INTRODUCTION

The National Football League (NFL) and the National Football League Player’s Union (NFLPA) have had a collective bargaining agreement (CBA) in place since 1993, when they ended five years of labor strife by coming to a mutually beneficial arrangement. This long period of labor peace has been attributed as one of the causes of the NFL’s massive surge in popularity, helping the league become the unstoppable juggernaut that it is today.\(^1\) In 2006, the then current CBA was extended, but in 2008 the owners voted to terminate that CBA early, making 2010 the last year covered by it.\(^2\) In response, the NFLPA began decertification procedures, with the World Champion New Orleans Saints the first team to vote on, and unanimously approve, decertification of the union in September of 2010.\(^3\) After the 2010 season, and with negotiations for a new CBA failing


\(^2\) Id. at 97.

\(^3\) Judy Battista, N.F.L. Players Union to Vote on Decertification, N.Y. Times, Sep. 11, 2010, at SP5.
to find success, the NFLPA decertified and declared itself a trade association rather than a union. Litigation then commenced, ending just prior to the start of the 2011 season when the sides agreed on a new CBA.

The obvious question is: why would the players and the NFLPA have begun decertification in 2010 with an entire season of football to come? The answer is deceptively simple: they wanted access to the awards of treble damages, which are meted out against antitrust law offenders. These damages, however, are inaccessible to those with collective bargaining agreements because of the non-statutory labor exemption to antitrust laws. The NFLPA was forced to begin decertification procedures so early because, frankly, no one knows when the non-statutory labor exemption to antitrust laws expires in the sports context. There is a confusing mess of conflicting district and circuit court opinions, all proposing different tests for when the exemption ends after the expiration of a CBA. Furthermore, there is an even less helpful Supreme Court opinion that, while finally ending the arguments about which test to apply, suggested a test that is so unclear that it left management, players, and scholars all wondering how to apply it. This led to the most recent situation: where a union felt it must decertify while a CBA is still in place—with an entire year of football left to play, thus depriving its workers of the protections of unionization—simply because they are unclear as to when exactly they will have access to antitrust laws again. This is not an ideal situation.

In response to the current morass of court decisions, this comment proposes a bright-line test for determining when the non-statutory labor exemption ends, and when players once again have access to antitrust laws and their punishing treble damages. Part II describes how the sports context and its corresponding laws are unique from other areas, establishing that this solution is for the sports environment only. Part III presents the relevant history, exploring the non-statutory labor exemption and the Mackey Test, a landmark case in the professional sports area. Part IV describes the hallmarks of an ideal test for when the non-statutory labor exemption should end. Part V will present in as clear a manner as possible the jungle of jurisprudence surrounding the expiration of the non-statutory labor exemption. Finally, Part VI will propose a form of impasse standard for when the non-statutory labor exemption will end after the expiration of a CBA, a much needed bright line rule to clarify this messy area of the law.

I. SPORTS LAW IS UNIQUE

Several important factors render labor discussions in the sports context different than the typical labor talk. The unique nature of the professional sports industry has contributed to the difficulty courts have applying the
non-statutory labor exemption to sports. Further, the collective bargaining history of the NFL is itself a function of the unique nature of employment in the professional sports industry. For this reason, this comment will focus on and discuss almost exclusively cases and opinions from within the professional sports context.

For starters, the NFLPA is weaker than other industrial bargaining units as a result of their inherently different structure. "Unlike industrial employees, professional athletes do not possess homogeneous skills; a wide range of ability and expertise exists among players." As a result, different players, who are members of the NFLPA, will be looking for different protections from the bargaining process and resulting CBA. Therefore, the NFLPA lacks the cohesiveness of industrial unions. Indeed, the wide divide between various members of the NFLPA is disruptive. In order to reach a CBA, compromise is required between both the management and labor, as well as amongst the members of the union themselves. An additional unique factor to the sports context is individually negotiated contracts. Coupled with the finite pool of money from which to pay those contracts, "[u]nder a negotiated settlement, the stars would have to take less so the defensive backs, punters, and linemen can get a little more." This obviously creates tension between the stars, who would like to test their value in a completely free market, and the less recognizable faces, who enjoy the protections that a union and CBA provide.

There is also greater leeway in the sports context to make personnel changes than in the industrial setting. Football is a team sport, and thus a player’s value to his team depends not only on his skill level, but also on the player’s relationship with teammates. This necessitates that management retains the discretion to make personnel changes in search of the right combination of talents and leadership to create a winning team. As a corollary to this, players have almost no job security. In addition, often due either to injury or to management’s acquisition of a more skilled

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6. Id.
7. Id.
8. Id.
10. Id.
11. Id, supra note 5, at 354.
12. Id.
13. Id.
player, the average career for players in the NFL is less than four years.\textsuperscript{14} As a consequence of the lack of job security and brief work-life of the majority of players, the NFLPA runs into difficulties not encountered by other unions.\textsuperscript{15} Most importantly, the NFLPA has a short institutional memory, because of an approximately twenty-five percent annual turnover rate in its members. This means that for any given bargaining process most members of the NFLPA will not have been members of the union during the previous bargaining process.\textsuperscript{16} The same lessons often must be learned over and over again. Compounding this problem is the fact that few players involved in a given CBA negotiation will remain with the League long enough to benefit from the elimination of certain restraints, and the NFLPA must therefore ask players to strike for the benefit of future players.\textsuperscript{17}

The players themselves are also in a more precarious position. Professional sports athletes possess “very specialized skills that will be of little use to them in any other industry.”\textsuperscript{18} Furthermore the NFL is, for the most part, the only buyer of the skills possessed by professional football players.\textsuperscript{19} Indeed, even if they are able to find other work, it will most likely come with a substantial decrease in salary, making the prospect unattractive.\textsuperscript{20}

The apparently weak position of the professional sports union stands in contrast to the comparatively strong position of professional sports management. NFL football has little competition, as it is distinctive enough that it does not compete with college football or leagues of other professional sports. Therefore, there are no other professional football leagues powerful enough to challenge it.\textsuperscript{21} The NFL has also been able to successfully regulate intra-league competition for fans and players, using a competitive balance argument.\textsuperscript{22} Finally, the League has been able to adopt a revenue sharing system amongst the teams, governing intra-league economic competition.\textsuperscript{23} As a result, the National Football League Management Council, the body responsible for negotiating CBAs, is a more cohesive unit than most multi-employer bargaining units.\textsuperscript{24}

\textsuperscript{14} Id. at 355.
\textsuperscript{15} Id.
\textsuperscript{16} Id.
\textsuperscript{17} Id. at 355–56.
\textsuperscript{18} Corcoran, supra note 4, at 1057.
\textsuperscript{19} Lock, supra note 5, at 356.
\textsuperscript{20} Corcoran, supra note 4, at 1057.
\textsuperscript{21} Lock, supra note 5, at 357.
\textsuperscript{22} Id.
\textsuperscript{23} Id.
\textsuperscript{24} Id. at 358.
For all of the above reasons, collective bargaining negotiations in professional sports, and in the NFL specifically, produce unique issues and challenges that must be dealt with in negotiations, or later in courtroom litigation. Regardless of the apparent disparities in power, “[t]he professional sports industry presents a unique context for the application of the antitrust laws, as there is a strong argument that restrictions on full economic competition are necessary for the existence of successful leagues.” Because of these unique elements, discussion in this note will largely be confined to sports cases only. It is perhaps due to this unique context that the courts have had such a difficult time deciding when the non-statutory labor exemption should end.

II. THE NONSTATUTORY LABOR EXEMPTION AND THE MACKEY TEST

The root of the statutory labor exemption is found in the Clayton Act and the Norris-LaGuardia Act, which “declare that labor unions are not combinations or conspiracies in restraint of trade.” These two acts, taken together, specifically exempt some legitimate union activities, such as picketing and group boycotts, from antitrust laws. This statutory labor exemption was created to insulate these legitimate employee collective activities, which are, in fact, anticompetitive, but are favored by labor policy and thus immune from antitrust laws.

However, this statutory labor exemption did not extend to agreements between unions and non-labor groups (for example, employers). Two areas of federal labor law were meshed together to create the non-statutory labor exemption, namely the protection of unions in the Clayton and Norris-LaGuardia Acts, and the congressional policy promoting collective bargaining expressed in the National Labor Relations Act. It was the Supreme Court that extended this policy, holding “that in order to properly accommodate the congressional policy favoring free competition in business markets with the congressional policy favoring collective bargaining under the National Labor Relations Act . . . certain union-employer agreements must be accorded a limited non-statutory exemption from antitrust sanctions.” In this way the non-statutory labor exemption was created, and extended over Collective Bargaining Agreements,

25. Corcoran, supra note 4, at 1053.
27. Id.
28. Id.
29. Id.
31. Mackey, 543 F.2d at 611–12.
protecting them from antitrust scrutiny. Courts have used this non-statutory labor exemption in the professional sports context to insulate the teams and leagues from antitrust violations, as long as those antitrust violations are part of a valid CBA, granting preeminence to labor laws over antitrust laws.

The first case to apply this non-statutory labor exemption in the sports context was Mackey v. National Football League.33 In this case, players attacked a league-mandated limitation on player movement, the so-called Rozelle Rule, on antitrust grounds.34 In deciding this case, the court laid down what has come to be known as the “Mackey Test” to determine whether a particular restriction should be protected from antitrust laws by the non-statutory labor exemption. In order to satisfy the test, a particular restriction must meet three prongs. First, the restraint must affect primarily only the parties to the collective bargaining relationship.35 Second, the restraint must have been a mandatory subject of collective bargaining.36 Finally, labor law prevails over antitrust law only if the restraint sought to be exempted was “the product of bona fide arm’s-length bargaining.”37 In other words, to pass the Mackey Test, any given restriction in the sports context must affect only the parties to the CBA; must have been a mandatory subject of collective bargaining, defined as “‘wages, hours, and other terms and conditions of employment’”;38 and must have been the product of the collective bargaining process. Only when all three prongs have been satisfied does a restriction pass the Mackey Test.

Apart from laying down the Mackey Test, the court in Mackey also began a trend towards refusing to hold violations of the Sherman Act in the sports context per se illegal. The language of the Sherman Act itself is exceedingly broad, such that it could render almost every business agreement illegal.39 Therefore, the Supreme Court held that “only those agreements which ‘unreasonably’ restrain trade come within the proscription of the Act.”40 Subsequently, the courts began identifying some types of agreements as so regularly unreasonable that they termed them illegal per se, and stopped inquiring as to their purported justifications.41 These were agreements that had debilitating effects on competition and had

32. Shapiro, supra note 30, at 1207–08.
33 543 F.2d 606 (8th Cir. 1976)
34. Id. at 609.
35. Id. at 614.
36. Id.
37. Id.
38. Id. at 615.
39. Id. at 618.
40. Id.
41. Id.
no pro-competitive justifications, and were therefore conclusively presumed unreasonable and illegal.42 The *Mackey* court reversed a district court decision that the Rozelle Rule was *per se* illegal, deciding instead to subject the rule to a “Rule of Reason” analysis.43

The court stated that the “focus of an inquiry under the rule of reason is whether the restraint imposed is justified by legitimate business purposes, and is no more restrictive than necessary.”44 In other words, viewing a rule under a rule of reason analysis allows the party promulgating the rule to put forth justifications for having that rule, and if the pro-competitive justifications outweigh the harm to trade caused by the rule, it may be declared not to violate antitrust laws. The most common pro-competitive justification claimed by leagues in the sports context is to maintain competitive balance throughout the League.45 Leagues claim this justification to protect everything from the draft, to restrictions on player and team movement, to salary limitations.

The *Mackey* court felt that it was necessary to inquire into justifications of the Rozelle Rule because of the unusual circumstances presented in the case.46 The *per se* rules were generally used in situations of traditional business competitors. However, as the court recognized, the NFL assumes more of the characteristics of a joint venture, since every club has a stake in the success of the other teams, in order to ensure a successful league as a whole.47 The *Mackey* court’s recognition of the joint venture nature of a sports league, and their resulting refusal to apply the *per se* rule to the rule at issue in this case set a precedent that became the norm—to evaluate issues in the sports context under the rule of reason standard. Thus, sports leagues have two potential protections from antitrust liability. They can guarantee protection by the non-statutory labor exemption by making sure the restriction meets the Mackey Test, and by including it in a CBA. If that fails, a sports league may avoid antitrust violations by promulgating rules that would pass the rule of reason standard, rules that have pro-competitive justifications, and are no more anti-competitive than is absolutely necessary.

III. **HALLMARKS OF A SUCCESSFUL TEST**

The next section will present the various tests that courts have used to
decide when the non-statutory labor exemption should end. Flaws of each test are pointed out. It is helpful, however, in considering each of the tests in turn to have in mind an idea of the ideal test and what its traits would be. This section will briefly describe the key characteristics of the ideal test.

Most importantly, the test should set for the parties clear expectations of when the non-statutory labor exemption should end. If both parties know what to expect when they are initially negotiating their agreement, they can then focus their attentions on the bargaining process itself, secure in the knowledge that there will be no court-created surprises down the road. To that end, the test must spell out as plainly and concretely as possible when, exactly, the non-statutory labor exemption will end.

There will always exist out of necessity some imprecise terms, due to the need to allow the law to be flexible in response to unforeseen situations. However, the uncertainty created by these indefinite aspects can be countered by the use of a governing body to quickly and precisely clarify any questions. The National Labor Relations Board (NLRB) is a perfect body for this, already in existence and equipped to deal with questions of this type. Further, use of the NLRB to resolve these issues rather than the courts is in line with the federal policy favoring collective bargaining rather than litigation, which is to be used only as a last resort.

Finally, the ideal test will contain mutual “poison pills,” ensuring that both sides find it in their best interest to bargain and conclude a CBA. Under the ideal test, both sides will be better off under the CBA than without it, ensuring that the sides themselves continue to embrace collective bargaining. If the test is imbalanced, supporting one side more than the other, then the chances of collective bargaining failures are exponentially increased.

With these factors in mind, this Article now turns to an exploration of the failure of the courts to create and endorse an acceptable test.

IV. CONFUSED COURTS

With the non-statutory labor exemption judicially established, courts applied it freely to union employer collective bargaining agreements. It was not long, however, until the next logical question surfaced. If it was the collective bargaining agreement that exempted a given restraint of trade from antitrust laws, and that collective bargaining agreement expired, what was the status of the restraint of trade that had prior to the expiration been protected only by the CBA? At what point did antitrust liability reestablish itself, and the treble damages possible under the Sherman Act kick back into force? Over several years, and more cases, the only thing the courts proved for certain was that they themselves were not sure of the answer to
this question.

The first case to deal with this issue in the sports context was *Bridgeman v. National Basketball Association*. National Basketball Association (NBA) players were challenging, on antitrust grounds, certain restrictions imposed by the NBA owners, including a draft and a reserve system. These restrictions had been protected from challenge by the non-statutory labor exemption because of their inclusion in a collective bargaining agreement, which had expired at the end of the 1987 season. On October 14, 1987, the players informed the NBA that they no longer consented to the player restraints included in the CBA, and subsequently initiated a lawsuit challenging those restrictions. In the meantime, the NBA continued to operate under the terms of the most recent, but by then expired, collective bargaining agreement. The crux of the case revolved around when exactly the protection of those restrictions expired.

The players argued that restrictions included in a CBA should lose their antitrust immunity the moment the agreement expires. The NBA, on the other hand, argued that the immunity should continue in perpetuity, as long as the league continued to apply the exact restrictions, without modification, that had been included in the expired agreement, and that the players had at one point agreed to. These became known as the “instant” and “perpetual/indefinite” tests, respectively. The players also proposed another test where the exemption could not extend beyond an impasse, which is defined as somewhat of a temporary deadlock in negotiations, “‘which in almost all cases is eventually broken, through either a change of mind or the application of economic force.’” This became known as the “impasse” test. Though the players preferred the instant test, they proposed the impasse test as a compromise.

As this was the first case to approach this question in the sports context, all three proposed tests were novel. The judge looked at and rejected each test in turn, before beginning what came to be a long tradition in non-statutory labor exemption cases: the rejection of all proposed tests and the creation of one by the court. The judge first rejected the instant test, stating that such a rule was unrealistic and would actually inhibit the collective bargaining process, especially given that the history of collective bargaining in the NBA is punctuated by periods between agreements where

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49. Id. at 962.
50. Id. at 962–63.
51. Id. at 963.
52. Id.
53. Id. at 964.
54. Id. at 964–65.
55. Id. at 966.
the league maintains the status-quo, until a new agreement is reached.\textsuperscript{56} He believed it would be anomalous for the league to lose immunity immediately on expiration of a CBA regardless of the status of negotiations for the next CBA.\textsuperscript{57} Similarly, he rejected the NBA’s proposed indefinite test, holding that to allow immunity to continue indefinitely would provide the NBA with an easy way to avoid antitrust laws and discourage unions from entering collective bargaining agreements, since the rights they bargained away would bind them forever.\textsuperscript{58} Though the judge saw some merit to the impasse test, he ultimately rejected that as well, believing that he could not allow a test that in his view, did not directly encourage collective bargaining.\textsuperscript{59}

Finding none of the proposed options appealing, the judge created his own test. He ultimately decided that “the exemption for a particular practice survives only as long as the employer continues to impose that restriction unchanged, and reasonably believes that the practice or a close variant of it will be incorporated in the next collective bargaining agreement.”\textsuperscript{60} This became known as the “employer’s reasonable belief” test. Notably, the judge did not define when exactly an employer no longer held this reasonable belief, and further stated that resolution of that factual matter may not even be possible until after the parties have entered a new CBA.\textsuperscript{61} Never again was this test accepted.

In August of 1987, the then-existing CBA between the NFL and the NFLPA expired.\textsuperscript{62} There would not be a new CBA for several years, until an agreement was reached that included the formation of a new CBA as part of the settlement in \textit{White v. National Football League}.\textsuperscript{63} Similar to the facts of \textit{Bridgeman}, the players’ union immediately filed suits challenging restrictions that had been part of the expired CBA. In the six-year interim between the expired and the new CBA, the NFL was marked by labor strife, strikes, replacement players, lawsuits, and the inability of the courts to agree upon an appropriate test for when the non-statutory labor exemption ended. In fact, almost every case put forth a different test, and the confusion lasted even longer than the labor strife. When the Supreme Court finally stepped in, it occurred \textit{after} the new CBA was signed.\textsuperscript{64} All of the cases that follow grew out of the CBA that expired in

\begin{footnotesize}
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\item 56. \textit{Id.} at 965–66.
\item 57. \textit{Id.} at 965.
\item 58. \textit{Id.} at 966.
\item 59. \textit{Id.} at 966–67.
\item 60. \textit{Id.} at 967.
\item 61. \textit{Id.}
\item 63. 836 F.Supp. 1458 (D. Minn. 1993).
\item 64. Brown v. Pro Football, Inc., 518 U.S. 231 (1996) (The new CBA was ratified in
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1987 and the years of labor strife that followed.

The first lawsuit to capitalize on the expired CBA was *Powell v. National Football League*. The case, brought by the players’ union against the league, alleged violations of antitrust law. In defense, the league argued the same theories that had been put forth in *Bridgeman*, claiming either that the exemption continued in perpetuity, or alternatively, that the exemption at least survived the expiration of the CBA. The league also made an argument that the exemption should continue for the duration of the collective bargaining relationship, later known as the “collective bargaining relationship” test. While the union conceded that the exemption did not immediately die upon expiration of the CBA, they contended instead that immunity lasted only until the employees made it “unequivocally clear” that they no longer assented to the imposition of the restriction.

The Minnesota district court decision was handed down in January of 1988. In it, Judge Doty first rejected the perpetual theory advanced by the league, on much the same grounds as it had been previously rejected, before agreeing with the league that the exemption would survive the expiration of the CBA. Judge Doty further rejected the league’s “collective bargaining relationship” test, holding that this proposal would accord the exemption “undue longevity.” He also rejected the players’ theory because under their “unequivocally clear” standard of antitrust liability, the league could still be subjected to instant liability, if the players made their rejection clear early enough. This instantaneous liability had already been soundly rejected in *Bridgeman*. Judge Doty also pointed out that the players’ proposed standard disregarded “established labor law principles imposing upon the parties the duty to negotiate in good faith as to mandatory bargaining subjects following expiration of a collective bargaining agreement.” In other words, to allow a party to state unilaterally that they rejected a restriction would hamper the collective bargaining process. Finally, Judge Doty rejected the “reasonable belief” standard set forth in *Bridgeman*, finding that it did not properly support the

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66. Id. at 783.
67. Id. at 788.
68. Id. at 786.
69. Id. at 777.
70. Id. at 783–85.
71. Id. at 788.
72. Id. at 786.
73. Id. at 787.
congressional policy of promoting the collective bargaining process.\textsuperscript{74}

Instead, Judge Doty returned to a test advocated, and then rejected, in \textit{Bridgeman}. He concluded that the best accommodation of the competing interests of labor and antitrust law was the “impasse test.”\textsuperscript{75} He held that a labor exemption would expire the moment the parties reached impasse as to that particular issue, and at that moment the employer ran the risk of antitrust sanctions.\textsuperscript{76} To Judge Doty, the test was very simple: “whether, following intense, good faith negotiations, the parties have exhausted the prospects of concluding an agreement.”\textsuperscript{77} Unfortunately, this sensible test would not last long, as the test was scrapped on appeal.

On appeal to the Eighth Circuit, the league argued that the “impasse” test was inappropriate, since in their view the test provided the union with motivation to generate impasse, thus putting antitrust laws back in play.\textsuperscript{78} To some extent, the court agreed, as they found the impasse standard to “treat[] a lawful stage of the collective bargaining process as misconduct by [the NFL], and in this way conflict[] with federal labor laws that establish the collective bargaining process . . . as the method for resolution of labor disputes.”\textsuperscript{79} The court not only rejected the test put forth by the Judge Doty, but refused to suggest a test at all, leaving the issue cloudier than ever. The court simply held that upon the facts presented, it was not necessary for them to pick a termination point for the exemption, but that it was clear it extended “beyond impasse.”\textsuperscript{80} This “beyond impasse” test was even less helpful than the tests that preceded it, essentially adding nothing to the jurisprudence and leaving the critical issues still undecided.

Interestingly, the court did mention off-handedly that “as long as there is a possibility that proceedings may be commenced before the [National Labor Relations] Board, or until final resolution of Board proceedings and appeals therefrom, the labor relationship continues and the labor exemption applies.”\textsuperscript{81} This “labor relationship” test is the first test to find some agreement amongst courts, but it was subsequently rendered unclear and insubstantial by the Supreme Court, characteristic of the other cases in this line. In fact, it was the dissent in this case that made the point that the effect of the majority’s holding was that “the labor exemption will continue until the bargaining relationship is terminated either by a NLRB decertification proceeding or by abandonment of bargaining rights by the

\begin{itemize}
\item \textsuperscript{74} Id.
\item \textsuperscript{75} Id. at 788.
\item \textsuperscript{76} Id.
\item \textsuperscript{77} Id.
\item \textsuperscript{78} Powell v. Nat’l Football League (\textit{Powell II}), 930 F.2d 1293, 1302 (8th Cir. 1989).
\item \textsuperscript{79} Id. at 566.
\item \textsuperscript{80} Id. at 568.
\item \textsuperscript{81} Id.
\end{itemize}
union.” In the end, the Eighth Circuit decided that the non-statutory labor exemption had not yet expired, and they consequently rejected the suit.

The NFLPA was thus left with a rejection of their contention that the non-statutory labor exemption had expired, but no guidance as to when that exemption would expire other than vague references to some point in time after impasse, or after the labor relationship no longer continues. Believing that the Powell decision “left players with the choice of either accepting indefinitely the NFL defendants’ allegedly illegal restraints of trade or abandoning entirely union representation in order to pursue their antitrust claims,” the NFLPA did the only thing they could think of—the NFL players ended their union representation, clearing the way for antitrust suits. In December 1989, the player representatives voted to end the NFLPA’s status as the collectively bargaining representative. The union thus “abandon[ed] all collective bargaining rights in an effort to end the labor exemption defense to the NFL defendants’ system of player restraints.” Subsequently, the players immediately moved to begin lawsuits that, under the most recent interpretation, would no longer be barred by the non-statutory labor exemption.

As a first step, the NFLPA, now reconstituted as a voluntary professional association, brought Powell back to the Minnesota fourth division district court and Judge Doty. The NFLPA argued that because it was no longer a union, the non-statutory labor exemption no longer applied, and antitrust challenges should go forward. In fact, the NFLPA asked for summary judgment on the issue, as it saw no defense of fact. The NFLPA went on to argue that the exemption could have expired no later than December of 1989, when they voted to end the NFLPA status as a union. In response, the NFL argued that summary judgment was inappropriate, especially as they believed issues of fact existed as to the effectiveness of the NFLPA attempt to disclaim its union status. Judge Doty rejected the NFL’s arguments and found that the NFLPA was no longer a union, before applying the circuit court’s test and finding that “[b]ecause no ‘ongoing collective bargaining relationship’ exists, the court determines that nonstatutory labor exemption has ended.”

82. Id. at 570 (Heaney, J., dissenting).
83. Id. at 568.
85. Id.
86. Id.
87. Id.
88. Id.
89. Id.
90. Id. at 1359.
decertification, the NFLPA had won its first victory.

In 1992, another opinion was handed down in the District of Columbia. *Brown v. Pro Football, Inc.* was a suit by a class of NFL players against the league, focusing on salary restrictions for players on the “development squad.” Breaking from the Eighth Circuit’s test, the district court in Washington D.C. instead decided that it was appropriate that the non-statutory labor exemption not extend past the expiration of the agreement itself, resurrecting the “immediate” test that had been rejected several times already. While recognizing the weight of several precedents finding that the exemption did survive the expiration of the CBA, the court decided to confuse the issue by “question[ing] the wisdom of continued application of that court-made doctrine beyond expiration.” Having determined that the non-statutory labor exemption had expired, the court found it necessary to view the restriction under the rule of reason standard set forth in *Mackey*. Ultimately the court held for the players, finding that the restriction did not satisfy the rule of reason.

A year later, back in Minnesota, *White* was entering its final stages. As part of the settlement of this case, the parties entered into a new collective bargaining relationship and agreement. In January of 1993 the NFLPA began to collect authorization cards from players, seeking to be re-designated as the collective bargaining representative. On May 6, 1993, the parties reached agreement on the terms of a new CBA. The CBA was ratified on June 13, 1993, and the labor strife that had existed for several years in the NFL was officially ended. However, this did not end the litigation surrounding the expiration of the non-statutory labor exemption. Sports cases outside the NFL, as well as the appeals process for cases within the NFL, continued to confound the issue.

Just after the NFL ended its strife by concluding a new CBA, the NBA was finding itself again racked by labor conflict. The timing issue of when the non-statutory labor exemption again arose in *National Basketball Association v. Williams*, this time in the district court of New York. The court looked at prior precedents, including the most recent *Brown* decision, before making an astute observation: “This review of the case law

92. *Id.* at 130.  
93. *Id.* at 131.  
96. *Id.* at 1465.  
97. *Id.* at 1465–66.  
98. *Id.* at 1467.  
establishes that, if nothing else, opinions vary a great deal on this issue."\textsuperscript{100}

The courts themselves were beginning to realize that a lack of a clear position was making application of the law difficult. After making this observation, the court went on to attempt to create some solidarity by endorsing the standard of \textit{Powell II}, that “[a]ntitrust immunity exists as long as a collective bargaining relationship exists,” and with that holding the “collective bargaining relationship” test gained another follower.\textsuperscript{101} On appeal, the Second Circuit gave tacit endorsement to the \textit{Powell II} court, though they stopped short of a full concurrence, stating only that they agreed with the decision holding that “non-statutory labor exemption precluded an antitrust challenge to various terms and conditions of employment implemented \textit{after impasse}.”\textsuperscript{102} In so doing, they affirmed the lower court’s decision, reached on the basis of the “collective bargaining relationship” test, while also endorsing the “impasse” test.

Though the labor strife in the NFL had technically ended, one case, \textit{Brown v. Pro Football, Inc.}, which began during the struggle, was still being litigated. Recall that the D.C. district court had rejected the “collective bargaining relationship” test in favor of the much maligned “instant” test. On appeal to the District of Columbia Court of Appeals that decision was reversed.\textsuperscript{103} This court also endorsed the “collective bargaining relationship” test, holding that the exemption protects from challenge restraints “imposed through the collective bargaining process, so long as the challenged actions are lawful under the labor laws.”\textsuperscript{104} With three different circuit courts endorsing the collective bargaining relationship test, it would seem that the courts were finally in agreement, and that a concrete test had been discovered and agreed upon. Unfortunately, this was not the case.

It was \textit{after} the circuit courts had seemed to come to an agreement about when the non-statutory labor exemption ended, and \textit{years after} labor strife in the NFL had ended, that the United States Supreme Court decided to weigh in on the issue with a completely new test—one that had not discussed or postulated by any other court previously.\textsuperscript{105} Further, the Supreme Court test is even more ambiguous than any of the previous tests. After reviewing the relevant case law, the Supreme Court decided to accept the current “collective bargaining relationship” test, but only with

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\textsuperscript{100} \textit{Id.} at 1076.
\textsuperscript{101} \textit{Id.} at 1078.
\textsuperscript{102} Nat’l Basketball Ass’n v. Williams, 45 F.3d 684, 692–93 (2d Cir. 1995) (emphasis added).
\textsuperscript{103} Brown v. Pro Football, Inc., 50 F.3d 1041, 1058 (D.C. Cir. 1995).
\textsuperscript{104} \textit{Id.} at 1048.
\end{flushleft}
substantial modification. In the Supreme Court’s view, to attach antitrust liability, not only must the parties lack a collective bargaining relationship, but they must be “sufficiently distant in time and circumstances from the collective bargaining process that a rule permitting antitrust intervention would not significantly interfere with that process.” In other words, the Supreme Court abandoned a test that had started to add clarity to this area of the law, and that had support amongst several circuits. Instead, the Court imposed a test that seems to have no definition at all, other than that liability is imposed at some point after the dissolution of the collective bargaining relationship.

Overall, this area of the law has been anything but clear from the first court case applying the non-statutory labor exemption in the sports context. Numerous tests have been proposed, rejected, or accepted, only to be subsequently rejected. The courts bounced from a “reasonable belief” test to an “impasse” test to a “point beyond impasse,” “instantaneous,” and “collective bargaining relationship” test. When one test—the collective bargaining relationship test—finally had some agreement among the circuits, and had even been successfully used in the labor argument in the NFL, the Supreme Court decided to throw everything back into doubt by creating a “point in time distant” test. As this test was created outside of labor strife, it has never truly been tested, and no one has any idea what it actually means in terms of an antitrust suit timeline.

This lack of clarity even led to the recent maneuvering between the NFL and NFLPA, with the NFLPA beginning decertification procedures while they were still locked into a CBA and collective bargaining negotiations. This seems blatantly at odds with the congressionally and judicially stated goal of facilitating collective bargaining. A new, or perhaps old, test is needed—one that adds clarity to this area of the law while also plainly stating when the non-statutory labor exemption expires.

V. A SENSIBLE RULE

Due to the nature of the issue, no single rule will be perfect. Every approach to the expiration of the non-statutory labor exemption will entail both advantages and disadvantages, and any rule will be subject to abuse by one side or the other, or both. The best approach will balance as equitably as possible the needs and interests of both sides, and will include mutual poison pills that ensure that compliance with the congressional interest favoring labor laws is in both sides’ best interest. This mutuality is the

106. Id. at 250.
107. Id.
108. Battista, supra note 3.
most important facet of any rule applying to the non-statutory labor exemption. As the Eighth Circuit in *Powell* pointed out, “the federal labor laws provide the opposing parties to a labor dispute with offsetting tools, both economic and legal, through which they may seek resolution of their dispute.”

The test that would most closely balance the competing interests of the parties, while also prompting the parties to conform with the Congressional interest of compliance with labor laws, is a form of the “impasse” test. This comment proposes that the non-statutory labor exemption should continue to apply to a given restraint once the CBA has expired, until one year after the parties have bargained to impasse as to that particular issue—an “impasse plus one year” test. The one year time period was chosen because it makes the most sense from a fiscal point of view, allowing both sides to plan accordingly. Further, it is roughly equivalent to one season of football, meaning that from the league’s point of view a player has significant incentive to stay and bargain, lest he lose a year of playing time. From the player’s point of view, if the league engages in anti-competitive practices, significant damages will have piled up by the end of the year-long period. The time period of “one year,” however, is less important than the certainty of a set time, be it four months, six months, or one year. This solution is exceptionally well-suited to labor disagreements in the sports context, for the reasons that follow.

First and most importantly, an impasse standard with a one year stay before litigation can be commenced would give both sides reasons to stay at the bargaining table and come to an agreement, the most important goal of labor laws. Some courts have hesitated to adopt an impasse standard, but adding a one-year stay before litigation can ensue would skirt the perceived downfalls of the test. In rejecting the test in *Powell II*, the Eighth Circuit argued that it seemed as if the impasse standard treated a lawful stage of the bargaining process as misconduct. Under the proposed “impasse plus one year” test, that issue is rendered moot. Once impasse is reached, employers are not immediately held accountable for violations of the antitrust laws. They have one year during which they can continue bargaining at the table towards a new CBA. While suits cannot be brought against them during this time, the restraint is still considered a violation of the antitrust laws, subject to the *Mackey* test. The antitrust treble damages will begin to pile up, ensuring that the employer has a reason to stay at the bargaining table and work towards a new CBA.

Players will likewise have a reason to stay and bargain. The *Powell II*
court had accepted the argument that the “impasse” standard provided the NFLPA with an incentive to “force an impasse in order to pursue an antitrust claim.” Under this standard, the fear that players will force early impasse in order to gain access to treble damages is also moot. There are significant difficulties that would come from players choosing not to bargain, but waiting out the one-year stay while at impasse simply to gain access to the treble damages of an antitrust suit. Since the average career of a player is less than four years, most players will be unwilling to sacrifice a full year of earning potential, which will give them ample reason to stay at the table and bargain. It is also unlikely that they will be happy to sit back and wait the year out in order to institute a suit, as trials are uncertain and entail many risks and expenses. The court in White pointed out that litigation over antitrust violations is undesirable because it is lengthy, often presenting complex and novel issues of law, expensive, complicated in regards to damages and injunctive relief, and may lead to a finding of no liability.

Because both sides have mutual reasons to bargain, this test fits into the usual mutuality requirements that both sides have reciprocal abilities. Federal labor laws provide both sides of a labor dispute with offsetting tools, both economic and legal, to seek resolution of the dispute. Examine, for example, the reciprocal capabilities of the league to lock out, and the players to strike. As part of the protections, employers may not fire striking players, but may hire replacement players to work. Under an “impasse plus one year” standard, a strike or lockout is likely to damage both sides and is thus unlikely to be desirable to either; a perfect product of mutuality effecting the desire and the likelihood that the parties will bargain.

If the owners call for a lockout, they have a choice of either hiring replacement players, who are not as talented or recognizable as the stars (and thus a less attractive overall product), or cancelling games and not fielding teams at all. A less attractive product by way of replacement players is dangerous, as the sport of professional football will lose viewers, and thus revenue. Only once have replacement players been used—during the 1987 strike—and while fans still attended and the games were still

112. Lock, supra note 5, at 355.
114. Powell II, 930 F.2d at 1302.
broadcast,\textsuperscript{116} a protracted season of replacement games would undoubtedly damage fan interest. Cancelling games altogether is even less attractive from the league’s standpoint. During the recent discussions, league estimates were that if a regular season game was missed, the NFL would lose about four hundred million dollars per week.\textsuperscript{117} In addition, regardless of which route they choose, under the proposed standard the league can still be held accountable after the year for any restraints of trade it may impose until a new CBA is worked out, thus giving it more reason to conclude the matter as quickly as possible. Certainly, the NFL would have ample reason under this standard to stay at the bargaining table.

On the other hand, imagine that the players call a strike. If they do, they will be losing valuable time in their prime, many of whom will have less than a four-year career. The league may play with replacement players, proving that football can go on without its stars and possibly swaying public opinion against the players. Individual players will worry about their futures and begin crossing the picket line as they did in 1987, effectively ending the strike without any success. They too would have a reason not to strike, but rather to bargain and conclude a new CBA as quickly and painlessly as possible.

Finally, both sides will be hurt by the labor strife, as confidence in the league will be shaken. By way of analogy, one can observe the damage done to hockey and baseball during their respective labor disputes in the mid-1990’s, or to the damage recently done to the NBA as owners and players argued over a new CBA. The baseball work stoppage so damaged the game as a whole that both sides view it as a “nuclear option,” to be threatened but never again used.\textsuperscript{118} Football is currently the peak of the professional sports world, and the Super Bowl is one of the most watched television programs. Neither the players, nor the league, want to see football’s predominant status dissipate, as it stands a very real chance of doing if there is a work stoppage.

This proposal also has the advantage of being much clearer than the present “distant in time and circumstances” test. Even the prior “collective bargaining relationship” test was clearer than the one the Supreme Court finally settled upon. At least under that test, both the league and the union knew that antitrust laws were in force once the bargaining relationship was

\textsuperscript{116} Shapiro, \textit{supra} note 30 at 1211.


\textsuperscript{118} Kevin Baxter, \textit{Baseball Owners, GMs See No Labor Strife on Horizon}, \textit{Los Angeles Times} (Nov. 18, 2010).
terminated. Under the current “distant in time and circumstances” test, the antitrust laws do not regain preeminent status until some point after the end of the collective bargaining relationship ends. There is absolutely no guidance as to when exactly this is. The Supreme Court did not provide any guidance, and so far no additional cases have surfaced to explore the issue. Unfortunately, this has led to the recent drama where the union began decertification proceedings even while in the midst of talks about a new CBA, just so they could reach the point “distant in time and circumstances” from the collective bargaining relationship as quickly as possible, whenever that is.

The “impasse plus one year” test proposed eliminates this uncertainty. Antitrust laws are in effect exactly one year after the two sides reach impasse as to a particular issue. Because “impasse” has been a recognized status in collective bargaining for many years, useful tests are already in place to determine when “impasse” has been reached. The proposed standard uses those already existing tests to create a practical endpoint to the non-statutory labor exemption. Once impasse has been reached as to an issue, the two sides have exactly one year to come to an agreement as to that issue. As discussed above, both sides have considerable reasons to use that year effectively to resolve their issues, rather than play the waiting game. The resulting clarity will be very helpful in pushing the two sides to a new agreement, rather than allowing them to focus on figuring out when the non-statutory labor exemption will end.

Finally, this test has the very important advantage of not requiring decertification of the union before the players have access to treble damages provided for under antitrust law. This is a significant change to the state of the law. First, it means that the union will be focusing its efforts on negotiating at the bargaining table, rather than on gathering the necessary documents and votes to decertify. Second, and more importantly, this means that the union will not be required to forego and relinquish all of the advantages unionized representation brings it, simply to have access to antitrust protections. Decertification would strip from players significant rights that they gained by unionizing: recognition as a bargaining unit with bargaining strength; establishment of mandatory bargaining subjects; protection of the right to strike; pooled benefit plans; judicial enforcement of CBAs; and the establishment of a list of employer actions that, if taken, constitute unfair labor practices.\(^\text{119}\) A related issue brought about by the current test is extra litigation over whether the union has truly decertified, or whether the decertification was a sham used only to gain access to treble damages, as is currently being argued by the NFL.

\(^{119}\) Brown, 50 F.3d at 1057.
Not to mention that recertification after the strife can be a time consuming process, as described in White.\textsuperscript{120}

The proposed test completely eliminates the need for the NFLPA, or any sports union, to decertify to gain access to the antitrust laws. The need to decertify is not codified in statute anywhere; it was a judicially created necessity. Adopting the proposed test does away with this hurdle. As such, players can continue to have access to all of their rights—rights they gain by unionizing, rights under the CBA, and rights under antitrust laws—without having to exchange one set for another. This single fact alone makes this test vastly superior to the current test. When combined with the advantages of clarity and mutuality, this “impasse plus one year” test is easily unmatched by any of the other tests, in force or in contention.

As mentioned above, the test is not perfect, as there is no perfect test to resolve these issues. Some might argue that the test encourages several mini impasses on certain issues while the CBA is in effect in an effort to build leverage for a suit. This argument is misleading. While the union may be tempted to engage in this sort of behavior, they will be effectively dissuaded by the one-year waiting period. Each of the issues would be rendered moot once a new CBA is agreed upon, so in order to benefit from several small impasses the sides would have to fail to reach a new CBA before the waiting period has expired for each issue. However, the certainty that comes with an agreed upon CBA is likely to foster in the players a desire to bargain and come to an agreement. Similarly, the League would not want to allow the one-year period to expire without a new CBA, because they would have been accumulating antitrust infractions throughout that year. The owners may have deeper pockets than the players, but stretching the impasses out over a year means that they are accumulating treble damages, and should the issue move into litigation those deep pockets may be used to pay significant sums to the players. Thus, both sides are incentivized to bargain.

\textbf{CONCLUSION}

As has been shown, the current test and standard is unsustainable, creating more problems—like the recent situation in the NFL—than it solves. The Supreme Court created a test that is not only exceedingly confusing and vague, but one that also makes the parties at issue choose between sets of rights they wish to exercise. Of course, the Supreme Court would not have decided upon such a confused test had the history of the issue in the lower courts not been equally as confusing and ambiguous. A

\textsuperscript{120} White, 836 F.Supp. at 1483 (describing the difficulties of antitrust litigation).
new, comprehensible, and plain test is needed. The proposed “impasse plus one year” test meets these needs.

Even with the new CBA reached in the NFL, and the recent situation ending without prolonged labor strife, the root issue has not been solved. The current test is still there, creating uncertainty. That particular problem will not dissipate until a truly usable test is chosen for deciding when the non-statutory labor exemption has ended. Until that test is chosen, the sports labor environment will be punctuated at the least by severe uncertainty, and in the worst case by periods of labor strife and unrepresented players. The proposed test placates those fears, and harmonizes the labor environment in the sports context with the congressional desire to have labor and employers sit down at a bargaining table and come up with a mutually beneficial CBA. For that reason this comment proposes that the current imprecise “distant in time and circumstances” test be scrapped, and in its place accepted the proposed “impasse plus one year” test, for the good of the sports labor market.