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An Implicit Exemption, Implicitly Applied: Blurring the Line of Accommodation Between Labor Policy and Antitrust Law in *Harris v. Safeway*

Laura Kaplan
Boston College Law School, laura.kaplan@bc.edu

AN IMPLICIT EXEMPTION, IMPLICITLY APPLIED: BLURRING THE LINE OF ACCOMMODATION BETWEEN LABOR POLICY AND ANTITRUST LAW IN *HARRIS v. SAFEWAY*

Abstract: On July 12, 2011, in *Harris v. Safeway,* the U.S. Court of Appeals for the Ninth Circuit held that an agreement among employers to share profits during a labor union strike did not fall within the non-statutory labor exemption to the antitrust laws and required full rule of reason review. In doing so, however, the court may have discouraged future plaintiffs from bringing suit in antitrust labor cases. This Comment argues that although the court appropriately denied exemption from the antitrust laws, it implicitly applied the exemption by allowing collective bargaining peculiarities to control its subsequent antitrust analysis.

Introduction

United States labor and antitrust policies inherently conflict.[1] On the one hand, antitrust law promotes competition and protects consumers from monopolistic behavior.[2] On the other hand, labor law permits employees to bypass certain types of competition by protecting their rights to organize and to bargain collectively.[3] As a result of this conflict, and to balance these competing policies, Congress enacted a statutory exemption from antitrust laws to permit unions and employees to engage in certain kinds of anti-competitive behavior.[4] Subsequently, the U.S. Supreme Court recognized a non-statutory labor exemption from antitrust law, which permits certain collective action by both employers and employees.[5]

In 2011, in *Harris v. Safeway,* the U.S. Court of Appeals for the Ninth Circuit attempted to reconcile these incompatible policies as

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[1] Steven D. Buchholz, Comment & Note, *Run, Kick, and (Im)passe: Expanding Employers' Ability to Unilaterally Impose Conditions of Employment After Impasse in* Brown v. Pro Football, 81 Minn. L. Rev. 1201, 1209–11 (1997); Daniel H. Weintraub, *1994–95 Annual Survey of Labor and Employment Law—Labor Law,* 37 B.C. L. Rev. 305, 305 (1996).

[2] Buchholz, *supra* note 1, at 1205; Weintraub, *supra* note 1, at 305.

[3] Buchholz, *supra* note 1, at 1206; Weintraub, *supra* note 1, at 305.

[4] Weintraub, *supra* note 1, at 305.

[5] Buchholz, *supra* note 1, at 1209–10; Weintraub, *supra* note 1, at 305–06.

they related to a profit-sharing agreement among employers.[6] First, the court questioned whether the agreement fell within the non-statutory labor exemption, which exempts from antitrust scrutiny agreements that are tied to the collective bargaining process.[7] Second, after concluding that the agreement was not exempt from antitrust scrutiny, the court examined the depth of antitrust analysis required.[8] Yet, in determining the appropriate antitrust analysis, the court strayed from Supreme Court precedent by mandating rule of reason review, thereby blurring the line between exempt and non-exempt activity.[9]

Part I of this Comment introduces the facts of *Harris v. Safeway* and outlines the development and application of the non-statutory labor exemption.[10] Then, Part II discusses the broader impact of the case.[11] Finally, Part III argues that although the court correctly determined that the non-statutory exemption did not apply, it implicitly applied this exemption through its antitrust analysis, thereby circumventing Supreme Court precedent.[12] This divergence may prevent future plaintiffs from succeeding in cases in which antitrust and labor law intersect.[13]

I. *Harris v. Safeway:* The Intersection Between Non-statutory Labor Exemption and Substantive Antitrust Analysis

A. *The Agreement, the Strike, and Subsequent Suit*

In the summer of 2003, three large California supermarket chains, Albertson's, Ralph's, and Von's (collectively, the "Grocers") formed a multi-employer bargaining unit and entered into a Mutual Strike Assistance Agreement (the "Agreement").[14] The Grocers did so anticipating the looming expiration of their collective bargaining agreement ("CBA") with local chapters of United Food and Commercial Workers (the "Union") and hoping to mitigate the effects of any resulting

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[6] *See* California *ex rel.* Harris v. Safeway, Inc., 651 F.3d 1118, 1131–32 (9th Cir. 2011); Buchholz, *supra* note 1, at 1209–11.

[7] *Harris,* 651 F.3d at 1129–32.

[8] *Id.* at 1132–33.

[9] *See infra* notes 97–124 and accompanying text.

[10] *See infra* notes 14–63 and accompanying text.

[11] *See infra* notes 64–96 and accompanying text.

[12] *See infra* notes 96–124 and accompanying text.

[13] *See Harris,* 651 F.3d at 1135–39.

[14] *Id.* at 1122–23. The MSAA also included a fourth grocer, Food 4 Less, which was not involved in CBA negotiations with the other three employers but anticipated the need to enter into similar negotiations when its own CBA expired several months later. *Id.*

strike.[15] Therefore, they included a revenue sharing provision ("RSP") within the Agreement.[16] The RSP provided that, in the event of a strike against one of the Grocers, the other Grocers would reimburse the impacted Grocer for revenue lost during the strike.[17] That reimbursement would approximate the extra profits earned by the non-impacted supermarkets as a result of the strike.[18]

After negotiations between the Grocers and the Union broke down in October of 2003, the Union initiated a strike against Von's.[19] In accordance with the Agreement, Albertson's and Ralph's locked out their union employees and the Union then continued to strike against Von's and Albertson's stores.[20] The strike continued for four and a half months until the parties agreed on a new CBA.[21] At that time, Ralph's reimbursed Von's and Albertson's according to the provisions of the RSP.[22]

During the strike, the State of California brought suit against the Grocers, claiming that the parties' RSP was an unreasonable restraint of trade and therefore violated Section 1 of the Sherman Act.[23] California, hoping to avoid the lengthy proceedings accompanying a full antitrust analysis, agreed not to pursue a rule of reason analysis for the contended Sherman Act violation and instead argued that the Agreement was a per se violation or, in the alternative, would be impermissible under a quick look review.[24]

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[15] *Id.*

[16] *Id.*

[17] *Id.* The RSP provided that "any grocer that earned revenues above its historical share relative to the other chains during the strike period would pay 15% of those excess revenues as reimbursement to the other grocers to restore their pre-strike shares." *Id.*

[18] *Id.*

[19] *Harris,* 651 F.3d at 1122–23.

[20] *Id.*

[21] *Id.*

[22] *Id.*

[23] *Id.* at 1124. The Sherman Act states that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1 (2006).

[24] *Harris,* 651 F.3d at 1124; *see id.* at 1145–46 (Reinhardt, J., dissenting). The default method of analysis for Sherman Act claims is a rule of reason review in which courts analyze the specific facts and data of the case to determine whether the activity in question unreasonably restrained trade. *Id.* at 1145–46. When "(a) judicial experience with a particular class of restraints shows that virtually all restraints in that class operate so as to reduce output or increase price; and (b) particularized inquiry into the output or price effects of such a restraint is not worth its costs," courts hold the activity a per se violation of the Sherman Act and do not engage in the detailed review required by rule of reason analysis. 6 Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 1911a, at 294 (2d ed. 2005). For example, horizontal price fixing is traditionally considered a per se

After determining that the truncated review process advocated by California was not appropriate, the District Court entered final judgment for the Grocers according to the parties' stipulations not to proceed to a full rule of reason analysis.[25] California appealed, arguing that the Agreement violated the Sherman Act under a per se or quick look analysis; the Grocers cross-appealed, arguing that the non-statutory labor exemption applied to the RSP, and therefore relieved the Agreement from antitrust review.[26]

B. *Non-statutory Labor Exemption*

The statutory and non-statutory labor exemptions to antitrust law both arose as attempts to reconcile the often conflicting goals of labor and antitrust policies.[27] Antitrust policy, governed primarily by the Sherman Act, seeks to preserve a competitive economic climate by prohibiting all activity that unreasonably restrains trade.[28] Conversely, U.S. labor policy, governed by the National Labor Relations Act of 1935, aims to promote the free flow of commerce by preserving the right of employees to organize and bargain collectively.[29]

Recognizing the potential for difficulty in the implementation of these conflicting labor and antitrust policies, Congress created the statutory labor exemption through the Clayton Act in 1914 and the Norris–LaGuardia Act in 1932.[30] The Clayton Act declared that unions are not combinations or conspiracies in restraint of trade under the Sherman Act.[31] Thus, the Clayton Act restricted courts from granting

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violation. Cal. Dental Ass'n v. FTC, 526 U.S. 756, 770 (1999); United States v. Trenton Potteries Co., 273 U.S. 392, 397–98 (1927). Additionally, when activity does not fall within a per se category, courts will sometimes use an abbreviated rule of reason, or "quick look," review when "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets." *Cal. Dental*, 526 U.S. at 770.

[25] *Harris*, 651 F.3d at 1124.

[26] *Id.*

[27] Buchholz, *supra* note 1, at 1209–11.

[28] *See* 15 U.S.C. § 1. The Sherman Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations." *Id.* The Sherman Act has been interpreted to prohibit only unreasonable restraints of trade. Buchholz, *supra* note 1, at 1204.

[29] 29 U.S.C. §§ 151–169; Buchholz, *supra* note 1, at 1206.

[30] 15 U.S.C. §§ 12–27, 29; 29 U.S.C. §§ 52–53, 104, 105, 113; Herbert Hovenkamp, Federal Antitrust Policy: The Law of Competition and Its Practice § 19.7b (4th ed. 2011); Buchholz, *supra* note 1, at 1209–11.

[31] 15 U.S.C. § 17; Hovenkamp, *supra* note 30, § 19.7b; Dylan M. Carson, Note, *The* Brown*ing of Sports Law: Defining the Survival of the Labor Exemption After Expiration of Bargaining Agreements*, 30 Suffolk U. L. Rev. 1141, 1150–51 (1997).

injunctions in disputes between employers and employees.[32] Yet, when the Court continued to apply the Sherman Act to union conduct, Congress passed the Norris–LaGuardia Act, which prevented court actions in cases involving or growing out of a labor dispute.[33] By reading the Clayton, Norris–LaGuardia and Sherman Acts in concert, the Supreme Court determined that a union, when acting independently and in its own self-interest, does not violate the antitrust laws.[34] The Court's decision to treat labor union activity as outside the scope of the Sherman Act is known as the statutory labor exemption to the antitrust laws.[35]

The non-statutory labor exemption is a judicially created doctrine that permits anticompetitive agreements, otherwise impermissible under antitrust law, when such agreements exist to promote the collective bargaining process.[36] Furthermore, the non-statutory labor exemption extends the statutory exemption beyond inter-union activity.[37] Although the Clayton and Norris–LaGuardia Acts do not exempt agreements between unions and employers or agreements among employers from antitrust laws, the Supreme Court has recognized that union-employer and employers-only agreements should be exempt when those agreements are intimately related to collective bargaining among the parties.[38] Thus, so long as the agreement aims to further collective bargaining, the exemption may apply to agreements between unions and their employers, as well as agreements among multiple employers.[39] This non-statutory exemption reflects the same policy behind the statutory exemption.[40] That is, labor policy seeks to promote the creation of labor unions to allow employees to organize and bargain collectively.[41] When this policy comes into conflict with antitrust law, labor policy should prevail.[42] Although the resulting agreements between

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[32] 29 U.S.C. § 52; Hovenkamp, *supra* note 30, § 19.7b; Carson, *supra* note 31, at 1150–51.

[33] 29 U.S.C. §§ 151–169; Hovenkamp, *supra* note 30, § 19.7b; Lee Goldman, *The Labor Exemption to the Antitrust Laws: A Radical Proposal,* 66 Or. L. Rev. 153, 156–57 (1987).

[34] United States v. Hutcheson, 312 U.S. 219, 231–32 (1941); Hovenkamp, *supra* note 30, § 19.7b.

[35] Hovenkamp, *supra* note 30, § 19.7b; Carson, *supra* note 31, at 1152.

[36] *See* Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100, 421 U.S. 616, 625–26 (1975); Hovenkamp, *supra* note 30, § 19.7b; Buchholz, *supra* note 1, at 1209–11.

[37] *See infra* notes 38–43 and accompanying text.

[38] *Connell,* 421 U.S. at 621–22; Hovenkamp, *supra* note 30, § 19.7b.

[39] Brown v. Pro Football, Inc., 518 U.S. 231, 250 (1996); Hovenkamp, *supra* note 30, § 19.7b; Buchholz, *supra* note 1, at 1209–11.

[40] Hovenkamp, *supra* note 30, § 19.7b; Carson, *supra* note 31, at 1152.

[41] Hovenkamp, *supra* note 30, § 19.7b; Carson, *supra* note 31, at 1152.

[42] Hovenkamp, *supra* note 30, § 19.7b; Carson, *supra* note 31, at 1152.

unions and employers or among employers may reduce competition, the Court created the non-statutory exemption to antitrust scrutiny to protect the collective bargaining process.[43]

In 1996 in *Brown v. Pro Football, Inc.*, the U.S. Supreme Court defined the scope of the non-statutory labor exemption, both limiting and expanding its application.[44] The Court limited its application by permitting anticompetitive conduct only when that conduct fundamentally relates to the collective bargaining process.[45] Yet, the Court also expanded the non-statutory labor exemption by applying it to an agreement exclusively among employers for the first time.[46]

Nonetheless, although the Court applied the non-statutory exemption to an employers-only agreement, it failed to define the boundaries of this new type of application.[47] In *Brown,* the NFL unilaterally implemented a provision that had been proposed, but not agreed to, during failed CBA negotiations.[48] The Court held the NFL's behavior exempt from antitrust scrutiny because of its fundamental relation to the collective bargaining process.[49] The Court cautioned, however, that its decision was not meant to sanction all anticompetitive employer conduct.[50] Further, it stated that there may be employers-only agreements that are unrelated or distant from the collective bargaining process and therefore warrant full antitrust scrutiny.[51] Yet, the Court did not provide guidance for determining how distant in time and circumstances an employers-only agreement must be to prevent interruption of the collective bargaining process.[52]

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[43] *Connell,* 421 U.S. at 621–22; Hovenkamp, *supra* note 30, § 19.7b.

[44] *Brown,* 518 U.S. at 250; *see infra* notes 45–46 and accompanying text.

[45] *Brown,* 518 U.S. at 237. For anticompetitive conduct to be sanctioned, three requirements must be met: (1) the conduct must take place during or immediately after collective bargaining; (2) the conduct must grow out of and be directly related to the bargaining process; (3) the conduct must involve a matter that is necessary to address through collective bargaining; and (4) the conduct must only concern the parties in the bargaining relationship. *Id.* at 250.

[46] *Id.*; Hovenkamp, *supra* note 30, § 19.7b.

[47] *See infra* notes 48–52 and accompanying text.

[48] *Brown,* 518 U.S. at 234–35.

[49] *Id.* at 250.

[50] *Id.*

[51] *Id.* "Our holding is not intended to insulate from antitrust review every joint imposition of terms by employers, for an agreement among employers 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." *Id.*

[52] *Id.*

C. *Levels of Antitrust Analysis*

Courts employ two primary methods of antitrust analysis depending on the facts of the case at hand.[53] The first—and presumptive—method for antitrust claims is rule of reason analysis.[54] Rule of reason analysis requires courts to conduct a detailed analysis of the particular conduct at issue, taking into consideration factors such as the nature of the industry and industry conditions before and after the conduct arose.[55] Under this analysis, if the conduct unreasonably restricts competition, then it is unlawful.[56] In contrast, a court uses the second method—per se analysis—when the court has considerable experience with a particular type of restraint such that the restraint's anticompetitive nature may be presumed without delving into the peculiarities of the situation.[57] The per se method allows courts to condemn the conduct without considering particular market or industry conditions, or any justifications or defenses.[58]

It is often difficult to determine whether a given situation should be subject to rule of reason or per se analysis.[59] Thus, courts have developed an intermediate mode of examination for these situations.[60] Under "quick look" analysis, courts conduct a truncated rule of reason review, considering some specific factors or justifications.[61] Quick look analysis is usually employed when the conduct facially appears to fit within a per se category, but lack of judicial experience with the industry or specific situation at hand warrants some more detailed consideration.[62] Courts enjoy wide discretion in their application of quick look analysis as there are not any delineated guidelines.[63]

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[53] *See infra* notes 54–58 and accompanying text.

[54] *Harris,* 651 F.3d at 1133; Einer Elhauge, United States Antitrust Law and Economics 50–52 (2d ed. 2011); Hovenkamp, *supra* note 30, § 5.6b.

[55] Elhauge, *supra* note 54, at 50–52; Hovenkamp, *supra* note 30, § 5.6b, at 275.

[56] Buchholz, *supra* note 1, at 1205 n.20.

[57] Elhauge, *supra* note 54, at 50–52; Hovenkamp, *supra* note 30, § 5.6b, at 275–76.

[58] Elhauge, *supra* note 54, at 50–52; Hovenkamp, *supra* note 30, § 5.6b, at 177. "Per se rules, which impose antitrust liability without regard to actual anticompetitive effect, are usually easy to implement; a plaintiff must show, and the fact finder must determine, nothing more than that the defendant engaged in the practice at issue." Thomas A. Lambert, *The Roberts Court and the Limits of Antitrust,* 52 B.C. L. Rev. 871, 883 (2011).

[59] Hovenkamp, *supra* note 30, § 5.6d, at 285.

[60] *Id.*

[61] *Id.*

[62] *Id.* § 5.6d, at 285–86.

[63] *Id.* § 5.6d, at 286.

II. *Harris* as a Benchmark for Application of the Non-statutory Labor Exemption

Until the Ninth Circuit decided *Harris* in 2011, few circuit courts had addressed the scope of the Supreme Court's 1996 *Brown v. Pro Football, Inc.* decision in any depth.[64] For example, in 1996, in *Ehredt Underground, Inc. v. Commonwealth Edison Co.*, the U.S. Court of Appeals for the Seventh Circuit discussed how far removed in time and circumstances an agreement must be to preclude application of the exemption.[65] The *Ehredt* court concluded that the collective bargaining process must be rendered "defunct" before it would be appropriate for a court to apply antitrust scrutiny.[66] Therefore, the *Ehredt* court took an expansive view of the non-statutory exemption as applied to employers-only agreements and held that the exemption covered the conduct at issue.[67] Yet, in doing so, it did not explicitly delineate the boundaries of *Brown*.[68]

The Ninth Circuit, however, used *Harris* as an opportunity to define the boundaries of the non-statutory exemption as applied to employers-only agreements.[69] It held that the RSP did not fall within the exemption, and was thus subject to antitrust scrutiny.[70] The *Harris* court did so by concluding that *Brown* should be read narrowly, and by considering how the Court's reasoning in *Brown* applied to the Grocers' RSP provision.[71] The *Harris* court emphasized that the labor laws did not approve of or regulate the RSP.[72] Additionally, the RSP did not play a significant role in collective bargaining; the RSP concerned the product, rather than the labor market; and the collective bargaining process would not be hindered by the exclusion of the RSP.[73] Finally, the *Harris* court noted that the employers' inclusion of a grocer in the Agreement, Food 4 Less, who was not part of the CBA negotiations,

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[64] *See* Brown v. Pro Football, Inc., 518 U.S. 231, 250 (1996); Brady v. Nat'l Football League, 644 F.3d 661, 687 (8th Cir. 2011); Am. Steel Erectors, Inc. v. Local Union No. 7, 536 F.3d 68, 76–77 (1st Cir. 2008); Clarett v. Nat'l Football League, 369 F.3d 124, 138 (2d Cir. 2004); Ehredt Underground, Inc. v. Commonwealth Edison Co., 90 F.3d 238, 241 (7th Cir. 1996).

[65] *Ehredt,* 90 F.3d at 241.

[66] *Id.*

[67] *See id.*

[68] *See id.*

[69] California *ex rel.* Harris v. Safeway, Inc., 651 F.3d 1118, 1128 (9th Cir. 2011); *see infra* notes 70–75 and accompanying text.

[70] *See Harris,* 651 F.3d at 1131–32.

[71] *Id.* at 1128–30.

[72] *Id.* at 1129, 1131.

[73] *Id.* at 1129–32.

further cautioned against application of the exemption.[74] After considering these factors, the court concluded that application of the antitrust laws would not interfere with the bargaining process, and therefore, the RSP was sufficiently distant from the collective-bargaining process.[75]

After determining that the non-statutory labor exemption did not apply to the RSP, the court went on to analyze statutory antitrust liability.[76] The *Harris* court reasoned that the RSP was not a per se violation of the Sherman Act.[77] Although the RSP was a profit-pooling agreement—a type of agreement traditionally condemned as per se illegal because sharing profits reduces incentives to compete—the RSP's limited and uncertain duration and its exclusion of other competitors rendered any anticompetitive effects unclear.[78] The court further distinguished the RSP by reasoning that the Grocers maintained some incentive to compete, because they were unsure how long the strike would last and thus could not count on the continuance of the profit-pooling mechanism.[79] Additionally, the Grocers still had to compete with businesses, like specialty grocery stores Whole Foods and Trader Joe's, which were not part of the RSP agreement.[80] Finally, the court also determined that these same distinguishing characteristics made a quick look analysis inappropriate.[81] Therefore, the court determined that the case required full rule of reason analysis and affirmed the district court judgment in favor of the Grocers according to California's stipulation not to pursue a rule of reason analysis.[82]

The *Harris* decision is an important application of the *Brown* non-statutory labor exemption guidelines.[83] First, the decision provides a benchmark for judging whether an employers-only agreement is sufficiently close in time and circumstances to the collective bargaining process to render it exempt from antitrust scrutiny.[84] Under *Harris,* revenue sharing among employers, even when motivated by a desire to

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[74] *Id.* at 1131.
[75] *Id.* at 1129–32 (quoting *Brown,* 518 U.S. at 250).
[76] *Harris,* 651 F.3d at 1132.
[77] *Id.* at 1135–37.
[78] *Id.* at 1124, 1134–37.
[79] *Id.* at 1135.
[80] *Id.* at 1136.
[81] *Id.* at 1139.
[82] *Harris,* 651 F.3d at 1139.
[83] *See Brown,* 518 U.S. at 250; *Harris,* 651 F.3d at 1129–32.
[84] *See Brown,* 518 U.S. at 250; *Harris,* 651 F.3d at 1129–32 (quoting *Brown,* 518 U.S. at 250).

strengthen the employers' bargaining position, is not sufficiently related to the collective bargaining process to justify its categorical removal from antitrust scrutiny.[85]

Furthermore, the Ninth Circuit's decision to reign in the Supreme Court's extension of the non-statutory exemption reflects the policy objectives and history of the exemptions.[86] Both statutory and non-statutory labor exemptions aim to level the playing field between employees and employers.[87] The statutory exemption reflects this policy by allowing labor unions to function in their own self-interest without concern for antitrust implications.[88] Accordingly, when the Supreme Court extended the statutory exemption and created an implicit non-statutory exemption, it did so only to ensure that unions were able to negotiate CBAs with employers with the same freedom.[89] Thus, an agreement solely among employers should only be exempt from antitrust scrutiny if it is intimately related to the bargaining process.[90] *Harris* emphasizes that the labor exemptions aim to promote labor unions and the collective bargaining activities central to a union's existence, not to promote advantageous conditions for employers.[91] Therefore, *Harris* provides practical guidance for other circuits and lower courts to follow in applying the *Brown* factors by giving a concrete example of when an employers-only agreement is too far removed from the bargaining process to warrant application of the non-statutory exemption.[92]

The opinion is also significant for its commentary on how this type of agreement should be analyzed under the Sherman Act.[93] The court concluded that this employers-only Agreement justified a full rule of reason analysis.[94] As Judge Stephen Reinhardt noted in dissent, however, profit-sharing agreements enacted by employers have traditionally been struck down as per se Sherman Act violations, or quickly rejected

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[85] *See Harris,* 651 F.3d at 1129–32.

[86] *Id.* at 1131–32; *see* Goldman, *supra* note 33, at 153–54; Carson, *supra* note 31, at 1151–58.

[87] *See* Goldman, *supra* note 33, at 153; Brian Coolidge, Casenote, *Form over Function: The Goals of Labor and Antitrust Laws Sacrificed upon a Collective Bargaining Impasse,* Brown v. Pro Football, Inc., *116 S. CT. 2116 (1996),* 38 S. TEX. L. REV. 841, 848 (1997).

[88] *See* Buchholz, *supra* note 1, at 1209–10; Coolidge, *supra* note 87, at 844–48.

[89] *See* Buchholz, *supra* note 1, at 1210–11; Coolidge, *supra* note 87, at 846.

[90] *See Brown,* 518 U.S. at 250; *Harris,* 651 F.3d at 1131–32.

[91] *See Brown,* 518 U.S. at 250; *Harris,* 651 F.3d at 1131–32.

[92] *See Harris,* 651 F.3d at 1129–32.

[93] *See id.* at 1135–37.

[94] *Id.* at 1138–39.

after a truncated quick look review.[95] By treating this Agreement differently and mandating a full rule of reason review, the Ninth Circuit departed from the Supreme Court precedent of using per se or quick look review.[96]

III. What the Ninth Circuit Got Wrong: An Implicit Application of the Non-statutory Labor Exemption

The *Harris* court correctly held that the non-statutory labor exemption did not apply to the Agreement.[97] Yet, by permitting labor policy to control its antitrust analysis, it blurred the line between exempt and non-exempt activity, thus discouraging plaintiffs in antitrust labor cases from bringing suit, and injecting unnecessary confusion into the application of the non-statutory labor exemption.[98] Although similar profit-pooling agreements are typically rejected under a truncated review process, the Ninth Circuit held that this Sherman Act claim required full rule of reason analysis.[99] As a result, the Ninth Circuit departed from Supreme Court precedent and, in doing so, implicitly applied the non-statutory labor exemption that it had explicitly rejected earlier in the opinion.[100]

The *Harris* court correctly held that the Agreement did not fall within the non-statutory labor exemption because the Agreement was not essential to the collective bargaining between the Union and the Grocers.[101] Although the Grocers' Agreement centered on collective bargaining with the Union, an employers-only agreement to pool profits during a strike is not essential to maintaining equality among parties and promoting successful collective bargaining.[102] If anything, the Grocers' Agreement skewed the balance of power toward the employers, the exact situation that these exemptions seek to avoid.[103]

Furthermore, in *Harris,* the Ninth Circuit correctly adopted a narrow interpretation of the Supreme Court's 1996 decision, *Brown v. Pro Football, Inc.*, and preserved the policy behind the non-statutory exemp-

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[95] *Id.* at 1145 (Reinhardt, J., dissenting).

[96] *See* Cal. Dental Ass'n v. FTC, 526 U.S. 756, 770 (1999); *Harris,* 651 F.3d at 1144–45 (Reinhardt, J., dissenting).

[97] *See infra* notes 101–103 and accompanying text.

[98] *See infra* notes 103–124 and accompanying text.

[99] *See infra* notes 104–106 and accompanying text.

[100] *See infra* notes 107–124 and accompanying text.

[101] *See* California *ex rel.* Harris v. Safeway, Inc., 651 F.3d 1118, 1129 (9th Cir. 2011); *supra* notes 71–75 and accompanying text.

[102] *See Harris,* 651 F.3d at 1129–32.

[103] *See id.* at 1129–30; Coolidge, *supra* note 87, at 848.

tion: promoting a fair collective bargaining process and successful collective bargaining agreements.[104] Employers could argue that because the Agreement lasted only for the duration of the strike and represented an effort to get the parties back to the negotiating table, it was sufficiently related to the collective bargaining process so as to justify application of the non-statutory labor exemption.[105] Yet, crediting this argument would extend *Brown* too far because it would permit activity that reduces the effectiveness of a strike, a result that contradicts the policy of promoting union bargaining power vis-à-vis employers.[106]

Nonetheless, the Ninth Circuit ignored Supreme Court precedent supporting a truncated antitrust review and instead held that a full rule of reason analysis was necessary.[107] Under this precedent, profit-pooling agreements outside the context of collective bargaining are typically regarded as per se violations of the Sherman Act or are quickly dispatched under an abbreviated quick look analysis.[108] The *Harris* court, however, reasoned that the Grocers' Agreement warranted a full rule of reason analysis because its limited duration and lack of full market effect rendered the impact on competition unclear.[109] Yet, the Agreement's limited duration and market effect stemmed from the Agreement's relation to the ongoing collective bargaining between the Union and the Grocers.[110] The duration of the Agreement was tied to the duration of a potential strike against the Grocers.[111] Additionally, the Agreement only concerned Grocers who had existing CBAs with the Union that were set to expire and therefore did not affect the rest of the supermarket market in Southern California.[112]

By allowing these distinguishing characteristics to control the antitrust analysis, the court allowed concern for the peculiarities of the col-

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[104] *See* Brown v. Pro Football, Inc., 518 U.S. 231, 236–37 (1996); *Harris,* 651 F.3d at 1131–32.

[105] *See Harris,* 651 F.3d at 1122–23, 1128–30.

[106] *See id.* at 1131–32.

[107] *See id.* at 1131–39 (reasoning that neither per se nor quick look review is sufficient, and that full rule of reason review is required); *id.* at 1144–62 (Reinhardt, J., dissenting) (critiquing the majority opinion for departing from precedent by declining to dispatch of the case under a truncated per se or quick look review); *supra* notes 94–96 and accompanying text.

[108] *See* Citizen Publ'g Co. v. United States, 394 U.S. 131, 135–36 (1969); *Harris,* 651 F.3d at 1145 (Reinhardt, J., dissenting).

[109] *Harris,* 651 F.3d at 1139.

[110] *See id.* at 1122–24.

[111] *Id.*

[112] *Id.*

lective bargaining process to impede its reasoning.[113] The court had reasoned that not all links between the Agreement and the collective bargaining process between the Union and the Grocers were sufficient to warrant accommodation of the antitrust laws.[114] Thus, the court determined that the non-statutory labor exemption should not attach.[115] Yet, once it made this determination, any concerns related to promoting the collective bargaining process should have been irrelevant to the subsequent antitrust analysis because the labor exemptions—not antitrust analysis—are the proper vehicles for addressing concerns with promotion of collective bargaining.[116] As Judge Reinhardt commented in dissent, the distinguishing factors may make the Agreement *less* anticompetitive than other profit-pooling agreements, but the inherently anticompetitive nature of the conduct remains.[117]

Therefore, the majority effectively applied the non-statutory exemption by allowing these distinguishing factors to control its antitrust analysis.[118] By holding the Agreement subject to antitrust scrutiny, the court recognized that any relation between the RSP and collective bargaining was too attenuated to merit exemption.[119] Nonetheless, the court acted illogically when it subsequently allowed these collective bargaining concerns to bleed into its antitrust application.[120] The consideration of these collective bargaining concerns motivated the court's decision to require rule of reason review.[121] This rule of reason requirement operated in a parallel, albeit less direct, way as application of the non-statutory labor exemption would have.[122] Although the court did not explicitly hold the RSP immune from antitrust scrutiny, it implicitly did so by requiring a rule of reason review that was too long and costly for California to pursue.[123] The court allowed labor policy to control its antitrust analysis, blurring the line between exempt and non-

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[113] *See infra* notes 114–117 and accompanying text.

[114] *See Harris,* 651 F.3d at 1131–32.

[115] *Id.*

[116] *See supra* notes 36–43 and accompanying text.

[117] *Harris,* 651 F.3d at 1145 (Reinhardt, J., dissenting).

[118] *See id.* at 1135–39 (majority opinion).

[119] *Id.* at 1128–30.

[120] *See id.* at 1135–39.

[121] *Id.* at 1135–39 (reasoning that the RSP's indefinite duration and limited applicability distinguishes the case from Citizen Publ'g and precludes both per se and quick look review).

[122] *See id.* at 1124, 1139.

[123] *See Harris,* 651 F.3d at 1124, 1139.

exempt activity and discouraging plaintiffs in antitrust labor cases from bringing suit.[124]

Conclusion

In *Harris,* the Ninth Circuit implied that employers-only agreements do not qualify for the non-statutory labor exemption to antitrust law. Yet, such an application would have resulted in a rejection of the agreement under either a per se or quick look analysis. By instead holding distinguishing factors dispositive and requiring a full rule of reason review, the court implied that employers-only agreements made during the collective bargaining process do not qualify for exemption, but should receive some level of deference in the antitrust review process. Without articulating any boundaries to this deference, however, the court injected unnecessary confusion into the application of the non-statutory labor exemption.

In this way, the *Harris* decision sets a dangerous precedent for antitrust cases that overlap with labor policy. The decision effectively removes the time and cost-saving mechanisms of per se and quick look review as an option in these cases. This result discourages parties to these cases from bringing suit out of fear that time and expense will preclude a conclusion to the case. The *Harris* court therefore gives preferential treatment to the plight of employers confronted with union tactics by making it harder for plaintiffs to prevail against them. If employers are to be given preferential treatment in these circumstances, however, it should be under the direction of labor policy and the non-statutory exemption, not antitrust law.

Laura Kaplan

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[124] *See id.* at 1135–39.