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Comment

LET THEM TRAIN: WHY THE EIGHTH CIRCUIT'S DECISION TO STAY THE INJUNCTION OF THE 2011 NFL LOCKOUT WAS INCORRECT

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Although the 2011 National Football League ("NFL") lockout did not result in any cancelled regular season games, nor did it damage the players, stadium employees, and small business owners to the extent that it could have, there are still important lessons to be learned. This Comment provides background on the NFL's labor history, both in the court system and in the negotiation room. Further, this Comment analyzes the application of American labor law to the then-pending NFL lockout. This Comment concludes with the argument that the principles of labor law and public policy discussed herein should not have allowed the owners to lock out the players.

COMMENT CONTENTS

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I. INTRODUCTION

The history of the relationship between the National Football League ("NFL" or "League") and its players has been a rocky one at best. One reason for this tenuous relationship is the fact that the owners and players treat themselves as employers and employees, and that the courts have followed their lead. Owners have players sign the same contracts with the same language as everyday people. Yet, unlike the average American, NFL players are televised nationally every Sunday in the fall season. Another not-so-subtle difference between an NFL player and an average American is that the median NFL salary was $770,000 in 2011,[1] while the median household income in the United States was $50,673 in December 2011.[2] Nevertheless, the same labor laws that govern the work life of the average American govern the work life of the average NFL athlete.

It is with that understanding that this Comment, and the case of *Brady v. National Football League*,[3] takes its shape. The truth is that while professional football players may fall under the same general concept of jurisdiction and adjudication as the rest of us, there are nevertheless reasons why a labor issue between the players and their employers is unique. When the NFL imposed a lockout of the players and jeopardized the 2011 season, it was not only the players, but also the coaches, trainers, television networks, stadium and concession workers, along with neighborhood bar and restaurant owners who faced the possibility of

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[1] *The Average NFL Player*, BLOOMBERG BUSINESSWEEK, Jan. 27, 2011, http://www.businessweek.com/magazine/content/11_06/b4214058615722.htm. In fact, the average NFL salary is even higher at $1.9 million. *Id.*

[2] GORDON GREEN & JOHN CODER, SENTIER RESEARCH, HOUSEHOLD INCOME TRENDS: JANUARY 2012 2 (2012), *available at* http://www.sentierresearch.com/reports/Sentier_Research_Household_Income_Trends_Report_January_2012_12_03_01.pdf.

[3] Brady v. Nat'l Football League, 644 F.3d 661 (8th Cir. 2011).

serious revenue loss.[4] The owners' imposition of a lockout on the players, in an effort to maximize their already high revenue stream, showed a conscious disregard for the number of people who rely on the NFL season.

The improper conduct of the owners, however, is not the subject of this Comment. Instead, the discussion here will primarily focus on the four decisions made by federal courts on the legality of the lockout imposed by the League: two by the District Court for the District of Minnesota, and two by the United States Court of Appeals for the Eighth Circuit.[5] The district court decisions favored the players, granting their request for a preliminary injunction of the lockout and denying the League's motion for a stay pending appeal. The Eighth Circuit decisions overturned the district court holdings and granted the stay pending appeal on the theory that the district court lacked jurisdiction to enjoin a lockout under the Norris-LaGuardia Act.[6]

This Comment will examine the history of the legal and football-business-related issues between the League and the players to create a frame of reference for an analysis of why the Eighth Circuit's decision was incorrect. This Comment will be split into four parts: Part II will relate the history of labor relations between the NFL and its players; Part III will examine the most recent non-legal and football-related issues that led to the 2011 lockout; Part IV will discuss the federal courts' involvement in standard labor issues over the years; and Part V will discuss how the Eighth Circuit erred in *Brady*.

II. A HISTORY OF LABOR RELATIONS BETWEEN THE NFL AND ITS PLAYERS

Before analyzing the decisions made by the federal courts in *Brady v. National Football League*,[7] it is necessary to obtain a fundamental understanding of the tenuous and complex history of labor relations between the NFL and its players. This Part will lay the foundation for my discussion of the Norris-LaGuardia Act, specifically with respect to why the NFL should not have been able to lock out the players after the players

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[4] *See* Lou Dubois, *What an NFL Lockout Would Mean to Small Businesses*, INC. (Mar. 3, 2011), http://www.inc.com/articles/201103/what-an-nfl-lockout-would-mean-to-small-business.html ("[E]very city with an NFL franchise stands to lose about $160 million in revenue ($20 million per home game), $5 billion total, and an aggregate of 115,000 jobs."). The mayor of Buffalo, one of the League's smallest markets, is also on record as saying that a season-long lockout would cost the city $140 million. *Id.*

[5] Brady v. Nat'l Football League, 779 F. Supp. 2d 992 (D. Minn.) [hereinafter *Brady I*]; Brady v. Nat'l Football League, 779 F. Supp. 2d 1043 (D. Minn. 2011) [hereinafter *Brady II*]; Brady v. Nat'l Football League, 640 F.3d 785 (8th Cir. 2011) (per curium) [hereinafter *Brady III*]; Brady v. Nat'l Football League, 644 F.3d 661 (8th Cir. 2011) [hereinafter *Brady IV*].

[6] *Brady III*, 640 F.3d at 792.

[7] 779 F. Supp. 2d 992 (D. Minn. 2011).

decertified the union and decided to forfeit the protections of labor laws.

The first case relevant to *Brady* was *Mackey v. National Football League*.[8] In *Mackey*, the players challenged Commissioner Pete Rozelle's restriction of player movement between NFL clubs, known as the "Rozelle Rule," as a violation of the Sherman Act.[9] The League claimed that the Rule was protected from antitrust regulation under the non-statutory labor exemption, which serves to "insulate legitimate collective activity by employees, which is inherently anticompetitive but is favored by federal labor policy."[10] In affirming the district court's decision that the Rozelle Rule was a per se violation of antitrust laws,[11] the Eighth Circuit used a three-part test to determine that the Rozelle Rule did not fall under the non-statutory labor exemption and was thus vulnerable to antitrust scrutiny.[12] This victory for the players in *Mackey* did not last long, however, as the League ostensibly exchanged the Rozelle Rule for other provisions that could not be attacked in antitrust litigation.[13]

The next major antitrust disputes to emerge between the League and the players came in the *Powell*/*McNeil* line of cases.[14] *Powell v. National Football League*[15] focused on veteran free agency, and specifically whether players have a right to bring suit under the Sherman Act at the point of a bargaining impasse.[16] In *Powell*, the district court used the *Mackey* decision to determine that the League was open to a lawsuit at a bargaining impasse, but the Eighth Circuit rejected the district court's rationale that a bargaining impasse triggered the application of the antitrust laws.[17] Instead, the Eighth Circuit held that, even though the collective bargaining agreement had expired and the parties were at impasse, management was

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[8] 543 F.2d 606 (8th Cir. 1976).

[9] *Id.* at 609.

[10] *Id.* at 611.

[11] Mackey v. Nat'l Football League, 407 F. Supp. 1000, 1007 (D. Minn. 1975).

[12] *See Mackey*, 543 F.2d at 614 ("We find the proper accommodation to be: First, the labor policy favoring collective bargaining may potentially be given pre-eminence over the antitrust laws where the restraint on trade primarily affects only the parties to the collective bargaining relationship. Second, federal labor policy is implicated sufficiently to prevail only where the agreement sought to be exempted concerns a mandatory subject of collective bargaining. Finally, the policy favoring collective bargaining is furthered to the degree necessary to override the antitrust laws only where the agreement sought to be exempted is the product of bona fide arm's-length bargaining." (citations omitted)). The district court in *Brady II* outlined the same test for exemption by quoting the *Mackey* opinion. *Brady II*, 779 F. Supp. 2d 992, 998 (D. Minn. 2011). The Eighth Circuit was satisfied with the first two prongs of the test, but found that the Rozelle Rule restricting free agency was not the product of the League's bona fide arm's-length bargaining. *Mackey*, 543 F.2d at 615–16.

[13] *See Brady I*, 779 F. Supp. 2d at 1000 (discussing the "Plan B" restraints on players).

[14] *Id.* at 999.

[15] 930 F.2d 1293 (8th Cir. 1989).

[16] *Id.* at 1295–96.

[17] *Id.* at 1301.

protected from judicial intervention.[18] On appeal, the court noted that labor policy favors negotiation and settlements, rather than judicial intervention, and it declined to limit the applicability of the labor exemption.[19] While the ruling was unfavorable to the players, the Eighth Circuit did note the League's concession that the Sherman Act could be applicable in certain situations, specifically "if the affected employees ceased to be represented by a certified union."[20]

It was in the *Powell* line of cases that the courts made their first explicit reference to the Norris-LaGuardia Act. The Norris-LaGuardia Act is discussed further herein,[21] but the district court used the Norris-LaGuardia Act as a frame of reference for the non-statutory labor exemption in a separate *Powell* decision, holding—in line with the Eighth Circuit—that a bargaining impasse is *not* the equivalent of the end of a labor dispute, and thus does not preclude the Norris-LaGuardia Act from prohibiting an injunction in cases "involving or growing out of labor disputes."[22] In essence, the Norris-LaGuardia Act strips federal courts of the authority to enjoin labor disputes or disputes growing out of a labor relationship. The *Powell* cases refused to set guidelines as to when there is no labor relationship, but they nonetheless illustrate that a mere bargaining impasse is not enough to preclude the application of the Act and to trigger the involvement of the federal courts.[23]

Following the *Mackey* decision, the players chose to disclaim the union and bring suit against the League, alleging that a new system of player restraints (known as "Plan B" restraints) constituted an antitrust violation in another *Powell v. National Football League* decision.[24] The League reasserted the non-statutory labor exemption, but the argument was rejected on summary judgment because, without a union, no "ongoing

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[18] *See id.* at 1302 ("Both relevant case law and the more persuasive commentators establish that labor law provides a comprehensive array of remedies to management and union, even after impasse. . . . We are influenced by those commentators who suggest that, given the array of remedies available to management and unions after impasse, a dispute such as the one before us 'ought to be resolved free of intervention by the courts' . . . ." (citing J. Weistart & C. Lowell, *The Law of Sports* § 5.06, at 590 (1979))); *see also id.* ("A rule withdrawing immunity because the previous contract expired before a new agreement was reached is contrary to national labor law. The parties would be forced to enter into a collective bargaining agreement to avoid antitrust sactions [sic], when labor law is opposed to any such requirement." (quoting Robert C. Berry & William B. Gould, *A Long Deep Drive to Collective Bargaining: Of Players, Owners, Brawls, and Strikes*, 31 CASE W. RES. L. REV. 685, 774 (1981))).

[19] *Id.* at 1303.

[20] *Id.* at 1303 n.12.

[21] *See infra* Part III.B.

[22] Powell v. Nat'l Football League, 690 F. Supp. 812, 814 (D. Minn. 1988).

[23] *Id.* at 815 ("[W]here the bargaining relationship and the collective bargaining process remains intact, a controversy regarding terms or conditions of employment constitutes a labor dispute.").

[24] 764 F. Supp. 1351, 1353–54 (D. Minn. 1991).

collective bargaining relationship" existed between the two parties.[25] The League also claimed that for the union to be officially dissolved, the players would have to apply for and obtain decertification from the National Labor Relations Board ("NLRB").[26] The court ruled, however, that as long as certification was not required for a union to participate in collective bargaining, decertification was not required to end collective bargaining.[27] The court also recognized the limits of the requirement to bargain in good faith, establishing that the union no longer has such a duty when "a majority of the players have clearly indicated their wish not to be represented by any entity . . . during collective bargaining."[28]

Having satisfied the requirements for the dissolution of the union, the *Powell* plaintiffs successfully moved for partial summary judgment to strike the League's claim that the non-statutory labor exemption still applied.[29] The court granted partial summary judgment against the labor exemption defense, reasoning that the exemption no longer applied because no remedies existed under labor law with specific reference to collective bargaining, NLRB proceedings for failure to bargain in good faith, and strikes.[30] The district court eventually ruled against the summary judgment motion in *McNeil v. National Football League*,[31] a companion case of *Powell*.[32] The court labeled the motion premature, but the case made it to a jury, where a verdict was returned that Plan B violated Section 1 of the Sherman Act and caused economic injury to the players.[33] The successful *Powell* judgment spurred a group of hopeful free agents to bring legal action against the League for the same restraints in *Jackson v. National Football League*.[34] The court in *Jackson* based its holding on the decisions in both *Powell* and *McNeil*, granting a temporary restraining order because these individual players would suffer irreparable harm from the League's restraints.[35]

The decisions in *McNeil* and *Jackson* laid the groundwork for the antitrust class action litigation in *White v. National Football League*[36] in

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[25] *Id.* at 1358.

[26] *Id.* at 1356.

[27] *Id.* at 1358.

[28] *Id.* at 1357–58 n.6.

[29] *Id.* at 1359.

[30] *Id.*

[31] 790 F. Supp. 871, 897 (D. Minn. 1992).

[32] Judges and legal scholars often use *McNeil* to refer to the *McNeil* and *Powell* cases of 1991, both of which went in front of the District Court for the District of Minnesota.

[33] *Brady I*, 779 F. Supp. 2d 992, 1001–02 (D. Minn. 2011) (citing McNeil v. Nat'l Football League, 1992 WL 315292, at *1 (D. Minn. Sept. 10, 1992) (publishing the special verdict form)).

[34] *Id.* at 1002 (citing Jackson v. Nat'l Football League, 802 F. Supp. 226, 228 (D. Minn. 1992)).

[35] Jackson v. Nat'l Football League, 802 F. Supp. 226, 230–31 (D. Minn. 1992).

[36] 822 F. Supp. 1389 (D. Minn. 1993).

1993.[37] In *White*, the players sought an injunction that would require total or modified free agency.[38] After the court certified a settlement class, the League and the players entered into the *White* Stipulation and Settlement Agreement ("SSA"), as well as a new collective bargaining agreement that mirrored the SSA.[39] The most important compromise of the SSA was that the players were to recertify the union in exchange for the League agreeing to waive any future right to assert the non-statutory labor exemption.[40] The end result of the *White* litigation was that the players reconstituted the National Football League Players' Association ("NFLPA") as their bargaining authority, and entered into a collective bargaining agreement that mirrored the SSA.[41]

Brown v. Pro Football, Inc.[42] presented an opportunity for the Supreme Court to establish jurisprudence on the divergence between labor and antitrust law.[43] Having reached impasse in their negotiations with the players' union over developmental squad player salaries, the owners decided to implement the terms of their "last best bargaining offer" without the approval of the union.[44] The union filed an antitrust suit, but the Supreme Court held that this case fell under the "implicit antitrust exemption" that the Court has used in the past, which was designed to allow the collective-bargaining process to function properly.[45] In its opinion, the Supreme Court discussed the reasoning behind such an exemption, better known as the "nonstatutory labor exemption,"[46] noting that it has historical *and* logical roots.[47]

Historically speaking, the non-statutory labor exemption was one way of keeping judges from using antitrust law to resolve labor disputes, which was deemed inappropriate.[48] As decided in *Local Union No. 189, Amalgamated Meat Cutters & Butcher Workmen of North America v. Jewel Tea Company*,[49] it is for Congress, not judges, to determine what

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[37] *Brady I*, 779 F. Supp. 2d at 1002 (citing White v. Nat'l Football League, 822 F. Supp. 1389 (D. Minn. 1993)); *see infra* Part III (providing a more thorough discussion of labor dispute injunctions and when they are appropriate).

[38] *White*, 822 F. Supp. at 1395.

[39] *Brady I*, 779 F. Supp. 2d at 1002.

[40] *Id.*

[41] *Id.*

[42] 518 U.S. 231 (1996).

[43] *See id.* at 233 ("The question in this case arises at the intersection of the Nation's labor and antitrust laws.").

[44] *Id.* at 234.

[45] *Id.*

[46] *Id.* at 235 (internal quotation marks omitted).

[47] *Id.* at 236 ("This implicit exemption reflects both history and logic.").

[48] *Id.*

[49] 381 U.S. 676 (1965).

constitutes reasonable practice in industrial conflicts.[50] With respect to logic, the Court recognized the futility of a system of collective bargaining where negotiators are forbidden from signing contracts that restrict competition in any way.[51] Thus, the only mechanism capable of effectuating federal labor laws, while at the same time establishing meaningful collective bargaining relationships between employers and employees, became a non-statutory labor exemption that shielded the parties from antitrust regulation.[52]

The Court eventually held that the actions of the owners were still controlled by federal labor law, and by extension, the non-statutory labor exemption. Despite reaching an impasse,[53] the non-statutory labor exemption applied because the owners' conduct: (a) immediately followed collective-bargaining negotiation; (b) grew out of and directly related to the bargaining process; (c) dealt with a matter reserved for collective bargaining; and (d) involved only the two parties to collective bargaining.[54] The Court's decision to apply the non-statutory labor exemption is essentially its answer to the *Powell* decisions dealing with the duration of the non-statutory exemption and the significance of a bargaining impasse.[55] The Supreme Court made a similar ruling to that of the Eighth Circuit in *Powell*, holding that an impasse in labor negotiations did not always preclude antitrust intervention, notably in cases where an agreement among employers is "sufficiently distant in time and in circumstances from the collective-bargaining process."[56]

The situation that developed and ended with a lockout in March 2011 began in 2008 when the NFL decided to opt out of the final two years of the SSA and Collective Bargaining Agreement ("CBA"), seeking a greater share of revenues and the ability to impose new restraints on player contracts.[57] Attempts at structuring a deal in the years between 2008 and

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[50] *See id.* at 709 ("[T]his history shows a consistent congressional purpose to limit severely judicial intervention in collective bargaining under cover of the wide umbrella of the antitrust laws, and, rather, to deal with what Congress deemed to be specific abuses on the part of labor unions by specific proscriptions in the labor statutes.").

[51] *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 to 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.").

[52] *Id.*

[53] The government argued through an amici curiae brief that the "exemption should terminate at the point of impasse." *Id.* at 244. Termination of the exemption would allow the union to bring an antitrust suit.

[54] *Id.* at 250.

[55] *Brady I*, 779 F. Supp. 2d 992, 1002 (D. Minn. 2011).

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

[57] *See Brady I*, 779 F. Supp. 2d at 1003 (noting that the NFL wanted to impose restraints on the "rookie wage scale").

2011 proved fruitless, and the NFL threatened to impose a lockout.[58] By the time the SSA and CBA were to expire on March 11, 2011, the players had determined that it was in their best interest to decertify their union so that the League presumably could not impose on them anticompetitive restrictions free from antitrust scrutiny.[59]

The decertification of the players' union brings us to the litigation that will be thoroughly discussed in this Comment. Known as the "Brady Plaintiffs," a group of NFL players immediately filed a complaint alleging antitrust violations under Section 1 of the Sherman Act, along with breach of contract and tort claims.[60] Relief was requested in the form of a preliminary injunction that would enjoin all thirty-two teams from perpetuating the lockout.[61] The essence of the players' claim was that the teams (which are separately-owned and independently-operated) conspired through a "price-fixing arrangement or a unilaterally-imposed set of anticompetitive restrictions on player movement, free agency, and competitive market freedom—to coerce the [p]layers to agree to a new anticompetitive system of player restraints that will economically harm the Plaintiffs."[62]

Because the standard for a preliminary injunction is whether the absence of an injunction is "likely" to lead to irreparable harm,[63] the burden was on the players to show that allowing the lockout to stand would likely result in irreparable injury to them. The plaintiffs presented the court with affidavits supporting this irreparable harm, focusing mainly on the relatively short careers of NFL players, in an effort to prove that damages would be an insufficient remedy.[64] The players argued that because of the pressure they face every day to prove themselves physically and economically, the loss of an entire year in such a short professional career could never be regained, and thus could not be compensated in damages, as players' careers could easily be shortened or end as a result of

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[58] *Id.* (defining a lockout as when an employer lays off its unionized employees while undergoing a labor dispute to enhance its bargaining position (citing Am. Ship Bldg. Co. v. NLRB, 380 U.S. 300, 301–02 (1965))).

[59] *Id.* The players' union, the NFLPA, informed the NFL the next day that they claimed no interest in representing the players in negotiations. *Id.*

[60] *Id.* at 1004.

[61] *Id.* The players also used the term "group boycott" to describe the situation. *Id.*

[62] *Id.* (internal quotation marks omitted). The court also noted that the aim of the lockout was to shut down the entire free agent market. *Id*.

[63] *See* Winter v. Natura Res. Def. Council, Inc., 555 U.S. 7, 22 (2008) (holding that the *possibility* standard of there being irreparable harm is too lenient, and that the standard should be one where irreparable injury is *likely* (citing Los Angeles v. Lyons, 461 U.S. 95, 103 (1983))).

[64] *Brady I*, 779 F. Supp. 2d at 1004 (noting that it would be difficult to assess the amount of damages players deserved due to their unique skill-sets and because there was no competitive market to use as a guide). The court also discussed the affidavits in more detail, and it noted how many of them calculated the typical career of an NFL player to be less than four years, due to "the ever-present risk of career-ending injury and the constant physical wear and tear on players' bodies." *Id.*

the loss of a full season.[65]

Before discussing the legal issues in depth, the district court in *Brady I* acknowledged the low standard that has been applied in the past with respect to the likelihood of irreparable harm. In 2008, the district court held that lost playing time constituted irreparable harm.[66] In *Powell*, the district court also held that NFL restrictions produced irreparable injury.[67] Using language adopted by the attorneys in the case at bar, the district court held that "[t]he existence of irreparable injury is underscored by the undisputed brevity and precariousness of the players' careers in professional sports, particularly in the NFL."[68] It was with those affidavits and arguments in hand that the district court heard oral arguments on the motion for a preliminary injunction.[69]

III. A DISCUSSION OF THE NON-LEGAL ISSUES OUT OF WHICH THE 2011 LOCKOUT AROSE

This Part will discuss the non-legal issues that produced the tension between the NFL and the players, leading to the March 2011 lockout. The state of dissatisfaction amongst the owners began with the signing of a new CBA in 2006. Paul Tagliabue, who was on his way out as NFL commissioner at the time, lobbied ownership to accept the deal in an effort to keep his legacy of labor peace intact.[70] The deal eventually agreed to by the owners[71] contained a revenue-sharing provision that directed the

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[65] *Id.*

[66] Nat'l Football League Players Ass'n v. Nat'l Football League, 598 F. Supp. 2d 971, 982–83 (D. Minn. 2008) (extending a preliminary injunction issued as a temporary restraining order against arbitral awards that upheld four-game suspensions for the use of banned substances in part because the players were subject to irreparable harm).

[67] *Powell*, 690 F. Supp. at 818 (refusing to impose injunctive relief for the unrestricted free agency rules, but conceding that "at least some of the players are likely to sustain irreparable harm if they are not immediately permitted to sign with other NFL clubs").

[68] *Jackson*, 802 F. Supp. at 231 (citing Linseman v. World Hockey Ass'n, 439 F. Supp. 1315, 1319 (D. Conn. 1977) ("[T]he career of a professional athlete is more limited than that of persons engaged in almost any other occupation. Consequently the loss of even one year of playing time is very detrimental.")).

[69] *Brady I*, 779 F. Supp. 2d at 1005.

[70] *See* Jeffrey F. Levine & Bram A. Maravent, *Fumbling Away the Season: Will the Expiration of the NFL-NFLPA CBA Result in the Loss of the 2011 Season?*, 20 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1419, 1428 (2010) (suggesting that Commissioner Tagliabue did not want his legacy tarnished by retiring at a time of labor unrest); *see also* Michael Silver, *Fans' Guide to NFL Labor Battle*, YAHOO! SPORTS (Sept. 8, 2010), http://sports.yahoo.com/nfl/news?slug=ms-laborquestions090810 (detailing the involvement of Gene Upshaw, the NFLPA's late executive director, who may have used Tagliabue's fear of leaving a tarnished legacy as leverage to get the players an even better share of the revenue).

[71] The deal was signed by thirty of thirty-two owners, with the owners of the Buffalo Bills and Cincinnati Bengals dissenting. Jarrett Bell, *NFL Owners Accept Player Union Proposal with 30-2 Vote*, USA TODAY (Mar. 8, 2006, 4:43 PM), http://usatoday30.usatoday.com/sports/football/nfl/2006-03-08-labor_x.htm.

League's top fifteen revenue producers to contribute to a fund to be dispersed to the lower-revenue teams.[72] The agreement also placed another $850 million to $900 million of the owners' money into the player revenue pool, which was to run on a sliding scale based on the top fifteen teams in non-television and ticket income.[73] Based on that information alone, it is clear why the 2011 lockout not only occurred, but why it was virtually inevitable. This agreement was a dream scenario for the players, as it also raised the salary cap from $85.5 million to $102 million, leaving more money available for veterans and free agents.[74]

The question as to why a majority of the owners voted for this deal was often asked during the negotiations phase and after the deal was signed.[75] Despite large amounts of money changing hands from the NFL's richest owners and moving down the line, this system of profit-sharing was still seen as a better option than the possibility of an uncapped 2007 season and a work stoppage in 2008.[76] Perhaps the other owners should have listened to Buffalo Bills owner Ralph Wilson, who "questioned whether management acted too hastily without carefully deliberating its future economic consequences."[77] In total, thirty owners signed a deal that gave 59.6% of total revenue to players' salaries.[78] On top of that, the new CBA failed to address other areas of concern for the NFL, including the high salaries for star players and veterans, and especially the escalating rookie salary structure.[79] With the new CBA not only failing to address these areas of concern, but also actually allocating even more revenue for player salaries,[80] it is easy to see how the NFL became restless and discontented with the agreement in the following years.

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[72] *See id.* (noting that the League's top five teams would place the most money in the fund). The seventeen lowest-revenue teams would not only not have to contribute to the player revenue pool, but would also receive funds from the top fifteen earners, and yet two low-revenue teams (the Bills and the Bengals) still voted against the deal. *Id.*

[73] *Id.*

[74] *Id.*

[75] *Id.*

[76] *Id.*

[77] Levine & Maravent, *supra* note 70, at 1429. Wilson stated, "I didn't understand [the revenue sharing sections of the 2006 CBA] . . . it is a very complicated issue and I didn't believe we should [have] rush[ed] to vote in [forty-five] minutes." *Id.* (alterations in original) (citing *NFL Owners Approve Six-Year CBA Extension*, ESPN.COM (Mar. 8, 2006), http://sports.espn.go.com/nfl/news/story?id=2360258).

[78] Silver, *supra* note 70.

[79] Levine & Maravent, *supra* note 70, at 1428.

[80] *Id.*

IV. THE INVOLVEMENT OF FEDERAL COURTS

A. *Procedural History*

Before the dispute was settled out of court by a mediator, four decisions were handed down by federal court judges—two by the District Court for the District of Minnesota and two by the United States Court of Appeals for the Eighth Circuit.[81] On April 25, 2011, the district court granted the motion for a preliminary injunction, holding that: (1) the district court would not refer the issue of whether the players' union disclaimer was valid to the NLRB; (2) the disclaimer of the union was effective; (3) the Norris-LaGuardia Act did not apply and thus the district court was not precluded from issuing an injunction; (4) the players had demonstrated a likelihood of irreparable harm if no injunction were issued; (5) the players had a fair chance of succeeding on the merits of their claim; and (6) public interest supported granting the motion for a preliminary injunction.[82] For the purposes of this Comment, I will focus on the application of the Norris-LaGuardia Act as well as the public policy concerns of both the district court and the Eighth Circuit.

Courts should pay "particular regard to the public consequences" in employing the "extraordinary remedy" of preliminary injunction.[83] Indeed, the district court took that sentiment to heart in its opinion, determining that policies of collective bargaining give way to antitrust policies that favor competition as long as the decertification of the union is valid.[84] When the court discussed the impact being felt by non-parties to the suit, it was speaking of parties who feel a "tangible economic impact," from broadcasters down to individuals who run concession stands.[85] The court also noted a concededly non-economic "intangible interest" felt by fans of professional football who have a "strong investment" in a season.[86]

On April 27, 2011, the same judge denied the defendant owners' motion for a stay of the injunction, holding that: (1) the balance of equities

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[81] *See supra* note 5. The first case that came before the courts arose before the district court. As discussed previously, the players sought a preliminary injunction on the League-imposed lockout. *See supra* Part I.

[82] *Brady I*, 779 F. Supp. 2d 992, 1042 (D. Minn. 2011).

[83] Winter v. Nat'l Res. Def. Council, Inc., 555 U.S. 7, 24 (citing Weinberger v. Romero-Barcelo, 456 U.S. 305, 312 (1982)).

[84] *Brady I*, 779 F. Supp. 2d at 1041–42 ("[T]he public has an interest in the enforcement of the Sherman Act, which, by seeking to ensure healthy competition in the market, has a broad impact beyond the immediate parties to this dispute.").

[85] *Id.* at 1042.

[86] *Id.* (recognizing that the presence of these third parties makes this dispute "far from a purely private dispute over compensation"); *see also* Dubois, *supra* note 4 (discussing the short and long-term effects an NFL lockout would have on small business owners, including a real possibility that cancellation of the season would deliver "the final knockout punch" resulting in complete business shutdowns).

weighed against the owners; (2) the owners had not made a sufficient showing that they were likely to succeed on the merits; and (3) the public interest in considering the ramifications of a lost football season weighed in favor of denying the motion.[87]

The NFL appealed the ruling to the United States Court of Appeals for the Eighth Circuit, where on May 2, 2011, a divided 2-1 bench reversed the district court's decision and granted the motion for a stay of the injunction.[88] By *per curiam* opinion, the court reasoned that the NFL had made a strong showing that it was likely to succeed on the merits of its claim that the district court lacked jurisdiction to enjoin the lockout under the Norris-LaGuardia Act[89] and the NFL had met its burden to prove that it would suffer some degree of irreparable harm absent a stay.[90]

On June 3, 2011, the Eighth Circuit Court of Appeals submitted the official opinion that vacated the injunction entirely and remanded the case to the district court.[91] Unlike the previous opinion of the same court that was submitted *per curiam*, this decision was written by Judge Steven Colloton.[92] However, it remained a 2-1 decision, with Judge Kermit Bye writing a lengthy dissent.[93] In his opinion, Judge Colloton narrowed his focus to the Norris-LaGuardia Act itself and its application to the case at bar. Judge Colloton's opinion for the court held that: (1) the definition of a labor dispute under Norris-LaGuardia's anti-injunction provision did not require the existence of a union;[94] (2) the district court did not have the authority to enjoin a party to a labor dispute from implementing a lockout;[95] and (3) the Norris-LaGuardia Act did not foreclose an injunction against the League's dealings with non-employees (free agents, rookies, etc.), but that an injunction in that case would have to conform with the Norris-LaGuardia sections calling for open-court hearings that allow for cross-examination of witnesses.[96]

B. *The Norris-LaGuardia Act*

Before the federal courts' involvement in the *Brady* litigation can be properly analyzed, it is necessary to relate the background and history of the Norris-LaGuardia Act. Described as an anti-injunction statute, the

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[87] *Brady II*, 779 F. Supp. 2d 1043, 1053–54 (D. Minn. 2011).
[88] *Brady III*, 640 F.3d at 794.
[89] *Id.* at 792.
[90] *Id.* at 794.
[91] *Brady IV*, 644 F.3d at 682.
[92] *Id.* at 663.
[93] *Id.* at 682.
[94] *Id.* at 669–74.
[95] *Id.* at 680–81.
[96] *Id.* at 681–82.

Norris-LaGuardia Act passed through Congress in 1932,[97] signaling a changing dynamic in labor law.[98] The historical stage for the Norris-LaGuardia Act was set by the legal challenges to the Clayton Act, most notably in the case of *Duplex Printing Press Company v. Deering*.[99] The Clayton Act, enacted in 1914, was designed to prevent the federal courts from using the Sherman Act against organized labor.[100] *Duplex* arose when "unionized machinists organized a strike and boycott against a company that refused to recognize the union."[101] The issue in this case was the legality of secondary boycotts.[102] The majority refused to make a claim on absolute rights, and instead ruled against the workers because the boycott was "sentimental or sympathetic" rather than "proximate and substantial."[103] The Justices simply did not find a connection between working conditions at the company that was being boycotted and the interests of the boycotting workers employed by competing firms in the business.[104] The ruling against workers was yet another example of judges striking down efforts by organized labor to strengthen workers' bargaining positions by labeling them "malicious."[105]

It is out of this historical context, one where judges looked to enjoin the activities of organized labor, that Norris-LaGuardia emerged. The two principal goals of the Norris-LaGuardia Act were to curtail yellow-dog contracts and injunctions designed to strike down organized labor practices.[106] Despite the fact that the Norris-LaGuardia Act stripped federal courts of authority that they had possessed since the formation of

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[97] 29 U.S.C. § 101 (2006).

[98] *See* GEORGE I. LOVELL, LEGISLATIVE DEFERRALS 161 (2003) (discussing how the Norris-LaGuardia Act came out of a difficult era for labor organizations).

[99] 254 U.S. 443 (1921).

[100] *Id.* at 465.

[101] LOVELL, *supra* note 98, at 59.

[102] *See Duplex*, 254 U.S. at 466 (defining a secondary boycott as "a combination not merely to refrain from dealing with complainant, or to advise or by peaceful means persuade complainant's customers to refrain ('primary boycott'), but to exercise coercive pressure upon such customers, actual or prospective, in order to cause them to withhold or withdraw patronage").

[103] *Id.* at 472 (internal quotation marks omitted); *see also* LOVELL, *supra* note 98, at 59.

[104] LOVELL, *supra* note 98, at 59.

[105] *Id.*

[106] *Id.* at 161. Yellow-dog contracts, or those contracts that prohibit employees from becoming a member of a labor union, are strictly prohibited under Norris LaGuardia, and subsequently under the laws of every state. *See, e.g.*, HAW. REV. STAT. § 380-3 (West 2011); IND. CODE ANN. § 22-6-1-3 (West 2011); N.J. STAT. ANN. § 34:12-2 (West 2011); N.M. STAT. ANN. § 50-2-4 (West 2011); WASH. REV. CODE ANN. § 49.32.030 (West 2011); WIS. STAT. ANN. § 103.52 (West 2011). Case law for the better part of the early twentieth century came out against labor organizations and workers on the issue of yellow-dog contracts, as courts were reluctant to side against big businesses. *See* Hitchman Coal & Coke Co. v. Mitchell, 245 U.S. 229 (1917) (making yellow-dog contracts more of a tool for employers to resist unions); Coppage v. Kansas, 236 U.S. 1 (1915) (striking down a state law provision similar to the one in *Adair v. United States*); Adair v. United States, 208 U.S. 161 (1908) (rejecting the idea that the legislature could make law to protect labor organizations).

the judicial system, there were very few constitutional challenges[107] and, even more surprisingly, judges were quick to uphold the limits placed on their jurisdiction.[108]

The section of the Norris-LaGuardia Act most relevant to this comment is the section that places limits on the ability of a court to issue an injunction. Section 7 of the Norris-LaGuardia Act states: "No court of the United States shall have the jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute" until a certain set of procedural and substantive restrictions are met.[109]

What is most important about the Norris-LaGuardia Act is that it was Congress's response to years of big business abuse of labor organizations and judicial complicity in that abuse. When Congress makes it difficult to enjoin labor disputes, the petitioners asking for injunction are almost always the employers who want their employees to stop striking and boycotting their businesses. That understanding speaks directly to congressional intent, as it is reasonable to assume that Congress intended for the Norris-LaGuardia Act to deal with cases where employees have stopped working and have either gone on strike or staged an actual boycott, and that the party asking for an injunction would be the actual target of the strike. What Congress was worried about in drafting the Norris-LaGuardia Act was violence and damage to property, and the party asking for an injunction in those cases was almost always the target of the strike or boycott. Norris-LaGuardia did not leave a loophole for violent strikes, but in such cases, the complainants had an established five-part test to pass to determine whether or not an injunction was absolutely necessary.[110]

For "Norris-LaGuardia to succeed where the Clayton Act had failed, the courts had to do more than adopt a broader interpretation of *what* activities were immunized. . . . [T]he courts also had to find that the

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[107] *See* LOVELL, *supra* note 98, at 171–72 (stating that there were very few constitutional challenges to the yellow-dog contract language and that the constitutional challenges to the jurisdiction of the courts failed).

[108] *Id.* at 172 ("Even justices who were openly hostile to labor quickly dismissed constitutional challenges to Congress's power to place limits on court jurisdiction."); *see also id.* (citing lower level cases such as Knapp-Monarch Co. v. Anderson, et al., 7 F. Supp. 322, (E.D. Ill. 1934), Cinderella Theater Co., Inc. v. Sign Writers' Local Union No. 591, 6 F. Supp. 164 (E.D. Mich. 1934), and Levering & Garrigues Co. v. Morrin, 71 F.2d 284 (2d Cir. 1934), as well as Supreme Court cases Senn v. Tile Layers Protective Unions, 301 U.S. 468 (1937) and Lauf v. E.G. Shinner & Co., 301 U.S. 315 (1938)).

[109] *Id.* at 179 (noting that an injunction may not be issued until a judge has held an open, adversarial hearing to make the necessary findings of fact).

[110] *Id.* at 181 (discussing the idea that injunctions in labor disputes were not impossible, especially in cases where violence had occurred, but that judges still had to go through the finding of fact process to make such a determination); *see also id.* (citing Lauf v. Shinner, 303 U.S. 315 (1938) (reprimanding a lower court for failing to make the necessitated findings of fact in a case where violence grew out of a labor dispute).

immunities covered a much broader range of persons."[111] Essentially, judicial attitudes needed to change before Norris-LaGuardia could be a success. To put it bluntly, judges needed to take a hands-off approach to labor disputes in order to accomplish the purpose of Norris-LaGuardia. Further, "[t]he Norris-LaGuardia provisions were more successful than the corresponding provisions in the Clayton Act in part because judges often ruled that Norris-LaGuardia's immunities applied to a broader range of persons."[112]

A clear example of this shift in favor of a hands-off approach to labor disputes is the case of *Senn v. Tile Layers Protective Union*.[113] In *Senn*, a tiling contractor requested an injunction to prevent a union of tile layers from picketing outside his business.[114] The objective of the picketing was to force Senn to become a union contractor and to enter into an agreement under which he was to hire union men.[115] When Senn refused to sign the agreement, the union[116] peacefully and lawfully picketed his place of business.[117] The situation at bar was similar to the one in *Duplex Printing v. Deering*,[118] where the picketers were not seeking employment with the company they were targeting. However, while the Court in *Duplex* issued an injunction, the Court in *Senn* ruled that the lower court could not issue an injunction.[119] The Supreme Court's opinion in *Senn* reflected a newfound laissez-faire mentality with regard to shared interests among workers at different firms who happen to be involved in the same industry.[120]

The outcome in *Senn* shows that we owe much of the success of Norris-LaGuardia to the differences in language between this Act and the Clayton Act, especially with respect to who is and who is not protected. Section 20 of the Clayton Act lacked clear references to who was and who was not protected, while the Norris-LaGuardia Act has a section devoted to defining cases that "grow[] out of a labor dispute."[121] Section 13 of the Norris-LaGuardia Act defines such cases as those involving "persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; or who are employees of the same employer;

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[111] *Id.* at 200.

[112] *Id.*

[113] 301 U.S. 468 (1937).

[114] *Id.* at 473.

[115] *Id.* at 474.

[116] It is important to recognize that the union members picketing Senn's business were not employed by Senn nor were they seeking any employment at his business. LOVELL, *supra* note 98, at 201.

[117] *Senn*, 301 U.S. at 474–75.

[118] 254 U.S. 443 (1921).

[119] LOVELL, *supra* note 98, at 201.

[120] *Id.*

[121] Norris-Laguardia Act, 29 U.S.C. § 101 (2006).

or who are members of the same or an affiliated organization of employers or employees."[122] This language as to who or what is involved in "a labor dispute" seems to encompass just about every possibility conceivable by the drafters. The success of Norris-LaGuardia is due to this all-encompassing language, as judges could now overturn weak case law without controversy.

The Supreme Court went even further in crafting a working definition for the term "labor dispute" in deciding the case of *New Negro Alliance v. Sanitary Grocery Company*.[123] In *New Negro Alliance*, the petitioners were an organization composed of African-Americans that sought workplace improvements for its members as well as "the promotion of civic, educational, benevolent, and charitable enterprises."[124] The respondent in the case was a corporation operating 255 grocery stores and employing members of both races.[125] There was no employer-employee relationship between the parties.[126] As in *Senn*, the protesters also had no interest in being employed by the respondent or by any other grocery store.[127] In his majority opinion, Justice Roberts wrote: "We think the conclusion that the dispute was not a labor dispute within the meaning of the Act, because it did not involve terms and conditions of employment in the sense of wages, hours, unionization or betterment of working conditions is erroneous."[128]

Because there was no direct employer-employee relationship between the two parties, the Court applied other, lesser-known portions of the Norris-LaGuardia Act to establish that the case grew out of a labor dispute. Justice Roberts followed the language of Section 13 to draw this conclusion, specifically that a labor dispute need not require a dispute between employers and employees.[129] Justice Roberts quoted subsections (a) and (b),[130] but it is the language of subsection (c) that is most notable. Justice Roberts wrote that a labor dispute includes "'any controversy concerning terms or conditions of employment, . . . regardless of whether or not the disputants stand in the proximate relation of employer and employee.'"[131]

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[122] LOVELL, *supra* note 98, at 201.

[123] 303 U.S. 552 (1938).

[124] *Id.* at 555.

[125] *Id.*

[126] *Id.*

[127] *See id.* (discussing the fact that the petitioners were not competitors working in the same line of business as the respondent); *see also* LOVELL, *supra* note 98, at 201 n.60 ("This time, the ruling came even though none of the protesters were employed or interested in being employed at the store or at any other grocery store.").

[128] *New Negro Alliance*, 303 U.S. at 559–60.

[129] *Id.* at 560–61.

[130] *Id.* at 560.

[131] *Id.* (alteration in original) (quoting 29 U.S.C. § 113(c) (1934)).

V. WHY THE EIGHTH CIRCUIT WAS WRONG

As the Eighth Circuit incorrectly applied the framework established in Part I of this Comment[132] and the Norris-LaGuardia Act,[133] the court in *Brady* was incorrect in holding that the owners' lockout of the players could not be enjoined. The Eighth Circuit's decision was incorrect for the following reasons: (1) the NFL was unlikely to succeed on the merits of its claim that the district court lacked jurisdiction under the Norris-LaGuardia Act to enjoin the lockout; (2) the NFL had not met its burden to demonstrate that it would suffer irreparable harm absent a stay; and (3) public policy favored the players' position as to whether or not an injunction should have been issued.

When analyzing whether or not a stay should be issued, a circuit court of appeals is attempting to decide whether or not it should intrude on the decision made by a district court—in this case, the issuance of an injunction.[134] A stay is defined as "an intrusion into the ordinary processes of administration and judicial review, . . . and accordingly is not a matter of right, even if irreparable injury might otherwise result to the appellant."[135]

A. *The NFL Was Unlikely to Succeed on the Merits of Its Claim That the District Court Lacked Jurisdiction Under the Norris-LaGuardia Act*

The NFL was unlikely to succeed on the merits of its claim that a federal court lacked jurisdiction to enjoin a lockout in large part due to the principal purpose behind the Norris-LaGuardia Act. As was previously discussed, the rationale behind the passage of the Norris-LaGuardia Act was to protect labor organizations, which had very little protection, from exposure to the injunction power of the federal courts.[136] Judge Bye made reference to the *Duplex* case in his dissent, noting that "the Court refused to extend a similar anti-injunction provision in the Clayton Act to secondary activity—i.e., activity where union pressure is directed against third parties rather than the employees' own employer."[137] However, the language of the Norris-LaGuardia Act is broad and more encompassing for a reason, and that reason was so that more *labor* activities could be shielded from federal court involvement.[138]

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[132] *See supra* Part I.

[133] 29 U.S.C. § 101 (2006); *see also supra* Part IV.B.

[134] *See supra* Part IV.A.

[135] *Brady III*, 640 F.3d at 794 (Bye, J., dissenting) (quoting Nken v. Holder, 129 S. Ct. 1749, 1757 (2009)).

[136] *See supra* Part III.B.

[137] *Brady III*, 640 F.3d at 797 (Bye, J., dissenting) (citing Burlington N. R.R. Co. v. Bhd. of Maint. of Way Emps., 481 U.S. 429, 438 (1987)).

[138] *See supra* notes 113–28 and accompanying text (discussing how the *Senn* and *New Negro Alliance* cases applied the Norris LaGuardia Act to a larger class of citizens and activities).

When analyzing congressional intent in the enactment of the Norris-LaGuardia Act, Judge Bye noted that "Congress took care to greatly broaden . . . the meaning . . . attributed to the words labor dispute,"[139] and that Congress emphasized "the public importance under modern economic conditions of protecting the rights of employees to organize into unions and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection."[140] The case law under the Norris-LaGuardia Act strongly supports the proposition that the intent of the Act's drafters was to protect workers and those who were picketing in support of workers' interests,[141] and not to protect big business employers from locking out their employees.

The Norris-LaGuardia Act was enacted to protect the collective bargaining process.[142] It is with that understanding that we revisit the discussion of the early cases involving the NFL and its players. Judge Bye cited to the *Powell* case, recognizing that "[u]nless the values of collective bargaining are implicated, federal labor laws yield to the regular antitrust framework."[143] In *Powell*, the Eighth Circuit declined to set the limits on what qualifies as "involving or growing out of a labor dispute," but the Court did hold that a bargaining impasse was not enough to preclude the application of the Norris-LaGuardia Act.[144] As long as there is ongoing collective bargaining, courts have been reluctant to deny the applicability of the Norris-LaGuardia Act.[145]

The situation at bar in *Brady*, however, is inapposite to cases such as *Powell*. The players (read: employees) disclaimed the role of the NFLPA as their representative in any collective bargaining.[146] The players decertified the union in a vote to end its status as their legal

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[139] *Brady III*, 640 F.3d at 797 (Bye, J., dissenting) (alterations in original) (quoting Allen Bradley Co. v. Local Union No. 3, Int'l Bhd. of Elec. Workers, 325 U.S. 797, 805 (1945)) (internal quotation marks omitted).

[140] *Id.*; *see also* Local Union No. 189 v. Jewel Tea Co., 381 U.S. 676, 703 n.4 (1965) ("[T]o protect the rights of labor . . . .").

[141] *See, e.g.*, *Senn*, 301 U.S. at 470 (protecting the right to picket even though the picketers were not seeking employment with that business); *see also New Negro Alliance*, 303 U.S. at 560 (citing subsection (c) of the Norris-LaGuardia Act, defining the term "labor dispute" as including "any controversy concerning terms or conditions of employment, . . . regardless of whether or not the disputants stand in the proximate relation of employer and employee" (alteration in original) (quoting 29 U.S.C. § 113 (1934))).

[142] *Brady III*, 640 F.3d at 798 (Bye, J., dissenting) ("[T]he law remains focused on safeguarding the collective bargaining process.").

[143] *Id.* (citing *Powell*, 930 F.2d at 1303).

[144] *See Powell*, 690 F. Supp. at 815 ("[W]here the bargaining relationship and the collective bargaining process remains intact, a controversy regarding terms or conditions of employment constitutes a labor dispute.").

[145] *See id.* ("The current controversy surrounding the free agency issue constitutes a 'labor dispute' as contemplated by the Norris-LaGuardia Act.").

[146] *See supra* Part II.

representative.[147] This action taken by the players is perhaps the most significant action taken in the entire litigation, as their vote to strip the union of its power to represent them in their capacity as *employees* brings collective bargaining to a definitive halt.[148] Decertification of the union ends the collective bargaining process because the union is no longer the representative of the players, and also triggers the opportunity to bring antitrust litigation under the Sherman Act.[149]

Judge Bye found the solution to this issue in the *Brown* litigation, most notably in the Supreme Court decision of *Brown v. Pro Football, Inc*.[150] In *Brown*, although the Court was dealing with the nonstatutory labor exemption, and although the Court came out on the side of the employer,[151] there is much to be learned from the opinion. The Court in *Brown* discussed the existence of "an agreement among employers [that] could be sufficiently distant in time and in circumstances from the collective-bargaining process that a rule permitting antitrust intervention would not significantly interfere with that process."[152] The Court then cited examples of "sufficiently distant" events, one of which being a "collapse of the collective-bargaining relationship, as evidenced by decertification of the union."[153] Judge Bye understood the situation as one where the players have no association to a union, and have thus chosen to pursue their interests under the antitrust law instead of remaining under the protection of labor law.[154] Because the players do not fall under the framework of American labor law, the Norris-LaGuardia Act should not have been triggered, thus allowing an injunction to be issued against the lockout in this case.

In assessing the application of Norris-LaGuardia to the case at bar, Judge Bye distinguished between the majority's use of the *New Negro Alliance* case and the proper reading of the case.[155] The majority of the Eighth Circuit (Judges Colloton and Benton), incorrectly cited *New Negro*

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[147] *Id.*

[148] Phillip Lawrence Wright, Jr., *Major League Soccer: Antitrust, the Single Entity, and the Heightened Demand for a Labor Movement in the New Professional Soccer League*, 10 SETON HALL J. SPORT L. 357, 386 (2000).

[149] *Id.*

[150] 518 U.S. 231 (1996).

[151] *Brady III*, 640 F.3d at 798 (Bye, J., dissenting).

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

[153] *Id.* Ostensibly, employees can avoid the application of labor laws that preclude federal court involvement by decertifying the union that represented them. *See* Brown v. Pro Football, Inc., 50 F.3d 1041, 1057 (D.C. Cir. 1995), *aff'd*, 518 U.S. 231 (1996) ("If employees wish to seek the protections of the Sherman Act, they may forego unionization or even decertify their unions."); *see also* Nat'l Basketball Ass'n v. Williams, 857 F. Supp. 1069, 1078 (S.D.N.Y. 1994), *aff'd*, 45 F.3d 684 (2d Cir. 1995) (recognizing that the players can avoid a labor injunction if they disclaim the players' union as a collective bargaining agent).

[154] *Brady III*, 640 F.3d at 799 (Bye, J., dissenting) (citing *Brown*, 50 F.3d at 1057).

[155] *New Negro Alliance*, 303 U.S. at 552.

Alliance to stay the injunction under the proposition that there need not be a labor union for the Norris-LaGuardia Act to apply.[156] Further, the majority held that the Norris-LaGuardia Act embraces controversies whether they are between employers and employees, labor unions representing employees and employers, or even persons seeking employment and employers.[157] While *New Negro Alliance* certainly provides support for a broad reading of "labor dispute," the problem with the application of its holding to this case is that it did not address the question as to whether or not the Norris-LaGuardia Act applies after the decertification of a union.[158]

In *New Negro Alliance*, the Court made a determination that, even though the picketers were not asserting economic interests that most often are implicated in labor disputes, such as working conditions, wages, or hours, the controversy arose out of a labor dispute, thus triggering the application of the Norris-LaGuardia Act.[159] It is, in fact, immaterial that the primary concern was not economic, but instead political or social in nature, and Norris-LaGuardia should have thus applied to preclude federal court involvement.[160]

The Court in *Jacksonville Bulk Terminals v. International Longshore Men's Association*[161] went even further, discussing the intent behind the Norris-LaGuardia Act, laying the groundwork for Judge Bye's argument. Following the Soviet Union's invasion of Afghanistan in 1980, an affiliate of the International Longshoremen's Association refused to load three ships bound for the Soviet Union with superphosphoric acid.[162] The employer sought an injunction under the argument that Norris-LaGuardia only protects labor disputes, that labor disputes only exist when a union acts in economic self-interest, and that in this case the primary motivation was political, rather than economic.[163] The Court, however, reiterated that the critical test of Norris-LaGuardia application is whether or not "the employer-employee relationship [is] the matrix of the controversy."[164]

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[156] *See Brady III*, 640 F.3d at 791 (recognizing that no labor union was involved in *New Negro Alliance*); *see also id.* ("[T]he Act plainly embrace[s] the controversy which gave rise to the instant suit and classif[ies] it as one arising out of a dispute defined as a labor dispute." (internal quotation marks omitted)).

[157] *See id.* (citing *New Negro Alliance*, 303 U.S. at 560–61).

[158] *Id.* at 799 (Bye, J., dissenting).

[159] Jacksonville Bulk Terminals, Inc. v. Int'l Longshore Men's Ass'n, 457 U.S. 702, 714 (1982).

[160] *Id.* at 714–15 ("The Act does not concern itself with the background or the motives of the dispute." (quoting *New Negro Alliance*, 303 U.S. at 561)).

[161] 457 U.S. 702 (1982).

[162] *Id.* at 704–05 (notably, superphosphoric acid was not included in President Carter's embargo restricting certain trade with the Soviet Union).

[163] *Id.* at 713.

[164] *Id.* at 712–13 (alteration in original) (quoting Columbia River Packers Ass'n v. Hinton, 315 U.S. 143, 147 (1942)).

Further, the Court cited *New Negro Alliance* for the proposition that noneconomic motives do not render Norris-LaGuardia inapplicable.[165]

In holding Norris-LaGuarida applicable because this dispute deals with the employees' obligation to provide labor the employer, the Court reasoned, "[t]he Act was enacted in response to federal-court intervention on behalf of employers through the use of injunctive powers against unions and other associations of employees."[166] As such, it was not Congress's intent to pass Norris-LaGuardia in order to protect employers from having injunctions instituted against a lockout of employees. Instead, Norris-LaGuardia was passed to strengthen labor laws so that employees could unionize and not have to worry about courts striking down their organized actions.

The *New Negro Alliance* opinion makes no mention of how Norris-LaGuardia should be applied if the collective bargaining process has been abandoned,[167] and thus the Court is not bound by any holding that unionized action is covered by the Norris-LaGuardia Act. *New Negro Alliance* does not recognize the process of collective bargaining, leaving open the dangerous possibility for all employment discrimination cases to come under federal law.[168]

B. *The NFL Did Not Meet Its Burden of Demonstrating That It Would Suffer Irreparable Harm Absent a Stay*

Another objection to issuing a stay discussed in Judge Bye's dissent is that the NFL owners did not meet the burden of proving that they would suffer irreparable harm in the absence of a stay. Anyone interested in obtaining a stay has to "show a threat of irreparable harm."[169] An inability to show that irreparable harm is likely to occur is enough to warrant a denial of the motion to stay.[170] In his dissent, Judge Bye clearly laid out the test for whether or not a stay should be granted.[171] For a stay to be granted, the irreparable harm must threaten the very existence of the petitioner's business,[172] in this case the NFL itself.

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[165] *Id.* at 714.

[166] *Id.* at 715.

[167] *Brady III*, 640 F.3d at 800. *See generally New Negro Alliance*, 303 U.S. at 552 (holding that non-economic protest is protected by the Norris-LaGuardia Act).

[168] *Brady III*, 640 F.3d at 800 (citing Stearns v. NCR Corp., 297 F.3d 706, 710 (8th Cir. 2002), for the proposition that employment contracts between employers and non-union employees are generally governed by state law and not federal labor law).

[169] Rogers Grp., Inc. v. City of Fayetteville, Ark., 629 F.3d 784, 789 (8th Cir. 2010) (quoting Gen. Motors Corp. v. Harry Brown's, LLC, 563 F.3d 312, 318 (8th Cir. 2009)).

[170] *Id.*

[171] *See Brady III*, 640 F.3d at 794–95 (Bye, J., dissenting) (stating that a party must show certain harm of an imminence as to require present equitable relief, that the harm must be actual and not theoretical, and that economic loss in itself does not constitute irreparable harm).

[172] Packard Elevator v. Interstate Commerce Comm'n, 782 F.2d 112, 115 (8th Cir. 1986).

The first argument the NFL made is that allowing the injunction to stand deprives the owners of their labor law right to lock the players out, which in turn would skew the collective bargaining process in favor of the players.[173] As discussed earlier, the idea that the NFL has the labor law right to lock out the players is misplaced. The players are not currently members of a union, having decertified it early in the process, and are thus not currently engaged in the process of collective bargaining.[174] If the players no longer fall under the protection of federal labor law, then it follows that their employers, the owners, should be precluded from using federal labor laws against them. In any case, the injury that the NFL claimed it will suffer is a loss of that bargaining power, but because there is no ongoing collective bargaining process, any claim that the owners will suffer irreparable harm due to loss of bargaining power is moot.[175]

The NFL's second argument that irreparable harm will occur absent a stay was that it will be impossible to go back to the status quo with respect to player movement if a stay were not granted.[176] As the district court described it, the NFL's argument centered on the idea that not staying the injunction would—after giving the players a leg up in the collective bargaining process—force the owners to give into demands for unrestricted free agency, thus exposing the NFL and its owners to antitrust challenges simply for trying to make their product desirable.[177] The problem with this argument is that the court is not ordering the NFL to do anything that the owners say they would have to do absent a stay. Nothing about the injunction makes anything court-mandated. The district court opinion held, "[l]ike any defendant in any lawsuit, Defendants themselves must make a decision about how to proceed and accept the consequences of their decision."[178]

Although unrestricted free agency and the lack of a salary cap are two different practices, they are both sought by players as a means to higher pay. They are also both resisted by owners, as both of those ideas shift the competitive balance in favor of the higher-spending, major-market teams. In 2010, the last season to operate without a salary cap, the two teams that played in the Super Bowl were the Pittsburgh Steelers and the Green Bay Packers, two small-market teams.[179] It was not teams such as the New

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[173] *Brady III*, 640 F.3d at 795 (Bye, J., dissenting).

[174] *See supra* notes 57–62 and accompanying text.

[175] *Brady III*, 640 F.3d at 795 (Bye, J., dissenting).

[176] *Id.* at 793.

[177] Brady *II*, 779 F. Supp. 2d at 1049 ("[A]bsent a stay, its clubs' possible agreements to common terms and conditions of player employment would expose the NFL and the member clubs to antitrust challenge for . . . respond[ing] to consumer demand." (internal quotation marks omitted)).

[178] *Id.*

[179] *See* Patrick Rishe, *Fox Will Score Ratings Touchdown with Steelers-Packers Super Bowl*, FORBES (Jan. 24, 2011, 12:35 PM), http://www.forbes.com/sites/sportsmoney/2011/01/24/fox-will-

York Jets, New York Giants, New England Patriots, or Dallas Cowboys. Thus, the argument that there would be irreparable harm to the League's competitive balance absent a stay of the injunction (which would assume higher spending from the big-market teams) is immaterial. Not only can the owners themselves decide how they want to proceed, meaning they do not *have* to support unrestricted free agency, but even if they did, the competitive balance of the League is not likely to shift any more than it does in a given year.

The argument that there will be irreparable harm to the owners absent a stay pales in comparison to the much more substantial reality of the irreparable harm the players would suffer in the event of a stay if the injunction was granted.[180] The most significant consequence of the stay is that it keeps players out of their team facilities. As Judge Bye discussed in his dissent, even the briefest of stays would deprive the players of precious opportunities to "develop their skills . . . and to otherwise advance their NFL careers."[181] A prolonged lockout, the product of a "stay," would prohibit the most vulnerable of the NFL's employees, the rookies, from having any kind of opportunity.[182] The owner-imposed stoppage leaves the rookies with no opportunity to practice with their team or access their team's game plan and coaching staff, leaving them with even less of a chance than otherwise to make the team.[183]

In addition, there are dangers of a stay for veteran players, who rely on being able to engage in certain activities at their team's facility each offseason in order to maintain not only their level of play but also their viability.[184] Long term, the inability to engage in a team's offseason program could have major ramifications for veteran players and rookies alike. Perhaps most importantly, the lasting effect cannot adequately be measured in monetary damages. A lost season, which a lockout could very easily lead to, can be devastating in a sport where the average career length of a player is no more than five years.[185] In such a competitive field,

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score-ratings-touchdown-with-steelers-packers-super-bowl/ (referring to the Green Bay Packers and Pittsburgh Steelers as "members of small-market, blue-collar communities").

[180] In order to intelligently analyze these events more closely, one has to take a step back and think of the consequences of the injunction being stayed. A stay on the injunction allows the lockout to continue, thus precluding players from associating themselves in any way with their teams.

[181] *Brady III*, 640 F.3d at 796 (Bye, J., dissenting) (internal quotation marks omitted).

[182] *Id.*

[183] *Id.*; *see also* Neeld v. Am. Hockey League, 439 F. Supp. 459, 461 (W.D.N.Y. 1977) ("A young athlete's skills diminish and sometimes are irretrievably lost unless he is given an opportunity to practice and refine such skills at a certain level of proficiency.").

[184] *See Brady III*, 640 F.3d at 796 (Bye, J., dissenting) (listing valuable events including, but not limited to, classroom sessions, club evaluations, medical procedures, etc., that would be lost if the lockout was allowed to continue).

[185] *The Average NFL Player*, *supra* note 1 (stating that the average career span of NFL players is 3.5 years).

players constantly have to prove their value, and the inability to prove that value for an entire season cannot be recaptured, not even by compensatory damages.[186] Because no irreparable harm is likely to be experienced by owners, and because whatever harm they are likely to incur is clearly outweighed by the irreparable harm that could be suffered by the players, the NFL has a heavier burden to show that it is likely to prevail on the merits.[187] As I have already demonstrated that the NFL's argument that Norris-LaGuardia applies was unpersuasive,[188] it is fair to say that the NFL did not sustain its burden.

C. *The Public Interest Weighs in Favor of the Players*

Perhaps most widely important, the public interest as to whether or not a stay of the injunction should be granted weighs in favor of the players. Again, to assess the public interest, we need to take note of what a stay of the injunction would mean. A stay of the injunction keeps the players out of their teams' facilities and hurts their opportunities to gain employment in the future by cutting off an entire offseason of training.[189] To gain an understanding of the public interest implications of a stay, we are forced to comprehend that allowing the lockout to stand forces apart the two sides even more, further hurting the chances that the two sides will reconcile and save the season. The public interest becomes a factor when we realize the possibility of a lost season and analyze the implications it might have for non-parties, including stadium vendors, restaurant owners, and society in general.

In his dissent, Judge Bye wrote, "At best, when considering the public interest in having a 2011 NFL season and, by extension, continuing with normal operations necessary for that objective, the public interest factor is a wash."[190] In Judge Bye's view, the players should have won notwithstanding any public interest issue. I question his judgment here, as I fear he does not fully understand what we mean by the "public interest." What I fear most is that Judge Bye and the majority are thinking about public interest solely in terms of how the public will be affected by not having a 2011 NFL season, how much money is tied up in an NFL season, and how many people will lose their ability to earn a salary because their

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[186] *Brady I*, 779 F. Supp. 2d at 1036 ("[T]ime spent off the playing and practice fields diminishes players' skills. In the course of sitting out a season, this diminishment in skills could shorten or end the careers of some players." (citations omitted)).

[187] *Brady III*, 640 F.3d at 796–97 (Bye, J., dissenting); *see* Dataphase Sys., Inc. v. C L Sys., Inc., 640 F.2d 109, 113 (8th Cir. 1981) ("If the chance of irreparable injury to the movant should relief be denied is outweighed by the likely injury to other parties litigant should the injunction be granted, the moving party faces a heavy burden of demonstrating that he is likely to prevail on the merits.").

[188] *See supra* Part IV.A.

[189] That reasoning is not public interest reasoning, and is more party-focused.

[190] *Brady III*, 640 F.3d at 800 (Bye, J., dissenting).

jobs depend on the NFL going about its daily business.

While Judge Bye likely did not want to be swayed by sympathetic stories of stadium workers who will lose their jobs and neighborhood bar owners who will lose a major money-making business, the stories do reflect the people whose livelihoods depend on an NFL season. Judge Bye is incorrect in saying that the public interest can be seen as a wash. Not only are we talking about major losses for these employees who are non-parties as the result of a season-long lockout, but there are also public legal interests that are at stake if the injunction is stayed.

As the district court pointed out in its opinion, the NFL is lobbying that the public interest lies in encouraging collective bargaining between the two parties, and the imposition of a lockout under labor law is one way they are attempting to encourage that process.[191] The problem with the NFL's logic here is that the players have decertified the union and are no longer engaged in collective bargaining.[192] The NFL's opt-out of the Collective Bargaining Agreement in May 2008 and subsequent failure to renegotiate should have hamstrung the League and restrained it from imposing a lockout under traditional labor laws.[193] The public interest is in fact served best by *not* allowing the NFL to seek protection under labor law while the players are unable "to enjoy their corresponding rights of collective bargaining and the right to strike."[194] At its very core, it is a slippery slope argument. We must not allow a group of employers to use labor laws to protect themselves when both the union has been disclaimed and the group of employees is not protected by labor laws themselves.

VI. CONCLUSION

Labor law in general is about allowing less powerful groups of people to come together and engage in collective bargaining to protect themselves against more powerful employers. The problems that arose between the NFL and its players in the early twenty-first century may have been fought over billions of dollars, where even the losers were making millions of dollars, but we cannot lose sight of the implications that laws have on all classes of society. Those who make up the lower class, the janitors, the food service employees, and the maintenance workers who make $12,000 a year come under the same labor laws as NFL players who make upwards of $10,000,000 a year in many cases. It is thus our duty to enforce labor laws and to respect the limits of labor law to ensure that all classes of

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[191] *Brady II*, 779 F. Supp. 2d at 1053 ("[T]he NFL contends that the public interest in encouraging the collective bargaining process would be well-served by issuing a stay pending expedited appellate review.").

[192] *Id.*

[193] *Id.*

[194] *Id.*

workers are treated fairly.

It might not have looked so bad from a public-relations standpoint to keep the players out of their facilities for an extended period of time, when in reality the NFL should not have successfully avoided the issuance of an injunction under the Norris-LaGuardia Act, but we have to imagine what it would have looked like to keep a lower class of workers out of their offices, to keep a lower class from earning enough to support their families. We are not only talking about million dollar athletes. The same laws that protect those athletes protect the workers who hold this country together. The Norris-LaGuardia Act was passed to deprive federal courts of the authority to stop those workers from picketing and attempting to improve their situations. It was not passed as a tool for employers to hide behind. The Eighth Circuit was wrong in granting the stay and vacating the injunction because it lost sight of the true meaning of labor law in this country: to protect those who cannot protect themselves.