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Comments

NFL 3-0 IN FEDERAL APPELLATE COURT CHALLENGES TO PLAYER SUSPENSIONS: A PATTERN OF “SUBSTANTIAL DEFERENCE” TO THE NFL CREATES AN UPHILL BATTLE FOR PLAYERS

I. INTRODUCTION

As the most popular professional sports league in America, the National Football League (“NFL,” or “the League”) is known for its star athletes and highly anticipated game days.¹ However, a recent set of cases illustrates a new form of competition within the League, one in which players compete against the NFL itself in off-field legal battles.² The cases have involved star players, including former Minnesota Vikings and Arizona Cardinals running back Adrian Peterson (“Peterson”), and New England Patriots quarterback Tom Brady (“Brady”), much like an actual NFL game.³ The cases have also attracted the attention of the media and fans.⁴ Peterson and Brady each sued the League in federal court to dispute the discipline the League imposed on them after it determined the players

1. See Christopher R. Deubert et al., *Comparing Health-Related Policies and Practices in Sports: The NFL and Other Professional Leagues*, 8 HARV. J. SPORTS & ENT. L. 1, 17 (2017) (noting NFL is highest-grossing professional sports league in United States).

2. For a discussion of the lawsuits filed against the NFL by Adrian Peterson, Tom Brady and Ezekiel Elliott, see *infra* notes 54–91, 92–128, and 129–169, respectively.

3. For further discussion of the Peterson and Brady cases, see *infra* notes 54–128 and accompanying text; see also John Keim, *Adrian Peterson Signs Deal With Redskins*, ESPN (Aug. 21, 2018), http://www.espn.com/nfl/story/_/id/24427263/adrian-peterson-signs-contract-washington-redskins [<https://perma.cc/8HL9-7BVR>] (noting that Peterson now plays running back for Washington Redskins).

4. See Ken Belson, *N.F.L. Sued By Players Union Over Adrian Peterson Ruling*, N.Y. TIMES (Dec. 15, 2014), <https://www.nytimes.com/2014/12/16/sports/football/nfl-sued-by-players-union-over-adrian-peterson-ruling.html> [<https://perma.cc/7KKV-L829>] (commenting on Peterson’s lawsuit against NFL); see also Adam Kilgore, *Details of Tom Brady’s Potential Lawsuit Against NFL; Patriots QB Could Possibly Start Week 1*, WASH. POST (July 15, 2015), https://www.washingtonpost.com/news/sports/wp/2015/07/15/details-of-tom-bradys-potential-lawsuit-against-nfl-patriots-qb-could-possibly-start-week-1/?utm_term=.cfc0d5ea1c9f [<https://perma.cc/GZ3Z-3P9F>] (providing details of Brady’s lawsuit); see also Ben Volin, *Tom Brady Officially Files Suit Against the NFL*, BOS. GLOBE (July 30, 2015), <https://www.bostonglobe.com/sports/2015/07/29/tom-brady-files-lawsuit-against-nfl/h8xeRX-AKRSWx93RCnAFk2L/story.html> [<https://perma.cc/9N6R-SG3W>] (discussing Brady’s lawsuit against NFL).

had violated one of the NFL's policies.⁵ In both cases, the players prevailed in district court, only to be defeated on appeal by the NFL.⁶

Dallas Cowboys' running back Ezekiel Elliott ("Elliott") was the most recent player to challenge a League-imposed suspension in federal court, and Peterson and Brady set the stage for this litigation.⁷ Elliott filed suit against the NFL in September 2017.⁸ Like Peterson and Brady, Elliott was successful in district court, securing an injunction against the NFL to prevent his suspension from taking effect.⁹ However, the NFL continued its winning streak at the appellate level, and Elliott's case met the same fate as the Peterson and Brady cases when the Fifth Circuit reversed the decision of the district court.¹⁰

The Elliott case is significant for several reasons.¹¹ In the context of the Peterson and Brady cases, the Elliott case demonstrates a pattern of federal appellate courts reinstating League discipline and reversing district court decisions favoring NFL players.¹² This pattern suggests that federal appellate courts exhibit substantial deference to the NFL when they review League-issued arbitration awards and that, as a result, the NFL will ultimately prevail in suits

5. See NFL Players Ass'n v. NFL, 88 F. Supp. 3d 1084, 1089 (D. Minn. 2015) [hereinafter *Peterson I*] *rev'd and remanded sub nom.* NFL Players Ass'n *ex rel.* Peterson v. NFL, 831 F.3d 985 (8th Cir. 2016) [hereinafter *Peterson II*] (noting NFL Players' Association filed petition on behalf of Peterson to vacate arbitration award upholding League-imposed punishment against Peterson); see also NFL Mgmt. Council v. NFL Players Ass'n, 125 F. Supp. 3d 449, 452 (S.D.N.Y. 2015) [hereinafter *NFL Mgmt. Council I*], *rev'd*, 820 F.3d 527 (2d Cir. 2016) [hereinafter *NFL Mgmt. Council II*] (describing NFLPA's lawsuit against NFL on behalf of Brady).

6. See *Peterson II*, 831 F.3d at 993–99 (providing Eighth Circuit's holding in favor of NFL); see also *NFL Mgmt. Council II*, 820 F.3d at 532 (reversing district court's decision to vacate arbitration award on grounds that "the Commissioner properly exercised his broad discretion to resolve an intramural controversy between the League and a player").

7. See Michael McCann, *Ezekiel Elliott Sues the NFL: What it Means For the League's Suspension of the Cowboys RB*, SPORTS ILLUSTRATED (Sept. 1, 2017), <https://www.si.com/nfl/2017/09/01/ezekiel-elliott-suspension-sues-nfl-nflpa-lead-investigator-domestic-violence> [<https://perma.cc/WT4T-96CE>] (discussing Elliott's suit against NFL following League-imposed suspension).

8. See generally NFL Players Ass'n v. NFL, 270 F. Supp. 3d 939 (E.D. Tex. Sept. 8, 2017) [hereinafter *Elliott I*], *vacated and remanded*, 874 F.3d 222 (5th Cir. 2017) [hereinafter *Elliott II*] (noting NFLPA sued NFL on behalf of Elliott seeking vacatur of arbitrator's impending decision).

9. See *id.* at *1 (enjoining NFL's suspension of Elliott).

10. See *Elliott II*, 874 F.3d at 225 (remanding case with instructions to dismiss).

11. See *id.* at 224–236 (offering details of Elliott case in Fifth Circuit).

12. See *Peterson II*, 831 F.3d at 993–99 (8th Cir. 2016) (holding in favor of NFL); see also *NFL Mgmt. Council II*, 820 F.3d 527, 532 (2d Cir. 2016) (reversing district court's decision to vacate arbitration award and finding in favor of NFL).

filed by NFL players to challenge the arbitration process.¹³ The case also involves an analysis of federal arbitration law, with the Fifth Circuit delivering an outcome that transcends sports and will likely impact future labor disputes.¹⁴

The Elliott case is also significant because it illustrates the power of the NFL over its players, and the extent to which the NFL derives its power from the collective bargaining agreement (“CBA,” or “the Agreement”) between the National Football League Management Council (“NFLMC”) and the National Football League Players Association (“NFLPA”).¹⁵ The CBA governs each NFL player’s relationship with the League.¹⁶ The Agreement is the product of negotiation between the NFLMC, which is led by the League Commissioner and represents the NFL teams in the collective bargaining process, and the NFLPA, which represents the NFL players.¹⁷ However, the Elliott case shows that the CBA significantly favors the League, to the disadvantage of players.¹⁸ Therefore, the case carries the potential to influence the terms of the new CBA, which will take effect in 2021.¹⁹

This Casenote argues that federal appellate courts show substantial deference to the NFL when they review the decisions of League arbitrators and that, as a result, the NFL will always prevail over players who challenge the arbitration process.²⁰ In Part II, this Casenote discusses the CBA, including its role in the Elliott case

13. See *Peterson I*, 88 F. Supp. 3d at 1089 (D. Minn. 2015), *rev’d and remanded sub nom. Peterson II*, 831 F.3d 985 (quoting *Associated Elec. Coop., Inc. v. Int’l Bhd. of Elec. Workers, Local No. 53*, 751 F.3d 898, 901 (8th Cir. 2014)) (providing that federal courts afford “substantial deference” to arbitration awards).

14. See *Elliott II*, 874 F.3d at 225–29 (vacating district court’s preliminary injunction against League).

15. See generally COLLECTIVE BARGAINING AGREEMENT (Aug. 4, 2011) [hereinafter 2011 NFL CBA], available at <https://nflabor.files.wordpress.com/2010/01/collective-bargaining-agreement-2011-2020.pdf> [<https://perma.cc/CR9E-ZW2C>] (stating terms of agreement between NFL clubs and NFL players).

16. See *id.* (providing terms of agreement between NFL and its players).

17. See Daniel R. Peterson & Michael J. Redding, *Third and Long: The Issues Facing the NFL Collective Bargaining Agreement Negotiations and the Effects of an Uncapped Year*, 20 MARQ. SPORTS L. REV. 95, 96–97 (2009) (providing background information on CBA, including parties and terms).

18. See *id.* (analyzing current NFL CBA); see also *Elliott II*, 874 F.3d at 225 (ruling in favor of NFL).

19. See Matt Bonesteel, *NFL Players’ Union Leader Says 2021 Labor War ‘Is Almost a Virtual Certainty’*, WASH. POST (Aug. 18, 2017), https://www.washingtonpost.com/news/early-lead/wp/2017/08/18/nfl-players-union-leader-says-2021-labor-war-is-almost-a-virtual-certainty/?utm_term=.dbd8259f8931 [<https://perma.cc/5P3C-QDS7>] (noting current NFL CBA expires in 2021).

20. For further discussion of the standard of review in federal arbitration cases, see *infra* notes 42–53 and accompanying text.

and the key provisions that impacted the Fifth Circuit's analysis.²¹ Part II also includes a summary of the legal principles that established the Fifth Circuit majority's standard of review.²² Additionally, Part II analyzes the Peterson and Brady cases as the precursors to the Elliott case.²³ Part III of this Casenote reviews the facts of the Elliott case.²⁴ Part IV provides an overview of the Fifth Circuit majority's decision, as well as an overview of Judge Graves's dissenting opinion.²⁵ Part V critiques the court's analysis, including its approach to the significance of the CBA, and its application of prior Fifth Circuit cases.²⁶ Finally, Part VI explores the potential impact of the Elliott case on future labor disputes, as well as its impact on the NFL and its players.²⁷

II. THE FIFTH CIRCUIT'S PLAYBOOK: THE CBA, THE STANDARD OF REVIEW, AND THE PETERSON AND BRADY CASES

A. The CBA

When an NFL player challenges League-imposed discipline in court, the CBA plays a lead role in the court's resolution of the matter.²⁸ The Elliott case aptly illustrates this reliance on the current CBA.²⁹ The CBA laid the groundwork for the entire dispute, including the initial investigation and hearing by NFL Commissioner Roger Goodell ("the Commissioner," "Goodell," or "Commissioner Goodell"), as well as the procedure permitting Elliott to appeal the discipline imposed by the Commissioner and commence

21. For a discussion of the relevant portions of the CBA between the NFL and its players, as well as the role of the Agreement in the Fifth Circuit's resolution of the Elliott case, see *infra* notes 29–41 and accompanying text.

22. For a discussion of the standard of review applied by the Fifth Circuit majority, see *infra* notes 42–52 and accompanying text.

23. For an analysis of the Peterson and Brady cases, see *infra* notes 54–91 and 92–128, respectively, and accompanying text.

24. For a discussion of the facts of the Elliott case, see *infra* notes 129–169 and accompanying text.

25. For an analysis of the Fifth Circuit majority's opinion in the Elliott case, see *infra* notes 170–208 and accompanying text. For an analysis of Judge Graves's dissenting opinion, see *infra* notes 209–241.

26. For a critique of the Fifth Circuit's holding, see *infra* notes 242–292.

27. For a discussion of the potential impact of the Fifth Circuit's holding in the Elliott case, see *infra* notes 296–324 and accompanying text.

28. See 2011 NFL CBA, Art. 46 (outlining NFL protocols for "Commissioner Discipline").

29. See *Elliott II*, 874 F.3d at 229 (holding that each NFL player is "required to exhaust his contractual remedies before filing his lawsuit").

arbitration.³⁰ The CBA also served as the foundation for the matter once it reached court, steering the Fifth Circuit’s analysis.³¹

The CBA is the product of negotiation between the NFLMC, which is led by the League Commissioner and represents the NFL teams in the collective bargaining process, and the NFLPA, which represents the NFL players.³² Article 46 is the most pertinent section of the CBA in the context of the Elliott case.³³ It permits the Commissioner to impose discipline on players for “conduct detrimental to the integrity of, or public confidence in, the game.”³⁴ Article 46 also allows a player to appeal the Commissioner’s disciplinary decision to a hearing officer appointed by the Commissioner.³⁵ Notably, Article 46 permits the “Commissioner or his designee” to serve as hearing officers in an arbitration proceeding.³⁶

Each player also signs a contract, which is part of the CBA.³⁷ The contract states that, upon a finding of conduct detrimental to the League, the Commissioner “will have the right, but only after giving Player the opportunity for a hearing . . . to fine Player in a reasonable amount; to suspend Player for a period certain or indefinitely; and/or to terminate this contract.”³⁸ The NFL also has a Personal Conduct Policy (“PCP”), which is part of the CBA and de-

30. See 2011 NFL CBA, Art. 46 (detailing procedures through which Commissioner may investigate player conduct and impose discipline, and through which player may pursue arbitration to appeal Commissioner’s decision).

31. See *Elliott II*, 874 F.3d 222, 232–36 (discussing pertinent sections of CBA and role of CBA as binding contract between parties).

32. See Peterson & Redding, *supra* note 17, at 96–97 (naming parties to CBA).

33. See 2011 NFL CBA, Art. 46 (outlining NFL protocols for “Commissioner Discipline,” including hearings and penalties).

34. See *id.* at § 1(a) (detailing aspects of “League Discipline”).

35. See *id.* at §§ 1(a), 2(a) (outlining procedure for player appeals).

36. *Peterson I*, 88 F. Supp. 3d 1084, 1088 (D. Minn. 2015), *rev’d and remanded sub nom. Peterson II*, 831 F.3d 985 (8th Cir. 2016) (quoting language from CBA); see also 2011 NFL CBA, Art. 46 (providing that Commissioner may act as arbitrator in proceeding between League and player).

37. See 2011 NFL CBA, Art. 4 (stating that NFL teams and NFL players agree to amend NFL Player Contract contained in CBA); *NFL Player Contract*, SEC. AND EXCH. COMM’N, available at https://www.sec.gov/Archives/edgar/data/1573683/000104746913009713/a2216998zex-10_3.htm (last accessed Jan. 7, 2019) [<https://perma.cc/PS74-6CJD>] (providing terms of standard contract for NFL player); see also *Peterson I*, 88 F. Supp. 3d at 1086 (D. Minn. 2015), *rev’d and remanded sub nom. Peterson II*, 831 F.3d 985 (discussing terms of players’ contracts with NFL).

38. See 2011 NFL CBA, Art. 46 (discussing scope of Commissioner’s ability to discipline players).

termines what constitutes conduct detrimental to the League and the discipline that may follow.³⁹

The Elliott case shows that the CBA favors the NFL, and that courts are unwilling to depart from the CBA when resolving disputes between NFL players and the League.⁴⁰ Thus, the case raises the possibility that players will demand more favorable arbitration terms during the collective bargaining process for the 2021 agreement.⁴¹

B. Federal Arbitration Law as the Standard of Review

The Peterson, Brady, and Elliott cases originated in the realm of sports, but they required each court to analyze federal arbitration law.⁴² Each player filed his lawsuit *only* after he participated in mandatory arbitration proceedings with the NFL.⁴³ The principles of federal arbitration law in each case establish the judicial standard of review of an arbitrator's award and highlight the uphill battle that NFL players face when they challenge a League-imposed arbitration award in court.⁴⁴

39. See *Peterson I*, 88 F. Supp. 3d at 989 (acknowledging applicability of NFL PCP to case).

40. See *Elliott II*, 874 F.3d 222, 232–36 (5th Cir. 2017) (discussing significance of CBA in resolution of case and delivering holding in favor of NFL and reversing district court's decision to grant petition by NFLPA and Elliott to vacate arbitration award).

41. See Kevin Seifert, *DeMaurice Smith: NFLPA Will Approach 2021 Talks Like War*, ESPN (Feb. 2, 2018), http://www.espn.com/nfl/story/_/id/22291292/demaurice-smith-nflpa-approach-2021-cba-talks-war [<https://perma.cc/KB5X-R3Q5>] (stating NFL “[p]layers plan to pursue changes” to current CBA when it expires in 2021).

42. See *Peterson I*, 88 F. Supp. 3d at 1089 (analyzing federal arbitration law as result of petition filed by NFLPA on behalf of Peterson to vacate arbitration award upholding League-imposed punishment against Peterson); see also *NFL Mgmt. Council I*, 125 F. Supp. 3d 449, 452 (S.D.N.Y. 2015), *rev'd*, *NFL Mgmt. Council II*, 820 F.3d 527 (2d Cir. 2016) (analyzing federal arbitration law in context of NFLPA's lawsuit against NFL on behalf of Brady); see also generally *Elliott I*, 270 F. Supp. 3d 939 (E.D. Tex. Sept. 8, 2017), *vacated and remanded*, *Elliott II*, 874 F.3d 222 (analyzing federal arbitration law in context of NFLPA's lawsuit on behalf of Elliott to challenge arbitrator's decision to uphold League-imposed suspension of Elliott).

43. See 2011 NFL CBA, Art. 15 (requiring players to engage in arbitration with NFL if players appeal League-imposed discipline).

44. See *Peterson I*, 88 F. Supp. 3d at 1089 (analyzing federal arbitration law as result of petition filed by NFLPA on behalf of Peterson to vacate arbitration award upholding League-imposed punishment against Peterson); see also *NFL Mgmt. Council I*, 125 F. Supp. 3d at 452 (analyzing federal arbitration law in context of NFLPA's lawsuit against NFL on behalf of Brady); see also *Elliott I*, 270 F. Supp. 3d at 947–48 (analyzing federal arbitration law in context of NFLPA's lawsuit on behalf of Elliott to challenge arbitrator's decision to uphold League-imposed suspension of Elliott).

As the district court stated in the Peterson case, “[c]ourts give decisions by labor arbitrators ‘substantial deference.’”⁴⁵ In other words, “[a]s long as the arbitrator is even arguably construing or applying the [CBA] and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision.”⁴⁶ However, the arbitrator’s authority does not go completely unchecked by a reviewing court.⁴⁷ “The court must vacate the award if it fails to ‘draw its essence from the agreement,’ such that the arbitrator imposed ‘his own brand of industrial injustice.’”⁴⁸ An arbitration award may also be vacated when the arbitrator “‘exceed[ed] the authority given to him by the CBA or decided matters parties have not submitted to him.’”⁴⁹

The findings of the district court in each case illustrate the potential relief that these avenues for judicial intervention offer to an NFL player who brings a lawsuit to challenge the unfavorable award of a League arbitrator.⁵⁰ However, the decisions of each appellate court suggest that the “substantial deference” standard is the guiding principle for judicial review of an arbitration award.⁵¹ The decisions further suggest that when courts apply the “substantial deference” standard to players’ lawsuits under the current CBA, the NFL will ultimately prevail.⁵² The Peterson and Brady cases are instructive in demonstrating the application of this standard of review

45. *Peterson I*, 88 F. Supp. 3d at 1089 (quoting *Associated Elec. Coop., Inc. v. Int’l Bhd. of Elec. Workers, Local No. 53*, 751 F.3d 898, 901 (8th Cir. 2014)).

46. *Id.* (quoting *United Paperworkers Int’l Union v. Misco, Inc.*, 484 U.S. 29, 38 (1987)).

47. *See id.* at 901 (quoting *Associated Elec. Coop.*, 751 F.3d 898, 901) (stating “[a] court need not merely rubber stamp the arbitrator’s interpretations and decisions”).

48. *Id.* (quoting *Associated Elec. Coop.*, 751 F.3d at 901).

49. *Id.* at 1089 (D. Minn. 2015), *rev’d and remanded sub nom. Peterson II*, 831 F.3d 985 (discussing judicial standard of review of arbitrator’s award).

50. *See Peterson I*, 88 F. Supp. 3d at 1089 (finding in favor of Peterson and granting vacatur of arbitration award); *see also NFL Mgmt. Council I*, 125 F. Supp. 3d 449, 452 (S.D.N.Y. 2015), *rev’d, NFL Mgmt. Council II*, 820 F.3d 527 (2d Cir. 2016) (finding in favor of Brady and vacating arbitrator’s award upholding Brady’s suspension); *see also Elliott I*, 270 F. Supp. 3d 939 (E.D. Tex. Sept. 8, 2017), *vacated and remanded, Elliott II*, 874 F.3d 222 (5th Cir. 2017) (finding in favor of Elliott and granting injunction to prevent NFL from enforcing Elliott’s suspension).

51. *See Peterson II*, 831 F.3d at 993–98 (providing Eighth Circuit’s holding in favor of NFL); *see also NFL Mgmt. Council II*, 820 F.3d at 532 (reversing district court’s decision to vacate arbitration award on grounds that “the Commissioner properly exercised his broad discretion to resolve an intramural controversy between the League and a player”); *see also Elliott II*, 874 F.3d at 229 (holding in favor of NFL and vacating district court’s preliminary injunction against League).

52. *See Peterson II*, 831 F.3d at 998–99 (upholding arbitration award in favor of NFL); *see also NFL Mgmt. Council II*, 820 F.3d at 549 (upholding arbitration award and discipline NFL imposed on Brady); *see also Elliott II*, 874 F.3d at 229 (holding

and in setting the context for the Fifth Circuit's decision in the Elliott case.⁵³

C. The Adrian Peterson Case

On September 11, 2014, a grand jury indicted Peterson on a charge of felony reckless or negligent injury of a child, as a result of a May 2014 incident involving his son.⁵⁴ "Peterson pleaded *nolo contendere* to a reduced misdemeanor charge of reckless assault."⁵⁵ At the time, Peterson played for the Minnesota Vikings.⁵⁶ The NFL acknowledged Peterson's plea and informed him that the League would review the matter for potential disciplinary action under the PCP.⁵⁷ On November 18, 2014, Commissioner Goodell told Peterson that his conduct during the May 2014 incident was detrimental to the League.⁵⁸ The Commissioner then applied the PCP to Peterson and suspended Peterson without pay for at least the remainder of the 2014 season, fined him six weeks' pay, and ordered him to participate in a counseling and treatment program.⁵⁹ Notably, the Commissioner applied the updated version of the PCP, which the Commissioner had enacted on August 28, 2014, in response to the domestic violence incident involving Baltimore Ravens running back Ray Rice.⁶⁰ The updated PCP increased the sanctions for domestic violence and sexual assault incidents, al-

that district court lacked subject matter jurisdiction to issue preliminary injunction against NFL).

53. For discussion of the judicial standard of review for challenges to an arbitrator's award, see *supra* notes 42–52 and accompanying text; see also *Elliott II*, 874 F.3d at 225 (holding in favor of NFL and vacating district court's preliminary injunction against League).

54. See *Peterson I*, 88 F. Supp. 3d at 1087 (providing details of charges brought against Peterson).

55. See *id.* (noting that, on November 4, 2014, Peterson pleaded *nolo contendere* to reduced misdemeanor charge of reckless assault, after which court issued deferred adjudication order and placed Peterson on community supervision for two years).

56. See *id.* (noting Minnesota Vikings deactivated Peterson shortly after indictment).

57. See *id.* (providing NFL's response to charges against Peterson).

58. See *id.* at 1088 (discussing NFL Commissioner's decision to punish Peterson under PCP).

59. See *id.* at 1087–88 (discussing NFL Commissioner's decision to punish Peterson for "conduct detrimental to the League" under PCP and stating that results of Peterson's time in counseling and treatment would dictate whether he could return to NFL). The PCP establishes "a baseline discipline of a suspension without pay for six games for certain offenses, including a first offense of assault, battery, or domestic violence." *Id.*

60. See *id.* at 1086, 1090 (providing background of updated PCP, which Commissioner Goodell applied to Peterson in response to charges filed against Peterson).

lowing “suspension without pay of six games for a first offense, with consideration given to mitigating factors, as well as a longer suspension when circumstances warrant.”⁶¹ Although the PCP was not collectively bargained with the NFLPA, “the [L]eague asserted that the policy did not require bargaining since Article 46 [of the CBA] empowers Goodell with unlimited discretion on punishments.”⁶²

The NFLPA appealed the discipline on Peterson’s behalf, as permitted by Article 46 of the CBA.⁶³ In response, the NFL scheduled an arbitration hearing for December 2, 2014 and appointed Harold Henderson (“Henderson”) as arbitrator.⁶⁴ The NFLPA asked Henderson to recuse himself, arguing that his former role as an NFL executive established “inextricable ties” between Henderson, the League and Commissioner Goodell, and showcased his “evident partiality” toward the League.⁶⁵ Henderson declined to recuse himself, and the arbitration commenced as planned.⁶⁶

During arbitration, the NFLPA asked Henderson to consider four issues: whether (1) Commissioner Goodell had impermissibly applied the updated PCP to Peterson; (2) Peterson was deprived of a fair disciplinary process; (3) Commissioner Goodell’s requirement that Peterson undergo psychiatric counseling was permissible under the CBA; and (4) the NFL’s Exempt List could be used as a form of discipline under the CBA.⁶⁷

61. *Id.* at 1086–87 (stating that updated PCP increased sanctions that League could impose on players who had been involved in incidents of domestic violence or sexual assault).

62. Michael McCann, *Roger Goodell’s Power to Discipline Stronger Than Ever After Win vs. Adrian Peterson*, SPORTS ILLUSTRATED (Aug. 4, 2016), <https://www.si.com/nfl/2016/08/04/adrian-peterson-appeals-court-suspension-roger-goodell-wins> [<https://perma.cc/26YY-2MWH>] (discussing NFL’s rationale in enacting updated PCP without securing agreement of NFLPA).

63. *See Peterson I*, 88 F. Supp. 3d at 1088 (acknowledging Peterson’s decision to enlist NFLPA to appeal discipline imposed by Commissioner against him); *see also* 2011 NFL CBA, Art. 46, § 1(a) (providing NFL player or NFLPA may appeal Commissioner-imposed discipline within three business days of Commissioner’s notice of action to player).

64. *See Peterson I*, 88 F. Supp. 3d at 1088 (stating NFL selected Henderson to serve as arbitrator for Peterson’s December 2, 2014 hearing).

65. *See id.* (discussing Henderson’s current and past relationship with NFL). Notably, Henderson had served as NFL executive for nearly two decades and had earned \$2.5 million in compensation from NFL since 2009. *Id.* at 1088 n.2.

66. *See id.* (providing that Henderson declined to recuse himself from role as arbitrator for Peterson’s hearing).

67. *See id.* at 1088–89 (listing four issues raised by NFLPA on behalf of Peterson during arbitration proceedings); *see also* McCann, *supra* note 62 (noting that Goodell had placed Peterson on Commissioner’s Exempt List, “a form of administrative suspension where Peterson would be paid while ineligible to play”).

Regarding the first issue, the NFLPA argued that Commissioner Goodell was required to apply the PCP that was in effect in May 2014—the time of Peterson’s misconduct—rather than the updated version that was enacted in August 2014.⁶⁸ The NFLPA asserted that, under the prior version of the PCP, the Commissioner’s disciplinary authority was limited to the imposition of a maximum two-game suspension and a fine for a first-time domestic violence offense.⁶⁹ The NFLPA asked Henderson to reduce Peterson’s punishment accordingly.⁷⁰ Henderson rejected the NFLPA’s arguments on this issue and the three others it raised in arbitration, and he upheld the Commissioner’s discipline.⁷¹

On December 15, 2014, the NFLPA filed a petition in the United States District Court for the District of Minnesota to vacate the arbitration award under the Labor Management Relations Act (“LMRA”) and the Federal Arbitration Act (“FAA”).⁷² The NFLPA argued in favor of vacating the award on four grounds:

- (1) [the arbitration award] violated the essence of the CBA;
- (2) Henderson exceeded his authority by deciding the matter based on the hypothetical question of whether Peterson’s punishment was permissible under the former PCP;
- (3) the award was fundamentally unfair given the retroactive application of the updated PCP and the procedural irregularities in the pre-discipline process; and
- (4) Henderson was an evidently partial arbitrator.⁷³

The district court found that vacatur was warranted on the basis of the first two arguments.⁷⁴ Specifically, the court ruled that the updated PCP should not have been applied retroactively to Pe-

68. See *Peterson II*, 831 F.3d 985, 990–91 (8th Cir. 2016) (providing NFLPA’s argument that Commissioner Goodell was required to abide by “custom and practice” under PCP in effect at time of Peterson’s misconduct).

69. See *id.* at 991 (noting Commissioner Goodell’s scope of authority).

70. See *id.* at 990–91 (stating that NFLPA asked Henderson to amend Peterson’s punishment to two-game suspension and fine equivalent to two-weeks’ salary).

71. See *Peterson I*, 88 F. Supp. 3d at 1089 (providing decision of Henderson as arbitrator for Peterson’s appeal).

72. See *id.* (providing details of NFLPA’s claim in federal court on behalf of Peterson); see also Labor Management Relations Act § 310, 29 U.S.C. §§ 151–169 (1935) (outlining provisions for vacating arbitration awards); see also Federal Arbitration Act § 10, 9 U.S.C. § 1 et seq. (1925) (providing circumstances in which it is appropriate to vacate arbitration awards).

73. *Peterson I*, 88 F. Supp. 3d at 1090 (listing arguments made by NFLPA on behalf of Peterson in support of petition to vacate arbitration award).

74. See *id.* at 1090–92 (providing district court’s finding in favor of NFLPA and Peterson).

terson and that “Henderson exceeded his authority by adjudicating the hypothetical question of whether Peterson’s discipline could be sustained under the previous [PCP].”⁷⁵ Judge Doty, who wrote the court’s opinion, criticized Commissioner Goodell for his decision to apply the updated PCP to Peterson.⁷⁶ Judge Doty referenced the Commissioner’s August 2014 statement to the public noting that the new domestic abuse provisions of the updated PCP constituted a “change” in League policy.⁷⁷ In Judge Doty’s opinion, this statement amounted to an implied admission by Commissioner Goodell that he had disciplined Peterson under the new PCP.⁷⁸

The NFL appealed to the Eighth Circuit because it was unwilling to accept its loss in district court.⁷⁹ The League raised only one issue on appeal: whether it could collect the Commissioner’s fine against Peterson that Henderson upheld during arbitration.⁸⁰ On August 4, 2016, the court issued an opinion in full agreement with the NFL.⁸¹ Judge Colloton, who wrote the opinion on behalf of the panel, began by emphasizing the limited authority of federal courts in vacating arbitration awards.⁸² Judge Colloton stated that the Eighth Circuit could “not apply [its] own view of what would be appropriate player discipline, and . . . do[es] not review whether the arbitrator ‘correctly’ construed the Collective Bargaining Agreement when he reviewed the Commissioner’s decision.”⁸³ Instead,

75. *Id.* (providing district court’s rationale for granting vacatur of arbitration award).

76. *See* McCann, *supra* note 62 (asserting that Judge Doty was critical of Commissioner Goodell in finding for NFLPA and Peterson and granting petition of vacatur).

77. *See Peterson I*, 88 F. Supp. 3d at 1090–91 (“Henderson’s conclusion that the [updated PCP] is consistent with the previous [PCP] is contradicted by the Commissioner’s own statements in which he acknowledged that the [updated PCP] included ‘changes.’”).

78. *See* McCann, *supra* note 62 (quoting Judge Doty’s criticism of Commissioner Goodell for applying updated PCP to Peterson, and stating, “[t]o Judge Doty, the commissioner’s own words indicated that Peterson was the recipient of a retroactive punishment”).

79. *See Peterson II*, 831 F.3d 985, 992–93 (8th Cir. 2016) (providing background of Peterson case, including district court’s ruling, and NFL’s decision to appeal to Eighth Circuit).

80. *See id.* at 989 (noting that NFL’s appeal only concerned monetary sanction Commissioner Goodell imposed against Peterson and arbitrator upheld).

81. *See id.* at 993–99 (holding in favor of NFL, reversing district court’s judgment, and remanding with instructions to dismiss NFLPA’s petition to vacate arbitration award).

82. *See id.* at 993 (citing *Major League Baseball Players Ass’n v. Garvey*, 532 U.S. 504 (2001)) (“In an arbitration case like this one, the role of the courts is very limited.”).

83. *Id.* (clarifying Eighth Circuit’s limited scope of review in analysis of Peterson’s case).

the court confined its analysis to deciding whether Henderson had plausibly applied Article 46 of the CBA and reasonably interpreted the “law of the shop,” which requires consistency in arbitration awards.⁸⁴

After applying those principles, the Eighth Circuit found “no basis for setting aside the decision [of the arbitrator].”⁸⁵ Writing for the court, Judge Colloton reasoned that Henderson acted within his authority as an arbitrator when he determined that Commissioner Goodell had not changed the PCP in August 2014, even though the Commissioner had used the word “change” to describe the new domestic violence provisions and corresponding disciplinary measures for players.⁸⁶ As Judge Colloton reasoned, “the Commissioner is not forever bound to historical precedent if prior discipline under the Personal Conduct Policy provided insufficient deterrence.”⁸⁷ “In other words, the League might change its discipline without changing its policy.”⁸⁸ Thus, Judge Colloton “thought it was ‘unnecessary’ under federal law for Henderson ‘to decide whether the Commissioner applied an ‘old’ policy, a ‘new’ policy, or simply a ‘single’ policy that encompassed the writings from both June and August.’”⁸⁹ The Eighth Circuit afforded substantial deference to the NFL in its resolution of the Peterson case.⁹⁰ The outcome was not an unfamiliar one, though, given the holding of the Second Circuit in the Brady case just four months earlier.⁹¹

84. *See id.* at 995–96 (outlining limited scope of review for federal court in arbitration cases and stating: “In any event, the question for a reviewing court is not whether the arbitrator’s distinctions were correct, but whether the arbitrator was arguably construing and applying the contract and the law of the shop”).

85. *Id.* at 996 (stating court’s finding that arbitration award in favor of NFL could not be vacated).

86. *See id.* at 994–95 (providing court’s reasoning for finding that Henderson had not exceeded scope of his authority as League arbitrator in Peterson hearing).

87. *Id.* at 995 (offering support for court’s conclusion that August 2014 updates to NFL’s PCP did not constitute “change” in League policy).

88. *Id.*

89. *Id.* at 995 (providing court’s finding that federal law did not require Henderson to determine whether Commissioner Goodell had applied updated version of PCP in imposing discipline on Peterson); *see also* McCann, *supra* note 62 (referring to Judge Colloton’s opinion to decide how to apply updated PCP to Peterson’s case).

90. *See Peterson II*, 831 F.3d at 993–99 (providing Judge Colloton’s reasoning for holding in favor of NFL and rationale for decision to reverse district court’s judgment and remand case with instructions to dismiss NFLPA’s petition to vacate arbitration award).

91. *See McCann supra* note 62 (“Judge Colloton’s opinion echoed themes that were enunciated in the . . . opinion by Judges Barrington Parker, Jr. and Denny Chin against Brady.”).

D. The Tom Brady Case

On May 11, 2015, the NFL suspended Tom Brady, quarterback for the New England Patriots, for four games without pay.⁹² The suspension came after the League concluded that Brady had participated in a scheme to deflate footballs during the 2015 American Football Conference Championship Game.⁹³ The NFL also punished the Patriots, imposing a \$1 million fine on the team and requiring the Patriots to forfeit their first-round draft pick in 2016 and fourth-round pick in 2017.⁹⁴ Brady exercised his Article 46 right to appeal the discipline by proceeding to arbitration with the League.⁹⁵ Commissioner Goodell served as the arbitrator, which he is permitted to do under Article 46 of the CBA.⁹⁶ Perhaps unsurprisingly, Commissioner Goodell upheld the discipline he had imposed on Brady.⁹⁷ Goodell concluded, “Brady knew about, approved of, consented to, and provided inducements and rewards in support of a scheme by which, [Patriots’ employees] tampered with the game balls.”⁹⁸

Brady enlisted the NFLPA to appeal the arbitration award in federal court.⁹⁹ The NFLPA filed a petition to vacate the award on Brady’s behalf in the Southern District of New York.¹⁰⁰ In re-

92. See *NFL Mgmt. Council II*, 820 F.3d 527, 531 (2d Cir. 2016) (noting decision to discipline Brady without pay for four games).

93. See *id.* (providing background of NFL’s decision to suspend Brady).

94. See *NFL Mgmt. Council I*, 125 F. Supp. 3d 449, 452 (S.D.N.Y. 2015) (noting that New England Patriots were also disciplined by NFL for 2015 incident involving deflated footballs), *rev’d*, *NFL Mgmt. Council II*, 820 F.3d 527.

95. See *id.* at 457 (opting to appeal through Players Association); 2011 NFL CBA, Art. 46 (outlining NFL protocols for “Commissioner Discipline,” including process by which players are permitted to appeal discipline and proceed to arbitration).

96. See *NFL Mgmt. Council I*, 125 F. Supp. 3d at 457 (noting Goodell opted to serve as arbitrator for Brady’s hearing); see also 2011 NFL CBA, Art. 46 (stating “Commissioner or his designee” are entitled to serve as hearing officers in arbitration).

97. See *NFL Mgmt. Council I*, 125 F. Supp. 3d at 461–62 (stating outcome of Brady’s arbitration hearing, in which Commissioner Goodell served as arbitrator).

98. *Id.* (noting Commissioner Goodell based his July 28, 2015 decision on “the available electronic evidence, coupled with information compiled in the investigators’ interviews”).

99. See *NFL Mgmt. Council II*, 820 F.3d at 531–32 (providing information on NFLPA’s petition to vacate Commissioner Goodell’s arbitration award).

100. See *id.* at 535 (providing NFLPA’s argument that Brady lacked notice that his conduct was prohibited and punishable by suspension, and that arbitration proceedings were conducted in unfair way, thereby depriving him of fundamental fairness).

sponse, the NFL filed a cross-motion to confirm Commissioner Goodell's arbitration award.¹⁰¹

Like Peterson, Brady prevailed in district court.¹⁰² In its September 3, 2015 opinion, the court granted the NFLPA's petition to vacate the arbitration award upholding Brady's suspension.¹⁰³ The ruling invalidated Brady's suspension and enabled him to play for the Patriots in week one of the regular season.¹⁰⁴ In support of its decision to vacate the award, the court said the award was "pre-mised upon several significant legal deficiencies, including . . . inadequate notice to Brady of both his potential discipline . . . and his alleged misconduct."¹⁰⁵

The NFL filed an appeal with the Second Circuit on the same day the district court entered its opinion in favor of Brady and the NFLPA.¹⁰⁶ Shortly after, on September 25, 2015, the NFL moved for an expedited briefing, and the NFLPA consented.¹⁰⁷ In its appellate brief, the NFL argued that the district court's decision to invalidate Brady's suspension was "unfathomable" and that the lower court "reached an 'inexplicable' conclusion when [it] determined that the league failed to adequately warn Brady of the potential suspension and made errors in its investigation that required him to nullify the penalty."¹⁰⁸ The NFLPA responded by asserting that the district court had reached the correct conclusion, because

101. See *NFL Mgmt. Council I*, 125 F. Supp. 3d at 452 (noting NFL's attempt to vacate arbitration award).

102. See *id.* at 463 (holding in favor of Brady and NFLPA and granting NFLPA's petition to vacate League arbitration award upholding Brady's suspension); see also *Peterson I*, 88 F. Supp. 3d 1084, 1090–91 (D. Minn. 2015) (stating district court's finding in favor of Peterson and NFLPA), *rev'd and remanded sub nom. Peterson II*, 831 F.3d 985 (8th Cir. 2016).

103. See *NFL Mgmt. Council I*, 125 F. Supp. 3d at 463 (holding in favor of NFLPA and Brady).

104. See *Tom Brady Suspension Case Timeline*, NFL.COM (July 15, 2016, 3:24 PM), <http://www.nfl.com/news/story/0ap3000000492189/article/tom-brady-suspension-case-timeline> [<https://perma.cc/4AS5-W29Q>] (listing key dates in Brady case and noting that district court's ruling enabled Brady to resume playing football).

105. *NFL Mgmt. Council I*, 125 F. Supp. 3d at 463 (providing court's grounds for vacating arbitration award upholding Brady's discipline, including court's assertion that arbitration award was premised upon "denial of the opportunity for Brady to examine one of two lead investigators . . . and . . . denial of equal access to investigative files, including witness interview notes").

106. See *Tom Brady Suspension Case Timeline*, *supra* note 104 (outlining key points in chronology of Brady's case, including NFL's decision to appeal to Second Circuit after district court found in favor of NFLPA and Brady).

107. See *id.* (noting that NFL filed motion for expedited briefing on appeal and providing NFLPA's decision to consent to motion).

108. *Id.* (summarizing main argument made by NFL on appeal and quoting NFL's brief).

Commissioner Goodell had indeed acted outside of the scope of his authority when he suspended Brady.¹⁰⁹ The NFL then filed its final appellate brief, arguing that Commissioner Goodell's decision to suspend Brady was an appropriate exercise of his power to discipline players under the CBA.¹¹⁰

The NFL's decision to appeal to the Second Circuit proved to be a wise one, because the court found in favor of the League in its April 2016 opinion.¹¹¹ The court reversed the district court's decision to vacate the arbitration award on the grounds that "the Commissioner properly exercised his broad discretion to resolve an intramural controversy between the League and a player."¹¹² The court further concluded that each of the three bases for overturning Brady's suspension in district court "was insufficient to warrant vacatur and that none of the [NFLPA]'s remaining arguments had merit."¹¹³ The Second Circuit continued by highlighting the significance of the CBA and the extent of its final authority in disputes between the League, the NFLPA, and the players.¹¹⁴ The court stated:

Here, the parties contracted in the CBA to specifically allow the Commissioner to sit as the arbitrator in all disputes brought pursuant to Article 46, Section 1(a). They did so knowing full well that the Commissioner had the sole power of determining what constitutes 'conduct detrimental,' and thus knowing that the Commissioner would have a stake both in the underlying discipline and in every arbitration brought pursuant to Section 1(a). Had the parties wished to restrict the Commissioner's authority, they could have fashioned a different agreement.¹¹⁵

109. *See id.* (noting that NFLPA filed its appellate brief on December 7, 2015).

110. *See id.* (stating NFL filed its final appellate brief on December 21, 2015); *see also* PERSONAL CONDUCT POLICY: LEAGUE POLICIES FOR PLAYERS, 1, (2016) *available at* <https://static.nfl.com/static/content/public/photo/2017/08/11/0ap3000000828506.pdf> [<https://perma.cc/8FNN-ZFEP>] (requiring all players to refrain from "'conduct detrimental to the integrity of and public confidence in' the NFL").

111. *See NFL Mgmt. Council II*, 820 F.3d 527, 532 (2d Cir. 2016) (reversing district court's holding in favor of NFLPA and Brady).

112. *Id.* (offering findings of Second Circuit in favor of NFL, including that Commissioner Goodell did not exceed scope of his authority under CBA).

113. *Id.* at 538 (providing court's rationale for reversing district court's decision and finding in favor of NFL).

114. *See id.* at 548 (discussing CBA's binding nature on parties and how parties could have negotiated CBA differently).

115. *Id.* (acknowledging power of CBA and its existence as document mutually agreed upon by parties and thus controlling in disputes).

In his dissent, Judge Katzmman criticized the actions of Commissioner Goodell and asserted that the Commissioner violated the CBA in disciplining Brady.¹¹⁶ First, Judge Katzmman cited Article 46 of the CBA as requiring the Commissioner to provide a player with notice of the basis for any disciplinary action and an opportunity to challenge the discipline in an appeal hearing.¹¹⁷ Judge Katzmman asserted that the Commissioner had violated this requirement by “act[ing] in his capacity as an arbitrator, chang[ing] the factual basis for the disciplinary action after the appeal hearing [had] conclude[d].”¹¹⁸ In doing this, Judge Katzmman argued, Commissioner Goodell had “undermine[d] the fair notice for which the [NFLPA] bargained, deprive[d] the player of an opportunity to confront the case against him, and, it follows, exceed[ed] his limited authority under the CBA to decide ‘appeals’ of disciplinary decisions.”¹¹⁹

Judge Katzmman also stated that he was “troubled by the Commissioner’s decision to uphold the unprecedented four-game suspension,” because the Commissioner had failed to even consider a highly relevant alternative penalty, and relied, instead, on an inapt analogy to the League’s steroid policy.¹²⁰ Judge Katzmman asserted that, in this regard, Commissioner Goodell’s decision to suspend Brady was unenforceable because it did not draw its essence from the CBA.¹²¹ Judge Katzmman argued that Commissioner Goodell should have considered the penalty imposed on players

116. *See id.* at 549 (Katzmann, J., dissenting) (asserting that Second Circuit majority reached incorrect conclusion and that district court’s decision to vacate League arbitration award should have been upheld).

117. *See id.* (Katzmann, J., dissenting) (providing Judge Katzmman’s first of three dissenting arguments that Commissioner failed to provide required notice to Brady of basis for disciplinary action against him and failed to give Brady fair opportunity to appeal discipline); *see also* 2011 NFL CBA, Art. 46 (requiring League Commissioner to notify player with basis for Commissioner’s decision to discipline player and to provide player with opportunity to challenge discipline in arbitration hearing).

118. *NFL Mgmt. Council II*, 820 F.3d at 549–50 (Katzmann, J., dissenting) (asserting that Commissioner Goodell violated Article 46 when he imposed discipline on Brady, and asserting that Goodell changed factual basis for Brady’s disciplinary action after conclusion of appeal hearing).

119. *Id.* at 549 (Katzmann, J., dissenting) (arguing specific CBA violations by Commissioner Goodell).

120. *See id.* (Katzmann, J., dissenting) (arguing Commissioner Goodell failed to consider alternative penalty for Brady, opting to impose four-game suspension instead).

121. *See id.* (Katzmann, J., dissenting) (asserting that Commissioner Goodell should have considered other forms of discipline for Brady). For a discussion of the standard of judicial review of an arbitration award, *see supra* notes 42–52 and accompanying text.

who use stickum, a substance that enhances a player's grip, instead of suspending Brady for four games.¹²² In support of this argument, Judge Katzmman stated that, because "both the use of stickum and the deflation of footballs involve attempts at improving one's grip and evading the referees' enforcement of the rules, this would seem a natural starting point for assessing Brady's penalty."¹²³ Judge Katzmman suggested that Commissioner Goodell's decision to ignore the stickum penalty showed an overall failure of the award to draw its essence from the CBA.¹²⁴

Judge Katzmman concluded his dissent by emphasizing the importance of the CBA as a commitment to fairness by both parties, and condemning the Commissioner's abuse of his power under the agreement.¹²⁵ "The Commissioner's authority is . . . broad," Judge Katzmman stated, "[b]ut it is not limitless, and its boundaries are defined by the CBA."¹²⁶ Judge Katzmman described the Article 46 appeals process as a means of curbing the Commissioner's authority to discipline players.¹²⁷ Judge Katzmman also said it was "ironic . . . that a process designed to ensure fairness to all players has been used unfairly against one player."¹²⁸

III. THE FACTUAL BACKGROUND OF THE ELLIOTT CASE

In 2016, Tiffany Thompson ("Thompson") brought allegations of domestic violence against Ezekiel Elliott in Columbus, Ohio.¹²⁹ Columbus law enforcement officers investigated the allegations and declined to arrest or prosecute Elliott based on "conflicting and inconsistent information across all incidents."¹³⁰ Pursuant to the

122. *See id.* at 552 (Katzmann, J., dissenting) (noting NFL player is subject to fine of \$8,268 for using stickum in absence of aggravating circumstances).

123. *Id.* (Katzmann, J., dissenting) (footnote omitted) (offering support for argument that Commissioner Goodell should have imposed fine on Brady).

124. *See id.* at 553 (Katzmann, J., dissenting) (bolstering argument that Commissioner's arbitration award failed to draw its essence from CBA and thus warranted vacatur by reviewing court).

125. *See id.* at 554 (Katzmann, J., dissenting) (providing third and final argument of Judge Katzmman's dissent).

126. *Id.* (Katzmann, J., dissenting) (acknowledging authority of Commissioner Goodell over League but noting limits to his authority).

127. *See id.* at 549–50 (Katzmann, J., dissenting) (suggesting that players' right to appeal League-imposed discipline constitutes check on League Commissioner's power under Article 46 of CBA).

128. *Id.* (Katzmann, J., dissenting) (addressing how Commissioner Goodell's power presses unfair discipline and appeal procedures on NFL players).

129. *See Elliott I*, 270 F. Supp. 3d 939, 944 (E.D. Tex. Sept. 8, 2017) (providing background on domestic violence allegations Thompson made against Elliott), *vacated and remanded, Elliott II*, 874 F.3d 222 (5th Cir. 2017).

130. *See id.* (referencing findings of Columbus law enforcement).

PCP, the NFL opted to conduct its own investigation to determine whether Elliott should be disciplined by the League.¹³¹ Kia Roberts (“Roberts”), Director of Investigations for the NFL, and Lisa Friel (“Friel”), Senior Vice President and Special Counsel for Investigations for the NFL, were selected to conduct the investigation into the allegations against Elliott.¹³² The investigation lasted for a year and concluded with the production of an investigative report.¹³³ Roberts was the only investigator who participated in all twenty-two of the witness interviews, including those with Thompson, Elliott’s accuser, whom Roberts interviewed six times.¹³⁴ Friel was not present for any of the witness interviews.¹³⁵ Commissioner Goodell also assembled a team of outside advisors who met on June 26, 2017 to discuss the allegations against Elliott and whether the League should punish him.¹³⁶ The advisors also interviewed Elliott.¹³⁷ Roberts was excluded from the meeting with Commissioner Goodell and the outside advisors, but Friel was included.¹³⁸

On August 11, 2017, Elliott received a letter informing him that Commissioner Goodell had decided to impose a six-game suspension on him.¹³⁹ Elliott enlisted the NFLPA to appeal the sus-

131. *See id.* (providing NFL’s decision to investigate allegations against Elliott after law enforcement declined to arrest or prosecute Elliott); *see also* PERSONAL CONDUCT POLICY: LEAGUE POLICIES FOR PLAYERS, *supra* note 110, at 1 (“It is a privilege to be part of the National Football League. Everyone who is part of the league must refrain from ‘conduct detrimental to the integrity of and public confidence in’ the NFL. . . . Conduct by anyone in the league that is illegal, violent, dangerous, or irresponsible puts innocent victims at risk, damages the reputation of others in the game, and undercuts public respect and support for the NFL. We must endeavor at all times to be people of high character; we must show respect for others inside and outside our workplace; and we must strive to conduct ourselves in ways that favorably reflect on ourselves, our teams, the communities we represent, and the NFL.”).

132. *See Elliott I*, 270 F. Supp. 3d at 944 (noting Roberts and Friel were selected to lead NFL’s investigation into allegations against Elliott).

133. *See id.* (discussing investigative report Roberts and Friel produced at conclusion of Elliott investigation).

134. *See Elliott II*, 874 F.3d at 230 (Graves, J., dissenting) (noting Roberts had attended all witness interviews during investigation).

135. *See id.* (noting that, in contrast to Roberts, Friel participated in no witness interviews).

136. *See Elliott I*, 270 F. Supp. 3d at 944 (acknowledging that Commissioner Goodell assembled team of outside advisors to assist in deciding whether to discipline Elliott).

137. *See id.* (noting that outside advisors assembled by Commissioner Goodell interviewed Elliott).

138. *See Elliott II*, 874 F.3d at 230 (Graves, J., dissenting) (noting Roberts was excluded from meeting with Commissioner Goodell and outside advisors, even though Friel was included).

139. *See Elliott I*, 270 F. Supp. 3d 939 at 944 (stating Elliott learned of League-imposed suspension after receiving letter from Commissioner Goodell); *see also*

pension on his behalf, in accordance with the CBA's procedures for appealing Commissioner-imposed discipline.¹⁴⁰ As previously stated, the CBA mandates that player appeals be heard by an arbitrator.¹⁴¹ The arbitrator decides whether the Commissioner's decision "was made on unreasonable grounds or without any proper consideration of circumstances."¹⁴² Commissioner Goodell assigned Henderson to serve as the arbitrator in Elliott's appeal.¹⁴³

During arbitration, the NFLPA filed a motion to compel the NFL to provide Thompson for cross-examination.¹⁴⁴ The NFLPA also sought to compel the testimony of Roberts and asked that the NFL provide Roberts's investigative notes.¹⁴⁵ The NFL objected to the request for Roberts's testimony, arguing that testimony from Roberts would be "cumulative and unnecessary" due to the fact that Friel would attend the hearing.¹⁴⁶ Henderson denied the NFLPA's request that Thompson be compelled to testify and denied the request to receive Roberts's investigative notes.¹⁴⁷ However, Hender-

Elliott II, 874 F.3d at 230 (Graves, J., dissenting) (noting that, per NFL and NFLPA CBA, League Commissioner has sole authority to punish players).

140. See *Elliott I*, 270 F. Supp. 3d at 944 (providing Elliott's decision to enlist NFLPA to file suit on his behalf); see also 2011 NFL CBA, Art. 42, § 4 (noting that any player who wishes to dispute discipline imposed by NFL team must adhere to Article 43's procedure for initiating "Non-Injury Grievance," which requires player or NFLPA file written notice of appeal with NFLMC).

141. See *Elliott I*, 270 F. Supp. 3d at 944 (noting that NFL requires arbitration for resolution of player appeals of League-imposed discipline); see also 2011 NFL CBA, Art. 15 (stating that "System Arbitrator" will have exclusive jurisdiction to enforce terms of certain Articles of CBA, including those pertaining to player appeals of League discipline).

142. *Elliott I*, 270 F. Supp. 3d at 944 (providing standard of review which arbitrator must apply when hearing appeal from NFL player); see also 2011 NFL CBA, Art. 43, § 8 (discussing arbitrator's decision and award, including timing and effect).

143. See *Elliott I*, 270 F. Supp. 3d at 944 (providing that Commissioner Goodell selected Harold Henderson to serve as arbitrator for Elliott's appeal); see also *Peterson I*, 88 F. Supp. 3d 1084, 1088 (D. Minn. 2015) (noting Henderson was NFL executive for nearly two decades and earned \$2.5 million in compensation from NFL since 2009), *rev'd and remanded sub nom. Peterson II*, 831 F.3d 985 (8th Cir. 2016).

144. See *Elliott I*, 270 F. Supp. 3d at 944 (discussing NFLPA's motion to compel arbitrator to order Elliott's accuser, Thompson, to undergo cross-examination during arbitration).

145. See *id.* (stating that NFLPA also sought to compel testimony of Roberts, who led NFL's investigation into allegations against Elliott, and to receive Roberts' investigative notes).

146. See *id.* (noting that NFL objected to NFLPA's request for Roberts to testify during arbitration proceedings).

147. See *id.* (providing arbitrator's decision to deny NFLPA's request that Thompson be compelled to testify and its requests to receive Roberts' investigative notes).

son granted the NFLPA's motion to compel Roberts to testify at the arbitration proceeding.¹⁴⁸

The NFLPA and Elliott learned during arbitration that Roberts had concluded that the allegations of domestic violence against Elliott were "incredible, inconsistent, and without corroborating evidence to sufficiently support any discipline against Elliott."¹⁴⁹ During arbitration, the NFLPA and Elliott also learned of Commissioner Goodell's meeting with Friel and the team of outside advisors, and that Roberts had been excluded from that meeting.¹⁵⁰ In response, the NFLPA asked Henderson to compel Commissioner Goodell to testify.¹⁵¹ The NFLPA argued that the Commissioner's testimony was necessary in order to determine whether the Commissioner had knowledge of all critical facts, namely Roberts's conclusions about the allegations against Elliott, at the time the Commissioner decided to suspend Elliott.¹⁵² Henderson denied the request.¹⁵³

The three-day arbitration concluded on August 31, 2017.¹⁵⁴ The next day, the NFLPA sued the NFL on behalf of Elliott in the Eastern District of Texas, seeking vacatur of Henderson's impending decision.¹⁵⁵ The NFLPA also filed an emergency motion for a temporary restraining order and a preliminary injunction to prevent the NFL from enforcing the Commissioner-imposed six-game suspension of Elliott.¹⁵⁶ The NFLPA asserted that its emergency

148. *See id.* (noting that arbitrator granted NFLPA's motion to compel Roberts to testify during arbitration proceedings).

149. *See id.* (quoting Roberts's findings as to credibility of accusations made against Elliott by Thompson).

150. *See id.* at 944 (noting that, prior to arbitration proceedings, NFLPA and Elliott were unaware of Commissioner Goodell's meeting with Friel and outside advisors and that Roberts was excluded from that meeting), *vacated and remanded, Elliott II*, 874 F.3d 222 (5th Cir. 2017).

151. *See id.* (stating that NFLPA asked arbitrator to compel testimony of Commissioner Goodell after NFLPA and Elliott learned of meeting between Commissioner Goodell, outside advisors, and Friel).

152. *See id.* (discussing NFLPA's argument that Commissioner Goodell should be required to testify in order to determine whether he reviewed all material facts during his decision-making process).

153. *See id.* (stating Henderson's decision to deny request by NFLPA on behalf of Elliott to compel Commissioner Goodell to testify during arbitration).

154. *See id.* (providing that arbitration proceedings for Elliott's appeal concluded on August 31, 2017, at which time arbitrator stated that its decision would be finalized soon).

155. *See id.* at 944 (noting NFLPA filed lawsuit on behalf of Elliott in federal district court for Eastern District of Texas).

156. *See id.* (detailing NFLPA's initial actions on behalf of Elliott in Eastern District of Texas).

motion was warranted because the NFL regular season was set to begin shortly.¹⁵⁷

A preliminary injunction hearing was conducted by the Eastern District of Texas on September 5, 2017.¹⁵⁸ On that same day, Henderson issued the arbitration decision affirming Commissioner Goodell's six-game suspension of Elliott, and the NFL filed a complaint in the Southern District of New York, seeking to confirm and enforce the arbitration award.¹⁵⁹ In response, the Eastern District of Texas delayed ruling on the NFLPA's emergency motion and called for additional briefing on jurisdiction and the issuance of the arbitrator's decision.¹⁶⁰ Three days later, on September 8, 2017, the Eastern District of Texas entered an opinion and order granting the NFLPA's motion and enjoining Elliott's suspension, pending the court's final ruling on the petition for vacatur of Henderson's arbitration decision.¹⁶¹

On September 11, 2017, the NFL filed a notice of appeal and an emergency motion to stay the injunction in the Eastern District of Texas.¹⁶² The court responded by entering an order for expedited briefing on the NFL's emergency motion.¹⁶³ The NFL opted not to wait for the Eastern District court to rule on its motion.¹⁶⁴ Instead, the League filed an emergency motion for stay pending appeal with the Fifth Circuit on September 15, 2017.¹⁶⁵ The East-

157. *See id.* (explaining that NFLPA filed emergency motion for temporary restraining order and preliminary injunction against NFL because start of regular season was less than two weeks away).

158. *See Elliott II*, 874 F.3d 222, 231 (5th Cir. 2017) (Graves, J., dissenting) (providing details of preliminary injunction hearing held by district court).

159. *See id.* (Graves, J., dissenting) (stating outcome of Elliott's arbitration hearing and NFL's response to arbitrator's award and NFLPA's actions on behalf of Elliott in district court).

160. *See id.* (Graves, J., dissenting) (discussing district court's response to arbitrator's award and complaint NFL filed in Southern District of New York).

161. *See id.* (Graves, J., dissenting) (stating decision of Eastern District of Texas to grant NFLPA's emergency motion for temporary restraining order and preliminary injunction to prevent NFL from enforcing six-game suspension of Elliott).

162. *See id.* (Graves, J., dissenting) (discussing NFL's response to decision of Eastern District of Texas in favor of NFLPA and Elliott).

163. *See id.* (Graves, J., dissenting) (noting that both parties filed their briefs in compliance with district court for Eastern District of Texas's deadline).

164. *See id.* (Graves, J., dissenting) (acknowledging NFL's decision not to wait for Eastern District of Texas to rule on its emergency motion to stay injunction preventing implementation of Elliott's suspension).

165. *See id.* (Graves, J., dissenting) (stating that NFL filed emergency motion for stay pending appeal with Fifth Circuit in September 2017).

ern District of Texas denied the NFL's motion for stay on September 18, 2017.¹⁶⁶

The NFLPA and the NFL delivered oral arguments before a panel of the Fifth Circuit.¹⁶⁷ On October 12, 2017, the majority concluded in a 2-1 decision that the district court lacked subject matter jurisdiction when it issued the preliminary injunction.¹⁶⁸ The Fifth Circuit vacated the district court's preliminary injunction and remanded the case to the district court with instructions to dismiss.¹⁶⁹

IV. NARRATIVE ANALYSIS: THE FIFTH CIRCUIT SHOWS "SUBSTANTIAL DEFERENCE" IN GIVING THE NFL ANOTHER APPELLATE WIN

The Elliott case concluded with the Fifth Circuit's decision to reverse the holding of the district court and its finding in favor of the NFL.¹⁷⁰ The Fifth Circuit majority held that the district court lacked subject matter jurisdiction to hear the Elliott case because the NFLPA filed its action prematurely, without having exhausted the requisite contractual procedures under the CBA.¹⁷¹ Specifically, the majority asserted that exhaustion is required under the LMRA and that satisfaction of that requirement entails awaiting the issuance of the final decision of the arbitrator.¹⁷²

Prior to considering the soundness of the Fifth Circuit's holding and its potential impact, it is necessary to analyze the court's reasoning for reaching its decision.¹⁷³ The majority began by acknowledging that preliminary injunctions, such as the one granted by the district court, are typically reviewed under an "abuse of dis-

166. *See id.* (Graves, J., dissenting) (providing outcome of NFL's motion for stay pending appeal with Fifth Circuit).

167. *See id.* at 225 (majority opinion) (acknowledging that NFL and NFLPA delivered oral arguments before panel of Fifth Circuit on October 2, 2017).

168. *See id.* (providing Fifth Circuit's holding in favor of NFL).

169. *See id.* (stating Fifth Circuit's decision to remand Elliott case to district court with instructions to dismiss because district court lacked subject matter jurisdiction to issue injunction).

170. *See id.* at 227-28 (providing holding of Fifth Circuit majority in favor of NFL).

171. *See id.* (asserting, in its per curiam opinion, that reversal of district court's decision was warranted based on lower court's lack of subject matter jurisdiction).

172. *See id.* (offering Fifth Circuit's analysis under LMRA and emphasis on statute's exhaustion requirement); *see also* Labor Management Relations Act § 310, 29 U.S.C. §§ 151-169 (1935) (requiring procedures to be exhausted prior to arbitrators administering final decisions).

173. *See Elliott II*, 874 F.3d at 222-27 (providing court's reasoning leading up to its decision to reverse district court's decision and find in favor of NFL).

cretion” standard.¹⁷⁴ However, *de novo* review is appropriate where, as in the Elliott case, the lower court’s subject matter jurisdiction has been questioned.¹⁷⁵ Because the court found the question of subject matter jurisdiction to be dispositive, it did not address the proper standard of review of the district court’s preliminary injunction.¹⁷⁶

In addressing the issue of the lower court’s subject matter jurisdiction, the majority began by reciting the LMRA’s requirement that a lawsuit for violations between an employer and a labor organization satisfy three elements: “(1) a claim of violation of (2) a contract between (3) an employer and a labor organization.”¹⁷⁷ If a party fails to satisfy these elements in its claim, the failure deprives the court of subject matter jurisdiction.¹⁷⁸ The majority acknowledged the NFLPA’s argument that Elliott had stated a claim that satisfied these elements and that the district court consequently had subject matter jurisdiction.¹⁷⁹ However, the majority rejected this argument, opting to accept the NFL’s argument that jurisdiction would only have vested under the LMRA if Elliott had exhausted the remedies available to him under the CBA and that “the lack of a final arbitral decision at the time of filing the complaint” constituted a “fatal jurisdictional defect.”¹⁸⁰ In support of its decision to accept the NFL’s argument on this point, the majority cited *Mere-*

174. *See id.* at 225 (discussing appropriate standard of review of preliminary injunction in Elliott case).

175. *See id.* (stating that *de novo* review of preliminary injunction was appropriate because NFL argued on appeal that district court lacked subject matter jurisdiction under LMRA because Elliott filed his complaint before arbitrator issued final decision).

176. *See id.* at 225 n.2 (citing *Houston Refining, L.P. v. United Steel*, 765 F.3d 396 (5th Cir. 2014)) (bypassing decision as to whether to apply abuse of discretion or *de novo* standard of review).

177. *Id.* at 225 (quoting *Carpenters Local Union No. 1846 v. Pratt-Farnsworth*, 690 F.2d 489, 500 (5th Cir. 1982) (outlining three elements required by LMRA in lawsuit alleging violations between employer and labor organization); *see also* Labor Management Relations Act § 310, 29 U.S.C. §§ 151–169 (1935) (addressing LMRA requirements between employers and employees that must be satisfied)).

178. *See Elliott II*, 874 F.3d at 225 (quoting *Vaca v. Sipes*, 386 U.S. 171, 184–85 (1967)) (ruling that “[o]utside of limited circumstances, the failure to ‘fully exhaust . . . ‘contracted for ‘grievance procedures’ places an employee’s claim for breach of a collective bargaining agreement beyond ‘judicial review’”).

179. *See id.* (providing argument of NFLPA on behalf of Elliott that Elliott had in fact satisfied three elements of LMRA and that district court had subject matter jurisdiction to issue injunction against NFL).

180. *Id.* at 226 (deciding that Elliott had not exhausted his remedies under CBA because he had not waited for issuance of arbitrator’s final decision and that lower court consequently lacked subject matter jurisdiction).

dith v. Louisiana Federation of Teachers,¹⁸¹ an earlier Fifth Circuit case applying the LMRA's exhaustion requirement in the context of a CBA.¹⁸² Per the Fifth Circuit's opinion in *Meredith*, federal courts lack subject matter jurisdiction "to decide cases alleging violations of a collective bargaining agreement . . . by an employee against his employer unless the employee has exhausted contractual procedures for redress."¹⁸³

The NFLPA argued on appeal that *Meredith* was no longer good law, and that exhaustion should not be considered an issue of subject matter jurisdiction under the Supreme Court's holding in *Arbaugh v. Y & H Corp.*¹⁸⁴ In *Arbaugh*, the Supreme Court discussed the proper utilization of the term "jurisdiction," and stated that courts "ha[d] been less than meticulous" in their use of jurisdiction as a term, particularly in the "subject-matter jurisdiction . . . dichotomy."¹⁸⁵ The Fifth Circuit majority responded to the NFLPA's argument by citing the Supreme Court's holding in *Henderson ex rel. Henderson v. Shinseki*,¹⁸⁶ clarifying its earlier decision in *Arbaugh*.¹⁸⁷

In *Henderson*, the Supreme Court stated that "claims-processing rules, which are rules 'requiring that a party take certain procedural steps at certain specified times,' are not jurisdictional . . . unless Congress clearly indicated the rule was 'jurisdictional.'"¹⁸⁸ But, as the Fifth Circuit majority noted, the *Henderson* Court also said there were no "magic words" that "Congress needed to invoke, and if there was a 'long line of this Court's decisions left undisturbed by Congress' treating a requirement as jurisdictional, the Court would 'presume that Congress intended to follow that course.'"¹⁸⁹ The majority continued by stating that the Supreme Court has consistently treated the exhaustion of CBA grievance procedures as juris-

181. 209 F.3d 398 (5th Cir. 2000) (applying LMRA to decide dispute between union employee and union over CBA).

182. See *Elliott II*, 874 F.3d at 226 (citing *Meredith*, 209 F.3d at 402) (holding that federal courts lack subject matter jurisdiction to decide cases involving CBAs unless party bringing claim has availed self of all available remedies under CBA).

183. *Id.* (quoting *Meredith*, 209 F.3d at 402) (ruling on application of LMRA's exhaustion requirement in context of CBA).

184. See *id.* (citing *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 510–11 (2006)) (noting that Supreme Court in *Arbaugh* considered proper classification of issues as jurisdictional).

185. *Id.* at 226 (quoting *Arbaugh*, 546 U.S. at 510–11 (2006)) (providing guidance on what constitutes jurisdictional issue).

186. 562 U.S. 428, 435 (2011) (applying *Arbaugh* to determine whether Congress intended for rule to be jurisdictional).

187. See *Elliott II*, 874 F.3d at 226–27 (citing *Henderson*, 562 U.S. at 435) (clarifying Supreme Court's holding in *Arbaugh*).

188. *Id.* (quoting *Henderson*, 562 U.S. at 435–36).

189. *Id.* at 227 (quoting *Henderson*, 562 U.S. at 436).

dictional, and that *Meredith* remains good law, even in light of *Arbaugh*.¹⁹⁰

On this basis, the majority rejected the NFLPA's assertion that exhaustion is not an issue of subject matter jurisdiction.¹⁹¹ This marked a pivotal point in the majority's analysis, because it meant that the determination of whether the district court had subject matter jurisdiction in the Elliott case would depend on whether Elliott had exhausted the remedies available to him under the CBA prior to bringing his claim.¹⁹²

The majority quickly classified Elliott's claim in district court as "premature," because Elliott and the NFLPA had not exhausted the grievance procedures set forth in the CBA.¹⁹³ "At the time the NFLPA filed the complaint," the majority stated, "it was possible the arbitrator could have issued a final decision that was favorable to Elliott."¹⁹⁴ The majority went on to state that "Elliott cannot show it was futile to wait for a final decision simply because he believed the arbitrator would issue an unfavorable ruling."¹⁹⁵ Thus, "[a]s there was no final decision," the majority ruled that "Elliott had not yet exhausted the contracted-for remedies."¹⁹⁶

Having concluded that Elliott's district court claim was premature, the Fifth Circuit majority next turned to the issue of whether Elliott's failure to exhaust the contractual remedies available to him under the CBA could be excused.¹⁹⁷ Per the Fifth Circuit's holding in *Rabalais v. Dresser Industries, Inc.*,¹⁹⁸ there are three recognized exceptions to the exhaustion requirement.¹⁹⁹ Under *Rabalais*, a

190. *See id.* (asserting that Fifth Circuit had not overturned *Meredith*).

191. *See id.* (stating that LMRA's exhaustion requirement is indeed issue of subject matter jurisdiction).

192. *See id.* at 226 (quoting *Vaca v. Sipes*, 386 U.S. 171, 184–85 (1967)) (stating party's failure to exhaust all remedies available to party under CBA will deprive court of subject matter jurisdiction to hear party's claim).

193. *See id.* at 227–28 (deciding Elliott had not satisfied exhaustion requirement and that his lawsuit was thus "premature").

194. *Id.* at 228 (providing majority's rationale for determining that Elliott's lawsuit was "premature" and that he had failed to fully exhaust grievance procedures available under CBA).

195. *Id.*

196. *Id.* (declaring that Elliott failed to satisfy exhaustion requirement by filing claim in district court prior to issuance of arbitrator's final decision).

197. *See id.* (introducing potential for excusal of Elliott's failure to exhaust CBA remedies).

198. 566 F.2d 518 (5th Cir. 1978) (outlining the three recognized exceptions to LMRA's exhaustion requirement).

199. *See Elliott II*, 874 F.3d at 228 (citing *Rabalais*, 566 F.2d at 519) (listing three exceptions to exhaustion requirement).

party's failure to exhaust the contracted-for remedies available to him or her can be excused if:

(1) the union wrongfully refuses to process the employee's grievance, thus violating its duty of fair representation; (2) the employer's conduct amounts to a repudiation of the remedial procedures specified in the contract; or (3) exhaustion of contractual remedies would be futile because the aggrieved employee would have to submit his claim to a group which is in large part chosen by the employer and union against whom his real complaint is made.²⁰⁰

The majority only addressed the second exception, which pertains to repudiation of the CBA, because that was the only one raised as applicable by the NFLPA.²⁰¹ As stated by the majority: "An allegation that an employer has repudiated the grievance process is not substantiated merely by its 'refusal to accept an employee's position with respect to a grievance.'"²⁰² The majority also cited *Meredith*, in which the Fifth Circuit held that the repudiation exception applies where an employer fails to consider an employee's grievance.²⁰³ The facts of the Elliott case were distinguishable from the facts of *Meredith*, the majority asserted, because the NFL did not refuse to consider Elliott's grievance under the CBA.²⁰⁴ In the Elliott case, the NFL and Elliott had engaged in arbitration, as provided for under the CBA.²⁰⁵ "[F]or the repudiation exception to the exhaustion requirements to apply, the NFL would have had to completely refuse to engage in the process."²⁰⁶ Thus, the majority concluded that the NFL had not repudiated the agreement and that the repudiation exception from *Rabalais* did not apply.²⁰⁷ Ac-

200. *Id.* (quoting *Rabalais*, 566 F.2d at 519).

201. *See id.* (citing NFLPA's argument that second *Rabalais* exception should apply to Elliott because NFL had repudiated CBA).

202. *Id.* (quoting *Rabalais*, 566 F.2d at 519).

203. *See id.* at 229 (citing *Meredith v. La. Fed'n of Teachers*, 209 F.3d 398, 403 (5th Cir. 2000)). The *Meredith* court found that the repudiation exception from *Rabalais* applied to its case. *See Meredith*, 209 F.3d at 403.

204. *See Elliott II*, 874 F.3d at 229 (distinguishing facts of Elliott case from facts of *Meredith*, in which employer altogether failed to consider employee's grievance).

205. *See id.* (acknowledging that NFL had provided arbitration hearing for Elliott's appeal); *see also* 2011 NFL CBA, Art. 46 (outlining NFL protocols for "Commissioner Discipline," including process by which players are permitted to appeal discipline and proceed to arbitration).

206. *Elliott II*, 874 F.3d at 229 (citing *Meredith*, 209 F.3d at 403) (noting criteria under which repudiation exception to exhaustion requirement applies).

207. *See id.* (concluding NFL had not repudiated agreement with NFLPA/Elliott and that application of second exception from *Rabalais* was not warranted).

cordingly, the majority determined that Elliott was required to exhaust the contractual remedies available to him under the CBA before filing his claim in district court.²⁰⁸

In his dissenting opinion, Judge Graves made it clear that he would have reached a different result in the Elliott case.²⁰⁹ Judge Graves began by criticizing the NFL's investigation into the domestic abuse allegations against Elliott and its procedures for handling player appeals of League-imposed discipline.²¹⁰ The dissent began by stating:

This is a case about undisclosed information, uninformed decisions, and an arguably unfair process in determining whether Dallas Cowboys running back Ezekiel Elliott should be punished for allegations of domestic violence made by an accuser who was found not credible by the NFL's lead investigator, who was then excluded from meetings with NFL Commissioner Roger Goodell.²¹¹

Next, Judge Graves stated the reason for his dissent: his belief that the district court had subject matter jurisdiction when it issued the preliminary injunction against the NFL.²¹² In support of this assertion, Judge Graves turned to the LMRA.²¹³ The majority's outcome was flawed, Judge Graves argued, because the LMRA itself

208. *See id.* (finding that Elliott had not fully exhausted contractual remedies available to him under CBA and that, accordingly, he filed his claim prematurely with district court). For the full holding of the Fifth Circuit majority in the Elliott case, see *supra* notes 170–172 and accompanying text.

209. *See Elliott II*, 874 F.3d at 229–236 (5th Cir. 2017) (Graves, J., dissenting) (“For the reasons stated herein, I conclude that the district court properly exercised subject matter jurisdiction.”).

210. *See id.* at 229–30 (Graves, J., dissenting) (describing NFL's use of “arguably unfair process” in resolving Elliott's appeal of Commissioner-imposed suspension).

211. *Id.* (Graves, J., dissenting) (criticizing NFL for its handling of Elliott investigation and Elliott's appeal of suspension imposed on him). For details of NFL's investigation into allegations against Elliott, and lead investigator's findings that allegations lacked credibility, see *supra* notes 129–153 and accompanying text.

212. *See Elliott II*, 874 F.3d at 231 (Graves, J., dissenting) (“The majority . . . concludes that the district court lacked subject matter jurisdiction when it issued the preliminary injunction, vacates, and remands with instructions to dismiss. I disagree and conclude that the district court indeed had subject matter jurisdiction. I agree with the majority that this court reviews questions of subject matter jurisdiction *de novo*. But I disagree with the majority's repeated suggestion that we are here on the appeal of the district court's preliminary injunction as opposed to the NFL's motion for stay.”).

213. *See id.* at 231–32 (Graves, J., dissenting) (referencing LMRA as basis for majority's conclusion that district court lacked subject matter jurisdiction to issue preliminary injunction against NFL).

“does not explicitly require exhaustion.”²¹⁴ The NFL even conceded this point at oral argument, as Judge Graves pointed out.²¹⁵ Judge Graves asserted that, in order to properly allege breach of the CBA in its claim on behalf of Elliott, the NFLPA was only required to satisfy the LMRA’s three elements: “(1) a claim of a violation of (2) a contract (3) between an employer and a labor organization.”²¹⁶ The NFLPA did just that, Judge Graves stated, because it “allege[d] a violation of a contract, the CBA.”²¹⁷ “The CBA was entered into by the NFLPA, a labor organization, and the NFL, an employer.”²¹⁸

In the absence of an explicit exhaustion requirement in the LMRA, Judge Graves continued, the majority’s holding would need to be supported by case-law.²¹⁹ However, “neither the NFL nor the majority cite[d] a single case where a court held that the petitioner failed to exhaust in a situation like [Elliott’s],” Judge Graves stated.²²⁰ “Instead, both cite[d] various cases which are dissimilar and ignore cases which do not support a conclusion of lack of subject matter jurisdiction.”²²¹ To bolster this point, Judge Graves proceeded to address two of the cases on which the majority relied in forming its opinion: *Vaca* and *Meredith*.²²²

Regarding *Vaca*, Judge Graves asserted that the case does not stand for the proposition that it is only the arbitrator’s written

214. See *id.* at 236 (Graves, J., dissenting) (pointing out that language of LMRA does not require party to exhaust all contractual remedies available to him or her prior to filing claim in court). For an explanation of the three elements a party must satisfy to bring a lawsuit against an employer under the LMRA, see *supra* notes 177–178 and accompanying text.

215. See *Elliott II*, 874 F.3d at 232 (Graves, J., dissenting) (offering fact that NFL conceded that LMRA does not explicitly require exhaustion as further support for argument that district court had subject matter jurisdiction to issue preliminary injunction against League).

216. *Id.* at 232 (Graves, J., dissenting) (quoting *Carpenters Local Union 1846 v. Pratt-Farnsworth, Inc.*, 690 F.2d 489, 500 (5th Cir. 1982)).

217. *Id.* (Graves, J., dissenting).

218. *Id.* (Graves, J., dissenting) (providing facts from case to support assertion that NFLPA satisfied LMRA’s three elements for suing employer for breach of contract).

219. See *id.* at 231–32 (Graves, J., dissenting) (supporting argument on dissent that exhaustion is not required by LMRA and that majority also lacked supporting case-law to bolster its finding that district court lacked subject matter jurisdiction).

220. *Id.* (Graves, J., dissenting) (asserting that majority failed to cite any cases to support its proposition that district court lacked subject matter jurisdiction because NFLPA and Elliott failed to satisfy exhaustion requirement).

221. *Id.* at 232 (Graves, J., dissenting) (noting that cases supported by majority were factually distinct from Elliott case).

222. See *id.* at 234–35 (Graves, J., dissenting) (addressing prior Fifth Circuit cases on which majority relied in reaching its conclusion in *Elliott II*).

award that constitutes exhaustion and that failure to fully exhaust places a breach of contract claim outside of judicial review.²²³ Instead, Judge Graves argued that *Vaca* only requires the employee to attempt to exhaust and show that the contractual remedy proved unsatisfactory, and that Elliott satisfied those requirements.²²⁴

Judge Graves then distinguished *Meredith*, in which the Fifth Circuit held that a federal court lacks subject matter jurisdiction absent exhaustion, because the employee had failed to seek arbitration.²²⁵ Judge Graves argued that, unlike in *Meredith*, the NFLPA and Elliott took the final required step in the CBA's grievance procedures and attempted arbitration.²²⁶

Next, Judge Graves suggested that the majority should have considered the Fifth Circuit case of *Houston Refining, L.P. v. United Steel*²²⁷ for the proposition that an alleged violation of a CBA satisfies the jurisdictional requirement of Section 301(a) of the LMRA.²²⁸ Judge Graves noted that the case is binding authority on the court and shows that "exhaustion is a prudential consideration and not a strict jurisdictional prerequisite."²²⁹ Contrary to the majority's assertion that the district court would have only had jurisdiction if the NFLPA had fully exhausted the grievance procedures available to it under the CBA, Judge Graves argued that the only prerequisite to district court jurisdiction was an alleged violation of a CBA.²³⁰ Judge Graves stated that an alleged violation of a CBA "is all that is required to allow the district court to exercise jurisdiction," and that the NFLPA satisfied this requirement by alleging

223. *See id.* at 235 (Graves, J., dissenting) (discussing relevance of *Vaca* to *Elliott II* case).

224. *See id.* (Graves, J., dissenting) (suggesting that *Vaca* only requires attempt to exhaust, rather than full exhaustion).

225. *See id.* (Graves, J. dissenting) (discussing relevance of *Meredith* to Elliott case).

226. *See id.* (Graves, J., dissenting) (citing *Meredith v. La. Fed'n of Teachers*, 209 F.3d 398 (5th Cir. 2000)) (distinguishing *Meredith* from Elliott case).

227. 765 F.3d 396 (5th Cir. 2014) (holding that alleged violation of CBA satisfies LMRA's jurisdictional requirement).

228. *See Elliott II*, 874 F.3d at 232 (Graves, J., dissenting) (citing *Houston Refining*, 765 F.3d at 403).

229. *Id.* (Graves, J., dissenting) (noting that "the binding authority only requires an attempt," rather than exhaustion, and, "[t]hus, the NFLPA's complaint in district court was not premature").

230. *See id.* at 231–32 (Graves, J., dissenting) (presenting counter-argument to majority's assertion that district court would have only had jurisdiction if NFLPA had fully exhausted all grievance procedures available under CBA).

that the NFL had violated the CBA through its handling of the arbitration proceedings.²³¹

Next, Judge Graves argued that, as conceded by the majority, the controlling authority recognizes that an employee is only required to “attempt use of the contract grievance procedure.”²³² Judge Graves pointed out that in the Elliott case, the NFLPA only filed a lawsuit after its unsuccessful attempt to use the CBA’s grievance procedures.²³³

Judge Graves also cited the three exceptions to the exhaustion requirement that the Fifth Circuit articulated in *Rabalais* as proof that full exhaustion is not inevitably required by a court before it can exercise jurisdiction under Section 301 of the LMRA.²³⁴ In addition, Judge Graves stated that the recognized exceptions demonstrate that the “exhaustion requirement is not unlimited,” especially in cases in which there is reason to doubt “the integrity of the arbitration process.”²³⁵ Turning to the second *Rabalais* exception, which pertains to repudiation of a CBA, Judge Graves asserted that application of the exception is warranted when an employer fails to comply with the terms or procedures of the CBA and thus breaches the CBA.²³⁶ Judge Graves noted that the district court had applied the second *Rabalais* exception and concluded that “the NFL had repudiated the required procedures set forth in the CBA” by failing to provide Elliott with a fundamentally fair arbitration hearing.²³⁷ Judge Graves supported this finding by the district court, citing Article 46 of the CBA, which states that a player is entitled to counsel and has the right “to attend all hearings provided for in this Article

231. *Id.* at 232 (Graves, J., dissenting) (suggesting that only prerequisite to district court jurisdiction was NFLPA’s allegation that NFL had violated CBA).

232. *Id.* at 233 (Graves, J., dissenting) (quoting *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 652 (1965)) (providing that LMRA is satisfied when party attempts to use contracted-for grievance procedures).

233. *See id.* at 234 (Graves, J., dissenting) (supporting argument that NFLPA satisfied jurisdictional requirement by attempting to use grievance procedure laid out in CBA with NFL).

234. For a discussion of the three *Rabalais* exceptions to the exhaustion requirement, as well as the mention of the exceptions in the majority opinion, see *supra* notes 199–200 and accompanying text.

235. *Elliott II*, 874 F.3d at 233 (5th Cir. 2017) (Graves, J., dissenting) (quoting *Ramirez-Lebron v. Int’l Shipping Agency, Inc.*, 593 F.3d 124, 132 (1st Cir. 2010)).

236. *See id.* at 234 (Graves, J., dissenting) (citing *Rabalais v. Dresser Indus.*, 566 F.2d 518 (5th Cir. 1978)). In *Rabalais*, the Fifth Circuit held that there are three exceptions to the LMRA’s exhaustion requirement. *Rabalais*, 566 F.2d at 519.

237. *See Elliott II*, 874 F.3d at 234 (Graves, J., dissenting) (noting that district court had applied second *Rabalais* exception and found that relief was warranted for Elliott under that exception).

and to present, by testimony or otherwise, any evidence relevant to the hearing.”²³⁸ Based on this language from the CBA, Judge Graves argued that the NFL denied the NFLPA and Elliott a fair hearing by attempting to keep Roberts from testifying, preventing the NFLPA and Elliott from accessing Roberts’s notes, and refusing to allow the NFLPA and Elliott to cross-examine Thompson, Elliott’s accuser.²³⁹

Judge Graves concluded by stating that the NFL’s actions in denying the NFLPA and Elliott the ability to exercise their rights under Article 46 “impugned the integrity of the arbitration process.”²⁴⁰ Thus, Judge Graves asserted, “the NFL’s refusal to follow those agreed upon procedures in the CBA resulted in a repudiation of the grievance procedure sufficient to vest jurisdiction in the district court.”²⁴¹

V. CRITICAL ANALYSIS: HOW THE FIFTH CIRCUIT MAJORITY MAY HAVE CALLED THE PLAYS INCORRECTLY

Courts afford “substantial deference” to a labor arbitrator’s decision when the arbitrator’s award has been challenged.²⁴² The majority opinion in the Elliott case illustrates this standard of review and suggests that, when the “substantial deference” standard is applied to lawsuits filed by NFL players against the League, it will be the NFL that ultimately prevails.²⁴³

The holding of the Fifth Circuit majority was consistent with the holdings of the Eighth and Second Circuits in the Peterson and Brady cases.²⁴⁴ However, the Fifth Circuit majority’s opinion was

238. *See id.* (Graves, J., dissenting) (quoting Art. 46, Section 2(b) of CBA); *see also* 2011 NFL CBA, Art. 46, § 2(b) (outlining players’ rights in hearing to appeal arbitration award).

239. *See Elliott II*, 874 F.3d at 234 (Graves, J., dissenting) (quoting 2011 NFL CBA, Art. 46, §§ 2(b), (g)(i)) (providing facts of Elliott case in support of argument that NFL repudiated CBA by denying Elliott fair arbitration hearing, namely referring to revelation of Roberts’s exclusion from meeting with Goodell and other investigator and suggesting that Goodell was not fully informed when he decided to suspend Elliott).

240. *Id.* (Graves, J., dissenting) (quoting *Ramirez-Lebron*, 593 F.3d at 132).

241. *Id.* at 234 (Graves, J., dissenting) (arguing that NFL’s actions constituted repudiation of CBA, which satisfied second *Rabalais* exception and granted jurisdiction to district court).

242. For a discussion of the judicial review standard in NFL labor arbitration cases, *see supra* notes 42–52 and accompanying text.

243. For the full holding of the Fifth Circuit majority in the Elliott case, *see supra* notes 170–172 and accompanying text.

244. For a discussion of the Eighth Circuit’s holding in the Peterson case and the holding of the Second Circuit in the Brady case, *see supra* notes 79–91 and 106–115, respectively, and accompanying text.

arguably flawed in two ways.²⁴⁵ First, the opinion was inconsistent in how it treated the CBA between the NFL and the NFLPA.²⁴⁶ Second, the majority incorrectly interpreted some of the binding case-law it relied on in reaching its decision.²⁴⁷

A. The Majority's Treatment of the CBA

The significance of the CBA in the Elliott case cannot be disputed.²⁴⁸ The CBA laid the groundwork for the case because it allowed the NFL to conduct its investigation into the domestic violence allegations against Elliott and gave Commissioner Goodell the authority to suspend Elliott after the investigation.²⁴⁹ The CBA also outlined the procedure permitting Elliott to appeal the Commissioner's discipline and commence arbitration.²⁵⁰ Last, and most importantly for the purpose of this analysis, the CBA influenced the Fifth Circuit's analysis once the matter reached court.²⁵¹ The crucial factor in the majority's resolution of the case revolved around whether the NFLPA and Elliott had fulfilled their duties under the CBA, and the court ultimately found in favor of the NFL based on its determination that the NFLPA and Elliott had failed to fully exhaust the remedies available to them under the CBA.²⁵² As the majority noted, "the parties *contracted* to have an arbitrator make a final decision," and the NFLPA and Elliott violated that contract by challenging the arbitration process before the final decision had been made.²⁵³ In the majority's view, because the NFLPA and Elliott had

245. For the holding of the Fifth Circuit majority in the Elliott case, see *supra* notes 170–172 and accompanying text.

246. For an analysis of the majority's treatment of the CBA between the NFL and NFLPA, see *infra* notes 248–264 and accompanying text.

247. For a discussion of the majority's interpretation of certain binding Fifth Circuit cases, see *infra* notes 265–292 and accompanying text.

248. For information on the terms of the CBA between the NFL and the NFLPA, as well as a discussion of the role of the CBA in the Elliott case, see *supra* notes 28–41 and accompanying text.

249. For details on the role of the CBA in the resolution of the Elliott case, see *supra* notes 28–41 and accompanying text.

250. For a discussion of the pertinence of the CBA between the NFL and NFLPA in the Fifth Circuit's resolution of the Elliott case, see *supra* notes 28–41 and accompanying text; see also 2011 NFL CBA, Art. 46 (detailing procedures through which Commissioner may discipline players, and through which players may pursue arbitration to appeal Commissioner's decision).

251. For an analysis of the Fifth Circuit majority's opinion in the Elliott case, including its discussion of the CBA between the parties, see *supra* notes 170–208 and accompanying text.

252. For the Fifth Circuit majority's holding in the Elliott case, see *supra* notes 170–172 and accompanying text.

253. *Elliott II*, 874 F.3d 222, 228 (5th Cir. 2017) (emphasis added) (emphasizing importance of CBA as binding on parties).

inexcusably violated the CBA, the district court lacked subject matter jurisdiction to issue the injunction against the NFL, and a reversal in favor of the League was warranted.²⁵⁴

Despite the fact that the majority emphasized the binding nature of the CBA and the importance of the Agreement in deciding the case, the court reached an outcome that was inconsistent with that view.²⁵⁵ While it stressed that the NFLPA and Elliott had failed to fulfill their duties under the CBA, the majority disregarded the potential contract violations by the NFL.²⁵⁶ As suggested by Judge Graves in his dissenting opinion, the NFL violated the CBA in its handling of the arbitration proceedings initiated by Elliott.²⁵⁷ Article 46 of the CBA requires the League to give players the opportunity to “present, by testimony or otherwise, any evidence relevant to the [arbitration] hearing.”²⁵⁸ Despite this requirement, the NFL denied the request by the NFLPA and Elliott to present the notes of Roberts, who led the NFL’s investigation into the allegations against Elliott, during arbitration.²⁵⁹ The NFL also denied the request by the NFLPA and Elliott to compel the testimony of Thompson, Elliott’s accuser.²⁶⁰

Both requests were critical to a fair arbitration hearing because the NFLPA and Elliott learned during arbitration that Commissioner Goodell may have had incomplete information regarding the results of the Elliott investigation, and because of Thompson’s credibility when the Commissioner made the decision to suspend

254. For a statement of the Fifth Circuit majority’s holding in the Elliott case, see *supra* notes 170–172 and accompanying text.

255. For the majority’s statement of emphasis regarding the binding nature of the CBA to which the parties agreed, see *supra* note 253 and accompanying text.

256. For a review of the majority’s emphasis on the binding nature of the CBA, see *supra* note 253 and accompanying text.

257. See *Elliott II*, 874 F.3d at 233 (Graves, J., dissenting) (arguing that NFL repudiated CBA by denying Elliott fair arbitration hearing, namely by excluding lead investigator from meeting with Goodell, and suggesting that Goodell was not fully informed when he decided to suspend Elliott).

258. 2011 NFL CBA, Art. 46, § 2(b) (stating requirements for arbitration hearings between NFL player who challenges Commissioner-imposed discipline and NFL). For the facts of the Elliott case, including the fact that Elliott and the NFLPA were denied the opportunity to present the notes of the lead investigator and denied the opportunity to cross-examine Elliott’s accuser during arbitration, see *supra* notes 129–169 and accompanying text.

259. For further discussion on the role Roberts played as a lead investigator in the NFL’s case against Elliott and the discovery that Roberts had been excluded from meeting with the Commissioner, see *supra* notes 129–153 and accompanying text.

260. For information on the request by the NFLPA and Elliott that Thompson be compelled to testify during arbitration, and the arbitrator’s denial of that request, see *supra* notes 129–153 and accompanying text.

Elliott.²⁶¹ The NFL's decision to deny these requests casts significant doubt on the fairness of Elliott's arbitration hearing and supports Judge Graves's assertion that the League had "impugned the integrity of the arbitration process."²⁶² Moreover, the denials arguably should have been construed as violations of the CBA.²⁶³ This is particularly true given the majority's emphasis on the responsibility of each party to fulfill its obligations under the Agreement and the majority's stringent approach to determining what constituted fulfillment on the part of the NFLPA and Elliott.²⁶⁴

B. The Majority's Interpretation of Fifth Circuit Precedent

The Fifth Circuit majority relied on several prior, related cases as the basis for its decision that the district court lacked subject matter jurisdiction to issue a preliminary injunction in the Elliott case.²⁶⁵ However, the majority incorrectly applied some of these cases.²⁶⁶ The majority's interpretation of *Meredith v. Louisiana Federation of Teachers* exemplifies the first such misapplication of precedent.²⁶⁷

In *Meredith*, the Fifth Circuit stated that federal courts lack subject matter jurisdiction to decide cases alleging violations of a CBA by an employee against his employer *unless* the employee has exhausted all contractual procedures available to the employee for redress.²⁶⁸ The Fifth Circuit majority in the Elliott case cited *Meredith* in support of its assertion that the LMRA requires exhaustion, and that the NFLPA and Elliott had failed to fully exhaust the con-

261. See *Elliott II*, 874 F.3d at 233 (Graves, J., dissenting) (arguing that NFL denied Elliott fair arbitration hearing by excluding lead investigator from meeting with Goodell, and denying requests of NFLPA and Elliott to present Roberts's notes and to cross-examine Elliott's accuser, Thompson).

262. See *id.* (Graves, J., dissenting) (quoting *Ramirez-Lebron v. Int'l Shipping Agency, Inc.*, 593 F.3d 124, 132 (1st Cir. 2010)).

263. See 2011 NFL CBA, Art. 46, § 2(b) (stating rights of players who proceed to arbitration to challenge NFL and Commissioner-imposed discipline).

264. For the Fifth Circuit majority's assertion that the NFLPA and Elliott were required to fully exhaust the contractual remedies available to them under the CBA, rather than merely attempt to exhaust them, see *supra* notes 170–172 and accompanying text; see also *Elliott II*, 874 F.3d at 228 (emphasizing importance of CBA as binding contract for NFLPA and Elliott).

265. For further discussion of the Fifth Circuit majority's holding in the Elliott case, see *supra* notes 170–172 and accompanying text.

266. For the suggestion that the majority opinion may have been flawed in its interpretation of prior Fifth Circuit cases, see *supra* notes 265–292 and accompanying text.

267. For a summary of the majority's treatment of *Meredith* in its opinion in the Elliott case, see *supra* notes 182–196 and accompanying text.

268. For further discussion of the Fifth Circuit majority's treatment of *Meredith*, see *supra* notes 182–196 and accompanying text.

tractual remedies available to them prior to filing a claim in district court.²⁶⁹ The NFLPA argued before the Fifth Circuit that *Meredith* was no longer good law, following the Supreme Court's holding in *Arbaugh v. Y & H Corp.*²⁷⁰

In *Arbaugh*, the Supreme Court suggested that exhaustion should not be an issue of subject matter jurisdiction.²⁷¹ The Fifth Circuit acknowledged *Arbaugh* but declined to hold that *Meredith* was no longer good law.²⁷² However, even if *Meredith* remains good law, the majority's application of *Meredith* was still flawed.²⁷³ As asserted by Judge Graves in his dissenting opinion, *Meredith* was factually distinguishable from the Elliott case.²⁷⁴ In *Meredith*, the employee's claim failed because the employee had not even sought to compel arbitration.²⁷⁵ In contrast, the NFLPA and Elliott undisputedly attempted arbitration as required by the CBA in the Elliott case.²⁷⁶ Thus, the majority should not have relied on *Meredith* to support its conclusion that a federal court lacks subject matter jurisdiction in a case where the exhaustion requirement was not satisfied.²⁷⁷

The Fifth Circuit majority also cited *Vaca v. Sipes*²⁷⁸ for the proposition that a party's failure to exhaust the contracted-for reme-

269. For further discussion of the Fifth Circuit majority's treatment of *Meredith*, see *supra* notes 182–196 and accompanying text.

270. See *Elliott II*, 874 F.3d 222, 226–27 (5th Cir. 2017) (providing argument by NFLPA that *Meredith* is no longer good law, in light of *Arbaugh*, and that exhaustion should not be considered issue of subject matter jurisdiction for federal court).

271. See *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 510 (2006) (discussing proper use of term “jurisdiction”).

272. See *Elliott II*, 874 F.3d at 227 (discussing *Arbaugh* and stating: “Given that Congress has left undisturbed the Supreme Court precedent holding the exhaustion of remedies is a jurisdictional prerequisite to bring an action alleging a breach of a collective bargaining agreement, the court declines to hold that *Meredith* is no longer good law in light of *Arbaugh*”).

273. For a discussion of the *Meredith* case and the Fifth Circuit's application of it to the Elliott case, see *supra* notes 182–196 and accompanying text.

274. See *Elliott II*, 874 F.3d at 235 (Graves, J., dissenting) (arguing that *Meredith* is factually distinguishable from Elliott and that majority opinion consequently erred in relying so heavily on *Meredith*).

275. See *Meredith v. La. Fed'n of Teachers*, 209 F.3d 398, 408 (5th Cir. 2000) (concluding that district court lacked subject matter jurisdiction to decide case because exhaustion requirement was not satisfied).

276. For discussion of the facts of the Elliott case, including details of the arbitration initiated by the NFLPA and Elliott, see *supra* notes 129–169 and accompanying text.

277. For further discussion of the majority's conclusion that the district court lacked subject matter jurisdiction to issue a preliminary injunction against the NFL, see *supra* notes 170–172 and accompanying text.

278. 386 U.S. 171 (1967).

dies available to him or her places the party's claim for breach of a CBA beyond "judicial review."²⁷⁹ However, the *Vaca* court did not state that it was only the arbitrator's written award that constituted exhaustion.²⁸⁰ Moreover, as asserted by Judge Graves in his dissenting opinion, the court in *Vaca* may not have intended to require full exhaustion of a contract's grievance procedures as a prerequisite for subject matter jurisdiction in a federal court.²⁸¹ In *Vaca*, the Court cited *Republic Steel Corp. v. Maddox*²⁸² for the principle that "the employee must at least attempt to exhaust exclusive grievance and arbitration procedures established by the bargaining agreement."²⁸³ Under this standard, the district court in the Elliott case would have had subject matter jurisdiction, because the NFLPA and Elliott made an attempt to exhaust the procedures available to them under the CBA.²⁸⁴ Thus, *Vaca* may actually lend more support to the dissent's argument than to the majority's opinion.²⁸⁵

In addition, the Fifth Circuit quoted *United Paperworkers Int'l Union v. Misco, Inc.* to propose, "where the contract provides grievance and arbitration procedures, those procedures must first be exhausted and courts must order resort to the private settlement mechanisms without dealing with the merits of the dispute."²⁸⁶ However, as noted by the dissent, *Misco* did not involve a breach of

279. *Elliott II*, 874 F.3d at 226 (quoting *Vaca*, 386 U.S. at 184–85 (1967)) ("[O]utside of limited circumstances, the failure to 'fully exhaust []' contracted for 'grievance procedures' places an employee's claim for breach of a collective bargaining agreement beyond 'judicial review.'").

280. *See id.* (concluding that *Vaca* requires exhaustion but does not specifically mention issuance of final award by arbitrator); *see also id.* at 235 (Graves, J., dissenting) (stating "[t]he *Vaca* Court in no way said that only the arbitrator's written award constitutes exhaustion and that failure to fully exhaust places a breach of contract claim outside judicial review").

281. *See id.* at 234–35 (Graves, J., dissenting) (asserting that *Vaca* Court did not state that it was only arbitrator's written award that constituted exhaustion and that failure to fully exhaust placed breach of contract claim outside judicial review).

282. 379 U.S. 650 (1965).

283. *Vaca*, 386 U.S. at 184–85 (1967) (citing *Republic Steel Corp.*, 379 U.S. at 652).

284. *See Elliott II*, 874 F.3d at 234–35 (Graves, J., dissenting) (pointing out that Elliott and NFLPA attempted to exhaust grievance procedures under League CBA).

285. *See id.* (Graves, J., dissenting) (stating that attempt to exhaust was made in Elliott case and contractual remedy proved unsatisfactory; thus, requirements under *Vaca* were met).

286. *Id.* at 226 (majority opinion) (quoting *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 37 (1987)).

contract or an issue of exhaustion.²⁸⁷ Thus, like *Meredith*, *Misco* was factually distinguishable from the Elliott case.²⁸⁸ Further, as also noted by Judge Graves in his dissenting opinion, the *Misco* court stated that “decisions procured by the parties through fraud or through the arbitrator’s dishonesty need not be enforced.”²⁸⁹ While the Elliott case did not involve an allegation of fraud, the soundness of Commissioner Goodell’s decision to suspend Elliott should be questioned.²⁹⁰ As Judge Graves asserted, given that the NFLPA and Elliott were not permitted to question Goodell about the knowledge he had at the time he suspended Elliott, “it is likely impossible to determine whether information was intentionally withheld from [the Commissioner] or whether he was provided false information.”²⁹¹ Judge Graves suggested that this uncertainty could satisfy the *Misco* Court’s standard for arbitration decisions that need not be enforced.²⁹²

VI. IMPACT: THE FIFTH CIRCUIT MAJORITY’S OPINION BOLSTERED THE POWER OF THE NFL BUT MAY DRIVE PLAYERS TO DEMAND CHANGE

Although Elliott lost his legal battle with the NFL, he continues to enjoy on-field success with the League.²⁹³ He still plays running back for the Dallas Cowboys, and his jersey is one of the most popu-

287. See *id.* at 235 (Graves, J., dissenting) (“*Misco* involved the attempt to set aside a final arbitration award and did not involve a breach of contract or an alleged issue of exhaustion.”).

288. For the assertion that *Meredith* was factually distinguishable from the Elliott case, see *supra* notes 268–277 and accompanying text.

289. *Elliott II*, 874 F.3d at 235 (Graves, J., dissenting) (quoting *United Paperworkers*, 484 U.S. at 38).

290. For further discussion of the facts leading up to Commissioner Goodell’s decision to suspend Elliott from the NFL, see *supra* notes 129–139 and accompanying text; see also *Elliott II*, 874 F.3d at 234–35 (Graves, J., dissenting) (addressing possibility that Goodell was not “fully informed” about results of investigation before he decided to suspend Elliott).

291. *Elliott II*, 874 F.3d at 235 (Graves, J., dissenting) (“Here, there is no claim of fraud, but, without the ability to question Goodell under these circumstances, it is likely impossible to determine whether information was intentionally withheld from him or whether he was provided false information.”). For further discussion of the requests by the NFLPA and Elliott during arbitration to compel Commissioner Goodell to testify, as well as to cross-examine Elliott’s accuser and present the notes of the lead investigator, see *supra* notes 144–153 and accompanying text.

292. See *Elliott II*, 874 F.3d at 235 (Graves, J., dissenting) (suggesting that facts of Elliott case could potentially satisfy *Misco* standard for unenforceable arbitration awards).

293. See *Ezekiel Elliott*, NFL.COM, <http://www.nfl.com/player/ezekielelliott/2555224/profile> [<https://perma.cc/Y7MT-DQPM>] (profiling Elliott as member of Dallas Cowboys).

lar among football fans.²⁹⁴ This suggests that the case had little effect on Elliott's career.²⁹⁵ However, the Fifth Circuit's holding will have an impact on the relationship between arbitration law and football.²⁹⁶

The majority's holding was premised on arbitration law, because it based its holding on the fact that Elliott failed to satisfy the LMRA's exhaustion requirement.²⁹⁷ The majority arrived at this conclusion after it analyzed the LMRA and prior cases in which the exhaustion requirement was explored in the context of a CBA.²⁹⁸ Notably, the opinion was broad in its scope, because the Fifth Circuit did not confine its holding to the facts of the Elliott case.²⁹⁹ Instead, the court held that a petitioner is required to *fully exhaust* all contractual remedies available to him or her prior to filing a claim against his or her employer in federal court.³⁰⁰ Otherwise, a federal court will lack subject matter jurisdiction to hear the claim.³⁰¹ The scope of this holding is broad, because prior cases, including *Vaca* and *Maddox*, indicated that a petitioner was only required to *attempt* to exhaust all available remedies.³⁰²

In addition, the Fifth Circuit majority also broadly held that the second *Rabalais* exception, providing that exhaustion is not re-

294. See RJ Ochoa, *Ezekiel Elliott and Dak Prescott Are Still Near the Top in NFL Jersey Sales*, BLOGGING THE BOYS, (June 22, 2018, 10:00 AM) <https://www.bloggingtheboys.com/2018/6/22/17483924/ezekiel-elliott-and-dak-prescott-are-still-near-the-top-in-nfl-jersey-sales> [<https://perma.cc/W4CN-ERQU>] (stating Elliott's jersey is among ten most popular in sales at Dick's Sporting Goods).

295. See *id.* (suggesting that Elliott's popularity among fans remains among highest in NFL).

296. For a discussion of the Fifth Circuit majority's holding in the Elliott case, see *supra* notes 170–172 and accompanying text.

297. See *Elliott II*, 874 F.3d at 235 (reversing district court's decision in favor of NFLPA and Elliott, and holding that district court lacked subject matter jurisdiction to issue preliminary injunction against NFL, because NFLPA and Elliott filed "premature" claim).

298. For further discussion of the majority's analysis of the LMRA and prior Fifth Circuit cases, see *supra* notes 170–208 and accompanying text.

299. For a summary of the Fifth Circuit majority's holding, see *supra* notes 170–172 and accompanying text.

300. For an analysis of the LMRA's exhaustion requirement in relation to the facts of the Elliott case, see *supra* notes 177–208 and accompanying text.

301. For further analysis of whether Elliott satisfied the LMRA's exhaustion requirement, see *supra* notes 177–208 and accompanying text.

302. See *Elliott II*, 874 F.3d 222, 226 (5th Cir. 2017) (quoting *Vaca v. Sipes*, 386 U.S. 171, 184–85 (1967)) ("Outside of limited circumstances, the failure to 'fully exhaust[]' contracted for 'grievance procedures' places an employee's claim for breach of a collective bargaining agreement beyond 'judicial review.'"); see also *id.* at 226 (Graves, J., dissenting) (quoting *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 652 (1965)) (concluding that, under LMRA, employees who bring severance pay grievances must attempt to use contracted-for grievance procedures).

quired in the event of an employer's repudiation of a contract, is not satisfied when an employer breaches the terms of a CBA.³⁰³ The majority articulated this point when it stated that, "[F]or the repudiation exception to the exhaustion requirements to apply, the NFL would have had to completely refuse to engage in the process."³⁰⁴ This component of the majority's holding adds to its breadth and potential impact on later cases by raising the standard for future claimants who wish to use the repudiation exception.³⁰⁵ It also relaxes the burden on employers in such cases by requiring that they merely demonstrate some effort toward engaging in the required grievance process.³⁰⁶ The Fifth Circuit's holding marked the latest installment in a string of federal appellate-court decisions that have reversed lower court rulings in favor of NFL players and reinstated League discipline.³⁰⁷ In this sense, its holding carries even more of an impact because it illustrates the strong likelihood of success for the NFL in cases brought by players who seek to challenge League discipline and the fairness of the League's arbitration process.³⁰⁸

The majority's holding in the Elliott case will also impact the NFL, the NFLPA, and the League's players.³⁰⁹ The court's holding bolstered the broad power that the League already held over the

303. For a discussion of the majority's application of the second *Rabalais* exception to the Elliott case, see *supra* notes 197–208 and accompanying text; see also *Rabalais v. Dresser Indus., Inc.*, 566 F.2d 518, 519 (5th Cir. 1978) (articulating exceptions to LMRA's exhaustion requirement).

304. *Elliott II*, 874 F.3d at 229 (citing *Meredit v. La. Fed'n of Teachers*, 209 F.3d 398, 403 (5th Cir. 2000)) (holding that repudiation exception to LMRA's exhaustion requirement only applies when employer completely fails to engage in contracted-for grievance procedures).

305. For a summary of the Fifth Circuit's holding in the Elliott case, see *supra* notes 170–172 and accompanying text; see also *Rabalais*, 566 F.2d at 519 (articulating exceptions to LMRA's exhaustion requirement).

306. For the majority's assertion that application of the repudiation exception is only warranted where an employer completely fails to engage in a contracted-for grievance procedure, see *supra* notes 303–304 and accompanying text.

307. For the holding of the Fifth Circuit majority in the Elliott case, see *supra* notes 170–172 and accompanying text. For further discussion of the significance of the Fifth Circuit's holding in the Elliott case in the context of the prior holdings by the Second and Eighth Circuits in the Brady and Peterson cases, see *supra* notes 11–13 and accompanying text.

308. For a discussion of whether the holdings of the Second and Eighth Circuits were isolated incidents or part of a pattern of cases in which federal appellate courts have reversed district court holdings and found in favor of the NFL, see *supra* notes 11–13 and accompanying text.

309. For a summary of the Fifth Circuit majority's holding in the Elliott case, see *supra* notes 170–172 and accompanying text.

process for dispute resolution with players.³¹⁰ As previously stated, the League's dispute resolution system allows the Commissioner to unilaterally select the arbitrator and allows the NFL to choose the forum in which the results of the arbitration process are subject to appeal.³¹¹ The rights of NFL players are thus extraordinarily limited within the League's internal dispute resolution system.³¹² The system leaves a player with almost no option for relief other than court, but the Fifth Circuit's holding in the Elliott case signals that the courtroom is not necessarily the best place for players to take refuge.³¹³

Under the current CBA between the NFL and the NFLPA, the players are essentially powerless to overcome the unfairness of the League's dispute resolution process.³¹⁴ However, the current CBA expires in 2021.³¹⁵ Decisions like the Fifth Circuit's holding in the Elliott case may prompt players to negotiate a more favorable internal dispute resolution process.³¹⁶ In particular, NFL players may be

310. See 2011 NFL CBA, Art. 46 (detailing procedures through which Commissioners may investigate player conduct and impose discipline, as well as through which players may pursue arbitration, stating that Commissioner has authority to select arbitrator or to serve as arbitrator).

311. See *id.* (detailing broad authority of Commissioner over player-appeal process). For a discussion of the terms of the CBA and the ways in which they favor the NFL, see *supra* notes 28–41 and accompanying text.

312. See Marc Edelman, *Ezekiel Elliott Decision Adds to Commissioner's Power, but NFL Players Need Checks and Balances*, FORBES (Oct. 13, 2017, 8:30 AM), <https://www.forbes.com/sites/marcedelman/2017/10/13/ezekiel-elliott-decision-adds-to-commissioners-power-but-nfl-players-need-checks-and-balances/#564eb8ea49c9> [<https://perma.cc/S2YT-78UA>] (“With an internal dispute resolution system that allows the commissioner to control the internal arbiter of such a matter and then allows the NFL to choose the forum, if any, in which the process is subject to appeal, NFL players’ rights become extraordinarily limited.”).

313. For the holding of the Fifth Circuit majority in the Elliott case, see *supra* notes 170–172 and accompanying text.

314. See 2011 NFL CBA, Art. 46 (detailing procedures through which Commissioners may investigate player conduct, impose discipline, and through which players may pursue arbitration, stating that Commissioner has authority to select arbitrator or to serve as arbitrator). For further discussion detailing the procedures through which the Commissioners may investigate player conduct, impose discipline, and through which players may pursue arbitration, see *supra* note 310 and accompanying text.

315. See Bonesteel, *supra* note 19 (stating that current CBA between NFL and NFLPA expires in 2021); see also Ryan Wilson, *NFLPA Issues Statement in Response to NFL's New National Anthem Policy*, CBS SPORTS, (May 23, 2018) <https://www.cbsports.com/nfl/news/nflpa-issues-statement-in-response-to-nfls-new-national-anthem-policy/> [<https://perma.cc/MUQ2-HAQ6>] (noting NFL has announced new policy requiring players to stand during national anthem, and stating that NFLPA will ensure new policy does not violate players’ rights under current CBA).

316. For a discussion of the Fifth Circuit majority's holding in the Elliott case, see *supra* notes 170–172 and accompanying text; see also Marc Edelman, *Ezekiel Elliott Decision Adds To Commissioner's Power, But NFL Players Need Checks And Balances*,

inclined to write specific arbitration-related protections into the next CBA for themselves, because courts have shown an unwillingness to stray from the terms of the agreement.³¹⁷ NFL players could draw inspiration from the CBAs of other professional sports leagues, including the NBA, NHL, and MLB.³¹⁸ The other leagues' CBAs are particularly instructive in how to limit the power of their respective Commissioners.³¹⁹ The Commissioners of the NBA, NHL, and MLB have the power to review and discipline players; however, Commissioner Goodell's authority is much broader.³²⁰ In the MLB, for example, "appeals of discipline . . . go to either a neutral arbitrator or a tripartite arbitration review panel."³²¹ As discussed in this Casenote, if an NFL player appeals his discipline, Commissioner Goodell can choose to serve as the arbitrator.³²² NFL players could advocate for an arbitration model in which their appeals would be heard by a "neutral arbitrator," rather than the Commissioner himself.³²³ Thus, it is possible that the holding of the Fifth Circuit majority in the Elliott case, while unfavorable to the NFLPA and Elliott, could ultimately benefit League players by

FORBES (Oct. 13, 2017, 8:30 AM), <https://www.forbes.com/sites/marcedelman/2017/10/13/ezekiel-elliott-decision-adds-to-commissioners-power-but-nfl-players-need-checks-and-balances/#564eb8ea49c9> [<https://perma.cc/8SKX-3TC6>] ("Perhaps when the current NFL collective bargaining agreement expires, the NFL players will either negotiate a better process for arbitrating their disputes with the league or, even more drastically, decertify their union and challenge league-wide discipline under principles of antitrust law.").

317. For a discussion of the holding of the Fifth Circuit majority in the Elliott case, see *supra* notes 170–172. For the pro-NFL holdings of the Eighth and Second Circuits in the Peterson and Brady cases, see *supra* notes 79–91, 106–115 and accompanying text.

318. See Adriano Pacifici, *Scope and Authority of Sports League Commissioner Disciplinary Power: Bounty and Beyond*, 3 BERKELEY J. OF ENT. & SPORTS L. 93, 105 (Apr. 2014) (comparing NFL's CBA to CBAs of NBA, NHL, and MLB).

319. See *id.* (discussing aspects of CBAs of other leagues that would potentially benefit NFL).

320. See *id.* ("The NFL system is clearly the worst system of the four. It provides no independent review and grants Commissioner Goodell near unlimited power.").

321. *Id.* (highlighting benefits of MLB's CBA and its neutral arbitration protocol).

322. See 2011 NFL CBA, Art. 46 (stating that Commissioner or his designee are entitled to serve as hearing officers in arbitration).

323. See Pacifici, *supra* note 319, at 105 (comparing NFL's CBA to CBAs of NBA, NHL, and MLB).

prompting them to advocate for fairer dispute resolution processes.³²⁴

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324. For further discussion of Fifth Circuit majority's holding in the Elliott case, see *supra* notes 170–172 and accompanying text.

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