating that "the decertification strategy could ultimately still lead to a favorable antitrust trial").

246. *See* Walter, *supra* note 30 (discussing court's failure to expressly address nonstatutory labor exemption). As noted by Matthew Bodie, law professor at St. Louis University, "[i]t seemed to [Bodie] the judges on the panel were saying [the

Players were able to pressure the owners with the potential of their antitrust claim, and win some collective bargaining leverage by forcing the owners to settle in due time.[247] This resulted in more favorable terms for the Players in the new CBA.[248]

Although NFLPA President DeMaurice Smith publicly stated that decertification might not have been the most effective strategy, it is reasonable to disagree with that assertion.[249] The strategy by the Players in *Brady* was courageous.[250] The Players fought hard to pursue the most favorable terms in the eventual CBA, and they utilized the federal court system in an unprecedented fashion.[251] *Brady* represents a significant precedent for players' unions going forward because in the event professional athletes attempt to file an antitrust lawsuit against a professional sports league, *Brady* illustrates that the players should utilize a more liberal court, such as the Ninth Circuit in California.[252] Furthermore, as shown in the NBA lockout, *Brady* firmly proved that player unions going forward should seek treble damages, rather than a preliminary injunction, due to the jurisdictional restraints set out by the NLGA.[253]

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exemption ends within] six months to a year." *See id.* (indicating potential time restraint on scope of labor exemption).

247. *See id.* (discussing how NFL would have been subject to antitrust scrutiny if CBA talks continued to stall after *Brady* was issued). As noted by Matthew Bodie, law professor at St. Louis University, "If it's only six months, sometime in September the league is going to start racking up these antitrust violations." *Id.* "If you are the league, you're running some level of risk that the collective bargaining relationship ended when the collective bargaining agent went away." *Id.*

248. *See id.* (quoting Matthew Bodie, law professor at St. Louis University, indicating that risk involved with waiting lead to more favorable terms for Players in CBA). "We're in the zone of risk, and risk has a value to it." *Id.*

249. *See* Mike Florio, *De Smith Tells NBA Players that Decertification Is "Not the Silver Bullet"*, PRO FOOTBALL TALK (Sept. 15, 2011, 11:12 PM) http://profootballtalk.nbcsports.com/2011/09/15/de-smith-tells-nba-players-that-decertification-is-not-the-silver-bullet/ (discussing DeMaurice Smith's comments regarding NFL's decision to decertify in *Brady*). Smith addressed the NBA players, who were locked out at the time and contemplating decertification, by saying that shutting down the NBA might not be the way to go. *See id.* (explaining extent of Smith's comments to NBA players regarding decertification).

250. *See supra* notes 17-18 and accompanying text (indicating courageous nature of Players because *Brady* was unprecedented in terms of prior NFL labor disputes).

251. For a more detailed discussion on how the Players' lawsuit was unprecedented, see *supra* notes 17-18 and accompanying text.

252. *See* Beck, *supra* note 234 (indicating NBA players should pursue different federal circuit other than Eighth Circuit). "If NBA players do pursue an antitrust lawsuit, they are likely to use the NFL's case as a guideline and file in another jurisdiction, probably the Ninth Circuit in California, which is considered more liberal." *Id.*

253. *See Players File 2 Antitrust Suits vs. NBA*, ESPN.COM (Nov. 17, 2011, 11:10 AM), http://espn.go.com/nba/story/_/id/7239168/nba-cancels-games-dec-15-players-file-2-antitrust-lawsuits (explaining NBA players' legal strategy against NBA

In late 2011, the NBA went through a 149-day lockout, resulting in similar fashion to the NFL's lockout as both parties came to terms on a new ten-year CBA on November 26, 2011.[254] The new NBA CBA features many changes to the NBA's structure, especially with regard to free agency movement.[255] Prior to the new agreement, the NBA players were determined to place the future of the NBA in the hands of the federal courts.[256] On November 16, 2011, a group of named NBA players, including Carmelo Anthony, Kevin Durant, and Chauncey Billups, filed antitrust lawsuits in both the Northern District of California and the U.S. District Court of Minnesota seeking an end to what they claimed was an illegal boycott of the NBA workforce.[257] Instead of an injunction, the players sought summary judgment for $6 billion in monetary treble damages for lost wages, among other things.[258] Thus, their case did not trigger the Norris LaGuardia Act's jurisdictional restraints.[259] Eventually,

owners subsequent to the players' decertification). For a more detailed discussion on the Eighth Circuit's opinion in *Brady*, see *supra* notes 142-193 and accompanying text. For a more detailed discussion on the Norris LaGuardia Act, see *supra* notes 73-79 and accompanying text.

254. *See* Joe Dorish, *NBA Lockout Is Over, Why Owners Are The Clear Winners: Fan's View*, YAHOO! SPORTS (Nov. 26, 2011, 11:05 AM), http://sports.yahoo.com/nba/news?slug=ycn-10529629 (analyzing new CBA between NBA owners and NBA players). The CBA called for a sixty-six game regular season in 2011-2012, with an opt-out clause for either side after year six. *See id.* (detailing final CBA between parties in NBA lockout).

255. *See* Adrian Wojnarowski, *Specifics of NBA's Proposed Labor Deal*, YAHOO! SPORTS (Nov. 26, 2011, 1:53 PM), http://sports.yahoo.com/nba/news;_ylt=Ai5zMSxEFHGu8RVVc36a43PTjdIF?slug=aw-wojnarowski_nba_labor_deal_112611 (outlining terms of new ten-year NBA CBA). The players received a split on a base case of 50% of basketball-related income, which is down 7% from the previous CBA. *See id.* (explaining revenue split in new CBA). The split can range anywhere from 49% to 51% based on revenue projections. *See id.* (explaining range of revenue split for NBA players in new CBA). The maximum contract length, annual salary increases, and maximum salary for players coming off their rookie deals were all changed in the new deal. *See id.* (explaining new maximum contract length rules). The midlevel exception system was altered to include more opportunity to spend for teams in the luxury tax threshold, and the luxury tax system was changed as well. *See id.* (explaining new midlevel exception rule in NBA's new CBA). Lastly, the deal includes a minimum team salary of 85% in the first two years of the deal and 90% of the salary cap in the years thereafter. *See id.* (explaining new minimum salary requirement in new NBA CBA).

256. *See* Howard Beck, *In Attempt to Force Talks, Players File Antitrust Suit*, N.Y. TIMES, Nov. 16, 2011, at B15 (acknowledging NBA player filed antitrust lawsuits in federal district courts).

257. *See id.* (detailing NBA players' antitrust claim and merits of their lawsuit).

258. *See Players File 2 Antitrust Suits vs. NBA*, *supra* note 253 (acknowledging NBA players sought treble damages in antitrust suit against NBA owners prior to signing new CBA); *see also* Beck, *supra* note 256 (acknowledging NBA players did not seek an injunction).

259. For a more detailed discussion on the Norris LaGuardia Act, see *supra* notes 73-79 and accompanying text.

the players amended their federal complaint and consolidated their efforts to the U.S. District Court of Minnesota.[260]

Coincidentally, attorney David Boies, who also represented the NFL owners in *Brady*, represented the NBA players.[261] Boies was determined that the NBA's lockout violated federal antitrust laws because the NBA owners were refusing to the let the players work, similar to the argument made in *Brady*.[262] Moreover, the NBA's case was distinguishable from *Brady* in that the NBA players did not elect to decertify their union until nearly four months after the expiration of their CBA.[263] In the NBA's case, the NBA players were set to argue that disbanding their union, in conjunction with Commissioner David Stern's ultimatum to the players to accept the deal on the table or face harsher terms down the road, strengthened the argument that the nonstatutory labor exemption was not applicable.[264]

It is interesting to note how *Brady* affected the NBA lockout, which increases *Brady*'s influence on future labor disputes in professional sports.[265] First, *Brady* caused the NBA players to seek summary judgment in treble monetary damages in their antitrust claim,

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260. *See* Jeff Zillgitt, *Players' Lawsuits Combined in Minnesota; Stars Plan Charity Tour*, USA TODAY, Nov. 22, 2011, at 8C (detailing NBA players' consolidated lawsuit as well as supplying copy of players' brief submitted to United States District Court for District of Minnesota).

261. *See* Beck, *supra* note 256 (acknowledging coincidence of Boies representing both NBA players in NBA lockout and NFL owners in *Brady*).

262. *See Players File 2 Antitrust Suits vs. NBA*, *supra* note 253 (acknowledging NBA players' complaint alleged NBA lockout violated antitrust law by refusing to let players work).

263. *See* Marc Stein, *NBA Players Reject Owners' Offer*, ESPN.COM (Nov. 15, 2011, 12:52 PM), http://espn.go.com/nba/story/_/id/7234180/nba-lockout-players-not-accept-deal-seek-disband-billy-hunter-says?eleven=twelve (detailing NBA players' strategy to decertify their union prior to filing their antitrust lawsuit against the NBA); *see also supra* note 122 and accompanying text (detailing NFL's strategy to decertify upon expiration of their CBA with NFL owners in *Brady*). For a more detailed discussion on decertification, see *supra* notes 45-53 and accompanying text.

264. *See* Beck, *supra* note 256 (outlining NBA players' legal strategy and potential arguments against NBA owners in antitrust claim); *see also Players File 2 Antitrust Suits vs. NBA also*, *supra* note 253 (detailing NBA players' legal strategy and comments made by their attorney, David Boies). "Here you had an ultimatum from the [NBA] owners that made absolutely clear that the collective bargaining process was over." *Id.* Boeis also added that Commissioner David Stern's threat "is not collective bargaining," which points to the players' argument that the bargaining relationship had ended. *See id.* (presenting further comments made by Boeis). For a more detailed discussion on the nonstatutory labor exemption *see* notes 54-72 and accompanying text.

265. For a more detailed discussion on how *Brady* affected the recent NBA lockout, see *infra* notes 266-64 and accompanying text.

rather than a preliminary injunction.[266] As discussed in *Brady*, the NLGA sufficiently eliminates the injunction from professional athletes going forward.[267] Second, *Brady* furthers the belief that negotiation should remain both parties' first priority.[268] While decertification, lockouts, and antitrust suits are all potentially fitting legal strategies, the real value is gaining leverage at the bargaining table.[269] As the Eighth Circuit seemed to express in *Brady*, federal courts are more willing to side with collective bargaining than allow one party to pursue litigation on the merits.[270] Nevertheless, due to the potential of financial struggles in professional sports, leagues and/or player unions have more incentive to shut down their operations in order to get the most beneficial deal for the future success of their league.[271] Thus, in those situations, *Brady* will dictate to a certain extent how each party should pursue their legal strategies respectively.[272]

In conclusion, *Brady* brought a return to football, and potentially an end to some of the litigation.[273] Neutral arbitrators, not judicial oversight, will resolve future labor disputes between the NFL and the NFLPA.[274] Although *Brady* seems to be a narrow opinion on its face, the Eighth Circuit essentially saved the 2011 NFL

266. *See supra* note 258 and accompanying text (acknowledging what NBA players sought in antitrust claim against NBA).

267. *See supra* notes 142-193 and accompanying text for a more detailed discussion on the Eighth Circuit's opinion in *Brady* (detailing Eighth Circuit's opinion in *Brady* and scope of Norris LaGuardia Act to parties seeking injunctions in federal court). For a more detailed discussion on the Norris LaGuardia Act, *see supra* notes 73-79 and accompanying text.

268. For a more detailed discussion on how negotiation should remain both parties' first priority and on the implications of operating a league without CBA in place, see *supra* notes 207-210 and accompanying text.

269. For a more detailed discussion on how the motive behind an employer lockout is to gain leverage in collective bargaining negotiations, see *supra* notes 37-44 and accompanying text. For a more detailed discussion on how the motive behind decertification of a certified employee union is to gain leverage in collective bargaining negotiations, see *supra* notes 45-53 and accompanying text.

270. For a more detailed discussion on how the Eighth Circuit seemed to express a desire for both parties to negotiate such terms and conditions of employment through the collective bargaining process, see *supra* notes 231-232 and accompanying text.

271. *See* Wojnarowski, *supra* note 255 (illustrating how NBA went through financial woes, but in order to preserve success of NBA's future, both parties negotiated and agreed upon innovative financial structure in new CBA).

272. For a more detailed discussion of opinion in *Brady*, see *supra* notes 142-193 and accompanying text.

273. *See* Walter, *supra* note 30 (noting that new agreement brings return to football, and maybe end of litigation through new provisions set forth in new CBA).

274. *See id.* (acknowledging that "CBSSports.com reported that judicial oversight, a longstanding tradition in the NFL, will be required to give way to neutral

season, and allowed for both parties to resolve their differences the traditional way: at the negotiating table, not the federal courtroom.[275]

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arbitrators selected by the NFL and the NFL Players Association, who will resolve future disputes when they arise").

275. *See supra* notes 228-232 and accompanying text (illustrating that Eighth Circuit determined outcome of case by considering implications that 2011 NFL lockout posed on operations and future success of NFL, which allowed for both parties to negotiate, rather than litigate, eventual CBA). For a more detailed discussion on how *Brady* is considered a narrow opinion, see *supra* note 235 and accompanying text.

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