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## Unsportsmanlike Conduct: An Analysis of the NFL's Expansion Policy Under U.S. Antitrust Law

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# UNSPORTSMANLIKE CONDUCT: AN ANALYSIS OF THE NFL'S EXPANSION POLICY UNDER U.S. ANTITRUST LAW

**Abstract:** The National Football League (NFL) has a policy for admitting expansion franchises that conditions admission on the affirmative vote of three-fourths of current member teams. Limitations on the number of franchises allow a small group to control the provision of professional football, and every element thereof—from prices of tickets and concessions to the quality of the overall experience. The United States' antitrust law restricts conduct, by agreement or monopolization, that has the effect of restricting trade to the detriment of consumers. This Note discusses the antitrust setting in which the NFL's expansion policy exists and the foundational legislation. The Note goes on to apply current antitrust law to the NFL's expansion policy to determine whether there should be concerns about liability. In suggesting that, yes, the NFL expansion policy is anticompetitive to the detriment of consumers, this Note endorses the theory of parallel exclusion as a beneficial addition to antitrust analyses.

## INTRODUCTION

The New England Patriots have sold out every home game since 1994.<sup>1</sup> The Green Bay Packers' sellout streak goes back to 1959.<sup>2</sup> The Cincinnati Bengals drew the lightest crowd per regular season home game in 2018, with a crowd of nearly fifty-one thousand fans, while each team in the top half of NFL attendance was able to fill at least 65,800 seats per game during the same stretch.<sup>3</sup> In a league of thirty-two teams, the Buffalo Bills and the Dallas Cow-

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<sup>1</sup> Mark Daniels, *Patriots: Sellout Streak Continues for 24th Consecutive Season*, TELEGRAM (July 14, 2017), <https://www.telegram.com/sports/20170714/patriots-sellout-streak-continues-for-24th-consecutive-season> [<https://perma.cc/5MFA-P6H6>].

<sup>2</sup> *Id.* Although a team's report that a game has "sold out" does not necessarily mean that every seat is occupied at game time, it typically does suggest that a ticket for each seat has been sold. See Maury Brown, *How Sports Attendance Figures Speak Lies*, FORBES (May 25, 2011), <https://www.forbes.com/sites/sportsmoney/2011/05/25/how-sports-attendance-figures-speak-lies/#16b4645a2b2a> [<https://perma.cc/K2TE-9XPS>].

<sup>3</sup> See *National Football League: Total Regular Season Home Attendance by Team in 2018*, STATISTA, <https://www.statista.com/statistics/249368/regular-season-home-attendance-of-nfl-teams/> [<https://perma.cc/UGK4-WR4G>] (providing the total regular season home game attendance per team in 2018). This calculation did not consider the Los Angeles Chargers, who drew significantly fewer attendees in their temporary location. *Id.* The Chargers averaged nearly thirty-three thousand fans per game. See Cameron DaSilva, *The Chargers' Temporary L.A. Stadium Will Be the NFL's Smallest by Far*, FOX SPORTS (Jan. 13, 2017), <https://www.foxsports.com/nfl/story/san-diego-chargers-los-angeles-move-stadium-stubhub-center-size-capacity-011217> [<https://perma.cc/7ABW-8432>] (identifying the Stub-Hub Center as the Chargers' temporary home stadium and noting the thirty-thousand-seat capacity).

boys are the least and most valuable NFL franchises as of 2018, valued at approximately \$1.6 billion and \$5 billion, respectively.<sup>4</sup> These valuations suggest that every franchise in the NFL is successful, and beg the question: why are there only thirty-two teams in such a lucrative market?<sup>5</sup>

Article III of the Constitution and Bylaws of the NFL (NFL Constitution) requires a positive vote of at least three-fourths of the then members of the league to approve any admission of a new NFL franchise.<sup>6</sup> Under the current rule, a faction of any nine owners has the power to prevent the expansion of the league, independent of the reasonableness of adding a new franchise to the league or petitioning region.<sup>7</sup> As written, Article III of the NFL Constitution implicates U.S. antitrust laws, because it presents an opportunity for league owners to coordinate to exclude new franchises, thus limiting competition.<sup>8</sup> Moreover, the structure of the league suggests that it may be in each owner's best interest to do so.<sup>9</sup>

Part I of this Note provides a brief overview of antitrust law in the United States, discusses its application to professional sports leagues, and introduces cases examining the legality of NFL expansion and relocation rules.<sup>10</sup> Part II synthesizes the presented case law and explores what conduct under the NFL's

<sup>4</sup> *Franchise Value of National Football League Teams in 2018 (in Million U.S. Dollars)*, STATISTA, <https://www.statista.com/statistics/193534/franchise-value-of-national-football-league-teams-in-2010/> [<https://perma.cc/US9P-BXDV>].

<sup>5</sup> See *Teams*, NAT'L FOOTBALL LEAGUE, <https://www.nfl.com/teams> [<https://perma.cc/RUG5-575S>] (listing the current thirty-two National Football League (NFL) franchises). Of the fifty largest metropolitan areas within the United States, nineteen do not currently have NFL franchises or plans for a franchise to relocate there. See Chris Burke, *Building an NFL Expansion Team*, SPORTS ILLUSTRATED (Aug. 22, 2017), <https://www.si.com/nfl/2017/08/22/nfl-expansion-team-draft-keepers-cities-coaches> [<https://perma.cc/MF6W-YL4L>] (identifying nine cities in the United States, Canada, and Mexico that have potential to be home to NFL expansion franchises); *Population of the Largest Metropolitan Areas in the U.S. as of 2017 (in 1,000)*, STATISTA, <https://www.statista.com/statistics/183600/population-of-metropolitan-areas-in-the-us/> [<https://perma.cc/75H6-RLZU>] (providing the fifty largest metropolitan areas in the United States by population); *Report: Raiders Won't Move to Vegas Before 2020*, REUTERS (Oct. 5, 2018), <https://www.reuters.com/article/us-football-nfl-oak-raiders-vegas/report-raiders-wont-move-to-vegas-before-2020-idUSKCN1MF0CP> [<https://perma.cc/7CYC-2ZXD>] (discussing the Oakland Raiders' plans to relocate to Las Vegas, Nevada).

<sup>6</sup> NAT'L FOOTBALL LEAGUE, CONSTITUTION AND BYLAWS OF THE NATIONAL FOOTBALL LEAGUE art. III §§ 3.1–.3 (2006), [https://onlabor.org/wp-content/uploads/2017/04/co\\_.pdf](https://onlabor.org/wp-content/uploads/2017/04/co_.pdf) [<https://perma.cc/R3JP-84DJ>] [hereinafter NFL CONST.].

<sup>7</sup> See *L.A. Mem'l Coliseum Comm'n v. Nat'l Football League*, 726 F.2d 1381, 1397 (9th Cir. 1984) (noting that the NFL's relocation rule, which also requires a three-fourths vote, allows unreasonable restriction by existing franchises); NFL CONST., *supra* note 6, at art. III § 3.3(C) (requiring twenty-four votes under the current league structure to pass a vote on expansion).

<sup>8</sup> See Sherman Antitrust Act, 15 U.S.C. §§ 1–7 (2018) (making agreements between parties that have the effect of restricting competition illegal); *L.A. Mem'l Coliseum*, 726 F.2d at 1392 (noting the effects of agreements among competitors as limiting market forces to allow unreasonable prices); NFL CONST., *supra* note 6, at art. III (providing the NFL rule for adding expansion franchises).

<sup>9</sup> See generally C. Scott Hemphill & Tim Wu, *Parallel Exclusion*, 122 YALE L.J. 1182 (2013) (discussing parallel exclusion as a violation of antitrust laws).

<sup>10</sup> See *infra* notes 13–142 and accompanying text.

expansion rules could violate antitrust law.<sup>11</sup> Part III then argues that Congress should recognize parallel exclusion as a violation of antitrust law and that the NFL expansion rules, as written, are unreasonable restraints on competition.<sup>12</sup>

## I. AN OVERVIEW OF ANTITRUST LAW AS APPLIED TO COMPETITIVE SPORT LEAGUES

Antitrust laws have a long history of application in the United States, with the overarching goal of restricting anticompetitive behavior and practices for the benefit and protection of consumers.<sup>13</sup> Due to the structure of competitive sports leagues in the United States, including the NFL, it has not always been clear how antitrust laws should be applied.<sup>14</sup> Although recent years have clarified how an antitrust challenge to the NFL should be analyzed, certain aspects of the NFL's policies and behavior have not been challenged in the courts.<sup>15</sup> Section A of this Part provides a brief overview of the antitrust laws in place in the United States.<sup>16</sup> Section B introduces parallel exclusion as a theorized violation of the Sherman Act.<sup>17</sup> Section C presents existing wrinkles in antitrust law relating to professional sports leagues and their application as a defense against antitrust challenges.<sup>18</sup> Section D provides a history of the NFL as an entity, describes the current rules of the NFL surrounding expansion, and details the most recent expansions of the league.<sup>19</sup> Finally, Section E discusses

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<sup>11</sup> See *infra* notes 143–203 and accompanying text.

<sup>12</sup> See *infra* notes 204–226 and accompanying text.

<sup>13</sup> See H.R. REP. NO. 51-1707, at 1 (1890) (identifying the objectives of the Sherman Act); Eleanor M. Fox, *The Politics of Law and Economics in Judicial Decision Making: Antitrust as a Window*, 61 N.Y.U. L. REV. 554, 566–67 (1986) (discussing the Supreme Court's description of the rationales for antitrust laws in the United States); *The Antitrust Laws*, FED. TRADE COMMISSION (2019), <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws> [<https://perma.cc/8LUN-9KZA>] (identifying the consistent purpose of antitrust laws in the United States as protecting competition in the interest of consumers).

<sup>14</sup> See Daniel E. Lazaroff, *The Antitrust Implications of Franchise Relocation Restrictions in Professional Sports*, 53 FORDHAM L. REV. 157, 167 (1984) (comparing sports leagues in the United States to a parent/subsidiary relationship). Because sports leagues are typically composed of individually-owned corporate entities, the structure of leagues and their member teams does not directly parallel other corporate structures that courts have identified as posing a risk for anticompetitive behavior. *Id.*

<sup>15</sup> See *Am. Needle, Inc. v. Nat'l Football League*, 560 U.S. 183, 204 (2010) (examining whether NFL teams form a single entity for the purposes of antitrust analysis in the negative). Although the NFL has been challenged for its relocation and expansionary policies relating to open markets, the courts have not heard a legal challenge relating to a proposed expansion into a market where an NFL team already resides. See *L.A. Mem'l Coliseum*, 726 F.2d at 1381 (challenging the NFL's relocation policy); *Mid-S. Grizzlies v. Nat'l Football League*, 720 F.2d 772 (3d Cir. 1983) (challenging the NFL's denial of a franchise to a team in the Memphis market).

<sup>16</sup> See *infra* notes 21–53 and accompanying text.

<sup>17</sup> See *infra* notes 54–72 and accompanying text.

<sup>18</sup> See *infra* notes 73–85 and accompanying text.

<sup>19</sup> See *infra* notes 86–103 and accompanying text.

the application of general antitrust laws to the NFL to establish the baseline from which future challenges should begin.<sup>20</sup>

### A. Antitrust Laws in the United States

There are two major pieces of legislation in the United States concerning anticompetitive behaviors in the marketplace: the Sherman Act and the Clayton Act.<sup>21</sup> The Sherman Act was the initial piece of legislation, passed into law in 1890.<sup>22</sup> The Clayton Act followed in 1914 and expanded the scope of antitrust protection.<sup>23</sup> Subsection 1 of this Section describes the formation of the Sherman Act, relevant components of the Act, and tests for application of the Act.<sup>24</sup> Subsection 2 provides a brief discussion of the Clayton Act, as it forms one of the two pillars of antitrust legislation in the United States.<sup>25</sup>

#### 1. The Sherman Act

The Sherman Act was a statutory creation that was passed following the Industrial Revolution.<sup>26</sup> The main goal of the Act was to prevent newly established trusts, monopolies, and other anticompetitive behavior from restricting commerce in the United States.<sup>27</sup> Although the protection of the Sherman Act focused on smaller participants in the marketplace that were being forced out due to the presence of the larger trusts, the net impact of the legislation also benefited consumers.<sup>28</sup>

<sup>20</sup> See *infra* notes 104–142 and accompanying text.

<sup>21</sup> See Fox, *supra* note 13, at 563–65 (detailing the stages of antitrust legislation in the United States). See generally 15 U.S.C. §§ 1–7; Clayton Antitrust Act, 15 U.S.C. §§ 12–27.

<sup>22</sup> Fox, *supra* note 13, at 563.

<sup>23</sup> See *id.* at 563–64 (discussing the motivation behind the passage of the Clayton Antitrust Act). Whereas the Sherman Act makes conduct such as contracting or conspiring that restricts competition illegal, the Clayton Antitrust Act targets activities that do not by their nature restrict competition, but have an anticompetitive net effect. 15 U.S.C. §§ 1–7, 12–27; see Fox, *supra* note 13, at 564 (providing historical context for the Clayton Act).

<sup>24</sup> See *infra* notes 26–50 and accompanying text.

<sup>25</sup> See *infra* notes 51–53 and accompanying text.

<sup>26</sup> See Fox, *supra* note 13, at 563 (noting the historical backdrop against which the Sherman Act was enacted).

<sup>27</sup> See H.R. REP. NO. 51-1707, at 1 (stating the dual objectives of the Sherman Act); Fox, *supra* note 13, at 563 (providing historical context for the passage of the Sherman Act).

<sup>28</sup> See *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2284 (2018) (identifying higher prices and decreased quality of products as direct evidence of anticompetitive behavior); Fox, *supra* note 13, at 563–64 (noting the initial impetus of the Sherman Act was not for the benefit of consumers, but for businesses that were at the mercy of trusts).

*a. Dissecting the Sherman Act*

The Sherman Act has two main sections that dictate what behavior is anticompetitive, and thus, unlawful.<sup>29</sup> Section 1 of the Sherman Act targets, and further requires for conviction, a coordinated effort by two or more parties to participate in anticompetitive behavior that restricts a market.<sup>30</sup> Although the plain language of § 1 of the Sherman Act seems to preclude any agreed upon anticompetitive activity that restricts trade, the Supreme Court has made it clear that § 1 only applies to restrictions of trade that are unreasonable.<sup>31</sup>

Section 2 of the Sherman Act makes illegal any monopoly, or attempt to achieve a monopoly, in any part of trade or commerce in the United States, whether a party acts alone or in concert with others.<sup>32</sup> In defining a monopoly, courts look not at the position of a single competitor in a market, but rather at the actions of an alleged monopoly in obtaining its market share.<sup>33</sup> Market power obtained as the result of having a product that is preferable to that of competitors or by being more efficient than competitors does not necessarily create an illegal monopoly under § 2.<sup>34</sup> Of particular importance in the litigation of antitrust conflicts is the fact that antitrust law under the Sherman Act does not intend to protect the right of any one firm to compete in a market, but rather seeks to protect competition in general.<sup>35</sup>

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<sup>29</sup> 15 U.S.C. §§ 1–2. Whereas §§ 1 and 2 of the Sherman Act provide for conduct that is labeled illegal, and charge a convicted party of a felony, §§ 3–7 serve to expand jurisdiction of the Sherman Act into Washington D.C. and the territories of the United States (§ 3), grant jurisdiction to the federal district courts (§ 4), provide procedural instruction for making a claim under the Sherman Act (§ 5), limit applicability of the Sherman Act to certain economic activity with foreign countries (§ 6a), and provide definitions (§ 7). *Id.* §§ 1–7.

<sup>30</sup> *Id.* § 1. As relevant, § 1 of the Sherman Act states: “Every 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.” *Id.*; see *Am. Needle*, 560 U.S. at 190 (noting the exclusive applicability of § 1 to coordinated behavior that restrains trade); *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 768 (1984) (quoting *Albrecht v. Herald Co.*, 390 U.S. 145, 149 (1968)) (stating that § 1 of the Sherman Act requires multiple actors for liability).

<sup>31</sup> See *Copperweld*, 467 U.S. at 790 n.20 (Stevens, J., dissenting) (stating that § 1 only addresses unreasonable restraints on trade); *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 60 (1911) (limiting applicability of § 1 to “undue restraints”).

<sup>32</sup> 15 U.S.C. § 2; see *Copperweld*, 467 U.S. at 767 (noting the applicability of § 2 to single firm actors).

<sup>33</sup> See *Copperweld*, 467 U.S. at 767–68 (noting that some conduct that appears to restrain trade from the perspective of a competitor is allowable as a firm taking advantage of the competitive market forces).

<sup>34</sup> See *id.* at 767 & n.14 (quoting *United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966)) (noting legitimate competition may result in market power for a single firm without triggering antitrust violations).

<sup>35</sup> See *id.* at 767 n.14 (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977)) (stating that the goal of antitrust laws is to protect competition and not any single market participant).

In 1984, in *Copperweld Corp. v. Independent Tube Corp.*, the Supreme Court discussed additional differences in the application of §§ 1 and 2 of the Sherman Act.<sup>36</sup> The Court stated that alleged violations of § 1 are subject to more intense scrutiny than those claimed under § 2 because the participation of multiple parties increases the risk of anticompetitive behavior.<sup>37</sup> The *Copperweld* decision created two standards for anticompetitive results under the Sherman Act, which depend on whether an individual or group engaged in the challenged conduct.<sup>38</sup> Cooperative actions violate § 1 if there is evidence of an “unreasonable restraint of trade,” but unilateral action is only a violation under § 2 if there is a threat of a monopoly, independent of restrictions posed on the competitive market.<sup>39</sup>

*b. Methodology of Analysis in Determining Liability Under § 1 of the Sherman Act*

Courts have set out two means of determining whether conduct challenged under § 1 of the Sherman Act is, in fact, illegal.<sup>40</sup> The first instance, per se illegality, occurs when conduct required under an agreement has such obvious negative effects on competition that it is deemed a violation without requiring any further inquiry into actual harm.<sup>41</sup> The second, and more commonly applied path to liability is a “rule of reason” analysis.<sup>42</sup> This requires that a court examine all aspects of an agreement in determining whether it violates

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<sup>36</sup> See *id.* at 768 (comparing §§ 1 and 2 of the Sherman Act). The discussion of §§ 1 and 2 of the Sherman Act in *Copperweld* came in the context of determining whether a parent and wholly-owned subsidiary may enter into an agreement in the manner required for antitrust liability under § 1 of the Sherman Act. *Id.* at 759.

<sup>37</sup> See *id.* at 767–69 (stating that coordinated behavior under § 1 receives a more intense review than behavior of a single actor under § 2). In identifying the increased risks of concerted activity that is the purview of § 1, the Court focused on the fact that agreements between competitors inherently result in a decrease in diversity of strategy in a market and provides the participants more market power with which they can achieve their goals. See *id.* at 768–69 (discussing Congress’s goals in treating concerted activity more strictly than unilateral conduct).

<sup>38</sup> See *id.* at 768 (contrasting unilateral and concerted activity); Andrew I. Gavil, *Copperweld 2000: The Vanishing Gap Between Sections 1 and 2 of the Sherman Act*, 68 ANTITRUST L.J. 87, 87–88 (2000) (discussing the relationship between §§ 1 and 2 of the Sherman Act).

<sup>39</sup> Gavil, *supra* note 38, at 87–88 (citing *Copperweld*, 467 U.S. at 767).

<sup>40</sup> See *Copperweld*, 467 U.S. at 768 (identifying per se illegality and illegality under the rule of reason).

<sup>41</sup> See *id.* (identifying horizontal price fixing and market allocation as examples of agreements that warrant per se liability); see also *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958) (noting that some behavior is so certain to negatively impact competition that the act itself warrants illegality).

<sup>42</sup> See *Copperweld*, 467 U.S. at 768 (identifying rule of reason analysis as the alternative to per se illegality); *Cont’l T. V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49 (1977) (identifying the rule of reason test as the predominant method of analysis in cases considering § 1 of the Sherman Act).

§ 1 of the Sherman Act.<sup>43</sup> These aspects include the market power held by the defendant, the structure of the market in which the defendant operates, and the actual effect of the agreement.<sup>44</sup> Ultimately, a finding of liability under the rule of reason test requires that a court find that multiple parties are engaging in behavior that has a net negative effect on competition, and the combination of the market power of those parties is sufficient as to actually affect the market.<sup>45</sup> Unlike a *per se* analysis, the rule of reason allows for the continuation of behavior that may appear anticompetitive from the perspective of affected competitors, but in fact preserves competition for the benefit of consumers.<sup>46</sup>

A rule of reason analysis usually requires that a court identify the relevant market, which includes both the “product” and “geographic” markets.<sup>47</sup> A product market consists of all products that are acceptable as substitutes to consumers.<sup>48</sup> Even if a precise market is indiscernible, clear evidence showing coordinated behavior between parties resulting in anticompetitive outcomes can cure the lack of specificity in a market determination.<sup>49</sup> Once the relevant

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<sup>43</sup> See *Sylvania*, 433 U.S. at 49 (citing *Bd. of Trade of Chi. v. United States*, 246 U.S. 231, 238 (1918)) (describing the rule of reason analysis as totality test to determine whether challenged conduct has a net anticompetitive effect).

<sup>44</sup> See *Copperweld*, 467 U.S. at 768 (providing considerations of a rule of reason test for conduct that is not inherently anticompetitive).

<sup>45</sup> See *Cal. Dental Ass’n v. F.T.C.*, 526 U.S. 756, 782 (1999) (Breyer, J., concurring in part and dissenting in part) (identifying a four-part analytical tree in assessing whether challenged activity is net anticompetitive); *Sylvania*, 433 U.S. at 49 (identifying the rule of reason test as the proper method of analysis in cases considering § 1 of the Sherman Act). The test that Justice Breyer identified in *California Dental Ass’n* requires asking: “(1) What is the specific restraint at issue? (2) What are its likely anticompetitive effects? (3) Are there offsetting procompetitive justifications? (4) Do the parties have sufficient market power to make a difference?” 526 U.S. at 782 (Breyer, J., concurring in part and dissenting in part). The Court in *Sylvania* noted that the target of a rule of reason analysis is to determine whether the totality of the circumstances suggests that the challenged conduct is unreasonably anticompetitive. 433 U.S. at 49.

<sup>46</sup> See WILLIAM C. HOLMES & MELISSA H. MANGIARACINA, *ANTITRUST LAW HANDBOOK* § 2:10 n.3 (2019 ed.), Westlaw ANTITRHD BK (quoting *Am. Express Co.*, 138 S. Ct. at 2284) (stating that a rule of reason analysis is intended to separate anticompetitive conduct that is harmful to consumers from that which is perhaps beneficial).

<sup>47</sup> See *id.* § 2:10 & n.5 (collecting cases treating identification of the relevant market as a necessary step in a rule of reason analysis). See generally Comment, *Leveling the Playing Field: Relevant Product Market Definition in Sports Franchise Relocation Cases*, 2000 U. CHI. LEGAL F. 245, 251–52, 258–64 (discussing the application of product markets in antitrust cases and examining product market definitions in the context of sports leagues).

<sup>48</sup> See *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 482 (1992) (citing *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 404 (1956)) (stating that if a product does not have any substitutes it exists in a product market of its own). For example, in *Kodak*, no alternate manufacturers made the parts required to repair Kodak’s products, so the product market for Kodak parts was limited to those parts manufactured by Kodak itself. *Id.*

<sup>49</sup> See *du Pont*, 351 U.S. at 391 (identifying examples of conduct that affects competition); HOLMES & MANGIARACINA, *supra* note 46, § 2:10 (quoting *F.T.C. v. Ind. Fed’n of Dentists*, 476 U.S. 447, 460–61 (1986)) (noting that market definition allows for a judgment on potential anticompetitive effects that is not needed if those effects can be directly shown).



market is defined, a plaintiff must also show that the defendant has sufficient market power to affect competition, through, for example, undue control of prices or the exclusion of competition.<sup>50</sup>

## 2. The Clayton Act

The Clayton Act, which was passed into law in 1914, was the second installment of antitrust legislation in the United States.<sup>51</sup> Having passed the Sherman Act in 1890, Congress's intent in passing the Clayton Act was to fill certain gaps that survived the prior legislation, and to further prevent behavior that limited competition.<sup>52</sup> To achieve this goal, the Clayton Act identifies, and makes unlawful, several discrete practices that Congress identified as being potentially threatening to free competition.<sup>53</sup>

### *B. Parallel Exclusion as a Violation of the Sherman Act*

As discussed above, one of the major distinctions between §§ 1 and 2 of the Sherman Act is the requirement under § 1 that a "contract, combination in the form of trust or otherwise, or conspiracy" be present.<sup>54</sup> Conversely, § 2 of the Sherman Act only pertains to single defendants that have obtained, attempted to obtain, or conspired to obtain a monopoly in a certain area of commerce.<sup>55</sup> Parallel exclusion may exist where multiple parties participate in similar conduct or practices, or have mirrored policies that result in partial or total

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<sup>50</sup> See *du Pont*, 351 U.S. at 391 (discussing *du Pont*'s market power in the cellophane market).

<sup>51</sup> See generally 15 U.S.C. §§ 12–27.

<sup>52</sup> See S. REP. NO. 698, 63d Cong., 2d Sess., at 2 (1914) (identifying the purpose of the Clayton Act). Among the goals of the Clayton Act was to make certain practices that existing antitrust law did not cover, yet may have had the effect of furthering the "creation of trusts, conspiracies, and monopolies in their incipiency and before consummation," illegal. *Id.*; see Fox, *supra* note 13, at 564 (detailing the historical context and goals of the Sherman and Clayton Acts). While the Sherman Act targeted anticompetitive behavior that already existed, the Clayton Act sought to prevent actions by firms in a market that may lead to a decline of competition. See Fox, *supra* note 13, at 564 (detailing the goals of the Clayton Act in expanding antitrust coverage).

<sup>53</sup> See 15 U.S.C. §§ 13–14 (detailing specific activity that is punishable under the statute). Examples of conduct that the Clayton Act prohibits are price discrimination and mergers of companies that reduce competition or create the risk of monopoly formation. *Id.* §§ 13, 18; see also *Brunswick*, 429 U.S. at 485 (quoting *United States v. E.I. du Pont de Nemours & Co.*, 353 U.S. 586, 597 (1957)) (providing for the application of § 18 of the Clayton Act to mergers that have anticompetitive effects, although the respondent did not challenge, and the Court did not decide, whether mergers of a majority of bowling alleys in a market created an anticompetitive effect). As the Court points out in *Brunswick*, provisions of the Clayton Act intend to be viable before a Sherman Act claim ripens. 429 U.S. at 485 (identifying the Clayton Act as a "prophylactic measure" to prevent anticompetitive behavior before it occurs).

<sup>54</sup> 15 U.S.C. § 1; see Fox, *supra* note 13, at 564 (noting the differences between the Sherman and Clayton Acts).

<sup>55</sup> 15 U.S.C. § 2.

exclusion of new competitors in a marketplace.<sup>56</sup> Due to the ability of distinct entities in a market to mirror the behavior of others, parallel exclusion may be pursued absent any agreement required for antitrust liability under § 1 of the Sherman Act.<sup>57</sup> Meanwhile, it remains likely that each individual participant still lacks the necessary market power to have “monopolized” the industry and run afoul of § 2 of the Sherman Act.<sup>58</sup> Parallel exclusion thus allows independent actors to enjoy the benefits of monopolization without direct risk of antitrust liability.<sup>59</sup>

In their seminal article on parallel exclusion, Professors C. Scott Hemphill and Tim Wu identify three criteria in which there is a likely risk that parallel exclusion may be enacted to inhibit competition.<sup>60</sup> First, parallel exclusion is more common in markets that have few existing actors.<sup>61</sup> Second, parallel exclusion is more effective when used to prevent the entry of a new competitor into a market.<sup>62</sup> The third criterion identified by Hemphill and Wu is the cost of enacting the strategy of exclusion.<sup>63</sup> The authors go on to identify

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<sup>56</sup> See Hemphill & Wu, *supra* note 9, at 1185 (defining parallel exclusion).

<sup>57</sup> See *id.* at 1186–87 (noting the absence of an agreement as a bar on liability under § 1 of the Sherman Act).

<sup>58</sup> See *id.* (proposing that § 2 of the Sherman Act should expand to cover parallel exclusion).

<sup>59</sup> See *id.* at 1192–93 (presenting case studies, including *United States v. Visa U.S.A., Inc.*, 344 F.3d 229 (2d Cir. 2003), to illustrate how parallel exclusion may exist in practice). Professors Hemphill and Wu identify oligopolies—or markets that are composed of a small number of competitors—as the optimal setting for parallel exclusion. *Id.* at 1192. In *Visa*, the corporate entities that issued MasterCard and Visa credit cards each adopted bylaws that forbade members from issuing American Express or Discover credit cards. 344 F.3d at 236 & n.3. The court found that the exclusion of American Express and Discover from the market (consisting primarily of the four mentioned entities) was, in and of itself, evidence of harm to competition. *Id.* at 240. In this instance, the court deemed the market power and effect of the actions unlawful, even though MasterCard enacted its bylaw after Visa and with no coordination between the parties. See Hemphill & Wu, *supra* note 9, at 1224 (citing Brief of United States at 19, *Visa*, 344 F.3d 229 (Nos. 02-6074, 02-6076, 02-6078), 2002 WL 32819130, at \*18) (detailing the timing of enactment of the exclusionary bylaws by Visa and MasterCard, and noting MasterCard’s unilateral decision whether to adopt similar policies to join Visa in excluding American Express or, alternatively, try and compete with Visa).

<sup>60</sup> See Hemphill & Wu, *supra* note 9, at 1192, 1210 (listing three criteria for parallel exclusion).

<sup>61</sup> *Id.* at 1192. Currently, of the thirty-two teams in the NFL, only Los Angeles and New York City are home to multiple franchises. See *Teams*, *supra* note 5 (providing links to the official websites of all thirty-two NFL franchises).

<sup>62</sup> Hemphill & Wu, *supra* note 9, at 1210. This criterion can be specifically contrasted against attempting to force an already-established competitor out of a market, in which case parallel exclusion is less likely. *Id.*

<sup>63</sup> See *id.* (noting that actors are likely to be willing to pay to exclude in rough proportion to the amount of benefit they anticipate collecting). The case of *Allied Tube & Conduit Corp. v. Indian Head, Inc.* is illustrative of this contention. See 486 U.S. 492 (1988) (deciding the antitrust liability of a voting scheme that resulted in the practical denial of a new competitor into the market for electrical conduit); Hemphill & Wu, *supra* note 9, at 1201, 1210 (using *Allied Tube* to explain the proposition of cost factoring into an entity’s decision to exclude). In *Allied Tube*, a manufacturer of polyvinyl chloride (PVC) conduit petitioned to have its product approved for use with electrical wiring systems. 486 U.S. at 495–96. To prevent the approval, members of the voting association who had interests in the

the potential harms of parallel exclusion, such as giving participants the opportunity to charge above the efficient market price, but also note that activity such as uniform standards within an industry may have exclusionary effects that are actually beneficial to competition.<sup>64</sup> Standard setting, however, if exclusively designed to prevent the entrance of competitors, lacks the beneficial effects for consumers that prevent the practices from being anticompetitive per se.<sup>65</sup>

## 1. Parallel Exclusion as a Prisoner's Dilemma Analysis

Like the classic prisoner's dilemma, parallel exclusion between two or more participants in a market may present conflicting incentives for each decisionmaker.<sup>66</sup> When deciding whether to exclude or not, participants in a scheme of parallel exclusion face only two choices, similar to the prisoners in the model scenario.<sup>67</sup> Although the decision not to exclude a competitor may not negatively impact certain actors at the time of entry, permanence of the market and certain other participants force decisionmakers to consider the po-

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use of steel conduit issued and paid for memberships for individuals promising to vote against the proposal. *Id.* at 496–97. Although the defendants in *Allied Tube* formed an agreement implicating § 1 of the Sherman Act, because the cost of implementation was not excessive, and the denial of the proposal would prevent (in theory) the introduction of potentially disrupting improvement in the market, the circumstances were ripe for parallel exclusion. *See id.* at 496–97, 510–11 (stating the price paid by steel interests and detailing the improvements of PVC over steel); Hemphill & Wu, *supra* note 9, at 1210 (using the low cost of acquiring votes in *Allied Tube* as an example of a scenario where parallel exclusion may be implemented).

<sup>64</sup> *See* Hemphill & Wu, *supra* note 9, at 1213, 1215–16 (identifying potential harms of parallel exclusion, such as the ability of the excluders to earn “supracompetitive profits” above the level that would be expected or achievable in a competitive environment). Hemphill and Wu also note potential benefits that may result from parallel exclusion, such as the setting of uniform standards, although exclusionary, which allow for interoperability that advances competition and innovation. *Id.*

<sup>65</sup> *See id.* at 1216–17 (using *Allied Tube* as an example to show that standard-setting can be used anticompetitively, for the purpose of excluding competition, or for beneficial purposes such as motivating progress or quality control, and therefore, per se liability is inappropriate).

<sup>66</sup> *See id.* at 1221–22 (providing scenarios where certain actors may benefit at the expense of others by defecting and allowing a competitor to enter); *see also Prisoner's Dilemma*, ENCYCLOPAEDIA BRITANNICA, <https://www.britannica.com/topic/prisoners-dilemma> [<https://perma.cc/UP3M-LTKJ>] (defining “prisoner's dilemma”). In the traditional narrative of a prisoner's dilemma, two parties are in a situation where coordinated decisions would allow each party to benefit from the net optimal outcome, but there is no communication between the parties. *See Prisoner's Dilemma, supra*. In the hypothetical scenario of two prisoners, each must decide whether to confess or not to confess to a crime. *Id.* If one confesses and the other does not, the withholding party serves a full prison sentence while the other is set free. *Id.* If both confess, they will each spend a significant amount of time in prison. *Id.* The final, optimal outcome, occurs when both prisoners remain silent, resulting in each party receiving a (relatively) insignificant amount of time in prison. *Id.* If the possible outcomes are presented to each prisoner, both have an incentive to confess, hoping that they are set free, although the net result is worse than if neither confesses. *Id.*

<sup>67</sup> Hemphill & Wu, *supra* note 9, at 1223; *see Prisoner's Dilemma, supra* note 66 (presenting the traditional prisoner's dilemma and the options for each actor to either cooperate or not).

tential impact on their future interests, not only the immediate impact of a new entrant.<sup>68</sup>

Unlike a prisoner's dilemma, however, Hemphill and Wu note that the structure and incentives of parallel exclusion allow "interdependent excluders" to act in a mutually beneficial and exclusionary manner without the communications needed for an agreement under § 1 of the Sherman Act.<sup>69</sup> This is particularly true when government action has provided protection from competition in the past, allowing players to follow traditional industry practices that may result in an exclusionary effect.<sup>70</sup>

Apart from being easy to enact, parallel exclusion may diverge from a direct analogy to a prisoner's dilemma when the members of a market are not in direct competition with one another, such as in the case of regional monopolies.<sup>71</sup> In this scenario, each individual member has clear incentive to prevent the entry of a competitor into its own region, and other members benefit from exclusion elsewhere as it acts as a check against future competition in their own territory.<sup>72</sup>

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<sup>68</sup> See Hemphill & Wu, *supra* note 9, at 1221–22 (suggesting that in certain scenarios actors are continuously incentivized to act in concert with their competitors, with no economic motivation to defect, in which case the parallel exclusion prisoner's dilemma becomes a "coordination game"). Unlike a classic prisoner's dilemma, where there is one action taken on the part of each actor and no future consequences, Hemphill and Wu cast parallel exclusion as a multi-turn "game" in which actors make decisions based in part on how they will shift the status quo, with the result being coordinated action. *Id.*

<sup>69</sup> *Id.* at 1226. The identified characteristics facilitating successful exclusion, as compared to other anticompetitive conduct, are "simplicity, transparency, and permanence" of the conduct. *Id.* Hemphill and Wu note that, unlike having to coordinate with competitors to set and maintain an oligopolistic price, each participant in parallel exclusion only needs to decide whether to deal with new competitors. *Id.* at 1222–23. The binary nature of the decision to exclude or not exclude also eliminates hard to detect self-interested conduct taken on the part of one of the would-be participants in an anticompetitive scheme, allowing easier monitoring by co-excluders. *Id.* at 1223. Whereas in a price fixing arrangement any participant may make a secret, independent deal that undercuts the goals of the overall scheme, the presence of a new market entrant necessarily alerts participants in parallel exclusion that a party has defected. *Id.* Finally, unlike anticompetitive pricing schemes that can be rolled back, parallel exclusion is relatively permanent in controlling the composition of a market. *Id.* at 1223–24.

<sup>70</sup> See *id.* at 1229–30 (using the history of AT&T and the American film industry as examples of prior government protection forming the basis for later exclusionary practices).

<sup>71</sup> See *id.* at 1232 (suggesting that parallel exclusion may become the dominant strategy for a prisoner's dilemma game where excluders do not compete).

<sup>72</sup> See *id.* at 1234 (proposing incentives for regional monopolies to exclude competition elsewhere in the marketplace). Hemphill and Wu use *Bell Atlantic Corp. v. Twombly* as a descriptive model of the incentives of regional monopolies to adopt a scheme of parallel exclusion. *Id.* (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007)). In *Twombly*, plaintiffs alleged that the companies, which formed as a result of the divestiture of AT&T, unlawfully restrained trade by acting in unison to prevent competitors from forming in their regions. 550 U.S. at 549–50. Although the Court concluded that the plaintiffs failed to state a claim sufficient to avoid summary judgment against them, it acknowledged that clear economic incentives existed, motivating each defendant to try and prevent competition in its territory, and found that the claim that a competitor's successful entry into an established market could promote similar entries in other markets was persuasive. *Id.* at 566, 570.

### *C. Exemptions and Immunities from Antitrust Liability for Sports Leagues in the United States*

This Section introduces two different legislative exemptions from antitrust law as they apply, or have applied, to sports leagues in the United States.<sup>73</sup> Subsection 1 discusses 15 U.S.C. § 1291, which has direct application to the NFL.<sup>74</sup> Subsection 2 then introduces 15 U.S.C. § 26(b) as an example of legislation that Congress has passed and its application to professional sports leagues.<sup>75</sup>

#### 1. The Sports Broadcasting Act: Congressional Aid in Broadcasting and Merger

As suggested by its title, 15 U.S.C. § 1291 (Sports Broadcasting Act) provides antitrust exemptions related to the broadcasting of athletic events and mergers of professional football leagues under certain conditions.<sup>76</sup> Enacted originally in 1961, § 1291 allowed professional football, baseball, basketball, and hockey leagues to enter into joint agreements issuing exclusive rights to telecasts of their respective games without being subject to antitrust liability.<sup>77</sup> Subsequently amended in 1966, the current version of § 1291 maintains the limited broadcast exemption as well as expands the exemption to include mergers of tax-exempt football leagues into a single league, so long as the resulting league is also tax-exempt, and the merger results in a league with more active teams.<sup>78</sup>

<sup>73</sup> See *infra* notes 76–85 and accompanying text.

<sup>74</sup> See *infra* notes 76–78 and accompanying text.

<sup>75</sup> See *infra* notes 79–85 and accompanying text.

<sup>76</sup> See 15 U.S.C. § 1291 (exempting agreements between professional sports teams relating to sponsored telecasts). To merge under 15 U.S.C. § 1291 (Sports Broadcasting Act), members of two or more professional football leagues must be tax-exempt under § 501(c)(6) of the Internal Revenue Code of 1986, form a league that is likewise exempt, and the net result must be to increase the total number of professional football teams in existence. *Id.*

<sup>77</sup> Pub. L. No. 87-331, § 1, 75 Stat. 732 (1961) (codified as amended at 15 U.S.C. § 1291). Interestingly, prior to the passage of the 1961 legislation, the NFL added an expansion franchise in Minnesota, the home state of the senator that was the Chairman of the Committee in which the legislation was considered. See *Mid-S. Grizzlies*, 720 F.2d at 784 (addressing the circumstances surrounding the addition of the Minnesota franchise).

<sup>78</sup> 15 U.S.C. § 1291; see *Mid-S. Grizzlies*, 720 F.2d at 775 (providing background of the development of § 1291); Thomas A. Piraino, Jr., *The Antitrust Rationale for the Expansion of Professional Sports Leagues*, 57 OHIO ST. L.J. 1677, 1723 (1996) (noting the limited scope of § 1291). Specifically, § 1291 exempts professional sports leagues from the provisions of § 1 of the Clayton Act (15 U.S.C. § 12) and the Federal Trade Commission Act, as amended (15 U.S.C. §§ 41–58). 15 U.S.C. § 1291. After proposal of the 1966 legislation, the NFL granted an expansion franchise to New Orleans, Louisiana, which was the home state of a senator that supported the passage of the bill. *Mid-S. Grizzlies*, 720 F.2d at 784.

## 2. Major League Baseball as an Example of Greater Congressional Protection

Although included in the coverage of the Sports Broadcasting Act, professional baseball is the beneficiary of additional legislation that acts as a shield against antitrust liability.<sup>79</sup> Codified within the Clayton Act, § 26b (Baseball Exemption) limits U.S. antitrust law as applied to professional baseball.<sup>80</sup> It excludes enforcement in areas that pertain to any conduct that “relate[s] to or affect[s] employment of major league baseball players,” specifically limited to employment at the major league level.<sup>81</sup> In its language, the Baseball Exemption states that this treatment of professional baseball is unique, providing that in areas relating to employing players, baseball is subject to the same antitrust laws as all other professional sports leagues.<sup>82</sup> Courts have had several occasions to interpret the Baseball Exemption, and have held that it applies to all aspects of coordinating and distributing professional baseball games for profit.<sup>83</sup> Of note is § 26b(b)(3) of the Baseball Exemption, which specifically exempts application of the U.S. antitrust laws to “franchise expansion, location, or relocation” of professional baseball teams.<sup>84</sup> Congress amended the Baseball Exemption in 1998 with the passage of the Curt Flood Act, which modified certain applications of the Baseball Exemption relating to player labor issues, but did not affect its application to franchise location.<sup>85</sup>

### *D. The National Football League as an Entity: Policies and History of NFL Expansion*

The NFL is an unincorporated association of thirty-two professional football teams headquartered in New York City.<sup>86</sup> Founded initially in 1920 in

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<sup>79</sup> 15 U.S.C. § 1291; *see id.* § 26b (highlighting a portion of the Clayton Act applicable solely to professional major league baseball).

<sup>80</sup> *Id.* § 26b(b).

<sup>81</sup> *Id.*

<sup>82</sup> *See id.* § 26b(a) (stating that, other than as dictated in subsections (b) through (d), all professional sports are subject to the same antitrust laws).

<sup>83</sup> *See City of San Jose v. Office of the Comm’r of Baseball*, 776 F.3d 686, 688–89, 690 (9th Cir. 2015) (quoting *Toolson v. N.Y. Yankees, Inc.*, 346 U.S. 356, 357 (1953)) (describing three cases that track the development of 15 U.S.C. § 26b (Baseball Exemption) and stating they “clearly extend the baseball exemption to the entire ‘business of providing public baseball games for profit between clubs of professional baseball players’”).

<sup>84</sup> 15 U.S.C. § 26b(b)(3). As defined by § 1 of the Clayton Act, “antitrust laws” include §§ 1 and 2 of the Sherman Act. 15 U.S.C. § 12(a).

<sup>85</sup> *City of San Jose*, 776 F.3d at 690. The Curt Flood Act served to modify the existing language of the Clayton Act, but it is not a standalone statute. Pub. L. No. 105–297, 112 Stat. 2824 (1998) (codified as amended at 15 U.S.C. § 26b).

<sup>86</sup> *Am. Needle*, 560 U.S. at 187; Claudia G. Catalano, Annotation, *Application of Federal Antitrust Laws to Professional Sports*, 79 A.L.R. Fed. 2d 1 (2013); *see Teams*, *supra* note 5 (listing the thirty-two NFL franchises). The NFL existed as a tax-exempt non-profit entity under § 501(c)(6) of

Canton, Ohio, the league adopted its current name in 1922.<sup>87</sup> Although the initial years following its formation were not immediately profitable for all member teams, the NFL has grown to be a national success and has stability and viability in the market of professional football unseen by any of its competitors.<sup>88</sup>

Included in the business model of the NFL is a system of revenue sharing, where all franchises pool earnings and then evenly distribute them among the teams.<sup>89</sup> Shared revenue consists of money earned from national media deals, merchandise sales and licensing, and ticket sales.<sup>90</sup> Meanwhile, each franchise

the Internal Revenue Code from 1942 until 2015, when it elected to forgo its tax-exempt status. *See Mid-S. Grizzlies*, 720 F.2d at 775 (noting the tax-exempt status of the NFL); Jared Dubin, *NFL Ends Tax Exempt Status After 73 Years: 3 Things to Know*, CBS SPORTS (Apr. 28, 2015), <https://www.cbsports.com/nfl/news/nfl-ends-tax-exempt-status-after-73-years-3-things-to-know> [<https://perma.cc/H63B-FQSD>] (showing a memo sent from the Commissioner of the NFL to the owners of the league's member franchises).

<sup>87</sup> U.S. Football League v. Nat'l Football League, 842 F.2d 1335, 1343 (2d Cir. 1988).

<sup>88</sup> *See id.* at 1343–44 (stating that forty-one teams failed in the early years of the NFL and detailing attempts by the World Football League (WFL) and United States Football League (USFL) to form competing football leagues); *see also* Thomas Barrabi, *XFL, USFL, Other Pro Football Leagues That Took on the NFL*, FOX BUS. (Dec. 6, 2018), <https://www.foxbusiness.com/features/xfl-usfl-other-pro-football-leagues-that-took-on-the-nfl> [<https://perma.cc/L5VN-D6TV>] (noting the tendency for the United States to have only one professional football league and summarizing failed attempts by the USFL, the XFL, and the United Football League (UFL) to enter the market); Ira Boudway & Eben Novy-Williams, *The NFL's Very Profitable Existential Crisis*, BLOOMBERG BUSINESSWEEK (Sept. 13, 2018), <https://www.bloomberg.com/news/features/2018-09-13/nfl-makes-more-money-than-ever-and-things-have-never-been-worse> [<https://perma.cc/4RR8-SR34>] (stating that across the NFL revenue has increased 47% since 2012, and that the Green Bay Packers, the only NFL franchise that is publicly owned and thus required to publish financial statements, has seen increased revenue over each of the past fifteen years); Earl Gustkey, *A Big Splash, Then No Cash: WFL Made History in 1974, but 'Whiffle Ball' Didn't Last*, L.A. TIMES (Mar. 31, 1994), [http://articles.latimes.com/1994-03-31/sports/sp-40651\\_1\\_whiffle-ball](http://articles.latimes.com/1994-03-31/sports/sp-40651_1_whiffle-ball) [<https://perma.cc/BUR6-VKQW>] (tracking the life of the WFL from its first game on July 10, 1974, through its collapse on October 22, 1975); *Report: NFL Teams' Revenue Share Topped \$8 Billion in 2017*, REUTERS (July 17, 2018), <https://www.reuters.com/article/us-football-nfl-gb-nfl-revenues/report-nfl-teams-revenue-share-topped-8-billion-in-2017-idUSKBN1K719F> [<https://perma.cc/TLJ5-X8GQ>] (calculating that the thirty-two NFL franchises' revenue increased 4.9% to more than \$8 billion in 2017).

<sup>89</sup> Howard Bloom, *NFL Revenue-Sharing Model Good for Business*, SPORTING NEWS (Sept. 5, 2014), <http://www.sportingnews.com/us/nfl/news/nfl-revenue-sharing-television-contracts-2014-season-business-model-nba-nhl-mlb-comparison-salary-cap/gu0xok7mpu01x3vu8750eaq6> [<https://perma.cc/GE59-HGG5>] (stating the NFL splits over 60% of the total revenue earned by the league).

<sup>90</sup> Gabriel Feldman, *The Puzzling Persistence of the Single-Entity Argument for Sports Leagues: American Needle and the Supreme Court's Opportunity to Reject A Flawed Defense*, 2009 WIS. L. REV. 835, 889; Bloom, *supra* note 89. Although revenue generated from ticket sales to games are included in the sharing system, distribution is not equal. *See* Piraino, *supra* note 78, at 1700 n.107 (citing Michael S. Jacobs, *Professional Sports Leagues, Antitrust, and the Single-Entity Theory: A Defense of the Status Quo*, 67 IND. L.J. 25, 31 n.27 (1991)) (detailing the distribution of gate revenues for NFL teams). Sixty percent of the money goes to the hosting franchise, while 40% goes to the visitor. *Id.* Additionally, the Dallas Cowboys do not participate in revenue sharing as it pertains to the sale of merchandise. Bloom, *supra* note 89.

independently retains all the money that is made from local sources, such as local media and advertising, sale of concessions, parking, and luxury seating.<sup>91</sup>

In 1966, when the NFL consisted of fifteen teams, the league agreed to merge with the American Football League (AFL).<sup>92</sup> The New Orleans Saints franchise was added as an expansion team to the NFL in 1967, and when the merger between the NFL and AFL was finalized in 1970, the newly formed NFL consisted of twenty-six teams.<sup>93</sup> Since the merger, six additional expansion franchises have been added.<sup>94</sup> The Seattle Seahawks and Tampa Bay Buccaneers received franchises in 1974, along with the Carolina Panthers and Jacksonville Jaguars in 1993, the Baltimore Ravens in 1996, and, finally, the city of Houston, Texas in 1999 (which then formed the Houston Texans).<sup>95</sup> Unlike the tumultuous beginnings of the NFL, no teams have folded or ceased continuous operation since the merger of the NFL and AFL.<sup>96</sup> There has also been relative stability in ownership of the franchises, as twenty of the teams have not been sold in the past twenty years, and ten of those have not traded hands since before the finalization of the NFL/AFL merger in 1970.<sup>97</sup>

Article III of the NFL Constitution governs the process of adding an expansion team to the NFL.<sup>98</sup> According to Article 3.1(B), for a new team to be admitted into the NFL, at least three-fourths of the then-existing teams must

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<sup>91</sup> Feldman, *supra* note 90, at 889; Piraino, *supra* note 78, at 1700 n.107 (citing Adam Teicher, *NFL Teams Walk When Money Talks*, KAN. CITY STAR, Nov. 12, 1995, at A1); Bloom, *supra* note 89.

<sup>92</sup> See *U.S. Football League*, 842 F.2d at 1344 (listing the NFL teams in existence at the time of the merger between the NFL and American Football League (AFL)).

<sup>93</sup> See *id.* (providing the effective date of the merger and full list of teams then members of the league).

<sup>94</sup> *Chronology of Professional Football*, in 2013 NFL RECORD & FACT BOOK 361, 366–68, <http://static.nfl.com/static/content/public/image/history/pdfs/History/2013/353-372-Chronology.pdf> [<https://perma.cc/WBX8-C99F>] (recording the entry of the Seattle, Tampa Bay, Carolina, Jacksonville, Baltimore Ravens, and Houston franchises into the NFL).

<sup>95</sup> *Id.* at 368. The Houston, Texas franchise was initially granted to the city of Houston and owner Robert McNair. *Id.* The franchise did not officially become the Houston Texans until after the franchise was granted. *Id.*

<sup>96</sup> See *U.S. Football League*, 842 F.2d at 1343 (identifying multiple bankruptcies in the early years of the NFL); *Chronology of Professional Football*, *supra* note 94, at 360–72.

<sup>97</sup> See Kevin Baumer, *What Every NFL Owner Paid for Their Team—and What It's Worth Today*, BUS. INSIDER (Nov. 16, 2010), <https://www.businessinsider.com/how-much-did-nfl-owners-paid-for-their-teams-2010-10> [<https://perma.cc/Q66V-9MYM>] (providing the year each NFL franchise was obtained by its current owner, updated to include the most recent sale of the Carolina Panthers in 2018). The Carolina Panthers were sold in 2018 following a revelation of allegations that then-owner Jerry Richardson had behaved inappropriately toward employees of the Panthers. *Id.*; see Ken Badenhausen, *Here Are 12 Potential Contenders to Buy the Carolina Panthers*, FORBES (Dec. 18, 2017), <https://www.forbes.com/sites/kurtbadenhausen/2017/12/18/here-are-12-potential-new-owners-of-the-carolina-panthers/#39905056be16> [<https://perma.cc/X49V-DUN3>] (detailing the legal troubles of Richardson). Richardson had purchased the Panthers franchise in 1993 for a total cost of \$206 million. Badenhausen, *supra*.

<sup>98</sup> NFL CONST., *supra* note 6, at art. III.



vote them into the league.<sup>99</sup> Once a franchise is established, it receives a “Home Territory,” defined under Article IV of the NFL Constitution as the city in which the franchise is based, extended out seventy-five miles from the corporate limits of such city.<sup>100</sup> Article IV of the NFL Constitution further provides that NFL franchises are allowed to market their team only in their “Home Marketing Area,” defined to include the Home Territory and the state in which the base city is located.<sup>101</sup> In the case that a state contains more than one franchise, the Home Marketing Area of each team does not include the Home Territories of any other team.<sup>102</sup> Once a franchise has been granted and a Home Territory established, the NFL Constitution provides that no franchise has the right to change the city in which it is based without a prior vote of approval by at least three-fourths of the teams existing in the league at the time.<sup>103</sup>

### *E. The State of Antitrust Law as Applied to the NFL*

Due to the organizational structure of the NFL, there has been significant discussion surrounding, and many cases trying to determine, how antitrust laws should be applied.<sup>104</sup> Subsection 1 describes the NFL’s attempt to be classified as a single entity for the purposes of antitrust analysis.<sup>105</sup> Subsection 2 discusses the rule of reason as it has come to be applied as the prevalent test for antitrust challenges regarding the NFL.<sup>106</sup> Subsection 3 looks at the relevant product and geographical markets for the business of fielding professional football games.<sup>107</sup> Finally, Subsection 4 summarizes two cases litigated against the NFL relating to its franchise relocation and expansion policies.<sup>108</sup>

<sup>99</sup> *Id.* at art. III § 3.1(B).

<sup>100</sup> *Id.* at art. IV § 4.1.

<sup>101</sup> *Id.* at art. IV § 4.4(A).

<sup>102</sup> *Id.* In the case that multiple teams share the same Home Territory, each franchise retains equal rights to market within the Home Territory and Home Marketing Area. *Id.*

<sup>103</sup> *Id.* at art. IV § 4.3.

<sup>104</sup> *See Am. Needle*, 560 U.S. at 204 (concluding that, although agreements between NFL teams are not categorically subject to liability under § 1 of the Sherman Act, they will not always be treated as a single entity for the purposes of antitrust litigation); *L.A. Mem’l Coliseum*, 726 F.2d at 1388–90 (affirming a decision by the district court that the NFL does not act as a single entity); Nathaniel Grow, *American Needle and the Future of the Single Entity Defense Under Section One of the Sherman Act*, 48 AM. BUS. L.J. 449, 465–66 & nn.111–13 (2011) (discussing attempts by professional sports leagues, organized similar to joint ventures, to be classified as single entities under *Copperweld*). *See generally* Feldman, *supra* note 90 (discussing the application of antitrust laws to American sports leagues).

<sup>105</sup> *See infra* notes 109–114 and accompanying text.

<sup>106</sup> *See infra* notes 115–121 and accompanying text.

<sup>107</sup> *See infra* notes 122–124 and accompanying text.

<sup>108</sup> *See infra* notes 125–142 and accompanying text.

## 1. *American Needle* and the NFL's Status as a Single Entity

Under the Sherman Act, courts analyze conduct that results from a multi-party agreement under § 1 more strictly than unilateral actions.<sup>109</sup> In *Copperweld*, the Supreme Court stated that the presence of multiple parties making unilateral decisions aids competition in a market and highlighted the inherent anticompetitive risk of coordinated behavior.<sup>110</sup> In determining whether multiple defendants should be treated as a single entity, the *Copperweld* Court held that the determining factors include whether the parties share common objectives and whether there is a single “corporate consciousness.”<sup>111</sup>

The Supreme Court addressed the NFL's status as a single entity in 2010 with its decision in *American Needle, Inc. v. National Football League*.<sup>112</sup> Applying the *Copperweld* factors, the Court held that, relevant to the licensing of intellectual property that was the subject of the case, the individual NFL teams were competitors, and the use of a single NFL-sponsored licensing group consolidated all NFL licensing decisions under one party.<sup>113</sup> Despite its decision that the NFL and its teams do not function as a single entity, and are thus covered by § 1 of the Sherman Act, the Court made clear that the conclusion did not decide liability for the NFL.<sup>114</sup>

## 2. Application of the Rule of Reason to NFL Agreements

Although its organizational structure does not establish the NFL as a single entity following the *American Needle* decision, existence as a professional sports league protects the NFL from having its actions judged as per se violations of antitrust laws.<sup>115</sup> In 1984, in *National Collegiate Athletic Ass'n v.*

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<sup>109</sup> *Copperweld*, 467 U.S. at 768.

<sup>110</sup> *Id.* at 768–69.

<sup>111</sup> *See id.* at 771 (identifying the unity of interest seen in a parent corporation and a wholly-owned subsidiary as the characteristic that allows single entity treatment).

<sup>112</sup> *See Am. Needle*, 560 U.S. at 186 (deciding a challenge to the NFL's single entity status). In *American Needle*, a former licensee of the NFL's licensing entity sued the NFL, challenging the agreements between the NFL, its franchises, and the licensing entity as violations of §§ 1 and 2 of the Sherman Act. *Id.* at 187. The NFL defended its actions by asserting that they were unable to violate § 1, as the teams and league functioned as a single entity. *Id.* at 187–88.

<sup>113</sup> *See id.* at 197 (quoting *Copperweld*, 467 U.S. at 769) (concluding that the aggregation of the NFL's licensing decisions “depriv[ed] the marketplace of independent centers of decisionmaking”). The Court additionally highlighted that each NFL franchise is independently-owned and managed, thus having “separate corporate consciousnesses.” *Id.* at 196 (citing *Copperweld*, 467 U.S. at 771). Of importance was the fact that the teams compete with each other in the general football market, including for ticket sales. *Id.* at 196–97.

<sup>114</sup> *See id.* at 199 n.7, 204 (concluding that although the NFL does not qualify for the single entity defense, coordinated action does not necessarily mean there is § 1 liability).

<sup>115</sup> *See id.* at 203 (quoting *NCAA v. Bd. of Regents*, 468 U.S. 85, 101, 104 (1984)) (stating that when anticompetitive conduct is necessary to make a product available, per se liability of the Sherman Act is inappropriate).

*Board of Regents*, the Supreme Court acknowledged that in certain industries it might be necessary for participants to restrict competition in order to create a product.<sup>116</sup> Considering the National Collegiate Athletic Association (NCAA) to be such an industry, the Court held that applying a per se test for antitrust liability would be ill-suited, even for conduct that usually falls under its purview.<sup>117</sup> Instead, the Court examined the case under a rule of reason analysis.<sup>118</sup>

In *American Needle*, the Supreme Court extended the application of *NCAA* to the NFL.<sup>119</sup> In doing so, the Court implied that, like the *NCAA*, the market for producing professional football games depends on the ability of NFL teams to coordinate in a manner that may reduce competition as a result.<sup>120</sup> Taking another step past the *NCAA* decision, the *American Needle* Court noted that agreements preserving the ability to market a product do not only mandate a rule of reason analysis, but are likely to pass the test if the marketing of a product depends on the agreement.<sup>121</sup>

### 3. The Relevant Product and Geographical Markets for the NFL

Important to the completion of a rule of reason analysis is the defining of the relevant product and geographical markets in which an industry participant operates.<sup>122</sup> Following some controversy regarding what product market is relevant for the NFL, the consensus appears to be either the provision of professional football or, more narrowly, the provision of NFL football.<sup>123</sup> As pertain-

<sup>116</sup> *NCAA*, 468 U.S. at 101. The *NCAA* Court noted that the National Collegiate Athletic Association (NCAA) was necessary to establish uniform rules, promote competition between member institutions, and preserve the character of the sports it oversees. *Id.* at 101–02. Central to the description of what made the *NCAA* fit in this unique carve-out in antitrust was the inability of any individual institution to restrict its participants and still compete in the industry. *Id.* at 102.

<sup>117</sup> *See id.* at 100 (finding that an application of per se liability would be inappropriate).

<sup>118</sup> *See id.* at 103 (choosing to apply a rule of reason analysis instead of per se antitrust illegality to a case alleging horizontal price fixing, although horizontal price fixing usually falls under the latter).

<sup>119</sup> *See Am. Needle*, 560 U.S. at 203 (applying *NCAA* to the NFL).

<sup>120</sup> *See id.* (citing *NCAA*, 468 U.S. at 117) (suggesting that it would be inappropriate to apply a per se rule to the NFL due to the nature of the market).

<sup>121</sup> *See id.* (citing *Broad. Music, Inc. v. CBS, Inc.*, 441 U.S. 1, 23, 99 (1979)) (stating that under the industry structure identified by *NCAA*, “the agreement is likely to survive the Rule of Reason”).

<sup>122</sup> *See HOLMES & MANGIARACINA, supra* note 46, § 2:10 & n.5 (collecting cases that treat the identification of the relevant market as a threshold issue in a rule of reason analysis).

<sup>123</sup> *See U.S. Football League*, 842 F.2d at 1342, 1343 (providing that the plaintiff and defendant agreed that the relevant product market at issue was major league professional football); *L.A. Mem'l Coliseum*, 726 F.2d at 1393 (defining the tests for relevant product market to include interchangeability and cross-elasticity of demand for a product, and seemingly accepting that the unique nature of NFL football suggests that it is itself the relevant product market for franchise relocation analyses); *Mid-S. Grizzlies*, 720 F.2d at 783 (citing *Mid-S. Grizzlies v. Nat'l Football League*, 550 F. Supp. 558, 571 n.33 (E.D. Pa. 1982)) (providing that the plaintiffs alleged, and the NFL did not challenge, that the relevant product market at issue was major league professional football); Lazaroff, *supra* note 14,

ing to the relevant geographic market, the case law suggests that it includes the entirety of the United States, with potential sub-markets in the specific regions in which franchises exist.<sup>124</sup>

#### 4. Challenges to the NFL's Expansion and Relocation Policies

##### *a. Expansion in Mid-South Grizzlies v. National Football League*

In 1983, in *Mid-South Grizzlies v. National Football League*, the Mid-South Grizzlies (Grizzlies), a former member of the World Football League, sued the NFL alleging antitrust violations relating to the NFL's denial of granting the Grizzlies an NFL expansion franchise.<sup>125</sup> In support of the claim, the Grizzlies cited the existence of an established, functioning football business, the value of Memphis as a professional football sub-market, and the lack of any basis for the denial as evidence of an agreement between the NFL members to unreasonably restrict trade in violation of § 1 of the Sherman Act.<sup>126</sup>

In affirming summary judgment against the Grizzlies, the Third Circuit Court of Appeals determined that the NFL had considered sufficient reasons for denying the entry of the new franchise and found that the act of leaving the Memphis market without a franchise was in fact pro-competitive within the market for professional football.<sup>127</sup> Further, the court determined that the Grizzlies had failed to present a plausible case that the denial of the expansion franchise had served to eliminate potential competition between a Memphis franchise and one already established in the NFL.<sup>128</sup> The court identified ticket sales, local broadcast rights, and concession stand and merchandise revenue as potential intra-league competition, but determined that it was unlikely that a Memphis franchise stimulated such competition.<sup>129</sup> In reaching this conclu-

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at 207–10 (discussing relevant market definition and suggesting that, due to the lack of close substitutes, NFL football is the logical relevant product market).

<sup>124</sup> *Mid-S. Grizzlies*, 720 F.2d at 783 (citing *Mid-S. Grizzlies*, 550 F. Supp. at 571 n.33) (alleging that the relevant geographic market at issue was the United States with a sub-market in the “Mid-South,” which the NFL did not challenge); see *Am. Football League v. Nat'l Football League*, 323 F.2d 124, 130 (4th Cir. 1963) (classifying the conduct of the AFL and NFL as national, and stating that the relevant geographic market must include the contiguous United States, and likely, Hawaii, and parts of Canada).

<sup>125</sup> *Mid-S. Grizzlies*, 720 F.2d at 776–77.

<sup>126</sup> See *id.* (noting various reasons in support of plaintiff's position).

<sup>127</sup> See *id.* at 786 (listing the NFL's stated reasons for denying the franchise). Supporting its claim that the act supported competition, the court opined that if a league were to form to compete with the NFL, the Grizzlies or another Memphis-based team could then compete with the NFL in a manner that the presence of an NFL team in the market would foreclose. *Id.*

<sup>128</sup> *Id.* at 787.

<sup>129</sup> *Id.* At the time of the decision, the closest NFL franchise to Memphis was over 280 miles away in St. Louis. *Id.* The court determined that, due to the distance, the plaintiff failed to show that a team located in Memphis would compete in ticket sales, local broadcasts, sale of merchandise, or another manner with a St. Louis franchise. *Id.*

sion, the court stated that, had the franchise been denied to a team seeking to operate within the established territory of another NFL franchise, the antitrust analysis could be different.<sup>130</sup>

The final component of the Grizzlies' argument that the court found unconvincing was its reliance on the essential facilities doctrine.<sup>131</sup> The essential facilities doctrine suggests that when competition in a market practically depends on becoming a member of an established association, members must be admitted on reasonable terms unless the exclusion preserves competition.<sup>132</sup> Although the lower court acknowledged that the NFL clearly held a monopoly in professional football in the United States, the Third Circuit found the Grizzlies' argument unpersuasive due to their inability to show that their admission to the NFL would result in increased intra-league competition.<sup>133</sup>

#### *b. Relocation in Los Angeles Memorial Coliseum Commission v. National Football League*

The next year, in 1984, in *Los Angeles Memorial Coliseum Commission v. National Football League*, the Ninth Circuit Court of Appeals affirmed a ruling that the NFL's franchise relocation policy—requiring approval of three-fourths of the league's members in order to move a team into the Home Territory of another member—violated § 1 of the Sherman Act.<sup>134</sup> In applying a rule of reason analysis, the court determined that the NFL Constitution sufficed to form an agreement between the NFL franchises and that the policy was an at-

<sup>130</sup> See *id.* (suggesting that a franchise application for an expansion team in New York City would provide the requisite intra-league competition to support an antitrust challenge under § 1 of the Sherman Act).

<sup>131</sup> See *id.* (denying the plaintiff's claim relying on the essential facilities doctrine).

<sup>132</sup> See *id.* (citing *Associated Press v. United States*, 326 U.S. 1 (1945)) (explaining the essential facilities doctrine in relation to the NFL); Piraino, *supra* note 78, at 1679 (presenting the essential facilities doctrine and proposing its application to professional sports leagues). In *Associated Press*, the Supreme Court affirmed that the bylaws of the Associated Press (AP) contained policies that were illegal restrictions on AP membership, and "designed to stifle competition in the newspaper publishing field." 326 U.S. at 4, 11, 23. The policies at issue allowed any member of the AP to challenge the admission of a new applicant that would compete in their market, and the veto could only be overruled by the vote of four-fifths of all AP members. *Id.* at 10.

<sup>133</sup> *Mid-S. Grizzlies*, 720 F.2d at 783, 787.

<sup>134</sup> *L.A. Mem'l Coliseum*, 726 F.2d at 1385, 1386, 1401. Following the ruling of the Ninth Circuit, the NFL has not changed its relocation policy contained in the NFL Constitution. NFL CONST., *supra* note 6, at art. IV § 4.3. Since the decision, however, teams have not always sought league approval before negotiating or announcing relocations. See Piraino, *supra* note 78, at 1687 & nn.43–44 (citing Leonard Shapiro, *League's Forward Progress Is Producing Some Major Pileups*, WASH. POST, Nov. 10, 1995, at C1; Leonard Shapiro, *Rams Approved for St. Louis Move*, WASH. POST, Apr. 13, 1995, at D1; and Timothy W. Smith, *N.F.L. Shifts: Seahawks Eye Los Angeles*, N.Y. TIMES, Feb. 2, 1996, at B9) (noting the relocation efforts made by the Los Angeles Rams, Cleveland Browns, Houston Oilers, and Seattle Seahawks prior to receiving league approval, and the effect of threatened antitrust litigation based on *Los Angeles Memorial Coliseum* on an ultimate league vote).

tempt to limit or preclude competition.<sup>135</sup> The majority of the court's opinion analyzed whether the implementation of the relocation policy had an actual impact on competition.<sup>136</sup> Initially, the court stated that, although the nature of the NFL structure provided members with legitimacy in advancing certain interests of the league, ensuring above market profits for owners was not one of them.<sup>137</sup>

As an additional argument, the NFL attempted to defend the reasonableness of the relocation policy under the doctrine of ancillary restraints.<sup>138</sup> Ancillary restraint is a common-law doctrine that preserves the enforceability of certain agreements that have the effect of reducing competition, so long as the impetus of the agreement is another legitimate purpose.<sup>139</sup> In deciding against the NFL, the court found clear anticompetitive effects of the relocation policy, stating that enforcement in this case would result in the prevention of natural competition between the Rams, the franchise that claimed the Los Angeles territory, and the Raiders, the team that sought to relocate there.<sup>140</sup> Absent the presence of the Raiders in Los Angeles, the court noted that the Rams would essentially hold a monopoly, and thus be able to charge above-market prices to the disadvantage of local consumers.<sup>141</sup> Further, the court determined that the ancillary restraints doctrine could not apply, as the NFL's interest in enforcing the relocation policy could have been achieved in a less restrictive manner.<sup>142</sup>

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<sup>135</sup> See *L.A. Mem'l Coliseum*, 726 F.2d at 1387, 1391, 1395 (identifying the NFL Constitution as a sufficient agreement, establishing the framework for the rule of reason analysis, and stating that the NFL admitted that the purpose of Rule 4.3 was to restrain competition between NFL teams). The exact rule of reason test applied by the Ninth Circuit required the plaintiff to prove: "(1) [a]n agreement among two or more persons or distinct business entities; (2) [w]hich is intended to harm or unreasonably restrain competition; (3) [a]nd which actually causes injury to competition [in a relevant market]." *Id.* (quoting *Kaplan v. Burroughs Corp.*, 611 F.2d 286, 290 (9th Cir. 1979)). Following the initial determinations, the court weighed anticompetitive effects against those that tended to be pro-competition. *Id.*

<sup>136</sup> See *id.* at 1391–98 (discussing the application of a rule of reason analysis in the context of the NFL relocation policy and its pro- and anticompetitive effects).

<sup>137</sup> *Id.* at 1391–92. The court identified "[c]ollective action in areas such as League divisions, scheduling and rules . . . [and] other activity that aids in producing the most marketable product attainable" as legitimate interests of NFL franchises. *Id.* at 1392.

<sup>138</sup> See *id.* at 1395 (introducing the NFL's ancillary restraints argument).

<sup>139</sup> *Id.* (quoting Robert H. Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, 74 *YALE L.J.* 775, 797–98 (1965)); see Piraino, *supra* note 78, at 1680 (presenting the ancillary restraints doctrine and proposing its application to professional sports leagues).

<sup>140</sup> *L.A. Mem'l Coliseum*, 726 F.2d at 1395. The interests that the NFL claimed were that the policy protected each team's investment in joining the league, provided teams with financial stability, and supported competitive balance, fan support, marketing decisions, and investments by local governments. *Id.* at 1396.

<sup>141</sup> *Id.* at 1395.

<sup>142</sup> *Id.* at 1396. Prior to the suit, Al Davis, the owner of the Raiders and party to the litigation, had suggested that the NFL use objective guidelines in determining whether or not to approve the relocation of a franchise, a system the court seemed to consider less prone to antitrust challenge than the stated relocation policy. *Id.* at 1397.

## II. EXAMINING THE NATIONAL FOOTBALL LEAGUE'S EXPANSION POLICIES AS AN ANTITRUST VIOLATION

Unchecked anticompetitive conduct in any market allows beneficiaries to have undue control over prices of their products to the detriment of consumers.<sup>143</sup> In the case of NFL football, each team sets its own prices for game tickets, sells team branded merchandise, and has control over its efforts regarding the overall fan experience.<sup>144</sup> In a system in which potential franchises are unnaturally excluded from the NFL, each established team is shielded from the effects of competition and lacks market pressure to provide a better product.<sup>145</sup>

As U.S. antitrust laws currently exist, a challenge to the NFL's expansion policy could come from any of three possible avenues.<sup>146</sup> Section 1 of the Sherman Act presents the strongest argument for a finding of liability, requiring a challenger to show that an agreement between the NFL franchises was in place, properly define the relevant markets, and allege facts sufficient to overcome a rule of reason analysis.<sup>147</sup> Liability under § 2 of the Sherman Act would require a showing that the NFL's expansion policy acts to, or attempts to, monopolize the relevant product market in a manner that allows the league to inflate prices or exclude competition.<sup>148</sup> Finally, a challenger could present the expansion policy as parallel exclusion by NFL franchises.<sup>149</sup>

<sup>143</sup> See *L.A. Mem'l Coliseum Comm'n v. Nat'l Football League*, 726 F.2d 1381, 1392 (9th Cir. 1984) (noting the role of anticompetitive agreements in restricting the influence of market forces and allowing "unreasonable and arbitrary" prices to be charged).

<sup>144</sup> See *Am. Needle, Inc. v. Nat'l Football League*, 560 U.S. 183, 196–97 (2010) (noting competition between NFL teams for gate revenue and merchandise).

<sup>145</sup> See Piraino, *supra* note 78, at 1678 (arguing that limitations on franchise expansion that result in below free market levels of NFL franchises result in increased prices and decreased quality).

<sup>146</sup> See Sherman Antitrust Act, 15 U.S.C. §§ 1–2 (2018) (requiring an agreement between multiple parties, or monopoly power, to impose antitrust liability). See generally Hemphill & Wu, *supra* note 9 (discussing parallel exclusion as a violation of antitrust laws).

<sup>147</sup> See 15 U.S.C. § 1 (requiring concerted action for liability). Because the single entity determination and relevant markets are seemingly decided, liability under § 1 of the Sherman Act for the NFL's expansion policy depends only on the balancing of anticompetitive effects and procompetitive justifications and, therefore, requires a more developed argument. See *Am. Needle*, 560 U.S. at 200, 203–04 (concluding that a rule of reason test is the appropriate review for antitrust challenges to professional sports leagues and that the NFL does not qualify for a single entity defense); *L.A. Mem'l Coliseum*, 726 F.2d at 1393 (accepting NFL football as the relevant product market for franchise relocation analyses); *Mid-S. Grizzlies v. Nat'l Football League*, 720 F.2d 772, 783 (3d Cir. 1983) (citing *Mid-S. Grizzlies v. Nat'l Football League*, 550 F. Supp. 558, 571 n.33 (E.D. Pa. 1982)) (establishing that the parties accepted that the relevant product market at issue was major league professional football); *HOLMES & MANGIARACINA*, *supra* note 46, § 2:10 & n.5 (noting that identification of the relevant market as a necessary first step in a rule of reason analysis); Lazaroff, *supra* note 14, at 207–10 (suggesting that NFL football is the logical relevant product market).

<sup>148</sup> See 15 U.S.C. § 2 (making monopolization of any industry, or the attempt to do so, illegal); *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956) (stating that a party has monopoly power over an industry when they are able to manipulate prices or exclude competitors from the market). In addition to the requirements under § 2 of the Sherman Act and market definition requirements suggested by *du Pont*, it is possible that a § 2 challenge to the NFL's expansion policy

### A. Section 1 Challenges to the NFL's Expansion Policy

Based on the examples of litigation surrounding NFL expansion and relocation policies, it appears that the success of a § 1 challenge depends heavily on the facts of the alleged anticompetitive act.<sup>150</sup> The threshold question of whether the various NFL franchises are party to an agreement, thus implicating § 1, has been answered in the affirmative.<sup>151</sup> In *Los Angeles Memorial Coliseum v. National Football League*, the Ninth Circuit ruled against the NFL in its assertion that NFL franchises could not form an agreement among themselves.<sup>152</sup> Rejecting the NFL's single entity defense, consistent with the Supreme Court's later decision in *American Needle, Inc. v. National Football League*, the Ninth Circuit held that each NFL franchise was a separate entity.<sup>153</sup> Further, the court stated that by being parties to the NFL Constitution, the franchises formed an actionable agreement under § 1 of the Sherman Act.<sup>154</sup>

Although the relevant geographic market appears to be settled as the entirety of the United States, with sub-markets in home locations of existing franchises, the determination of the scope of the relevant product market is still uncertain.<sup>155</sup> In the context of franchise expansions, the relevant product mar-

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would require argument around the continued applicability of 15 U.S.C. § 1291. 15 U.S.C. § 2; *see id.* § 1291 (implicating the tax-exempt status of the NFL); *du Pont*, 351 U.S. at 391 (assuming monopoly power within the defined relevant market); *Mid-S. Grizzlies*, 720 F.2d at 784, 788 (suggesting that, in passing § 1291, Congress must have known that it gave the newly formed NFL a significant advantage in gaining market power, and thus assented to the result).

<sup>149</sup> *See* Hemphill & Wu, *supra* note 9, at 1185 (defining parallel exclusion).

<sup>150</sup> *See L.A. Mem'l Coliseum*, 726 F.2d at 1401 (holding that the NFL's relocation rule, which also requires a three-fourths vote, unreasonably restricted relocation under § 1 of the Sherman Act); *Mid-S. Grizzlies*, 720 F.2d at 788 (holding that the record presented by the plaintiff did not create a scenario in which § 1 of the Sherman Act was implicated by the NFL's expansion policy).

<sup>151</sup> *See Mid-S. Grizzlies*, 720 F.2d at 783 (stating that the NFL did not challenge the plaintiff's assertion that the requisite vote of NFL franchises regarding potential expansion teams sufficiently established an agreement as required under § 1 of the Sherman Act).

<sup>152</sup> 726 F.2d at 1387.

<sup>153</sup> *See Am. Needle*, 560 U.S. at 196 (stating that NFL teams do not have the characteristics of a single entity); *L.A. Mem'l Coliseum*, 726 F.2d at 1387 (determining that the NFL, including its member teams, does not constitute a single entity).

<sup>154</sup> *L.A. Mem'l Coliseum*, 726 F.2d at 1387.

<sup>155</sup> *See Mid-S. Grizzlies*, 720 F.2d at 783 (citing *Mid-S. Grizzlies*, 550 F. Supp. at 571 n.33) (providing that the plaintiffs alleged, and the NFL did not challenge, that the relevant geographic market at issue was the United States with a sub-market in the "Mid-South"); *Am. Football League v. Nat'l Football League*, 323 F.2d 124, 130 (4th Cir. 1963) (identifying the relevant geographic market as including the contiguous United States and, likely, Hawaii, and parts of Canada); Lazaroff, *supra* note 14, at 207–08 (noting that the determination of both the relevant geographic and product markets are necessary for a rule of reason analysis). In *Mid-South Grizzlies*, the Third Circuit relied, in part, on the argument that the NFL's denial of a franchise to the plaintiffs effectively preserved a location for future competition against the NFL. 720 F.2d at 787. If the court had been confined to considering the product market as NFL football, this procompetitive argument could likely not have been raised. *See id.* (considering the effect of the NFL's expansion policy on potential competitors in the market for professional football).



ket appears to be the provision of NFL football, as opposed to professional football as a broader class.<sup>156</sup> Although the distinction is not necessarily determinative in either direction, narrowing the product market to include only NFL football appears to be representative of the reality that consumers of NFL football have no viable substitutes.<sup>157</sup> History has shown that competing professional football leagues have not been successful since the merger of the NFL and AFL, and there is no reason to believe that NFL fans view other sports or entertainment options as true alternatives to NFL football.<sup>158</sup>

Analyzing the NFL's expansion policy under the rule of reason, there is a strong argument that, at least in certain circumstances, the NFL unreasonably restricts competition.<sup>159</sup> Case law strongly suggests that the NFL's expansion policy of requiring a three-fourths affirmative vote is restrictive, and that the NFL exerts significant market power in its product market.<sup>160</sup> For the purposes

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<sup>156</sup> See *L.A. Mem'l Coliseum*, 726 F.2d 1381, 1393 (accepting that the unique nature of NFL football suggests that it is itself the relevant product market, as opposed to the broader market for professional football); *Mid-S. Grizzlies*, 720 F.2d 772, 783 (citing *Mid-S. Grizzlies*, 550 F. Supp. at 571 n.33) (providing that the NFL did not challenge the plaintiff's position that major league professional football was the relevant product market at issue); Lazaroff, *supra* note 14, at 207–10 (suggesting, alternatively, that NFL football is the logical relevant product market due to the lack of close substitutes). Although the plaintiff in *Mid-South Grizzlies* alleged that the relevant product market was professional football, the reasoning of the Ninth Circuit in *Los Angeles Memorial Coliseum* suggests that the court may have accepted the provision of NFL football as a narrower market. Compare *L.A. Mem'l Coliseum*, 726 F.2d 1381, 1393 (weighing the uniqueness of NFL football against other professional sports and entertainment in franchise cities), with *Mid-S. Grizzlies*, 720 F.2d at 783 (citing *Mid-S. Grizzlies*, 550 F. Supp. at 571 n.33) (noting that the relevant product market was stipulated as major league professional football).

<sup>157</sup> See *L.A. Mem'l Coliseum*, 726 F.2d 1381, 1394 (concluding that an exact determination of the relevant product market was unnecessary if the finder of fact would still be able to weigh the harm to competition against the reasonable benefits the challenged policy affords the NFL). Although the Ninth Circuit did not see the need to establish a definitive product market, its reasoning suggested that it favored the narrower view limited to NFL football. See *id.* at 1393 (noting that NFL coach Don Shula stated that the league had fans distinct from those of college football, pointing to ticket sales and television viewership as evidence of limited substitutes); Michael A. McCann, *Antitrust, Governance, and Postseason College Football*, 52 B.C. L. REV. 517, 535 & n.113 (2011) (observing the narrow construction of product market in NFL antitrust analyses, and applying that reasoning to NCAA football).

<sup>158</sup> See Lazaroff, *supra* note 14, at 209–10 (denying the proposition that general entertainment and other professional sports leagues are acceptable substitutes to fans of the NFL); Barrabi, *supra* note 88 (discussing failed attempts by the XFL, USFL, and UFL to enter the professional football market in the United States); Gustkey, *supra* note 88 (providing an overview of the formation and decline of the WFL). Although the Arena Football League is still active, it consists of four teams playing a modified version of football indoors, and it has previously filed for bankruptcy. See Barrabi, *supra* note 88 (providing the history of the Arena Football League).

<sup>159</sup> See *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2284 (2018) (first quoting *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 768 (1984); then quoting *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 886 (2007)) (stating that a rule of reason analysis considers a challenged action's effect on competition from the perspective of consumers in the relevant market).

<sup>160</sup> See *Cal. Dental Ass'n v. F.T.C.*, 526 U.S. 756, 782 (1999) (Breyer, J., concurring in part and dissenting in part) (identifying a four-part analytical tree including identifying the restraint and market

of determining liability, however, the analysis rests on whether a plaintiff can identify anticompetitive effects stemming from being denied entry that would outweigh any justifications put forth by the NFL.<sup>161</sup>

In *Mid-South Grizzlies v. National Football League*, the NFL acknowledged that the petitioning franchise met all the qualifications required by the NFL Constitution of a franchise applicant.<sup>162</sup> In denying the applicant a franchise, the NFL cited pending legislation surrounding television broadcasts, collective-bargaining disputes with players, and the scheduling difficulties associated with having an odd number of teams as its reasonable justification for its decision.<sup>163</sup> The *Mid-South Grizzlies* court found the NFL's justification sufficient, as the plaintiff failed to show competitive harm to consumers of NFL football, and thus effectively decided the rule of reason test independent of alleged anticompetitive intent.<sup>164</sup>

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power of the defendant); NFL CONST., *supra* note 6, at art. III § 3.1(B). Independent of whether the court defines the relevant product market to include NFL football or the broader provision of professional football, the history of failure of NFL competitors provides context that the *Mid-South Grizzlies* court lacked in considering rejected expansion as preserving potential future competition. *See* 720 F.2d at 786 (casting the NFL's decision to deny the plaintiff's expansion bid as procompetitive); Barrabi, *supra* note 88 (collecting examples of failed football leagues in the United States following the merger of the AFL and NFL); Gustkey, *supra* note 88 (detailing the collapse of the WFL). In effect, the market for professional football in the United States has collapsed into the market for NFL football, suggesting that the long-term viability of a prospective entrant depends on the three-fourths vote of existing NFL franchises. *See* Barrabi, *supra* note 88 (suggesting competing with the NFL in the provision of professional football is not sustainable); Gustkey, *supra* note 88 (detailing the WFL's failed attempt at competing with the NFL).

<sup>161</sup> *See Cal. Dental Ass'n*, 526 U.S. at 782 (Breyer, J., concurring in part and dissenting in part) (stating that weighing the resulting anticompetitive effects of an action against the procompetitive justifications is central to a rule of reason analysis); *Copperweld*, 467 U.S. at 768 (stating that a rule of reason analysis looks at the net impact of challenged conduct on competition).

<sup>162</sup> 720 F.2d at 786 (citing *Mid-S. Grizzlies*, 550 F. Supp. at 568). Eligibility of applicants for new NFL franchises is set forth in Article III, section 3.2 of the NFL Constitution. NFL CONST., *supra* note 6, at art. III § 3.2. Section 3.2 of the NFL Constitution does not provide any substantive requirements for what the NFL sees as a competitive candidate for admission, but rather limits the form of entity eligible for membership in the NFL. *See id.* (identifying the admissible forms of entity for membership eligibility). Section 3.3 of the NFL Constitution details the process by which a potential franchisee may apply for a new NFL franchise. *Id.* at art. III § 3.3. Section 3.3 requires that an applicant submit an application along with a fee, financial information on the applicant, and personal and financial information of the individuals involved with the applicant. *Id.* Like section 3.2, section 3.3 does not provide standards or suggest what the NFL looks for in applicants. *See id.* at art. III §§ 3.2–3 (providing a baseline for what an applicant must do to apply but giving no information on the examination process of applications).

<sup>163</sup> *Mid-S. Grizzlies*, 720 F.2d at 786.

<sup>164</sup> *See L.A. Mem'l Coliseum*, 726 F.2d at 1395 (citing *Bd. of Trade of Chi. v. United States*, 246 U.S. 231, 238 (1918)) (stating that it is not enough that conduct is motivated by desire to restrain trade if the net harm to competition is outweighed by procompetitive results); *Mid-S. Grizzlies*, 720 F.2d at 786–87 (stating that, without a complaint showing harm to competition, the motivation of the NFL in denying the plaintiff a franchise was not challengeable under § 1 of the Sherman Act). The rule of reason test requires weighing the anticompetitive effects of the challenged act against the procompetitive justifications, so absent allegations of an impact on consumers, a plaintiff must always lose. *See*

Although the plaintiff in *Mid-South Grizzlies* failed to make the allegations, the court noted that NFL teams compete in the selling of tickets, concessions, merchandise, and local broadcasting rights, each of which could be negatively affected by the NFL's denial of a franchise applicant in certain regional markets.<sup>165</sup> Applied in the context of relocation, the court in *Los Angeles Memorial Coliseum* identified similar factors and considered them significant in finding that they outweighed the NFL's interest in controlling the regional distribution of its teams.<sup>166</sup> It seems from these decisions that, despite the NFL having legitimate interests in protecting the league and promoting the stability of franchises and their ability to compete on the field, the net impact of policies that limit competition between member teams of the NFL are harmful to competition and subject to liability under § 1 of the Sherman Act.<sup>167</sup> Therefore, in a situation similar to that in *Los Angeles Memorial Coliseum*, or the application for an expansion franchise in the New York Metropolitan area as hypothesized in *Mid-South Grizzlies*, the rule of reason test suggests possible antitrust liability for the NFL.<sup>168</sup>

### B. The NFL as a Monopoly: A § 2 Challenge

Given the history of the market for professional football in the United States, there is little doubt that the NFL holds a monopoly in the space.<sup>169</sup> Alt-

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*Cal. Dental Ass'n*, 526 U.S. at 782 (Breyer, J., concurring in part and dissenting in part) (noting that a rule of reason test requires a weighing of the resulting anticompetitive effects of an action against the procompetitive justifications).

<sup>165</sup> *Mid-S. Grizzlies*, 720 F.2d at 787.

<sup>166</sup> *See* 726 F.2d at 1390 (noting that NFL teams in similar regions compete for fans and media revenue).

<sup>167</sup> *See id.* at 1391, 1394, 1396 (identifying the legitimate interests the NFL has in enforcing its relocation policies and determining that they are not sufficient to justify the resulting limitation of true competition between teams); *Mid-S. Grizzlies*, 720 F.2d at 787 (noting anticompetitive effects of NFL policies restricting intra-league competition).

<sup>168</sup> *See L.A. Mem'l Coliseum*, 726 F.2d at 1401 (holding that the NFL's relocation voting policy was anticompetitive under § 1 of the Sherman Act); *Mid-S. Grizzlies*, 720 F.2d at 787 (suggesting that the NFL's denial of a franchise expansion application in the New York Metropolitan area would result in a decline in intra-league competition, and have a different outcome than the case presented). The *Los Angeles Memorial Coliseum* court additionally noted that just because allowing the entry of a competitor may prove fatal for an existing franchise, or even the league, the reality serves as no defense if denying entry has anticompetitive effects. *See* 726 F.2d at 1395 (citing *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 221 (1940)) (suggesting that preservation of an established franchise is insufficient to justify restraints).

<sup>169</sup> *See Mid-S. Grizzlies*, 720 F.2d at 783 (citing *Mid-S. Grizzlies*, 550 F. Supp. at 571) (acknowledging that, at the time of the case, the NFL held a monopoly in professional football). Since the decision in *Mid-South Grizzlies*, there have been attempts to create competing—and co-existing—professional football leagues in the United States, which have in each case failed. *See* Barrabi, *supra* note 88 (detailing unsuccessful attempts by the XFL, USFL, and UFL to establish professional football leagues in the United States). During writing of this Note, the market for professional football was in a similar position as it was in 1983 when *Mid-South Grizzlies* was decided, with the NFL as the

though the existence of a monopoly is the foundation of § 2 liability, *Mid-South Grizzlies* provides a strong argument against the applicability of § 2 in a challenge of the NFL expansion policy.<sup>170</sup>

The court in *Mid-South Grizzlies* highlighted the continuing significance of the Sports Broadcasting Act in relation to the NFL's status and rights as a monopoly.<sup>171</sup> In passing the Sports Broadcasting Act and allowing the merger of the AFL and NFL, the Third Circuit in *Mid-South Grizzlies* read into the statute an implicit acknowledgment by Congress that the resulting NFL would have access to advantages not available to its competitors.<sup>172</sup> The court noted that, were the NFL to use these advantages for the purpose of disadvantaging competitor leagues from establishing a place in the market, the league could face antitrust liability.<sup>173</sup> As applied to granting membership within the monopoly, however, the court rejected the plaintiff's contention that the Sports Broadcasting Act placed an obligation on the NFL to actively share its market power.<sup>174</sup> Applying the same reasoning from its rejection of the plaintiff's § 1 claim, the court held that, without an immediate showing of anticompetitive

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sole professional football league and attempts to form a new league in progress. *See id.* (noting that the USFL began in 1983 and forecasting the launch of the Alliance of American Football (AAF) and revival of the XFL anticipated in 2019 and 2020, respectively). Demonstrating the difficulty of presenting an alternative football league, the AAF announced on March 27, 2019, forty-seven days after its debut, that it was at risk of dissolving unless allowed to use young NFL players. *See* Mike Jones & Kevin Allen, *Majority Investor: Alliance of American Football in Danger of Being Discontinued Without NFLPA Help*, USA TODAY (Mar. 27, 2019), <https://www.usatoday.com/story/sports/2019/03/27/alliance-of-american-football-aaf-tom-dundon-future-nflpa/3287922002/> [<https://perma.cc/3UZ8-CTA9>] (reporting that without an agreement with the NFL Players' Association allowing the fledgling league use of NFL players, the AAF may be forced out of business); ALLIANCE OF AM. FOOTBALL, <https://aaf.com/scores> [<https://perma.cc/GLU8-SNUV>] (memorializing the first game of the league on February 9, 2019). On April 17, 2019, the AAF filed for bankruptcy after officially ending operations. Michael Rothstein, *Shuttered AAF Files for Chapter 7 Bankruptcy*, ESPN (Apr. 18, 2019), [http://www.espn.com/espn/story/\\_/id/26546883/shuttered-aaf-files-chapter-7-bankruptcy](http://www.espn.com/espn/story/_/id/26546883/shuttered-aaf-files-chapter-7-bankruptcy) [<https://perma.cc/4P2A-NHR6>]; *AAF Files for Bankruptcy, Officially Closes Down*, USA TODAY (Apr. 17, 2019), <https://www.usatoday.com/story/sports/nfl/2019/04/17/aaf-alliance-american-football-files-bankruptcy/3500708002/> [<https://perma.cc/FR4F-SMM2>]. The XFL met a similar fate as the AAF, under different circumstances, filing for bankruptcy on April 13, 2020, after the league debuted in February 2020. *See* Kevin Seifert, *XFL Files for Chapter 11 Bankruptcy After Suspending Operations*, ESPN (Apr. 13, 2020), [https://www.espn.com/xfl/story/\\_/id/29030763/xfl-files-chapter-11-bankruptcy-suspending-operations](https://www.espn.com/xfl/story/_/id/29030763/xfl-files-chapter-11-bankruptcy-suspending-operations) [<https://perma.cc/Q934-96EZ>] (reporting the bankruptcy filing of the XFL amid the COVID-19 pandemic and suggesting the strong possibility that the league will not resume operations).

<sup>170</sup> *See* 15 U.S.C. § 2 (defining liability for monopolization under the Sherman Act); *Mid-S. Grizzlies*, 720 F.2d at 784–85, 788 (discussing the development of the NFL's monopoly power and inapplicability to franchise expansion).

<sup>171</sup> *See* *Mid-S. Grizzlies*, 720 F.2d at 788 (viewing the passage of the Sports Broadcasting Act as a congressional grant of monopoly power to the NFL).

<sup>172</sup> *See id.*

<sup>173</sup> *See id.* at 785 n.7 (noting the antitrust implications of the NFL using the position granted to it under the Sports Broadcasting Act to limit competitor leagues).

<sup>174</sup> *See id.* at 784–85 (stating the plaintiff's position and rejecting that they were entitled to a share in the NFL's monopoly under the Sports Broadcasting Act).

effects from the denial of a franchise, the NFL was a sanctioned monopoly and thus immune from a § 2 challenge.<sup>175</sup>

### C. Parallel Exclusion Among Individual NFL Franchises

Although not yet adopted by courts as actionable anticompetitive conduct, the NFL expansion rules provide an example of a scenario where parallel exclusion could apply.<sup>176</sup> Due to the small number of NFL franchises, the common benefit that each franchise receives in voting against a new entrant, and the low cost of performance, the NFL's expansion rules provide an ideal setting for parallel exclusion.<sup>177</sup> Viewing NFL franchises' negative vote for a franchise expansion as parallel exclusion presents the opportunity to apply the goals of U.S. antitrust law at a more granular level, and could establish liability where a straightforward application of §§ 1 and 2 of the Sherman Act do not.<sup>178</sup>

#### 1. Parallel Exclusion as an Aid for § 1 Liability

The largest hurdle that a § 1 challenge of the NFL's expansion rules is likely to face is the determination of whether the applicant's denial results in anticompetitive effects that are greater than the NFL's procompetitive justifications.<sup>179</sup> Whereas the NFL, when viewed in its entirety as a collection of teams, has broad goals and concerns related to the preservation of the league and gameplay, each individual franchise has its own private motivations.<sup>180</sup>

<sup>175</sup> See *id.* at 788 (affirming summary judgment against the plaintiff's § 2 claim).

<sup>176</sup> See Hemphill & Wu, *supra* note 9, at 1185 (defining parallel exclusion).

<sup>177</sup> See *id.* at 1192, 1210 (providing three criteria that influence the likelihood that parallel exclusion will be used to impact competition in a market); *Teams*, *supra* note 5 (identifying the thirty-two NFL franchises currently in existence). In the case of the NFL, the cost to each franchise in excluding a potential entrant is less than that of those blocking the approval of PVC conduit in *Allied Tube & Conduit Corp. v. Indian Head, Inc.* See 486 U.S. 492, 495–97 (1988) (providing an example of when exclusion of competition is relatively inexpensive to orchestrate). Each “no” vote costs the casting franchise nothing, perhaps with the exception of potential increase in league-wide revenue then subject to the NFL's revenue sharing policy. See Bloom, *supra* note 89 (describing the NFL's revenue sharing system).

<sup>178</sup> See H.R. REP. NO. 51-1707, at 1 (identifying the objectives of the Sherman Act); Fox, *supra* note 13, at 566–67 (discussing the Supreme Court's description of the rationales for antitrust laws in the United States); *The Antitrust Laws*, *supra* note 13 (identifying the consistent purpose of antitrust laws in the United States as protecting competition in the interest of consumers).

<sup>179</sup> See *Cal. Dental Ass'n*, 526 U.S. at 782 (Breyer, J., concurring in part and dissenting in part) (breaking the rule of reason test into a four-part inquiry, including weighing the anticompetitive effects of an action against its procompetitive justifications); *Mid-S. Grizzlies*, 720 F.2d at 787–88 (identifying the plaintiff's lack of a showing of harm to competition as the central reason for adverse summary judgment).

<sup>180</sup> See *Am. Needle*, 560 U.S. at 196 (noting the nature of each franchise as an independent business with objectives separate from those of the greater league); *L.A. Mem'l Coliseum*, 726 F.2d at 1389 (stating that, like a cartel, the economic interests of NFL franchises are at times, but not always,

Among those motivations is the maximization of profit, which is aided by limitations on intra-league competition.<sup>181</sup> Viewing each franchise and its decision to vote against expansion individually suggests that the rule of reason balancing test should apply at the franchise level.<sup>182</sup> The question then becomes: are there sufficient procompetitive justifications to outweigh each team's goal to preserve its local monopoly?<sup>183</sup>

Currently, only two regional markets in the United States contain more than one NFL franchise and, therefore, compete directly with another team for the local revenue as identified in *Mid-South Grizzlies*.<sup>184</sup> Whereas a significant portion of revenue earned by NFL franchises is subject to the league revenue sharing agreement, much of the local revenue generated by a franchise is theirs

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in line with those of the league in general). The court in *Los Angeles Memorial Coliseum* noted that certain interests of franchise owners, such as protecting the "integrity" of the NFL, were shared at the league level, whereas coordination to segment and control territories instead benefits the individual members. See 726 F.2d at 1391–92 (comparing legitimate interests of the NFL with illegitimate interests of cartels engaged in anticompetitive conduct). The existence of a corporate office, separate from the management bodies of each individual franchise, further supports the distinction between interests of the NFL and those of the individual franchises. See NFL CONST., *supra* note 6, at arts. II, VIII (establishing an independent commissioner whose job includes managing the "purposes and objects" of the league, and separately, the business of league members).

<sup>181</sup> See *Am. Needle*, 560 U.S. at 197–98 (identifying NFL franchises as profit-maximizing with interests separate from those common to the league in general); *L.A. Mem'l Coliseum*, 726 F.2d at 1395 (stating that NFL franchises compete with each other, and explaining that exclusive territories granted by NFL rules give franchises monopoly power that harms consumers); *Mid-S. Grizzlies*, 720 F.2d at 786–87 (listing ticket sales, local broadcast rights, and sale of concessions and licensed team items as potential sources of competition between NFL franchises).

<sup>182</sup> See *Am. Needle*, 560 U.S. at 196 (recognizing the individual motivations of the NFL member franchises, separate from those of the league).

<sup>183</sup> See *Cal. Dental Ass'n*, 526 U.S. at 782 (Breyer, J., concurring in part and dissenting in part) (discussing the necessary weighing of pro- and anticompetitive effects of challenged conduct in a rule of reason test); Hemphill & Wu, *supra* note 9, at 1198–99 (discussing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) as an example of parallel exclusion enacted by regional monopolies). In *Twombly*, the plaintiffs alleged that components of the former AT&T monopoly behaved in an anticompetitive manner in agreeing not to do business in the territories of the other components and in agreeing to exclude competitors from each territory. 550 U.S. at 551, 566. Although the Court determined that the plaintiff failed to plead with sufficient specificity as to make allegations of parallel exclusion plausible, its hesitation in finding that acts of the AT&T components to be anticompetitive and illegal rested in the fact that the alleged "parallel conduct" consisted of ordinary efforts to resist competition in a marketplace. *Id.* at 566, 570.

<sup>184</sup> See *Mid-S. Grizzlies*, 720 F.2d at 786–87 (listing potential sources of competition between NFL franchises in the same regional market). Only Los Angeles and New York City are home to multiple NFL franchises. *Teams*, *supra* note 5 (listing the Los Angeles Chargers, Los Angeles Rams, New York Giants and New York Jets as current NFL franchises). Although the San Francisco Bay area has traditionally been home to both the San Francisco 49ers and the Oakland Raiders, the Raiders' move to Las Vegas to begin the 2020 season ends the regional competition. Tadd Haislop, *Raiders' Move to Las Vegas: Why (and When) Oakland's NFL Team Is Leaving for New Stadium*, SPORTING NEWS (Dec. 15, 2019), <https://www.sportingnews.com/us/nfl/news/raiders-move-las-vegas-new-stadium/421klqekch1t1cu0h56zccqw2> [<https://perma.cc/AC52-BYVD>].

alone.<sup>185</sup> This reality places each franchise in a prisoner's dilemma, as theorized by Professors Hemphill and Wu, with the dominant strategy being exclusion, particularly for markets that could support a new franchise.<sup>186</sup>

The practical effect of a new franchise entering the NFL is an immediate impact on the revenue sharing model.<sup>187</sup> Once a franchise is established, it becomes party to the revenue sharing system, and each team's percentage of the shared pot decreases.<sup>188</sup> If the new team is located within the local market of an established team, increased competition for fans, ticket sales, and other revenue not subject to the revenue sharing agreement introduces elements of market forces previously absent from a monopolized market.<sup>189</sup> In voting on approval of an expansion team, representatives of each franchise are inevitably motivated by the business interests of maximizing their shared and individually earned revenue, and perhaps, the maintenance of their franchise's resale value.<sup>190</sup>

The structure of the NFL supports that there is an incentive for NFL franchises to restrict entry into the league, resulting in parallel anticompetitive conduct when the decision is left to a three-fourths vote.<sup>191</sup> If accepted, the

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<sup>185</sup> See Feldman, *supra* note 90, at 889 (describing revenue sharing as a system, including typical sources of shared revenue and sources that are traditionally independently retained); Piraino, *supra* note 78, at 1700 n.107 (citing Jacobs, *supra* note 90, at 31 n.27) (detailing the distribution of gate revenues for NFL teams); Bloom, *supra* note 89 (discussing revenue sharing in the context of the NFL).

<sup>186</sup> See Hemphill & Wu, *supra* note 9, at 1232 (discussing parallel exclusion as a dominant strategy in a prisoner's dilemma).

<sup>187</sup> See Feldman, *supra* note 90, at 889 (discussing revenue sharing); Bloom, *supra* note 89 (discussing the revenue sharing system of the NFL and the sources of shared revenue).

<sup>188</sup> See Bloom, *supra* note 89 (noting NFL teams share a large portion of their revenue). As an example, the estimate for the NFL's 2017 shared revenue is more than \$8 billion, with each of the thirty-two teams receiving approximately \$255 million. *Report: NFL Teams' Revenue Share Topped \$8 Billion in 2017*, *supra* note 88. If the league expanded to include one more team, each team's revenue share from the same year would have been reduced by approximately \$13 million (assuming total league revenue remained flat). See *id.* (providing the revenue sharing figures for a thirty-two-team league). If the league expanded to include two more teams—for a total of thirty-four—individual team revenue would decrease by nearly \$20 million (assuming total league revenue remained flat). See *id.* (same). Expansion fees imposed on any new franchise joining the NFL would offset, in part, the reduction in revenue sharing totals for established teams. See *NFL Expansion Fees*, PRO FOOTBALL HALL OF FAME (Jan. 1, 2005), <https://www.profootballhof.com/news/nfl-expansion-fees/> [<https://perma.cc/2SM9-5XPN>] (listing franchise fees paid by new franchises joining the NFL since 1925).

<sup>189</sup> See *Mid-S. Grizzlies*, 720 F.2d at 786–87 (listing potential sources of competition between NFL franchises); Feldman, *supra* note 90, at 889 (discussing what is, and is not, included in revenue sharing systems).

<sup>190</sup> See *Mid-S. Grizzlies*, 720 F.2d at 786–87 (listing potential sources of competition that could be triggered by the entrance of a new franchise into the regional market of an existing NFL team); Feldman, *supra* note 90, at 889 (discussing the sources of revenue included in a revenue sharing system versus those retained by independent members of professional sports leagues); see also Piraino, *supra* note 78, at 1684 (noting that an additional relevant market implicated by NFL expansion rules is that for the sale and resale of professional sports franchises).

<sup>191</sup> See *Mid-S. Grizzlies*, 720 F.2d at 786–87 (identifying potential sources of competition between NFL franchises that many teams currently do not face); Feldman, *supra* note 90, at 889 (dis-

theory of parallel exclusion provides a means by which courts could look directly at the interests of the individual franchises that participate in the voting, rather than considering a justification put forth by the NFL that masks individual intent with purported league-wide interests that may be easily fabricated.<sup>192</sup>

## 2. Parallel Exclusion and § 2 of the Sherman Act

Under the analysis theorized in the preceding Subsection, it was presumed that requiring procompetitive justifications at the franchise level would preserve the NFL Constitution as the requisite agreement for § 1 liability.<sup>193</sup> As proposed by Professors Hemphill and Wu, a benefit of parallel exclusion as actionable anticompetitive conduct is that it recognizes that coordination by firms can simulate monopoly power without the existence of a single dominant presence.<sup>194</sup> As a result, if the presumption of agreement were to fail, parallel exclusion may be captured under § 2 of the Sherman Act, which targets conduct that otherwise escapes antitrust liability.<sup>195</sup> In applying the theory of par-

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curring the system of revenue sharing that would be affected by the entrance of a new member in the NFL); NFL CONST., *supra* note 6, at art. III § 3.3(C) (providing that, to be admitted to the NFL, an applicant franchise must receive the affirmative vote of three-fourths of the then member franchises).

<sup>192</sup> See *L.A. Mem'l Coliseum*, 726 F.2d at 1396 (pointing to the NFL's overall rationale for its relocation policy, not those of the individual teams that the policy was found to protect); *Mid-S. Grizzlies*, 720 F.2d at 786 (providing the NFL's justifications for rejecting the expansion franchise, not looking to other potential motivations of existing members). An additional interest that may motivate NFL franchises in excluding new teams mirrors an allegation made in *Twombly* that if one expansion franchise were to gain entry and succeed, it might lay the path for other new teams to enter at the expense of the current franchises. See 550 U.S. at 566 (acknowledging the allegation that the entry by one competitor into the regional monopoly of one AT&T spinoff could increase competition in other locations). The *Twombly* Court ultimately rejected this line of argument, as it identified the behavior of the defendants to be in line with the reasonable desire of members of a market to not aid competitors. *Id.* A factual difference that perhaps aids this allegation in the context of NFL franchise expansion is that, unlike policies implemented by the defendants in *Twombly* that resist competition, NFL franchises acting in unison are able to completely deny entry to the market. See *id.* (finding that policies to resist competition were reasonable in a marketplace).

<sup>193</sup> See 15 U.S.C. § 1 (requiring an agreement between parties for antitrust liability); *L.A. Mem'l Coliseum*, 726 F.2d at 1387 (stating that the NFL Constitution formed an agreement sufficient for liability under § 1 of the Sherman Act).

<sup>194</sup> See Hemphill & Wu *supra* note 9, at 1236–37 (stating that parallel exclusion fits well under § 2 of the Sherman Act, as “shared monopol[ies]” may result in the same exclusionary impact as a single monopoly engaged in anticompetitive conduct).

<sup>195</sup> See *id.* at 1239 (citing *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 60 (1911)) (identifying the purpose of § 2 of the Sherman Act as expanding liability and suggesting that the theory of parallel exclusion is consistent with the goal of targeting substance over form). It seems unlikely that a court would find that a § 1 analysis, influenced by the principles of parallel exclusion, would lack an agreement necessary for liability. See 15 U.S.C. § 1 (requiring an agreement between parties for antitrust liability). Although excluding the NFL as a larger institution for the weighing of pro- and anticompetitive results looks at the level below the NFL as an entity, and therefore the level below the NFL Constitution, the role of the document in granting member franchises the ability to vote on, and theoretically exclude, new franchises retains the significance of the agreement. See NFL CONST.,



allel exclusion to NFL franchises, absent the sanctioned monopoly granted to the NFL under the Sports Broadcasting Act, it is possible to view the collection of teams as a “shared monopoly.”<sup>196</sup> Viewing the individual NFL franchises as composing a shared monopoly based on their actions, rather than through participation in the NFL, the Sports Broadcasting Act’s sanctioned monopoly appears to be less protective of the teams’ actions.<sup>197</sup>

Under the shared monopoly approach, Professors Hemphill and Wu propose a three-part test to determine whether participants should be liable for anticompetitive exclusion.<sup>198</sup> First, does the combination result in sufficient simulated monopoly power to create anticompetitive effects?<sup>199</sup> Second, does the challenged behavior limit entrance of competitors with the result of harming competition?<sup>200</sup> Finally, is the behavior justified, such that it produces a result that is net beneficial?<sup>201</sup> When applied to the shared monopoly created by the aggregation of NFL member franchises, there is monopoly power and limitation on entry.<sup>202</sup> The remaining questions seem to reflect a rule of reason analysis weighing the procompetitive justifications of an action against the anticompetitive effects, which would be very difficult for the NFL franchises to win in many scenarios, as an individual team owner’s negative vote for the protection of their franchise value lacks any procompetitive angle.<sup>203</sup>

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*supra* note 6, at art. III § 3.3(C) (providing that admission to the NFL requires an applicant franchise to receive the affirmative vote of three-fourths of the then member franchises).

<sup>196</sup> See Hemphill & Wu *supra* note 9, at 1296–97 (defining collective action by independent firms, with the result of excluding competitors, as a “shared monopoly”).

<sup>197</sup> See *Mid-S. Grizzlies*, 720 F.2d at 784, 788 (noting that the Sports Broadcasting Act granted the NFL its market power and stating that the plaintiff could not challenge that grant, not that the individual NFL teams held any right to a monopoly). As an additional argument, the Sports Broadcasting Act, as applicable to the NFL and its grant of market power resulting from the merger of the AFL and NFL, legalized agreements between member teams of professional football leagues subject to certain income tax exemptions. 15 U.S.C. § 1291. As of 2015, the NFL abandoned its status as a tax-free entity, suggesting that the 1966 amendment to the Sports Broadcasting Act no longer has relevance to the NFL or its member teams. See Dubin, *supra* note 86 (providing a memorandum from the NFL commissioner to league members detailing the abandonment of tax-free status).

<sup>198</sup> See Hemphill & Wu, *supra* note 9, at 1237–38 (detailing the three-step analysis).

<sup>199</sup> *Id.* at 1237.

<sup>200</sup> *Id.* at 1238.

<sup>201</sup> *Id.*

<sup>202</sup> See *Mid-S. Grizzlies*, 720 F.2d at 783 (citing *Mid-S. Grizzlies*, 550 F. Supp. at 571) (acknowledging that at the time of the case the NFL held a monopoly in professional football, which presumes that the individual teams share in that power); NFL CONST., *supra* note 6, at art. III (granting the power to include, and therefore exclude, expansion franchises solely to member franchises of the NFL).

<sup>203</sup> See *Cal. Dental Ass’n*, 526 U.S. at 782 (Breyer, J., concurring in part and dissenting in part) (identifying the components of a rule of reason test); *L.A. Mem’l Coliseum*, 726 F.2d at 1395 (giving deciding weight to the anticompetitive effect of excluding a team from an occupied market due to the harm to competitive pricing); *Mid-S. Grizzlies*, 720 F.2d at 787 (suggesting that the court might come to a different decision had the plaintiff presented examples of intra-league competition harmed by the denial of their expansion franchise).

### III. THE NFL'S EXPANSION POLICY IS ANTICOMPETITIVE

The stated goal of the Sherman Act is to prevent restriction of commerce for the benefit and protection of consumers.<sup>204</sup> Under this law, the NFL's expansion policy—leaving the decision of whether to admit or deny a new franchise to existing owners—is anticompetitive.<sup>205</sup> The structure of the NFL expansion voting rules leaves the decision of whether a competitor should be allowed to enter the market for NFL football—and therefore professional football—solely to those parties that benefit from the exclusion of competition.<sup>206</sup> Given the proper challenge, the laws in place provide the means for a rejected NFL franchise applicant to successfully challenge its denial.<sup>207</sup> Furthermore, if the courts take the goals of antitrust law seriously, they should adopt the theory of parallel exclusion in cases where the established analytical structure allows anticompetitive conduct outside the forms required under §§ 1 and 2 of the Sherman Act, resulting in a substantial harm to consumers.<sup>208</sup>

#### *A. No Sufficient Justification Under a § 1 Rule of Reason Test*

Absent a transparent set of narrowly tailored, objective guidelines put forth by the NFL dictating what the criteria are for the acceptance of an expansion franchise, any rejection under the current rules raises anticompetitive flags.<sup>209</sup> In

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<sup>204</sup> See H.R. REP. NO. 51-1707, at 1 (identifying the objectives of the Sherman Act).

<sup>205</sup> See Sherman Antitrust Act, 15 U.S.C. §§ 1–2 (2018) (providing that anticompetitive conduct, through agreement or attempts at monopolization, is illegal); NFL CONST., *supra* note 6, at art. III (establishing the rules for admission of an expansion franchise).

<sup>206</sup> See Barrabi, *supra* note 88 (highlighting the difficulty of launching a competing professional football league in the United States by showing the collapse of the XFL, USFL, and UFL); Gustkey, *supra* note 88 (detailing the ultimate decline of the WFL); NFL CONST., *supra* note 6, at art. III § 3.3(C) (requiring a three-fourths vote by member franchises for admission of an expansion franchise).

<sup>207</sup> See *L.A. Mem'l Coliseum Comm'n v. Nat'l Football League*, 726 F.2d 1381, 1395–96, 1401 (9th Cir. 1984) (holding that the justifications put forth by the NFL, although valid, were not sufficient to overcome the anticompetitive effects of its three-fourths member vote on relocation of franchises); *Mid-S. Grizzlies v. Nat'l Football League*, 720 F.2d 772, 787 (3d Cir. 1983) (leaving the door open to an NFL expansion challenge resulting from an applicant's denial from an occupied market).

<sup>208</sup> See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 550–51 (2007) (alleging parallel exclusion by surviving companies of the AT&T regulatory breakup in implementing uniform policies to exclude competitors from each region). Although the *Twombly* Court correctly restated the plaintiff's claims, they failed to treat parallel exclusion as unique, actionable, anticompetitive conduct. See *Hemphill & Wu*, *supra* note 9, at 1199 (concluding that *Twombly* presents, but then does not address, the theory of parallel exclusion, and it has not therefore been denied as a potential antitrust doctrine).

<sup>209</sup> See 15 U.S.C. § 1 (making agreements with the result of restraining trade illegal); *L.A. Mem'l Coliseum*, 726 F.2d at 1397 (suggesting that when the NFL enacts a policy to protect its interests as a league, adoption of a set of objective standards would provide a stronger defense against antitrust liability). As it stands, the Ninth Circuit determined the NFL Constitution is a sufficient agreement to subject NFL expansion decisions to antitrust liability under § 1 of the Sherman Act. See *L.A. Mem'l Coliseum*, 726 F.2d at 1387 (accepting that the NFL Constitution was an agreement as required under § 1 of the Sherman Act). Further, the NFL easily meets the market power analysis required under a

both *Los Angeles Memorial Coliseum Commission v. National Football League* and *Mid-South Grizzlies v. National Football League*, the courts either held or suggested that a showing of direct harm to consumers was sufficient to outweigh the NFL's proposed justifications.<sup>210</sup> Although harm to consumers was held to include monopolistic prices encouraged by controlling the number of franchises in a market, the *Mid-South Grizzlies* court's finding that there was no competition among existing teams in vacant markets, resulting in harm to consumers, is unconvincing.<sup>211</sup> Consumers of NFL football live across the United States, not only in cities or regions in which franchises are based.<sup>212</sup> Limiting the ability of a new franchise to enter an unoccupied region, therefore, prevents a team from entering the market and providing NFL football to a base of customers that have shown interest in the product, but for whom access is artificially directed.<sup>213</sup> Because customers of each NFL franchise exist outside the regional markets of each team, and their allegiances—and corresponding dollars—are funneled to existing teams due to artificial restriction of a more local provider, intra-league competition is limited.<sup>214</sup> The direct effect of the limitation is the same as that identified in *Los Angeles Memorial Coliseum*.<sup>215</sup> Mainly, that existing NFL franchises retain monopoly power to set prices.<sup>216</sup> Presumably, competition between

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rule of reason test. See *Cal. Dental Ass'n v. F.T.C.*, 526 U.S. 756, 782 (1999) (Breyer, J., concurring in part and dissenting in part) (identifying a four-part test involving weighing the restraint and market power of the defendant); *Mid-S. Grizzlies*, 720 F.2d at 783 (citing *Mid-S. Grizzlies v. Nat'l Football League*, 550 F. Supp. 558, 571 (E.D. Pa. 1982)) (determining that the NFL holds a monopoly in professional football in the United States).

<sup>210</sup> See *L.A. Mem'l Coliseum*, 726 F.2d at 1395–96, 1401 (finding that the anticompetitive harms of the NFL relocation policy outweighed legitimate concerns of the NFL in controlling franchise relocation); *Mid-S. Grizzlies*, 720 F.2d at 786–87 (stating that, despite the NFL's reasons for rejecting the plaintiff's franchise, a showing of intra-league competition that was restrained by the NFL's expansion policy could result in a different analysis and outcome).

<sup>211</sup> See *L.A. Mem'l Coliseum*, 726 F.2d at 1395 (holding that restricting a team from relocating into an occupied territory synthetically restricted competition and gave the occupying team a monopoly in the region); *Mid-S. Grizzlies*, 720 F.2d at 787 (stating that the record failed to present evidence that a franchise in Memphis would compete in any way with established NFL teams for the benefit of consumers).

<sup>212</sup> See *SeatGeek & Priceonomics, Here's Where Each NFL Team Is Most Popular in America, Mapped*, BUS. INSIDER (Oct. 7, 2018), <https://www.businessinsider.com/where-nfl-teams-most-popular-map-of-america-2018-10> [<https://perma.cc/4MR2-TCTR>] (providing a map of the United States showing what the most popular NFL team is in any given county).

<sup>213</sup> See *id.* (showing that consumers of NFL football in regions where there is no local team support existing franchises in other locations).

<sup>214</sup> See *Mid-S. Grizzlies*, 720 F.2d at 786 (requiring that a challenge to the NFL expansion policy show an injury to intra-league competition); *SeatGeek & Priceonomics, supra* note 212 (showing that fans of NFL football in regions without a local team support, and likely spend on, existing franchises in other locations).

<sup>215</sup> See *L.A. Mem'l Coliseum*, 726 F.2d at 1395 (finding that the lack of local competition created by the NFL's relocation policy grants monopoly power to established teams to the detriment of consumers).

<sup>216</sup> See *id.* (including price control as an effect of monopoly power resulting from artificially depressed competition).

an existing franchise and a new entrant, although not necessarily impactful on fans in the home cities, will increase efforts to attract fans in neutral geographic areas for the benefit of all.<sup>217</sup>

*B. The Sports Broadcasting Act Should Not Shield the NFL from Anticompetitive Conduct*

A major argument in the court's decision in *Mid-South Grizzlies* relied on the conclusion that the Sports Broadcasting Act was a Congressional grant of monopoly power.<sup>218</sup> This reading, however, appears to ignore the express language of the Sports Broadcasting Act, and is even less relevant following the NFL's abandonment of its tax-free status.<sup>219</sup> Although the Sports Broadcasting Act immunized the NFL from liability under § 2 of the Sherman Act when it sought to merge with the AFL, the language of the statute limits the exception to broadcasting and mergers, not exclusion.<sup>220</sup> As a result, it is reasonable to presume that the current NFL is subject to liability for monopolistic behavior, and the Sports Broadcasting Act cannot serve as a shield from § 1 liability.<sup>221</sup> With no statutory exemption, the NFL should be subject to antitrust liability

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<sup>217</sup> See *id.* (presuming that competition between two NFL franchises in the Los Angeles area would create benefits for consumers of NFL football in that region); SeatGeek & Priceconomics, *supra* note 212 (showing that there are large numbers of NFL consumers in regions not represented by an NFL franchise). Comparing the NFL fans in North Dakota to those in New Mexico provides an example of this concept. See *id.* (showing fan representation by county in both states). In New Mexico, which is bordered by three states containing NFL teams (Colorado, Arizona, and Texas), fandom is split. See *id.* (showing that counties in New Mexico are divided among fans of the Denver Broncos, Arizona Cardinals, and Dallas Cowboys). In North Dakota, which borders only one NFL-occupied state, nearly every county has a majority of Vikings fans. See *id.* (showing that forty-seven of fifty-three counties in North Dakota are majority Minnesota Vikings fans).

<sup>218</sup> See *Mid-S. Grizzlies*, 720 F.2d at 784, 788 (noting the congressional grant of a monopoly to the NFL in support of reasoning that the NFL could not be liable under either § 1 or § 2 of the Sherman Act).

<sup>219</sup> See 15 U.S.C. § 1291 (limiting the inapplicability of antitrust liability to the NFL exclusively to an agreement by members of two tax-exempt football leagues to merge into one tax-exempt football league); *Mid-S. Grizzlies*, 720 F.2d at 784, 788 (using the Sports Broadcasting Act as support for denying a challenge to the NFL expansion policy under §§ 1 and 2 of the Sherman Act); Dubin, *supra* note 86 (attaching a memorandum from the NFL commissioner to league members detailing the abandonment of tax-free status). As a result of the NFL's 2015 decision to forego its status as tax-exempt, the application of the Sports Broadcasting Act should be limited to the statute's original language prior to the 1966 amendment. See 15 U.S.C. § 1291 (exempting antitrust law applicability to tax-free football leagues); Dubin, *supra* note 86 (discussing the end of the NFL's tax-free status).

<sup>220</sup> See 15 U.S.C. § 2 (making monopolization illegal); *id.* § 1291 (providing two specific exceptions to antitrust laws for the NFL); *Mid-S. Grizzlies*, 720 F.2d at 784 (noting that the Sports Broadcasting Act was amended in 1966 to provide a statutory exception allowing the AFL and NFL to merge).

<sup>221</sup> See 15 U.S.C. § 1291 (granting limited exceptions to antitrust liability for agreements between sports league members related to broadcasting agreements and to tax-exempt football leagues); *Mid-S. Grizzlies*, 720 F.2d at 784 (applying the Sports Broadcasting Act in an analysis of the NFL's liability under § 1 of the Sherman Act).

when its conduct results in harm to consumers, which occurs when the franchises hold monopoly power due to artificial restrictions of entry.<sup>222</sup>

### *C. Courts Should Adopt Parallel Exclusion as a Method of Antitrust Analysis*

As an analytical tool, the theory of parallel exclusion allows courts to look past the form of anticompetitive conduct to the actual effect it has on the intended beneficiary of U.S. antitrust laws: the consumer.<sup>223</sup> When multiple actors engage in parallel conduct encouraged by their individual interests, such as the decision by NFL franchises to vote against new entrants to preserve inflated profits, consumers may experience anticompetitive effects.<sup>224</sup> The existence of a rule of reason test, which should still apply to identified parallel exclusion, provides some protection to alleged excluders, as it still requires a weighing of procompetitive justifications.<sup>225</sup> The hole in antitrust coverage that allows parallel excluders to restrict competition and avoid liability, solely because they do not form an agreement or have individual monopolies, is adverse to the goal of protecting consumers and must be corrected.<sup>226</sup>

## CONCLUSION

The NFL's policy of leaving the decision of whether to admit expansion franchises to a vote of existing member teams is anticompetitive and warrants liability under the Sherman Act. The parallel exclusion of new franchises creates a monopolistic environment for each existing franchise, granting protec-

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<sup>222</sup> See H.R. REP. NO. 51-1707, at 1 (identifying the objectives of the Sherman Act); *L.A. Mem'l Coliseum*, 726 F.2d at 1395 (noting that restriction of competition between teams gives monopoly power to NFL franchises, harming the interests of consumers). The existence of the Baseball Exemption adds force to the argument that there is no statutory shield protecting anticompetitive conduct by the NFL. See 15 U.S.C. § 26b (providing certain antitrust exemptions solely to professional major league baseball). The Baseball Exemption grants broader allowances to the provision of professional major league baseball, specifically setting baseball apart from other professional sports. *Id.* Because the groundwork for granting expanded antitrust exemptions exists within the umbrella of professional sports, the lack of a specific NFL exemption suggests Congress's lack of intent or desire to protect the NFL. See *id.* (preserving a baseline level of antitrust applicability to non-baseball professional sports).

<sup>223</sup> See H.R. REP. NO. 51-1707, at 1 (identifying the objective of the Sherman Act to benefit and protect consumers); Hemphill & Wu, *supra* note 9, at 1250–51 (discussing the insignificance of the agreement requirement of § 1 of the Sherman Act relative to the anticompetitive effect of the challenged conduct).

<sup>224</sup> See *L.A. Mem'l Coliseum* 726 F.2d at 1395 (noting that restriction of competition between teams allows NFL franchises to exert monopoly power for their benefit at the expense of NFL fans).

<sup>225</sup> See *Cal. Dental Ass'n*, 526 U.S. at 782 (Breyer, J., concurring in part and dissenting in part) (identifying weighing the resulting anticompetitive effects of an action against the procompetitive justifications as central to a rule of reason analysis); Hemphill & Wu, *supra* note 9, at 1247–48 (suggesting that a rule of reason test may be consistent with a parallel exclusion analysis).

<sup>226</sup> See Hemphill & Wu, *supra* note 9, at 1186–87 (identifying parallel exclusion as a theory that closes the gap between liability under §§ 1 and 2 of the Sherman Act).

tion from true competition and allowing inflated prices and no incentive to improve their product. Although these policies are excellent for business, they harm the consuming public in violation of the Sherman Act. For the NFL to defend its policy there must be stated, objective standards defining what is required for admission to the league, with the effect on consumers at the forefront.

In the event the court's view on expansion remains consistent with the decision in *Mid-South Grizzlies*, applicant franchises should be encouraged to follow the path to admission suggested by the Third Circuit. Application to an occupied market that has the means to support another franchise creates competition with the incumbent(s) for the benefit of consumers. The new franchise may then either remain in the target market or move elsewhere, with the knowledge that *Los Angeles Memorial Coliseum* held NFL relocation restrictions anticompetitive, and unenforceable.

LUCAS FOLLETT

