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INTRODUCTION

Sports, both professional and amateur, occupy an enormous portion of the American cultural zeitgeist. Of the top one hundred television broadcasts in the United States in 2021, sixty-seven were a sports broadcast.[1] The National Football League (NFL), with nearly $12 billion in revenue in the 2022–23 season,[2] and the National Basketball Association (NBA), with $10 billion in the 2021–22 season,[3] are two of largest sports leagues by revenue in the world.[4] Given the massive amount of money flowing to professional sports, the players unions of professional sports leagues are some of the most powerful labor unions in the United States.

The governing agreements between unions and professional sports leagues are collective bargaining agreements (CBA) negotiated by players unions, such as the NFL Players Association (NFLPA), the NBA Players Association, and the Major League Baseball Players Association (MLBPA).[5] A CBA is a contract between employers and unions defining union

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[1] Michael Scheider & Mónica Marie Zorrilla, *Top 100 Telecasts of 2021: 'NCIS,' 'Yellowstone,' NFL Dominate, as Oscars Fail to Make the Cut*, VARIETY (Dec. 29, 2021, 10:30 AM), https://variety.com/2021/tv/news/top-rated-shows-2021-ncis-yellowstone-squid-game-1235143671/ [https://perma.cc/6XAG-37SQ].

[2] Mike Ozanian, *NFL National Revenue Was Almost $12 Billion In 2022*, FORBES (July 11, 2023, 11:19 AM) https://www.forbes.com/sites/mikeozanian/2023/07/11/nfl-national-revenue-was-almost-12-billion-in-2022/?sh=727a6d692d74 [https://perma.cc/CU8C-MTJ5].

[3] Justin Byers, *NBA Tops $10B in Revenue for First Time Ever*, FRONT OFF. SPORTS (July 14, 2022, 4:48 PM), https://frontofficesports.com/nba-tops-10b-in-revenue-for-first-time-ever/ [https://perma.cc/UP76-3Y6A].

[4] Kevin Omuya & Jackline Wangare, *Which Are the 15 Richest Sports Leagues in the World Currently?*, SPORTS BRIEF (Nov. 19, 2023, 3:21 PM), https://sportsbrief.com/other-sports/32109-which-richest-sports-leagues-world-currently/ [https://perma.cc/JJR9-942P].

[5] *See generally* NAT'L BASKETBALL ASS'N, COLLECTIVE BARGAINING AGREEMENT (2017); NAT'L FOOTBALL LEAGUE, COLLECTIVE BARGAINING AGREEMENT (2020).

members' terms of employment, such as "pay, benefits, hours, [and] leave," among other conditions of employment.[6] The first collective bargaining agreement in professional sports was ratified between Major League Baseball and the MLBPA in 1968. This first CBA "guaranteed a uniform contract" and minimum salary for all professional baseball players.[7] Among other things, CBAs in sports leagues typically dictate how revenue is shared between players and owners, codify penalties for player misconduct, and, importantly, determine age rules and draft eligibility requirements for players hoping to join the professional ranks.[8] Negotiations for these CBAs are often extremely adversarial, leading to labor stoppages initiated by both players and owners.[9] However, in spite of the sometimes contentious nature of these labor negotiations, the relationship between unions and leagues has mostly been lucrative for both parties, as evidenced by the yearly increases in salary cap assigned to teams for player compensation.[10]

One small but important aspect of CBAs is the age requirements of prospective players who wish to join the respective leagues. In the NBA, for example, a player is eligible for selection in the NBA draft when they will be at least nineteen years old during the calendar year in which the draft is held, and "at least one . . . NBA Season has elapsed since the player's graduation from high school."[11] The NBA's draft eligibility rules

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[6] *Collective Bargaining*, AFL-CIO, https://aflcio.org/what-unions-do/empower-workers/collective-bargaining [https://perma.cc/VK96-WJYM].

[7] Marc Normandin, *50 Years Ago, Marvin Miller and the MLBPA Changed Sports Forever*, SB NATION (June 11, 2018, 11:00 AM), https://www.sbnation.com/mlb/2018/6/11/17437624/mlb-mlbpa-cba-marvin-miller-robert-cannon [https://perma.cc/PEP7-SM9C].

[8] *See* NAT'L BASKETBALL ASS'N, *supra* note 5, at 116, 273 (penalizing players for, among other things, failing to attend practice sessions and setting the minimum age for draft eligibility at nineteen); NAT'L FOOTBALL LEAGUE, *supra* note 5, at 69 (detailing, for example, what constitutes "All Revenues" for accounting purposes).

[9] *See, e.g.*, Dayn Perry, *MLB Lockout: What Negotiations Over the 2020 MLB Season Taught Us About the Current Owner Lockout*, CBS SPORTS (Dec. 10, 2021, 10:02 AM), https://www.cbssports.com/mlb/news/mlb-lockout-what-negotiations-over-the-2020-mlb-season-taught-us-about-the-current-owner-lockout/ [https://perma.cc/QTN6-UZ3P]; Howard Beck, *N.B.A. Reaches a Tentative Deal to Save the Season*, N.Y. TIMES (Nov. 26, 2011), https://www.nytimes.com/2011/11/27/sports/basketball/nba-and-basketball-players-reach-deal-to-end-lockout.html [https://perma.cc/EBL8-JNX8]; Patrick Rishe, *Who Won the 2011 NFL Lockout?*, FORBES (July 21, 2011, 10:44 PM), https://www.forbes.com/sites/sportsmoney/2011/07/21/who-won-the-2011-nfl-lockout/?sh=3f4dd2117071 [https://perma.cc/UX78-3E63].

[10] *See NBA Salary Cap for 2022-23 Season Set at $123.655 Million*, NBA (June 30, 2022), https://pr.nba.com/nba-salary-cap-2022-23-season/ [https://perma.cc/XGX2-HQQN]; *2022 Free Agency Questions & Answers*, NFL COMMC'NS, https://nflcommunications.com/Pages/2022-NFL-Free-Agency-Questions-and-Answers.aspx [https://perma.cc/V8NY-DYD7].

[11] NAT'L BASKETBALL ASS'N, *supra* note 5, at 273.

have been coined the "one and done rule" rule because it creates a one-year waiting period after high school graduation.[12] In the NFL, a player is eligible for selection in the draft when "three NFL regular seasons have begun and ended" following the player's graduation from high school.[13] Other than some exceptions for international players, these rules govern who is and is not eligible to play in the NBA and NFL respectively.[14]

Draft eligibility requirements faced their most forceful legal challenge in 2004 in *Clarett v. National Football League.* Maurice Clarett, an outstanding freshman football player for The Ohio State University in 2002, wanted to declare for the NFL draft after his freshman year.[15] Ineligible to do so under the terms of the NFL's CBA, Clarett filed suit, alleging that "the NFL's draft eligibility rules [were] an unreasonable restraint of trade in violation of [antitrust law]."[16] Accordingly, Clarett wanted the NFL's draft eligibility rule to be declared unlawful so that he would be eligible for the next draft.[17] Decisions at both the district court and Second Circuit hinged on whether the nonstatutory labor exemption from antitrust law applied to the NFL's draft eligibility requirements. The nonstatutory labor exemption exempts the judicial use of antitrust law to prevent labor disputes.[18] The nonstatutory labor exemption recognizes that "to allow meaningful collective bargaining to take place, some restraints on competition imposed through the bargaining process must be shielded from antitrust sanctions."[19] Simply put, the nonstatutory labor exemption is a judicially created doctrine that allows labor and antitrust policy to live in harmony by shielding some collective bargaining activities from antitrust scrutiny.

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[12] Ryan Resch, *College Basketball: The Problem with the One and Done Rule Debate*, BLEACHER REP. (Feb. 23, 2012), https://bleacherreport.com/articles/1077746-college-basketball-the-problem-with-the-one-and-done-rule-debate [https://perma.cc/4WZD-9V7H]. The one-and-done rule was adopted in 2005 in response to a slew of untested teenagers having difficultly transitioning from high school to the NBA. Grant Hughes, *Why the NBA's 1-and-Done Rule Is Causing More Harm Than Good*, BLEACHER REP. (Aug. 8, 2013), https://bleacherreport.com/articles/1723163-why-the-nbas-one-and-done-rule-is-causing-more-harm-than-good [https://perma.cc/KT9U-FC4U]. LeBron James's and Kobe Bryant's draft eligibility predated the one-and-done rule, which is why they were eligible for the NBA Draft directly from high school. *Id.*

[13] NAT'L FOOTBALL LEAGUE, *supra* note 5, at 17.

[14] *See* NAT'L BASKETBALL ASS'N, *supra* note 5, at 273–74; NAT'L FOOTBALL LEAGUE, *supra* note 5, at 17.

[15] Clarett v. Nat'l Football League, 369 F.3d 124, 126 (2d Cir. 2004), *rev'd* 306 F. Supp. 2d 379 (S.D.N.Y. 2004).

[16] *Id.*

[17] *Id.* at 128–29.

[18] Brown v. Pro Football, Inc., 518 U.S. 231, 236–37 (1996).

[19] *Id.* at 237.

While the District Court for the Southern District of New York held that the nonstatutory labor exemption did not apply and granted summary judgement in favor of Clarett,[20] the Second Circuit Court of Appeals reversed and held that the nonstatutory labor exemption did indeed apply to draft eligibility rules.[21] This meant that the NFL's draft eligibility rule was exempt from antitrust scrutiny and could remain in place.[22] While the Second Circuit's decision in *Clarett* has mostly held since it was decided, it has received criticism in academic circles.[23] Critics state that mandatory subjects of collective bargaining between players unions and sports leagues are limited to "wages, hours, and working conditions," and that draft eligibility rules are not included.[24] Others claim that draft eligibility rules fail to be "intimately related" to wages and establish "an anticompetitive restraint on the labor market" in professional sports.[25] Analogies have been drawn between draft eligibility requirements in professional sports and hypothetical situations in which students who graduate law school early would be prevented from practicing law until a certain number of years after graduation.[26]

The issue of whether the nonstatutory labor exemption applied to eligibility requirements in professional sports surfaced once again in *Moultrie v. National Women's Soccer League, LLC*.[27] Olivia Moultrie, a highly talented fifteen-year-old soccer player, sought a preliminary injunction to prevent the National Women's Soccer League (NWSL) from enforcing a rule that all players in the league must be at least eighteen years of age.[28] The court ruled in favor of Moultrie and held that the nonstatutory labor exemption did not apply to the NWSL's age rule because the rule was created years before the recognition of the NWSL Players Association (NWSLPA) as a bargaining unit and the start of

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[20] *Clarett*, 306 F. Supp. 2d at 393, *rev'd*, 369 F.3d 124.

[21] *Clarett*, 369 F.3d at 125.

[22] *Id.* at 138.

[23] *See, e.g.*, Jesse T. Clay, *Throwing the Challenge Flag: Why the Nonstatutory Exemption Should Not Apply to NFL and NBA Player Eligibility Policies*, 26 SPORTS LAWS. J. 69, 102 (2019); Zubin Kottoor, *One-and-Done Is No Fun: The NBA Draft Eligibility Rule's Conundrum and A Proposed Solution*, 8 ARIZ. ST. SPORTS & ENT. L. J. 98, 116 (2018); Tyler Pensyl, *Let* Clarett *Play: Why the Nonstatutory Labor Exemption Should Not Exempt the NFL's Draft Eligibility Rule from the Antitrust Laws*, 37 U. TOL. L. REV. 523, 523 (2006).

[24] Kottoor, *supra* note 23, at 116.

[25] Clay, *supra* note 23, at 102.

[26] Pensyl, *supra* note 23, at 523.

[27] O.M., *ex rel.* Moultrie v. Nat'l Women's Soccer League, LLC., 544 F. Supp. 3d 1063 (D. Or. 2021).

[28] *Id.* at 1176.

collective bargaining.[29] The NWSL argued that its Voluntary Recognition Agreement (VRA) with the NWSLPA placed the age rule beyond antitrust scrutiny because unilateral modification of the age rule would interfere with collective bargaining between the NWSL and NWSLPA.[30] The court disagreed, doubting whether the age rule was a term or condition of employment subject to mandatory collective bargaining.[31] After the decision in *Moultrie*, Olivia Moultrie was free to play professionally and signed with the Portland Thorns.[32]

The decision in *Moultrie* surfaced a new frontier in eligibility requirements and the nonstatutory labor exemption. The District Court for the District of Oregon believed age requirements were not a mandatory subject of collective bargaining,[33] while the Second Circuit believed that they were.[34] This note argues that those who oppose the nonstatutory labor exemption's application to age and draft eligibility rules ignore the fundamental importance of collective bargaining on player eligibility. Indeed, the Supreme Court "has implied this exemption from federal labor statutes, which set forth a national labor policy favoring free and private collective bargaining."[35] The nonstatutory labor exemption recognizes that "to allow meaningful collective bargaining to take place, some restraints on competition imposed through the bargaining process must be shielded from antitrust sanctions."[36] The Second Circuit in *Clarett* correctly recognized that many arrangements between leagues and players unions are mandatory bargaining subjects, even if they do "not appear to deal with wages or working conditions" at first glance.[37]

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[29] *Id.* at 1076.

[30] Defendant NWSL's Response to Plaintiff's Supplemental Memorandum in Support for Motion for Preliminary Injunction & Request for Amended Temporary Restraining Order at 9, *Moultrie*, 544 F. Supp. 3d 1063 (No. 3:21-CV-00683).

[31] *Moultrie*, 544 F. Supp. 3d at 1076.

[32] Anne M. Peterson, *Olivia Moultrie Proud of the Stand She Took to Play in the NWSL*, ASSOCIATED PRESS (Aug. 8, 2022, 5:46 PM), https://apnews.com/article/womens-soccer-sports-professional-international-257f1def64f1b7710ebb3f70ae93bd4a [https://perma.cc/L39T-LM8V]. In five seasons with the Portland Thorns, Moultrie has recorded five goals and seven assists in twenty-one matches. *Olivia Moultrie Career Stats*, ESPN, https://www.espn.com/soccer/player/stats/_/id/321118/olivia-moultrie [https://perma.cc/QYY7-XNT9].

[33] *Moultrie*, 544 F. Supp. 3d at 1076.

[34] Clarett v. Nat'l Football League, 369 F.3d 124, 139 (2d Cir. 2004) ("[T]he eligibility rules for the draft represent a quite literal condition for initial employment and for that reason alone might constitute a mandatory bargaining subject."); *id.* at 140 (explaining that draft eligibility rules "have tangible effects on the wages and working conditions" of professional athletes).

[35] Brown v. Pro Football, Inc., 518 U.S. 231, 236 (1996).

[36] *Id.* at 237.

[37] *Clarett*, 369 F.3d at 140.

The discussion around the nonstatutory labor exemption's application to age and draft eligibility requirements hinges on one core issue: are age rules and draft eligibility requirements mandatory subjects of collective bargaining? Given the unique arrangements between sports leagues and players unions, this note argues that age requirements and draft eligibility rules are mandatory subjects of collective bargaining. It also argues that the nonstatutory labor exemption should apply to preliminary agreements between developing professional sports leagues and players unions, such as the VRA in *Moultrie*. This approach will both strengthen the bargaining position of nascent players unions and encourage "the practice and procedure of collective bargaining."[38]

Part I sets forth the law and background of the nonstatutory labor exemption to antitrust legislation, with a brief history of its application in the sports collective bargaining context. Part II explores the legal reasoning behind the *Clarett* and *Moultrie* decisions in greater detail, explaining the differences between the Second Circuit's application of the nonstatutory labor exemption in *Clarett* and the District of Oregon's application in *Moultrie*. Part III analyzes criticisms of and proposed solutions to *Clarett* and critiques the approach adopted by the district court in *Moultrie*. Part IV explores why age and draft requirements are mandatory subjects of collective bargaining in professional sports and why the nonstatutory labor exemption should extend to preliminary agreements between leagues and players unions.

I. ANTITRUST AND LABOR POLICY IN THE SPORTS CONTEXT

Antitrust laws exist to protect consumers from anticompetitive conduct that deprives consumers of the "benefits of competition."[39] Specifically, the Sherman Antitrust Act makes every form of business "in restraint of trade or commerce" and any monopolization or attempt to monopolize any part of business illegal.[40] By the plain text of the statute, theoretically any agreement between two individuals can function as a restraint on trade.[41] Helpfully, in *Standard Oil Co. of New Jersey*

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[38] 29 U.S.C. § 151.

[39] *The Antitrust Laws*, U.S. DEP'T JUST. (June 25, 2015), https://www.justice.gov/atr/antitrust-laws-and-you#:~:text=The%20Sherman%20Antitrust%20Act,or%20markets%2C%20are%20criminal%20violations. [https://perma.cc/8TX6-U6PH].

[40] 15 U.S.C. §§ 1–2.

[41] *See* Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 63 (1911).

v. United States, the Supreme Court clarified that the Sherman Antitrust Act prohibits not every restraint on trade, but only those which are unreasonable.[42] Other than per se categories of antitrust violations, plaintiffs must prove injury under the rule of reason, "showing that the challenged action has had an actual adverse effect on competition as a whole in the relevant market."[43] Once the plaintiff meets this threshold, "the burden shifts to the defendant to offer evidence of the pro-competitive 'redeeming virtues'" of their arrangement.[44] If the defendant meets this burden, the plaintiff must then "demonstrate that any legitimate collaborative objectives proffered by defendant could have been achieved by less restrictive alternatives . . . that would be less prejudicial to competition as a whole."[45]

Antitrust laws do not expressly state whether CBAs and activities between unions and employers are subject to antitrust scrutiny.[46] To accommodate for collective bargaining and federal labor policy, certain activities between labor unions and employers have been deemed "beyond the reach" of antitrust law.[47] Federal labor policy is accommodated by two provisions: the statutory and nonstatutory exemptions to antitrust law. The Eighth Circuit, in *Mackey v. National Football League*, attempted to provide a framework for the application of the nonstatutory labor exemption before the Supreme Court, in *Brown v. Pro Football, Inc.*, provided the final word on shielding collective bargaining activity from antitrust scrutiny under the nonstatutory labor exemption.[48]

A. The Statutory and Nonstatutory Labor Exemptions

The statutory labor exemption is derived from the Clayton Act and the Norris-LaGuardia Act, which shield labor groups from antitrust scrutiny for activities such as picketing and boycotting, and from courts imposing injunctive relief in disputes between employers and employees, except in limited circumstances.[49]

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[42] *Id.* at 58.

[43] Cap. Imaging Assocs., P.C. v. Mohawk Valley Med. Assocs., Inc., 996 F.2d 537, 543 (2d Cir. 1993).

[44] *Id.*

[45] *Id.*

[46] United Mine Workers v. Pennington, 381 U.S. 657, 662 (1965).

[47] Clarett v. Nat'l Football League, 369 F.3d 124, 130 (2d Cir. 2004).

[48] *See* Mackey v. Nat'l Football League, 543 F.2d 606, 616 (8th Cir. 1976); Brown v. Pro Football, Inc., 518 U.S. 231, 250 (1996).

[49] *See* 15 U.S.C. § 17 ("Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor . . . organizations."); 29 U.S.C. § 52 ("No restraining order or injunction shall be granted by any court of the United States . . . in any case between an employer and employees . . . involving . . . a dispute

The nonstatutory labor exemption, created by courts, recognizes a congressional intent to prevent judicial use of antitrust law from resolving labor disputes.[50] The National Labor Relations Act of 1947 (NLRA) was passed with the intent "to prescribe legitimate rights of both employees and employers in their relations affecting commerce" and "to define and proscribe practices on the part of labor and management which affect commerce and [obstruct] the general welfare."[51] The NLRA grants employees the right to self-organization and collective bargaining by a chosen representative.[52] In effect, the nonstatutory labor exemption shields some restraints on competition imposed through the collective bargaining process from antitrust scrutiny.[53] Mandatory subjects of collective bargaining, which include "wages, hours, and other terms and conditions of employment," fall under the nonstatutory labor exemption.[54] Conversely, if collective bargaining does not concern these mandatory subjects of collective bargaining, the nonstatutory labor exemption does not apply and the resulting CBA may be subject to antitrust scrutiny.[55]

The nonstatutory exemption, therefore, was created to rectify the sometimes conflicting goals of national antitrust and labor policy.[56] Labor policy favors collective bargaining, but antitrust policy disfavors unreasonable restraints on trade; a CBA inherently violates antitrust policy because it functions as a restraint on trade, determining wages and working conditions absent a true competitive market. In *Meat Cutters v. Jewel Tea*, one of earliest applications of the nonstatutory labor exemption, the Supreme Court succinctly summarized the issue by holding that mandatory subjects of collective bargaining must be either directly on point or "intimately related to wages, hours and working conditions" to be eligible for the nonstatutory labor

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concerning terms or conditions of employment."); *id.* § 101 ("No court of the United States . . . shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute.").

[50] *Brown*, 518 U.S. at 236–37.

[51] 29 U.S.C § 141.

[52] *Id.* § 157.

[53] *Brown*, 518 U.S. at 236–37.

[54] 29 U.S.C § 158(d); *see, e.g.*, *Brown*, 518 U.S. at 236.

[55] Clarett v. Nat'l Football League, 306 F. Supp. 2d 379, 391–92 (2d Cir. 2004) ("Only agreements on [mandatory subjects of collective bargaining] are exempt from the antitrust laws.").

[56] *See Brown*, 518 U.S. at 237 ("As a matter of logic, it would be difficult, if not impossible, to require groups of employers and employees to bargain together, but at the same time forbid them to make among themselves or with each other *any* of the competition-restricting agreements potentially necessary to make the process work or its results mutually acceptable.").

exemption.[57] In *Meat Cutters*, Jewel Tea Co. challenged an agreement with the butcher's union to restrict hours for the sale of meat after Jewel Tea's proposals to eliminate the hours restriction were rejected with a threat to strike by the butcher's union.[58] Jewel Tea alleged that the butcher's union, through their threat to strike, conspired to prevent the sale of meat outside certain hours in violation of Sections 1 and 2 of the Sherman Antitrust Act.[59]

In a fractured decision, the majority in *Meat Cutters* agreed that the hours restriction fell outside of antitrust scrutiny, but for different reasons. Justice White, writing for himself and two others, concluded that the hours restriction was "so intimately related to wages, hours and working conditions" that the union's bargaining tactics for that provision, "through bona fide, arm's-length bargaining in pursuit of their own labor union policies," falls within the protection of the nonstatutory labor exemption.[60] Importantly, in a footnote, Justice White, without naming the nonstatutory labor exemption, clarified that whether the activities of labor unions fell under the protection of labor law required a balancing of the agreement's "relative impact on the product market and the interests of union members."[61]

Justice Goldberg, writing in a separate case, *United Mine Workers of America v. Pennington*, but concurring with the judgement in *Meat Cutters*, similarly held that mandatory subjects of collective bargaining—also "wages, hours, and working conditions" in his conception—may not be given antitrust scrutiny, as it would undermine the congressional scheme of "free collective bargaining between employers and unions."[62] However, he wrote that the balancing test proposed by Justice White was unnecessary, as "Congress intended to foreclose judges and juries from making essentially economic judgments in antitrust actions" in conflicts between unions and employers.[63]

Both the majority and Goldberg's concurrence in *Meat Cutters* defined the contours of the nonstatutory labor exemption: mandatory subjects of collective bargaining, namely "wages, hours, and working conditions," are not subject to

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[57] Loc. Union No. 189, Amalgamated Meat Cutters v. Jewel Tea Co., 381 U.S. 676, 689–90.

[58] *Id.* at 681.

[59] *Id.*

[60] *Id.* at 689–90 & n.5.

[61] *Id.* at 690 n.5.

[62] United Mine Workers v. Pennington, 381 U.S. 657, 700, 711–12 (1965) (Goldberg, J., concurring in part and dissenting in part).

[63] *Id.* at 719.

antitrust scrutiny.[64] The question then becomes what terms constitute wages, hours, and working conditions? Both *Clarett* and *Moultrie* answer that question differently with regard to draft eligibility rules. Before defining wages, hours, and working conditions though, *Mackey* and *Brown* are two formative cases that define the contours of the nonstatutory labor exemption's application to labor disputes.

B. Mackey*: An Early Attempt at Defining the Nonstatutory Labor Exemption*

One of the earliest inflection points on the application of the nonstatutory labor exemption was *Mackey v. National Football League*.[65] At issue was a provision known as the Rozelle Rule, which provided that when a player changes teams in free agency, the team who signs the free agent may be compelled to provide compensation, in the form of another player or draft picks, to the team losing the free agent.[66] A group of former and current NFL players sued the NFL over this provision, arguing that it "constituted an illegal combination and conspiracy in restraint of trade," in violation of the Sherman Act.[67]

Mackey is an example of the nonstatutory labor exemption's application to professional sports collective bargaining and articulates principles governing its application. The court in *Mackey* noted the Supreme Court's holding in *Meat Cutters v. Jewel Tea*, stating "in order to properly accommodate the congressional policy favoring free competition in business markets with the congressional policy favoring collective bargaining . . . certain union-employer agreements must be accorded a limited nonstatutory exemption from antitrust sanctions."[68] Summarizing case law on the nonstatutory labor exemption, the Eighth Circuit deduced three principles "governing the proper accommodation of the competing labor and antitrust interests."[69] For an agreement to be subject to the nonstatutory labor exemption, and thus free from antitrust scrutiny, the agreement must: (1) "primarily affect[] only the parties to the collective bargaining relationship," (2) concern a

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[64] *Id.* at 700 (majority opinion); *Meat Cutters*, 381 U.S. at 700 (Goldberg, J., concurring in part and dissenting in part).

[65] Mackey v. Nat'l Football League, 543 F.2d 606 (8th Cir. 1976).

[66] *Id.* at 609–11.

[67] *Id.* at 609.

[68] *Id.* at 611–12.

[69] *Id.* at 613–14.

"mandatory subject of collective bargaining,"[70] and (3) be the "product of bona fide arm's-length bargaining."[71]

Applying these principles, the Eighth Circuit held that the Rozelle Rule was not subject to the nonstatutory labor exemption because it was not the product of arm's-length negations between the NFL and NFLPA.[72] The *Mackey* factors defined by the Eighth Circuit continue to be influential in criticisms of *Clarett*.[73]

C. Brown*: The Supreme Court Weighs in on the Nonstatutory Labor Exemption in Professional Sports*

An important precursor to *Clarett*'s application of the nonstatutory labor exemption in the sports world was *Brown v. Pro Football, Inc.*[74] Where the nonstatutory labor exemption was implicitly recognized in cases such as *Meat Cutters* and *Pennington*, *Brown* is the first and only time the Supreme Court explicitly weighed in on the nonstatutory labor exemption's application to collective bargaining.[75] *Brown* also created the four-part test that defines the application of the nonstatutory labor exemption today.[76]

In *Brown*, a class of NFL developmental players sued the NFL for the unilateral imposition of a $1,000 weekly salary for players on developmental squads, arguing it was a violation of the Sherman Antitrust Act.[77] During collective bargaining negotiations in March 1989, the NFL adopted a plan that would allow each NFL team to establish a developmental squad comprised of six rookie players who had failed to secure a spot on the regular roster.[78] In April 1989, the NFL presented the developmental squad plan to the NFLPA and proposed a weekly salary of $1,000.[79] The NFLPA disagreed on the terms of pay and

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[70] *Id.* at 614; *see also* NLRB v. Borg-Warner Corp., 356 U.S. 342, 348 (1957) (stating that mandatory subjects of bargaining pertain to "wages, hours, and other terms and conditions of employment").

[71] *Mackey*, 543 F.2d at 614.

[72] *Id.* at 616.

[73] *See* Pensyl, *supra* note 23, at 537 ("The Second Circuit should have applied the *Mackey* test instead of the approach it used to evaluate whether the NFL's eligibility rule was exempt from antitrust liability.").

[74] Brown v. Pro Football, Inc., 518 U.S. 231, 235 (1996).

[75] *Id.* at 236–37; *see also* Loc. Union No. 189 v. Jewel Tea Co., 381 U.S. 676, 689 (1965) ("We pointed out in *Pennington* that exemption for union-employer agreements is very much a matter of accommodating the coverage of the Sherman Act to the policy of the labor laws.").

[76] *Brown*, 518 U.S. at 250.

[77] *Id.* at 235.

[78] *Id.* at 234.

[79] *Id.*

benefits for the developmental squad, and in June 1989, negotiations reached an impasse.[80] "The NFL then unilaterally implemented the developmental squad program," provided teams a uniform contract to offer developmental squad players, and threatened disciplinary action against any franchise that offered more or less than the standard $1,000 weekly salary.[81] In May 1990, a group of developmental squad players sued the NFL, alleging that the unilateral imposition of the development squad plan and uniform salary for developmental squad players was an antitrust violation.[82]

The Court ruled in favor of the NFL and applied the nonstatutory labor exemption to the NFL's conduct during negotiations.[83] In doing so, the Court defined a four-part test for applying the nonstatutory labor exemption: the conduct at issue must (1) take place "during and immediately after" collective bargaining negotiations, (2) grow out of or directly relate to the "lawful operation of the bargaining process," (3) involve issues the parties are "required to negotiate collectively," and (4) concern only "parties to the collective-bargaining relationship."[84] Importantly, this four-part test differs from the three-part test the Eighth Circuit defined in *Mackey*, functionally overturning *Mackey*'s guidance on the application of the nonstatutory labor exemption.[85]

The Court made several important observations on the importance of the nonstatutory labor exemption to the collective bargaining process.[86] Put succinctly, Congress's intent in enacting labor statutes was "to prevent judicial use of antitrust law to resolve labor disputes."[87] In accordance with congressional intent, "the implicit ('nonstatutory') exemption interprets the labor statutes . . . as limiting an antitrust court's authority to determine, in the area of industrial conflict, what is or is not a 'reasonable' practice."[88] The court clarified that an employer's actions "could be sufficiently distant in time and in circumstances from the collective-bargaining process" to warrant antitrust scrutiny, but the NFL's actions here did not approach that outer boundary.[89]

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[80] *Id.* at 234–35.
[81] *Id.* at 235.
[82] *Id.*
[83] *Id.* at 250.
[84] *Id.*
[85] *See* Mackey v. Nat'l Football League, 543 F.2d 606, 614 (8th Cir. 1976).
[86] *See Brown*, 518 U.S. at 235–37, 250.
[87] *Id.* at 236.
[88] *Id.* at 236–37.
[89] *Id.* at 250.

Brown provided a clear framework for the application of the nonstatutory labor exemption, but left some unanswered questions; namely, what constitutes mandatory subjects of collective bargaining, and what grows out of or relates to the "lawful operation of the bargaining process?"[90] *Clarett* and *Moultrie* take two different approaches to these lingering questions. However, *Clarett*'s application is more faithful to the nonstatutory labor exemption's central command: to prevent the "judicial use of antitrust law to resolve labor disputes."[91]

II. *CLARETT* AND *MOULTRIE*: NEW ISSUES IN COLLECTIVE BARGAINING AND DIFFERING APPROACHES TO THE NONSTATUTORY LABOR EXEMPTION

The courts in *Clarett* and *Moultrie* each took a different stance on whether age and draft eligibility requirements were mandatory subjects of collective bargaining. There are important differences between *Clarett* and *Moultrie*; namely that the court in *Clarett* dealt with a CBA that had long been ratified,[92] while the court in *Moultrie* was presented with only a preliminary agreement between league and union and a collective bargaining process that was in its infancy.[93] Despite these differences, a key question in both cases was whether eligibility requirements are mandatory subjects of collective bargaining. The Second Circuit determined that eligibility requirements were mandatory subjects of collective bargaining in *Clarett*,[94] while the district court in *Moultrie* held that they were not.[95] Eligibility requirements and each court's different approach represent a new "extreme outer boundar[y]" to the nonstatutory labor exemption in collective bargaining that the Supreme Court has not had the occasion to weigh in on.[96]

A. Clarett*: The District Court Relies on* Mackey *and Declines the Nonstatutory Labor Exemption*

In the Southern District of New York, Maurice Clarett challenged the NFL's draft eligibility rule requiring that eligibility be granted through permission of the Commissioner of

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[90] *Id.*

[91] *See id.* at 236.

[92] Clarett v. Nat'l Football League, 369 F.3d 124, 127 (2d Cir. 2004).

[93] O.M., *ex rel.* Moultrie v. Nat'l Women's Soccer League, LLC., 544 F. Supp. 3d 1063, 1076 (D. Or. 2021).

[94] *Clarett*, 369 F.3d at 139.

[95] *Moultrie*, 544 F. Supp. 3d at 1076.

[96] *See Brown*, 518 U.S. at 250.

the NFL, and that "[a]pplications will be accepted only for college players for whom at least three full *college seasons* have elapsed since their high school graduation."[97] Clarett, after a fantastic freshman season in which he led The Ohio State University to a victory over the University of Miami in the 2003 Fiesta Bowl, the National Championship game for the 2002 season, and was voted the Big Ten Freshman of the Year, had a strong case that the only thing standing between him and the NFL was the NFL's draft eligibility rule.[98] Clarett alleged that the draft eligibility rule was an illegal restraint on trade because it constituted a "group boycott" in which a broad class of possible players were excluded from the NFL labor market.[99]

In determining whether the nonstatutory labor exemption applied, the district court highlighted the formulation described in *Jewel Tea*, adopted by the Second Circuit in 1988.[100] First, the agreement in question "must further goals that are protected by national labor law" and be a traditionally mandatory subject of collective bargaining.[101] Next, "the agreement must not impose a 'direct restraint on . . . business . . . that has substantial anticompetitive effects . . . that would not follow naturally from the elimination of competition over wages and working conditions'" that result from collective bargaining.[102] Interestingly, the district court disregarded the Second Circuit's approach, described above, and instead applied the factors adopted by the Eighth Circuit in *Mackey*.

Applying the Eight Circuit's standard, the Southern District of New York held that the nonstatutory labor exemption did not apply to the NFL's draft eligibility rules because the rule did not concern "wages, hours and conditions of employment" in the NFL as required by *Jewel Tea*.[103] While the NFL cited several cases in support of the proposition that "rules governing eligibility for the draft" were protected by the nonstatutory labor exemption,

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97 Clarett v. Nat'l Football League, 306 F. Supp. 2d 379, 386 (S.D.N.Y. 2004).

98 *Id.* at 387–88.

99 *Id.* at 390. Group boycotts "generally consist of agreements by two or more persons not to do business with other individuals, or to do business with them only on specified terms." Balaklaw v. Lovell, 14 F.3d 793, 800 (2d Cir. 1994).

100 *Clarett*, 306 F. Supp. 2d at 392; *see generally* Loc. 210, Laborers' Int'l Union v. Lab. Rels. Div. Associated Gen. Contractors of Am., N.Y.S. Chapter, Inc., 844 F.2d 69 (2d Cir. 1988) (highlighting when the Second Circuit adopted the formulation described in *Jewel Tea*).

101 *Local 210*, 844 F.2d at 79.

102 *Id.* at 79–80.

103 *Clarett*, 306 F. Supp. 2d at 382.

the court dismissed these examples as cases concerning "the terms by which those who are drafted are employed."[104]

Furthermore, the court held that the nonstatutory labor exemption was inapplicable because the draft eligibility rule applied only to "complete strangers to the bargaining relationship."[105] Newcomers to an industry may "find themselves disadvantaged vis-à-vis those already hired," but the district court characterized Clarett's situation differently.[106] While employees hired after a CBA is ratified are bound by its terms, those "who are categorically denied eligibility for employment," such as Clarett, "cannot be bound by the terms of employment they cannot obtain."[107] In short, "Clarett's eligibility was not the union's to trade away."[108]

Finally, the district court found that the nonstatutory labor exemption was inapplicable because "the NFL ha[d] failed to demonstrate that the [draft eligibility r]ule" was the result of "arm's-length negotiations between the [NFL] and the NFLPA."[109] The court noted that the draft eligibility rule was adopted thirty-one years before the formation of the NFLPA, and forty-three years before the first CBA was ratified.[110] Furthermore, the NFL offered no evidence that the eligibility rule was addressed during negotiations in the first place.[111] At the time, NFL bylaws addressed the draft eligibility rules, and the fact that the CBA stated that the NFLPA "*waive*[*d*] its right[] to bargain over any provision" of bylaws demonstrated "that the union agreed not to *bargain over* or *challenge* the [draft eligibility rule]."[112]

Once the district court declined to apply the nonstatutory labor exemption, it went on to conclude that the NFL's draft eligibility rule violated antitrust law. After concluding that Clarett had antitrust standing, the district court applied the rule of reason and determined that the NFL's

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[104] *Id.* at 393, 395 (emphasis omitted); *see also* Nat'l Basketball Ass'n v. Williams, 45 F.3d 684, 687 (2d Cir. 1995) (challenging provisions on draft rights, revenue sharing, and salary cap); Caldwell v. Am. Basketball Ass'n, 66 F.3d 523, 529 (2d Cir. 1995) (concerning "circumstances under which an employer may discharge or refuse to hire an employee"); Wood v. Nat'l Basketball Ass'n, 602 F. Supp. 525, 527 (S.D.N.Y. 1984) (challenging an agreement between the league and players union limiting the right to negotiate some conditions of employment).

[105] *Clarett*, 306 F. Supp. 2d at 395.

[106] *Id.* (quoting Wood v. Nat'l Basketball Ass'n, 809 F.2d 954, 960 (2d Cir. 1987)).

[107] *Id.* at 396.

[108] *Id.* at 395.

[109] *Id.* at 396.

[110] *Id.*

[111] *Id.*

[112] *Id.*

draft eligibility rule was a restraint on trade with no legitimate procompetitive justification and hence a violation of antitrust law.[113] The court thereby ordered Clarett eligible for the upcoming 2004 NFL Draft.[114]

B. Clarett*: The Second Circuit Disregards* Mackey *and Applies the Nonstatutory Labor Exemption*

The NFL appealed the judgement of the District Court for the Southern District of New York ordering Clarett eligible for the 2004 NFL Draft to the Second Circuit Court of Appeals.[115] The Second Circuit ultimately reversed the district court's decision and held that the nonstatutory labor exemption applied to the NFL's draft eligibility rules.[116] As a result, Clarett was deemed ineligible for the 2004 NFL Draft.[117]

First, the Second Circuit disagreed with the district court's use of *Mackey* as the guiding authority on the application of the nonstatutory labor exemption.[118] While the lower court relied on *Mackey*, the Second Circuit stated that it "never regarded the Eighth Circuit's test in *Mackey* as defining the appropriate limits of the nonstatutory exemption."[119] The Second Circuit went a step further, criticizing the Eight Circuit's approach to the nonstatutory labor exemption.[120] It criticized the Eight Circuit's assumption that Supreme Court decisions in cases such as *Jewel Tea* and *Pennington* dictated the application of the nonstatutory labor exemption in cases where "the only alleged anticompetitive effect of the challenged restraint is on a labor market organized around a collective bargaining relationship"; the labor market in this case being the market for NFL-caliber football players.[121] Importantly then, the alleged restraint on trade does not disadvantage competitors; in the eyes of the Second Circuit, the restraint is on a unionized labor market (i.e., the NFLPA) in a collective bargaining relationship

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[113] *Id.* at 406, 410–11.

[114] *Id.* at 411.

[115] Clarett v. Nat'l Football League, 369 F.3d 124, 125 (2d Cir. 2004).

[116] *Id.*

[117] *Id.* at 143.

[118] *Id.* at 133.

[119] *Id.*

[120] *Id.* at 133–34 ("[T]he suggestion that the *Mackey* factors provide the proper guideposts in this case simply does not comport with the Supreme Court's most recent treatment of the nonstatutory labor exemption in *Brown v. Pro Football, Inc.*").

[121] *Id.* at 134 ("[T]hese decisions are of limited assistance . . . because all 'involved injuries to *employers* who asserted that they were being excluded from competition in the product market.'") (quoting Wood v. Nat'l Basketball Ass'n, 809 F.2d 954, 963 (2d Cir. 1987)).

with a "multi-employer bargaining unit" (i.e., the teams comprising the NFL).[122]

Furthermore, the Second Circuit critiqued the district court's disregard of relevant caselaw.[123] Where the district court disregarded caselaw on league-imposed restraints on "the labor market for players' services" because it did not concern job eligibility, the Second Circuit found that in those cases, the nonstatutory labor exemption defeated "players' claims that the concerted action of . . . professional sports league[s]" violated antitrust law because "the relationships among the defendant sports leagues and their players were governed by collective bargaining agreements" and were thus governed by labor, rather than antitrust, law.[124] The Second Circuit regarded this caselaw as controlling authority in Clarett's case because of its comport with the Supreme Court's holding in *Brown* that "the non-statutory exemption precludes antitrust claims against . . . professional sports league[s] for unilaterally setting policy with respect to mandatory bargaining subjects after negotiations . . . reach [an] impasse."[125]

Finding that *Brown* rather than *Mackey* governed the application of the nonstatutory labor exemption and that CBAs negotiated between leagues and players are subject to the nonstatutory labor exemption prompted the question: are draft eligibility rules mandatory subjects of collective bargaining? The Second Circuit emphatically answered yes.[126] According to the Second Circuit, draft eligibility rules are a "quite literal" condition for employment in professional sports.[127] Furthermore, based on precedent, draft eligibility rules are mandatory subjects of collective bargaining because they have "tangible effects on the wages and working conditions" of those already in the NFL.[128]

In *Silverman v. Major League Baseball Player Relations Committee, Inc.*, the Second Circuit had previously recognized that professional sports have unusual economic arrangements that on their face may not appear to deal with wages or working conditions.[129] At issue in *Silverman* was an agreement among baseball clubs not to negotiate with free agent players until a

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122 *Id.*
123 *Id.*
124 *Id.* at 134–35.
125 *Id.* at 137.
126 *Id.* at 139 ("[E]ligibility rules are mandatory bargaining subjects.").
127 *Id.*
128 *Id.* at 140.
129 *Id.*

new CBA was ratified.[130] While *Silverman* did not concern antitrust issues, the Second Circuit provided an expansive view on mandatory subjects for collective bargaining in professional sports.[131] It concluded that issues of player movement are part of "the history and economic imperatives of collective bargaining in professional sports."[132]

Here, the "complex scheme" by which NFL salaries are set—involving the NFL draft, rookie salary pools, team-by-team salary caps, and player free agency—rests on the assumption of restraints on draft eligibility.[133] "[E]ligibility rules . . . cannot be viewed in isolation[] because their elimination" may unravel the complex scheme of the NFL and NFLPA's CBA.[134] Eligibility rules also have an effect on the job security of veteran players already in the NFL.[135]

Although Clarett argued that the draft eligibility rules were impermissible because they affected those outside the NFLPA, the Second Circuit noted that just "because the eligibility rules work a hardship on prospective rather than current employees does not render them impermissible."[136] In analogous circumstances, Clarett was no different than a "typical worker who is confident that he or she has the skills to fill a job vacancy but does not possess the qualifications" that had been collectively bargained.[137] Such arrangements are a mandatory subject of collective bargaining even though they concern prospective rather than current employees.[138]

Finally, the Second Circuit dismissed Clarett's and the district court's concerns that the draft eligibility rule was not the result of arm's-length negotiations. The draft eligibility rules were included in the NFL's constitution and bylaws and well known to the NFLPA prior to and during collective bargaining negotiations.[139] Given that draft eligibility rules are a mandatory subject of collective bargaining, the issue could have easily been

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[130] Silverman v. Major League Baseball Player Rels. Comm., Inc., 67 F.3d 1054, 1059 (2d Cir. 1995).

[131] *See id.* at 1061.

[132] *Id.*

[133] *Clarett*, 369 F.3d at 140.

[134] *Id.*

[135] *Id.*; *see also* Michael S. Jacobs & Ralph K. Winter, Jr., *Antitrust Principles and Collective Bargaining by Athletes: Of Superstars in Peonage*, 81 YALE L. J. 1, 16 (1971) (recognizing that "[t]he method by which new players enter has an enormous effect on those already in the [collective bargaining] unit").

[136] *Clarett*, 369 F.3d at 140.

[137] *Id.* at 141.

[138] *Id.*; *see also* Associated Gen. Contractors of Am., Inc., 143 N.L.R.B. 409 (1963).

[139] *Clarett*, 369 F.3d at 142.

raised if either side felt a change was necessary.[140] Finally, the terms of the CBA itself made clear that the NFL and NFLPA agreed to the terms by which draft eligibility would be governed, since the NFLPA waived any challenge to the NFL's constitution and bylaws, including the draft eligibility rules.[141]

Since the nonstatutory labor exemption applied to the draft eligibility rule at issue, the Second Circuit did not have to go through an antitrust standing or rule of reason analysis, and thus it reversed the district court's decision and ruled in favor of the NFL.[142] Following the decision, Clarett was out of luck. Clarett was already suspended for the 2003 season and eventually dismissed from Ohio State for receiving improper benefits.[143] Since Clarett hired an agent in preparation for the 2004 NFL Draft, he was also ineligible to play college football anywhere in the 2004 season.[144] After sitting out over a season's worth of football, Clarett was drafted a year later in the 2005 NFL Draft by the Denver Broncos, with the last pick of the third round.[145] He was released by the Broncos before he ever played a game.[146]

C. Moultrie*: The Nonstatutory Labor Exemption's Use in Collective Bargaining's Infancy*

The salience of the nonstatutory labor exemption's application to draft and age eligibility rules was raised once again in *Moultrie v. National Women's Soccer League*. Olivia Moultrie was an exceptionally talented soccer player who wanted to play professionally as a teenager.[147] Moultrie explored professional options in Europe, but decided instead to sign in the NWSL with the Portland Thorns's developmental team.[148]

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[140] *Id.*

[141] *Id.*

[142] *Id.* at 143.

[143] Adam Rittenberg, *Inside the Latest Chapter of Former Ohio State Star Maurice Clarett's Life Turnaround*, ESPN (May 12, 2020, 7:00 AM), https://www.espn.com/college-football/story/_/id/28490590/inside-latest-chapter-former-ohio-state-star-maurice-clarett-life-turnaround [https://perma.cc/S9EE-4XZ3].

[144] *Clarett Hires Agent, Ending College Career*, SARASOTA HERALD-TRIBUNE (Feb. 17, 2004, 6:49 AM), https://www.heraldtribune.com/story/news/2004/02/17/clarett-hires-agent-ending-college-career/28788933007/ [https://perma.cc/ZS8Z-NJ7T].

[145] *2005 NFL Draft*, PRO FOOTBALL REFERENCE, https://www.pro-football-reference.com/years/2005/draft.htm [https://perma.cc/Z4CC-RHKT].

[146] John Clayton, *Broncos to Release Maurice Clarett*, ESPN (Aug. 28, 2005, 5:50 PM), https://www.espn.com/nfl/news/story?id=2145372 [https://perma.cc/85DY-KPHJ].

[147] Andrew Keh, *A Soccer Pro at 13? Olivia Moultrie Will Give It a Try*, N.Y. TIMES (Feb. 29, 2019), https://www.nytimes.com/2019/02/25/sports/olivia-moultrie-us-soccer.html [https://perma.cc/BY42-BTVQ].

[148] *Id.*; Jamie Goldberg, *13-Year-Old Phenom Olivia Moultrie to Move to Portland to Join Thorns Developmental Academy*, OREGONIAN (Feb. 26, 2019, 10:53 AM),

Moultrie trained with and wanted to join the senior squad, but at the time, an NWSL age rule prevented teams from signing anyone under the age of eighteen to the senior squad.[149] In response, Moultrie sought a temporary restraining order and preliminary injunction against the NWSL from enforcing its age rule against her.[150]

In decisions granting both a temporary restraining order and preliminary injunction, the District of Oregon ruled that the NWSL's age rule was not subject to the nonstatutory labor exemption and did not withstand antitrust scrutiny under the rule of reason.[151] While the court acknowledged that rules created by collective bargaining are immune from antitrust scrutiny, the court expressed weariness that extending the nonstatutory labor exemption to pre-CBA ratification would lead to leagues "insulat[ing] themselves from antitrust scrutiny by simply recognizing a union" and engaging in an oftentimes lengthy collective bargaining process, giving employers carte blanche to engage in anticompetitive behavior under the guise of the collective bargaining process.[152]

The NWSL had only recognized the NWSLPA as the exclusive bargaining unit of NWSL players in 2018 and at the time of litigation, the collective bargaining process was in its infancy.[153] Importantly, the NWSL age rule predated the recognition of the NWSLPA as the players' exclusive bargaining unit.[154] While the NWSL argued that the age rule was "immune[] from antitrust scrutiny once" the NWSLPA was recognized as the exclusive bargaining unit, the district court scrutinized the NWSL for not identifying "a single case where the non-statutory labor exemption applied to a regulation

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https://www.oregonlive.com/portland-thorns/2019/02/13-year-old-phenom-olivia-moultrie-to-move-to-portland-to-join-thorns-developmental-academy.html [https://perma.cc/NY6U-QU4G].

149 Caitlin Murray, *After Turning Pro, 13-Year-Old Phenom Olivia Moultrie Now Stuck in Soccer Limbo*, YAHOO! SPORTS (Apr. 29, 2019), https://sports.yahoo.com/olivia-moultrie-became-youngest-pro-in-womens-soccer-at-13-but-she-cant-play-for-a-topflight-club-so-whats-next-211506300.html?fr=sycsrp_catchall [https://perma.cc/Z7D4-9WDB]; *2018 Roster Rules*, NAT'L WOMEN'S SOCCER LEAGUE, https://www.nwslsoccer.com/2017-roster-rules [https://perma.cc/52CP-NXYH].

150 O.M. *ex rel.* Moultrie v. Nat'l Women's Soccer League, 541 F. Supp. 3d 1171, 1176 (D. Or. 2021).

151 *See id.* (granting a temporary restraining order); O.M. *ex rel.* Moultrie v. Nat'l Women's Soccer League, 544 F. Supp. 3d 1063, 1068 (D. Or. 2021) (granting a preliminary injunction).

152 *Moultrie*, 544 F. Supp. 3d at 1075.

153 Jeff Kassouf, *NWSLPA Becomes Legally Recognized as Union, Opening Doors to Further Improvements*, EQUALIZER (Nov. 15, 2018), https://equalizersoccer.com/2018/11/15/nwslpa-legally-recognized-union-nwsl-relationship/ [https://perma.cc/7BWE-GV93].

154 *See 2018 Roster Rules*, *supra* note 149.

created before the recognition of a union."[155] Additionally, an injunction would not interfere with the league and union's "ability to collectively bargain . . . terms [and] conditions of employment"; in fact, Moultrie recognized that she would be subject to a collectively bargained age rule if one were adopted.[156]

Finally, the court held that age rules were not a term or condition of employment subject to negotiation before the NWSL could make any unilateral changes to the age rule.[157] While the NWSL argued that the VRA between the NWSL and NWSLPA placed the age rule "beyond antitrust scrutiny," the district court rejected this argument because the VRA was "not the result of collective bargaining negotiations."[158] The NWSL also argued that the VRA implicated the nonstatutory labor exemption because under terms of the NLRA, the league was not allowed to make any changes to the NWSL's "status quo with respect to terms and conditions of employment without" negotiation.[159] The court dismissed this argument for two reasons. First, and importantly, the district court doubted "whether the [a]ge [r]ule is a term or condition of employment subject to any obligation to" collectively bargain under the NLRA.[160] Second, the language of the VRA itself, in the eyes of the court, did not impose any obligation on the NWSL before making unilateral changes to the age rule.[161]

Since the VRA between the NWSL and NWSLPA was not the result of collective bargaining, it could not provide the basis for nonstatutory labor exemption application.[162] The district court distinguished the circumstances at issue here from those in *Brown*. In *Brown*, the court applied the nonstatutory labor exemption because the impasse and unilateral imposition of the developmental squad program "grew out of, and [were] directly related to, the lawful operation of the bargaining process."[163] Instead, at issue in *Moultrie* was an age rule that predated the recognition of the NWSLPA and the start of collective bargaining.[164] Therefore, enjoining the enforcement of the age rule did not interfere with the NWSL and NWSLPA's ability to

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155 *Moultrie*, 544 F. Supp. 3d at 1075.
156 *Id.*
157 *Id.* at 1076.
158 *Id.*
159 *Id.*
160 *Id.*
161 *Id.*
162 *Id.*
163 *Id.* at 1075–76 (quoting Brown v. Pro Football, Inc., 518 U.S. 231, 250 (1996)).
164 *Id.* at 1076.

collectively bargain for a similar age rule, or any other term or condition of employment.[165]

Since the nonstatutory labor exemption was inapplicable, the court relied on its rule of reason analysis.[166] Under the rule of reason, the court held that the anticompetitive effects of the NWSL's age rule outweighed any procompetitive benefits.[167] Accordingly, the court granted a preliminary injunction against the NWSL's age rule.[168] Moultrie was free to sign with the Portland Thorns and play professionally.[169] The NWSL appealed the district court's decision but voluntarily dismissed once the issue was resolved in collective bargaining.[170] Collective bargaining between the NWSL and NWSLPA concluded when the CBA was ratified in January 2022.[171] Under current rules, players must be at least seventeen-years-old to be discovery eligible and eighteen-years-old to be eligible for the league's entry draft.[172] Provisions on age and eligibility rules do not appear in the current CBA, and the right to impose those rules appears to be retained by management under the terms of the agreement, presumably leaving it immune to antitrust scrutiny as part of the collective bargaining process under the nonstatutory labor exemption.[173]

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[165] *Id.*

[166] *Id.* at 1069.

[167] *Id.* at 1074.

[168] *Id.* at 1077.

[169] Kyle Garcia, *Olivia Moultrie Officially Signs With Thorns FC*, STUMPTOWN FOOTY (June 30, 2021, 3:13 PM), https://www.stumptownfooty.com/2021/6/30/22558181/olivia-moultrie-officially-signs-with-thorns-fc [https://perma.cc/AM3J-WP8P].

[170] O.M *ex rel.* Moultrie v. Nat'l Women's Soccer League, No. 21-35469, 2021 WL 4268938, at *1 (9th Cir. Aug. 20, 2021).

[171] Sandra Herrera, *NWSL Players Make History With First-Ever Collective Bargaining Agreement Ahead of 2022 Preseason*, CBS SPORTS (Feb. 1, 2022, 3:29 PM), https://www.cbssports.com/soccer/news/nwsl-players-make-history-with-first-ever-collective-bargaining-agreement-ahead-of-2022-preseason/ [https://perma.cc/H6K7-2DQN].

[172] *2022 Roster Rules*, NAT'L WOMEN'S SOCCER LEAGUE, https://www.nwslsoccer.com/roster-rules [https://perma.cc/W7SK-UFUR]. "Discovery is the mechanism by which [NWSL t]eams secure the exclusive right" to negotiate the terms of a standard player agreement with a prospective player. *Id.* Moultrie was seventeen by the time the current rules were ratified and thus eligible. *See Olivia Moultrie Career Stats*, *supra* note 32.

[173] *See* NAT'L WOMEN'S SOCCER LEAGUE PLAYERS ASS'N & NAT'L WOMEN'S SOCCER LEAGUE, COLLECTIVE BARGAINING AGREEMENT 2022-2026 § 6.2 (Apr. 29, 2022) ("All of the rights which were inherent in NWSL or incident to the management thereof, which existed prior to the selection of the NWSLPA as the exclusive bargaining representative by the Players and which are not expressly curtailed or contracted away by a specific provision of this Agreement . . . are retained solely by NWSL.").

III. CRITICISMS OF THE NONSTATUTORY LABOR EXEMPTION'S APPLICATION TO DRAFT AND AGE ELIGIBILITY RULES

While the labor pool of professional athletes is relatively small, CBAs between professional sports leagues and players unions attract much commentary, criticism, and attention.[174] This is probably due, at least in part, to the massive popularity of American sports and the dollar amounts at stake in sports collective bargaining.[175] As a result of the unique "economic imperatives" in professional sports, many arrangements between leagues and unions attract criticism because they appear unfair on their face to professional athletes, both prospective and current.[176]

Clarett is one such case that has attracted criticism. Some argue that *Clarett* was wrongly decided and propose applying the *Mackey* factors described by the Eighth Circuit to draft eligibility rules, leaving the nonstatutory labor exemption inapplicable and holding draft and age eligibility rules in violation of antitrust law.[177]

Moultrie can also be characterized as a criticism of *Clarett* and a weakening of the nonstatutory labor exemption's application to the collective bargaining relationship between leagues and unions.[178] The district court in *Moultrie* was clearly skeptical as to whether age eligibility rules were "a term or

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[174] *See, e.g.*, Alex Kirschenbaum, *Collective Bargaining Agreement*, HOOPS RUMORS (July 30, 2023, 4:12 PM), https://www.hoopsrumors.com/collective-bargaining-agreement [https://perma.cc/JZ6R-NFFZ] (covering NBA writer Tim Bontemps's commentary on the potential for the NBA's new CBA to drive parity); Grant Gordon, *NFL Player Vote Ratifies New CBA Through 2030 Season*, NFL (Mar. 15, 2020, 3:14 AM), https://www.nfl.com/news/nfl-player-vote-ratifies-new-cba-through-2030-season-0ap3000001106246 [https://perma.cc/NN5Y-M6P8] (cataloging changes in the new NFL CBA and detailing its ratification timeline).

[175] *See* Schneider & Zorrilla, *supra* note 1 (depicting that the most watched primetime telecasts of 2021 were all football games); Ozanian, *supra* note 2 (discussing the nearly $12 billion revenue of the NFL); Byers, *supra* note 3 (discussing the $10 billion revenue of the NBA).

[176] Clarett v. Nat'l Football League, 369 F.3d 124, 140 (2d Cir. 2004); *see also* Silverman v. Major League Baseball Player Rels. Comm., Inc., 67 F.3d 1054, 1061–62 (2d Cir. 1995) (holding that free agency and reserve system issues are mandatory subjects of collective bargaining).

[177] Clay, *supra* note 23, at 88, 98 (criticizing the Second Circuit's application of its own precedent); Pensyl, *supra* note 23, at 537 ("The Second Circuit should have applied the *Mackey* test instead of the approach it used to evaluate whether the NFL's eligibility rule was exempt from antitrust liability.").

[178] *See* O.M. *ex rel.* Moultrie v. Nat'l Women's Soccer League, 544 F. Supp. 3d 1063, 1077 (D. Or. 2021) (finding that the nonstatutory labor exemption does not apply to an age eligibility rule created before collective bargaining).

condition of employment subject to any obligation to bargain."[179] The Second Circuit's interpretation in *Clarett* may still hold with regard to existing collective bargaining relationships between leagues and unions, but if the district court's approach in *Moultrie* were to gain popularity, it would undermine the nonstatutory labor exemption's purpose at the intersection antitrust and labor law.

A. Mackey *or* Brown*: Which Governs Age Rules as Mandatory Subjects of Collective Bargaining?*

Critics of *Clarett* argue that *Mackey* provides a clear framework for an application of the nonstatutory labor exemption.[180] Indeed, there is a relatively simple three-part test presented in *Mackey*: the agreement must (1) only affect "parties to the collective bargaining relationship," (2) "concern[] a mandatory subject of collective bargaining," and (3) be the product of arm's-length collective bargaining.[181] However, *Brown*, not *Mackey*, defines the contours of the nonstatutory labor exemption. *Mackey* was functionally overturned by *Brown*, and was acknowledged as such within the Eighth Circuit in *Eller v. National Football League Players Association*.[182] The Supreme Court made clear in *Brown* that the nonstatutory labor exemption applies to employer conduct, implemented after impasse, when the conduct takes place during collective bargaining negotiations, is directly related to the lawful collective bargaining process, involves matters that the parties must negotiate collectively, and concerns only "parties to the collective-bargaining relationship."[183]

Clarett clearly satisfies all the conditions set forth in *Brown*. The draft eligibility rule did not even reach impasse; it was agreed to and incorporated in the CBA through NFL bylaws after a lawful collective bargaining negotiation.[184] Application of the draft eligibility rules at issue took place after

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[179] *See id.* at 1076 ("[T]his Court doubts whether the Age Rule is a term or condition of employment subject to any obligation to bargain that the NLRA imposes on Defendant.").

[180] *See* Pensyl, *supra* note 23, at 538 (characterizing the *Mackey* test as "a simple, three-pronged test").

[181] Mackey v. Nat'l Football League, 543 F.2d 606, 614 (8th Cir. 1976).

[182] Eller v. Nat'l Football League Players Ass'n, 731 F.3d 752, 755 (8th Cir. 2013).

[183] Brown v. Pro Football, Inc., 518 U.S. 231, 250 (1996).

[184] *See* Clarett v. Nat'l Football League, 369 F.3d 123, 127 (2d Cir. 2004) ("Although the eligibility rules do not appear in the text of the collective bargaining agreement, the NFL Constitution and Bylaws that at the time of the agreement's adoption contained the eligibility rules are mentioned in three separate provisions relevant to our discussion.").

collective bargaining negotiations and arose from the lawful operation of the collective bargaining process.[185] *Clarett* also sets forth a strong argument as to why draft eligibility rules are required to be negotiated collectively.[186] Finally, while Clarett himself perhaps can be characterized as outside the collective bargaining relationship, draft eligibility rules themselves clearly concern players in the collective bargaining relationship with the NFL.[187] Unlike a qualified law student ready to sign with any firm but prevented from doing so *unilaterall*y by the American Bar Association, the conditions by which Clarett would be hired by an NFL team were at the discretion of the NFL and NFLPA's *bilateral* collective bargaining, so long as those conditions do not violate federal labor law.[188] Rather than a party outside of the collective bargaining relationship, Clarett was a *prospective employee* subject to conditions and qualifications dictated by the CBA.[189] Hiring qualifications necessarily work a hardship on prospective employees, and just "because the eligibility rules work a hardship on prospective . . . employees does not render them impermissible."[190]

Whether *Mackey* applies or not, critics also contend that draft eligibility rules do not constitute a mandatory subject of collective bargaining.[191] This argument is unfounded in the context of professional sports. Given the unique economic arrangements and imperatives in professional sports, this argument ignores the importance of eligibility to enter the player pool to the careers of veteran players.[192] The phenomenon in which veteran players are squeezed out of a job because teams allocate most of their salary cap to high-priced superstars and rookies on minimum-scale contracts is present in most major professional sports leagues.[193] This phenomenon

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[185] *Id.* at 128.

[186] *Id.* at 139 ("[T]he eligibility rules for the draft represent a quite literal condition for initial employment and for that reason alone might constitute a mandatory bargaining subject.").

[187] *See id.* at 140 ("Because the size of NFL teams is capped, the eligibility rules diminish a veteran player's risk of being replaced by either a drafted rookie or a player who enters the draft and, though not drafted, is then hired as a rookie free agent.").

[188] *See* Pensyl, *supra* note 23, at 523; *Clarett*, 369 F.3d at 141.

[189] *See Clarett*, 369 F.3d at 141.

[190] *Id.* at 140.

[191] *See* Kottoor, *supra* note 23, at 115–16; Clay, *supra* note 23, at 90.

[192] Silverman v. Major League Baseball Player Rels. Comm., Inc., 67 F.3d 1054, 1061 (2d Cir. 1995).

[193] *See* Andy McCullough, *The Squeeze Continues for Baseball's Free-Agent Middle Class*, ATHLETIC (Feb. 1, 2021), https://theathletic.com/2357653/2021/02/01/mccullough-the-squeeze-continues-for-baseballs-free-agent-middle-class/ [https://perma.cc/K5GF-HQEW]; John Gonzalez, *The Middle of Nowhere*, RINGER (Jan.

refutes the idea that eligibility rules for entering the sports league are not intimately related to or themselves mandatory subjects of collective bargaining.[194] Of course, the current player pool has a heavy interest in the eligibility rules for their respective leagues because they have heavy implications for how long and lucrative their careers may turn out to be.[195] Given the interest players have in who is hired to play professional sports, eligibility rules, at the very least, are intimately related to mandatory bargaining subjects.

B. The Implications of Moultrie *to Collective Bargaining in Professional Sports*

The decision in *Moultrie* represents a weakening of the nonstatutory labor exemption's application to collective bargaining in professional sports.[196] The salience of the issue is not as distant as it may seem. Professional athletes unions are gaining popularity.[197] Given the enormous amount of money to be made, alternative sports leagues—both competitors and supplements to major sports leagues—are also gaining popularity.[198] If more courts adopt the approach of the court in *Moultrie* and intervene in the relationship between young sports leagues and unions, it would run counter to what the nonstatutory labor exemption is explicitly designed to do: "limit[] an antitrust court's authority" to intervene in industrial conflict.[199]

The VRA at issue in *Moultrie* satisfied the four conditions for the nonstatutory labor exemption set forth in *Brown*.[200] First,

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11, 2018, 10:00 AM), https://www.theringer.com/nba/2018/1/11/16875180/middle-class-heat-bucks-pistons-wizards [https://perma.cc/CVG3-BVCK]; Tom Pelissero, *NFL Has a Shrinking Middle Class*, USA TODAY (Sept. 5, 2013, 2:39 AM), https://www.usatoday.com/story/sports/nfl/2013/09/05/nfl-shrinking-middle-class/2769467/ [https://perma.cc/23HS-FJMY].

194 Clay, *supra* note 23, at 90.

195 Jacobs & Winter, *supra* note 135, at 16.

196 *See* O.M. *ex rel.* Moultrie v. Nat'l Women's Soccer League, 544 F. Supp. 3d 1063, 1077 (D. Or. 2021) (finding the nonstatutory labor exemption does not apply to an age eligibility rule created before collective bargaining).

197 Kassouf, *supra* note 153; James Wagner, *M.L.B. Will Voluntarily Recognize Minor League Union*, N.Y. TIMES (Sept. 9, 2022), https://www.nytimes.com/2022/09/09/sports/baseball/minor-league-union.html [https://perma.cc/JK3E-AR9F].

198 *See, e.g.*, Joel Beall, *The LIV Golf Series: What We Know, What We Don't, and the Massive Ramifications of the Saudi-Backed League*, GOLF DIG. (June 8, 2022), https://www.golfdigest.com/story/saudi-golf-league-2022-primer [https://perma.cc/LWC8-2D9L]; Reuters, *Nearly 40 Years After Its First Game, USFL Announces Return*, YAHOO! FIN. (June 3, 2021), https://finance.yahoo.com/news/nearly-40-years-first-game-160802827.html [https://perma.cc/5JFP-ZDB6].

199 Brown v. Pro Football, Inc., 518 U.S. 231, 236–37 (1996).

200 *See id.* at 250.

VRAs, while not technically the product of the full collective bargaining process, reflect an agreement between a league and union, and are functionally the start of collective bargaining negotiations. Second, as stated in *Brown*, VRAs, such as the one at issue in *Moultrie*, are directly related to the bargaining process between employers and unions.[201] Therefore, the NWSL's actions were conduct during collective bargaining negotiations and were "directly related to[] the lawful operation of the [collective] bargaining process."[202]

The idea that the nonstatutory labor exemption can apply to preagreements or the process by which the CBA is completed is not so farfetched: the Ninth Circuit, where the District of Oregon is located, itself interpreted *Brown* to affirm that notion in *California ex rel. Harris v. Safeway, Inc.*[203] At issue in *Safeway, Inc.* was a revenue-sharing provision among grocery chains to combat the effects of employee strikes during collective bargaining negotiations.[204] The court ultimately concluded that revenue sharing among employers during a labor dispute does not relate to collective bargaining, and therefore the nonstatutory labor exemption was inapplicable.[205] However, the court acknowledged *Brown* as controlling authority and stated the immunity from antitrust scrutiny applied not only to the collective bargaining process itself, but also to "the process before an initial collective-bargaining agreement is approved."[206] Therefore, VRAs, like the one at issue in *Moultrie*, may be immune from antitrust scrutiny under both *Brown* and Ninth Circuit precedent when a union has been recognized and the collective bargaining process has been initiated.[207]

Regarding whether a VRA incorporates the employer's preexisting rules under the nonstatutory labor exemption, *Clarett* is also instructive. In *Clarett*, the NFLPA agreed to waive any claim with NFL bylaws to ratify the CBA.[208] In *Moultrie*, under the terms of VRA, the NWSLPA required the NWSL to give any notice of changes to terms and conditions of employment while reserving the right to implement those rules

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[201] *Id.*

[202] *Id.*

[203] California *ex rel.* Harris v. Safeway, Inc., 651 F.3d 1118, 1128 (9th Cir. 2011) ("[F]or the [nonstatutory exemption] to be effective, it must apply not just to the completed bargain but also to the process by which the bargain is made, including the process before an initial collective-bargaining agreement is approved.").

[204] *Id.* at 1123–24.

[205] *Id.* at 1129–30.

[206] *Id.* at 1128.

[207] *See Brown*, 518 U.S. at 250; *see also Harris*, 651 F.3d at 1128.

[208] Clarett v. Nat'l Football League, 369 F.3d 123, 142 (2d Cir. 2004).

with the NWSL.[209] The circumstances of *Clarett* and *Moultrie* are analogous: terms and conditions of employment are governed by league bylaws and incorporated into an agreement between the league and union. This interpretation is bolstered by the fact that eligibility rules, governed by NWSL bylaws, were incorporated into the CBA ratified by the NWSLPA, in a fashion nearly identical to the eligibility rules in *Clarett*.[210]

Third, *Clarett* is also instructive in showing that age eligibility rules are required to be negotiated collectively.[211] It is clear that the NWSL's age rule constitutes a mandatory bargaining subject because the age rule has a tangible effect on the wages and working conditions of NWSL players, just like the draft eligibility rule at issue in *Clarett*.[212] The unique "economic imperatives" of professional sports means that the wages and job status of professional athletes in the NWSL are directly impacted by the eligibility requirements of the player pool.[213] The NWSL is subject to the same "middle class squeeze" present in other professional sports leagues, meaning unions have a strong imperative to negotiate eligibility rules on behalf of their existing membership.[214]

Finally, age eligibility rules concern parties to the collective bargaining relationship under *Brown*. Although Moultrie can be considered outside the bargaining unit, employers and unions can come to an agreement on hiring criteria "for nearly any reason whatsoever so long as they do not violate federal laws such as those prohibiting unfair labor practices."[215] Here, through the VRA, the NWSL and NWSLPA had come to an agreement on hiring criteria for the NWSL via an age eligibility rule. Like Clarett, Moultrie was merely a prospective employee "confident that . . . she ha[d] the skills to fill a job vacancy but d[id] not possess the qualifications . . . that ha[d] been set."[216]

The district court's decision in *Moultrie* is a clear application of antitrust scrutiny to a labor conflict. Going forward, it is easy to envision similar scrutiny being applied to newly formed professional sports leagues and players unions

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[209] *O.M. ex rel.* Moultrie v. Nat'l Women's Soccer League, 544 F. Supp. 3d 1063, 1076 (D. Or. 2021).

[210] *See* NAT'L WOMEN'S SOCCER LEAGUE, *supra* note 173.

[211] *See Brown*, 518 U.S. at 250; *Clarett*, 369 F.3d at 139.

[212] Defendant NWSL's Response, *supra* note 30, at 22; *Clarett*, 369 F.3d at 140.

[213] Silverman v. Major League Baseball Player Rels. Comm., Inc., 67 F.3d 1054, 1061 (2d Cir. 1995).

[214] McCullough, *supra* note 193; Gonzalez, *supra* note 193; Pelissero, *supra* note 193.

[215] *Clarett*, 369 F.3d at 141.

[216] *Id.*

hammering out their own CBAs. There are important reasons why nascent unions may want draft eligibility rules governed by such preliminary agreements. For one, veteran players have an interest in player eligibility, given the impact rookie entrants have on their career and salary.[217] The addition of a new player, who did not have to abide by previous rules agreed to by the league and union, could cost a player their playing time or roster spot.[218] Rookies on rookie-scale salaries are cheap alternatives to veteran players with higher salary floors due to their service time, placing a veteran player's place on the roster in a precarious position.[219] The *Moultrie* court undermined the nonstatutory labor exemption by applying antitrust scrutiny to a product of the collective bargaining process, the VRA, placing a dent in "national . . . policy favoring free and private collective bargaining."[220]

IV. THE NONSTATUTORY LABOR EXEMPTION SHOULD EXTEND TO PRELIMINARY AGREEMENTS BETWEEN LEAGUES AND UNIONS

The fundamental purpose of antitrust legislation is the protection of consumers from anticompetitive practices.[221] Therefore, when deciding whether a business practice is subject to antitrust scrutiny, it is important to remember the most basic consideration: whether the practice in question is harmful to consumers. In the case of draft eligibility and age rules, it is difficult to argue that they are. Qualitatively, rookies rarely contribute to quality play or winning games.[222] Quality play and

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[217] Jacobs & Winter, *supra* note 135, at 16.

[218] Defendant NWSL's Response, *supra* note 30, at 26 ("[Moultrie's] addition could mean that an existing member of the NWSL PA who earned her spot in the League according to the League's normal processes will lose her own playing time, or be eliminated from the roster entirely.").

[219] Danny Heifetz, *How Rookie-Deal Rentals Are Changing NFL Team-Building*, RINGER (Feb. 27, 2018, 4:35 PM), https://www.theringer.com/nfl/2018/2/27/17059520/rookie-deal-rentals-nfl-marcus-peters-philadelphia-eagles [https://perma.cc/HW73-GMHX] ("The deals NFL rookies sign are laughably team-friendly, making those players increasingly important for teams looking to win right away.").

[220] *See* Brown v. Pro Football, Inc., 518 U.S. 231, 236 (1996).

[221] John B. Kirkwood, *The Essence of Antitrust: Protecting Consumers and Small Suppliers from Anticompetitive Conduct*, 81 FORDHAM L. REV. 2425, 2426 (2013).

[222] Louis Zatzman, *The NBA Playoffs Are Usually No Place for Rookies. This Year Is Different*, FIVETHIRTYEIGHT (June 7, 2022, 10:56 AM), https://fivethirtyeight.com/features/the-nba-playoffs-are-usually-no-place-for-rookies-this-year-is-different/ [https://perma.cc/4YRZ-EVVF] ("Only 54 rookies of the 220 selected in the top 10 since the 2000 draft started at least 60 games and played at least 30 minutes per game during the regular season. Of those, only nine reached the playoffs."); Mike Tanier, *Great Draft Class? Doesn't Matter: Rookies Rarely Have an Immediate Impact*, BLEACHER REP. (May 7, 2015), https://bleacherreport.

winning teams typically lead to higher attendance and deeper playoff runs, garnering more revenue for teams.[223] Fans, the consumers of professional sports, naturally want to watch and root for more competitive teams that will compete for championships in their respective sports. Sports franchises, on the other hand, have dual, sometimes competing, interests to compete while constructing a roster as cheaply as possible. While some teams strike this delicate balance between competitiveness and frugality successfully, many franchises are left uncompetitive for years, demoralizing their fanbase.[224]

How do professional sports leagues and players unions navigate these competing interests? The answer is collective bargaining. By negotiating arrangements such as a salary cap, salary floors, roster limits, and draft eligibility rules, leagues and unions find a healthy balance between finance and competition, ultimately creating an appealing product for fans.[225] In *Moultrie*, the court interfered with the collective bargaining process by imposing antitrust liability on preliminary agreements between the NWSL and NWSLPA. Defendant NWSL was not handwringing when it explained the externalities antitrust liability could impose on the quality of play and composition of rosters going forward.[226] These externalities could impose hardship on the collective bargaining relationship between nascent leagues and unions in the near and long term because roster rules that are standard across professional sports may be subject to antitrust scrutiny before the collective bargaining process is finalized.

In response to *Moultrie* and the possibilities it raises, this note proposes a simple solution: district courts evaluating draft eligibility rules between professional sports leagues and new unions should apply the nonstatutory labor exemption to well-crafted preliminary agreements between leagues and

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com/articles/2455602-great-draft-class-doesnt-matter-rookies-rarely-have-an-immediate-impact [https://perma.cc/8VSW-K9T8].

[223] Of the teams with the top-ten total attendance in the NBA, eight had winning records, seven made the playoffs, three made the conference finals, and one made the NBA finals. *See* David Broughton, *NBA Attendance at 92% Capacity for the Regular Season*, SPORTS BUS. J. (Apr. 13, 2022), https://www.sportsbusinessjournal.com/en/Daily/Closing-Bell/2022/04/13/NBA [https://perma.cc/7VXG-S7MT]; *2022 Playoffs*, NAT'L BASKETBALL ASS'N, https://www.nba.com/playoffs/2022 [https://perma.cc/Q3RJ-2VKJ].

[224] *See, e.g.*, Heifetz, *supra* note 219; Jared Wyllys, *Major League Baseball Still Has a Tanking Problem*, FORBES (Mar. 15, 2022, 1:17 PM), https://www.forbes.com/sites/jaredwyllys/2022/03/15/major-league-baseball-still-has-a-tanking-problem/?sh=393a666f5977 [https://perma.cc/38SN-X48N].

[225] Clarett v. Nat'l Football League, 369 F.3d 124, 140 (2d Cir. 2004) (noting the importance of the "complex scheme" by which salaries in professional sports are set).

[226] *See* Defendant NWSL's Response, *supra* note 30, at 26.

unions, specifically with regard to age and eligibility requirements. District courts should adopt this approach because age and eligibility requirements are mandatory subjects of collective bargaining and preliminary agreements between leagues and unions are related to the collective bargaining process under *Brown*.[227]

A. Age Rules and Eligibility Requirements Are Mandatory Subjects of Collective Bargaining

First, it should be definitively established that age and eligibility rules in professional sports are mandatory subjects of collective bargaining, and thus subject to the nonstatutory labor exemption from antitrust scrutiny. The Second Circuit highlighted the unique "economic imperatives" present in professional sports.[228] Rather than a literal evaluation of eligibility rules relationship to wages and working conditions, the unique economic arrangements of professional sports call for a deeper analysis of the effects of draft eligibility and age requirements on the collective bargaining scheme. As the Second Circuit in *Clarett* convincingly argued, whether it be the scheme for salaries or veteran job security, draft and age eligibility rules have a real effect on salaries and working conditions of professional athletes.[229]

By calling into question whether an age rule is a term and condition of employment, the district court in *Moultrie* invited confusion for nascent professional sports leagues and players unions.[230] Because of the conflicting holdings in *Brown* and *Moultrie*, the age and eligibility rules of nascent leagues across the United States will be subject to contradictory governing law depending on where the team prospective players want to join is located. Hopeful professional athletes may seek circuits where they think they may have the best chance to avoid the nonstatutory labor exemption's application to eligibility rules. Given the convincing arguments provided by the Second Circuit in *Clarett* and *Silverman*, district courts should hold—or the Supreme Court should rule definitively—that draft and age eligibility rules are a mandatory subject of collective bargaining. Once it is established that draft and age eligibility rules are

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[227] *See* Brown v. Pro Football, Inc., 518 U.S. 231, 250 (1996).

[228] Silverman v. Major League Baseball Player Rels. Comm., Inc., 67 F.3d 1054, 1061 (2d Cir. 1995).

[229] *Clarett*, 369 F.3d at 140.

[230] *See* O.M. *ex rel.* Moultrie v. Nat'l Women's Soccer League, 544 F. Supp. 3d 1063, 1076 (D. Or. 2021).

mandatory subjects of collective bargaining, the nonstatutory labor exemption will then immunize such provisions from antitrust scrutiny.

B. The Nonstatutory Labor Exemption Should Extend to Preliminary Agreements Between Sports Leagues and Unions

In addition, the nonstatutory labor exemption should be clearly extended to preliminary agreements, such as the VRA at issue in *Moultrie*, either by district courts evaluating preliminary agreements or definitively by the Supreme Court. The Supreme Court in *Brown* made clear that the nonstatutory labor exemption could apply to practices that are a part of the collective bargaining process, not just the CBA itself.[231] Preliminary agreements, such as VRAs, represent the commencement of good faith collective bargaining between leagues and unions, and their terms should be given the same respect as any other piece of the collective bargaining process. If provisions of preliminary agreements are subject to antitrust scrutiny, both the league and union will have to spend resources litigating provisions' antitrust liability rather than collectively bargaining for the allocation of those resources between the league and union. Players' careers will also be in danger while eligibility rules are stuck in limbo, as the collective bargaining process unfolds, because preliminary agreements are subject to antitrust scrutiny.[232]

The district court's assertion in *Moultrie* that the age rule is not subject to the nonstatutory labor exemption because it predates the ratification of the VRA and collective bargaining process is a distinction without a difference.[233] As the Second Circuit recognized in *Clarett*, provisions not expressly in CBAs can be recognized through incorporation.[234] In *Moultrie*, the NWSLPA conceded the NWSL's authority to make unilateral changes to draft rules in exchange for mandatory notice before any such changes.[235] The appropriateness of such a provision is

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[231] *See Brown*, 518 U.S. at 243 ("One cannot mean the principle literally—that the [nonstatutory] exemption applies only to understandings embodied in a collective-bargaining agreement—for the collective-bargaining process may take place before the making of any agreement or after an agreement has expired.").

[232] *See* Defendant NWSL's Response, *supra* note 30, at 26.

[233] *See Moultrie*, 544 F. Supp. 3d at 1075–76.

[234] *See Clarett*, 369 F.3d at 142 (recognizing the NFLPA's agreement to draft eligibility rules when it waived any challenge to NFL bylaws, draft eligibility rules included therein).

[235] *Moultrie*, 544 F. Supp. 3d at 1076.

bolstered by the fact that the NWSLPA left the authority to implement or change the age rule with the NWSL in the eventually ratified CBA.[236] By holding such a provision to antitrust scrutiny, the district court did exactly what the Supreme Court made clear the nonstatutory labor exemption was designed to prevent: the "judicial use of antitrust law to resolve labor disputes."[237] Going forward, courts should steer clear of antitrust scrutiny of good faith labor practices and apply the nonstatutory labor exemption to preliminary agreements made between professional sports leagues and unions.

CONCLUSION

Draft and age eligibility rules in professional sports present compelling fairness issues with regard to those outside the bargaining unit. Normatively, Clarett and Moultrie's strongest argument was that it is simply unfair that they were unable to join the highest levels of their sport when there was a team willing to draft or sign them. Indeed, arguments along this line of reasoning are some of the most convincing, both in criticisms of *Clarett*, as well as the nonstatutory labor exemption's applicability to draft eligibility rules overall.[238]

However, this approach is an oversimplification of the issue. In *Clarett* and *Moultrie*, there are two competing congressional policies that are difficult to rectify neatly: antitrust and labor law.[239] While antitrust law provides a clear directive from Congress to protect the interest of the consumer, there is an equally clear directive from Congress to favor free and private collective bargaining.[240] Congress and the Supreme Court have created two mechanisms to resolve this conflict: the statutory and nonstatutory labor exemptions.[241] The statutory exemption was created by Congress to shield labor groups from antitrust scrutiny for standard union activity. The Supreme Court, in *Meat Cutters v. Jewel Tea*, crafted the nonstatutory exemption to rectify the conflicting goals of national antitrust and labor policy by exempting certain competition-restricting agreements between employers and unions, so long as they were

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[236] *See* NAT'L WOMEN'S SOCCER LEAGUE, *supra* note 173, at 6.

[237] *See* Brown v. Pro Football, Inc., 518 U.S. 231, 236 (1996).

[238] *See* Clay, *supra* note 23, at 70–71.

[239] *See* Wood v. Nat'l Basketball Ass'n, 809 F.2d 954, 959 (1987) ("The interaction of the Sherman Act and federal labor legislation is an area of law marked by more controversy than by clarity.").

[240] *See supra* Section I.A.

[241] *See supra* Section I.A.

related to "wages, hours, and working conditions."[242] This exemption has been wielded by courts ever since to avoid imposing antitrust scrutiny on collective bargaining activities favored by Congress.[243]

The district courts in *Clarett* and *Moultrie* strayed from this delicate balance.[244] What may seem unfair to young, prospective professional athletes is equally, if not more, unfair to veteran professional athletes who have antitrust scrutiny applied to the collectively bargained terms and conditions of their employment. Applying antitrust scrutiny to age and eligibility rules, ostensibly prolabor, is, in practice and effect, antilabor. Professional sports leagues and players unions, in pursuit of their unique economic imperatives, craft complex schemes by which salaries are determined and rosters are set.[245] If unions have collectively bargained these age and eligibility rules, either expressly or through incorporation of league bylaws, then it can only be inferred that they are in the best interest of their members.[246]

Going forward, courts should follow the approach of the Second Circuit in *Clarett* and apply the nonstatutory labor exemption to draft and age eligibility rules as a mandatory bargaining subject. The Second Circuit in *Clarett* raised a compelling argument as to the importance of draft and age eligibility rules in the scheme of salaries and working conditions for professional athletes, meaning they are a mandatory subject of collective bargaining under *Brown*.[247] A definitive pronouncement by the Supreme Court, or a general approach favored by district courts, holding that draft and age eligibility rules are exempt from antitrust scrutiny will provide nascent sports leagues and players the freedom to craft their own scheme for working conditions without fear of the possibility of antitrust scrutiny from courts.[248]

Finally, the nonstatutory labor exemption should extend to preliminary agreements between professional sports leagues and players unions. This will allow courts to steer clear of antitrust scrutiny during the collective bargaining process's infancy, and by extending the nonstatutory labor exemption to

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[242] Loc. Union No. 189, Amalgamated Meat Cutters v. Jewel Tea Co., 381 U.S. 676, 699–700 (1965).

[243] *See id.* at 689–90; Brown v. Pro Football, Inc., 518 U.S. 231, 250 (1996); Clarett v. Nat'l Football League, 369 F.3d 124, 137–38 (2d Cir. 2004).

[244] *See supra* Sections II.A, II.C.

[245] *See supra* Section III.A.

[246] *See supra* Section III.B.

[247] *See supra* Section IV.A.

[248] *See supra* Section IV.A.

preliminary agreements, prevent its use as a loophole around antitrust scrutiny.[249] These simple clarifications will allow courts to follow the clear directive of the Supreme Court and goal of the nonstatutory labor exemption: to prevent the "judicial use of antitrust law to resolve labor disputes."[250]

Mathew Santoyo[†]

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[249] *See supra* Section IV.B.

[250] *See* Brown v. Pro Football, Inc., 518 U.S. 231, 236 (1996).

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