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THE ROAD TO REDEMPTION: CHRONICLING JOSH  
GORDON'S PATH TO REINSTATEMENT AND  
DISSECTING THE NFL'S SUBSTANCE  
ABUSE POLICY

I. INTRODUCTION

Hope is not always easy to find in a winless season, as was the case for the 2017 Cleveland Browns.<sup>1</sup> However, the National Football League (“NFL” or “the League”) handed down hope on November 1, 2017, when the League announced that star-wide receiver Josh Gordon was to be reinstated on a conditional basis following a nearly two-year hiatus for violating the NFL’s substance abuse policy (hereinafter the “Policy”).<sup>2</sup> The League’s decision to reinstate Gordon allowed him to play in the remaining five games of the season, in which he tallied eighteen receptions for over three-hundred yards.<sup>3</sup> Although his numbers were far less impressive than those posted during his 2013 First-Team All-Pro campaign, Gordon’s reinstatement left NFL fans hopeful that the former superstar’s long battle with substance abuse was finally in his past.<sup>4</sup> Gordon’s two-year absence from the game also brought at-

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1. See Marc Sessler, *Cleveland Browns Finish 2017 Season 0-16*, NFL, <http://www.nfl.com/news/story/0ap3000000900572/article/cleveland-browns-finish-2017-season-016> [<https://perma.cc/5R3V-JW9T>] (last updated Dec. 31, 2017, 6:21 PM) (“From a win-loss perspective, it gets no darker. This season won’t soon be forgotten for what it represents for this once-glorious franchise: A total embarrassment.”).

2. See Nick Shook, *Josh Gordon to be Reinstated on Conditional Basis*, NFL <http://www.nfl.com/news/story/0ap3000000870891/article/josh-gordon-to-be-reinstated-on-conditional-basis> [<https://perma.cc/3ZM4-2S6X>] (last updated Nov. 1, 2017, 9:11 PM) (reporting NFL announced Gordon will be reinstated on conditional basis subject to compliance with League conduct policy).

3. See *Josh Gordon Stats*, NFL, <http://www.nfl.com/player/joshgordon/2537931/careerstats> [<https://perma.cc/2KW7-86WH>] (last visited Oct. 17, 2018) (reporting Gordon’s 2017 season statistics). In 2013, Gordon averaged 117.6 yards-per-game, which was 50 yards more than his average of 67 yards-per-game in 2017. See *id.*

4. See *id.* (listing Gordon’s career statistics). See also *ESPN Live Draft Results*, ESPN, <http://games.espn.com/ffl/livedraftresults> [<https://perma.cc/9H7H-TSVE>] (last visited Oct. 17, 2018) (listing Gordon as 45th best fantasy football player going into 2018). Despite only playing in five games during the 2017 season, Gordon’s average draft pick in all ESPN Fantasy Football leagues was 49.7. See *id.*

tention to the Policy and raised questions about the validity of its procedures.<sup>5</sup>

This Comment dissects the NFL's Policy and examines how the NFL can improve it.<sup>6</sup> Section II chronicles Gordon's background and path to reinstatement.<sup>7</sup> Section III examines the NFL's Policy, including its Intervention Program, the discipline schedule, the appeals process, and how it relates to Josh Gordon.<sup>8</sup> Section IV analyzes the legality of the NFL's Policy in regard to federal and state employment laws.<sup>9</sup> Section V details a recent lawsuit against the NFL challenging the validity of its Policy.<sup>10</sup> Section VI examines the corresponding policies of the National Basketball Association ("NBA") and Major League Baseball ("MLB"), and highlights some of the key differences amongst the leagues' policies.<sup>11</sup> Section VII addresses ways the NFL can improve upon its Policy and offers solutions on how to implement the necessary changes.<sup>12</sup> Lastly, Section VIII discusses Josh Gordon's future in the NFL against the backdrop of his path to reinstatement.<sup>13</sup>

## II. BACKGROUND: FROM SOPHOMORE STANDOUT TO DISGRACED FORMER-ALL-PRO RECEIVER AND THE QUEST FOR REINSTATEMENT

While Josh Gordon's battle with substance abuse first gained national coverage during his NFL career, his issues with marijuana date back to 2010, when Gordon was a sophomore at Baylor University.<sup>14</sup> In October 2010, police found Gordon and a teammate

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5. For a discussion on the NFL's Policy, see *infra* notes 44–147 and accompanying text.

6. For further discussion of how the NFL's Policy can be improved, see *infra* notes 206–249 and accompanying text.

7. For further discussion of Gordon's background and a timeline of his journey back to the NFL, see *infra* notes 14–42 and accompanying text.

8. For further discussion of the NFL's Policy, see *infra* notes 43–144 and accompanying text.

9. For further discussion of the legality of drug testing in the private sector, see *infra* notes 145–174 and accompanying text.

10. For further discussion of a recent lawsuit brought against the NFL, which challenged the League's Policy, see *infra* notes 175–182 and accompanying text.

11. For a discussion comparing the NFL's Policy to those of the NBA and MLB, see *infra* notes 183–205 and accompanying text.

12. For further discussion of how the NFL's Policy can be improved, see *infra* notes 206–226 and accompanying text.

13. For a discussion on Josh Gordon's NFL future, see *infra* notes 227–245 and accompanying text.

14. See Vinnie Iyer, *Josh Gordon Timeline: Wide Receiver's Twisted Path Leads Him Away From Browns, Patriots*, SPORTING NEWS (Dec. 23, 2018), <http://www.sportingnews.com/nfl/news/josh-gordon-timeline-news-cleveland-browns-nfl-reinstatement-denied-suspension/1m9gwhfoku9ns1ozy4pktm4k> [<https://perma.cc/4AHB-9SWH?type=image>] (chronicling Gordon's history with substance abuse).

asleep in a car outside of a Taco Bell.<sup>15</sup> The responding officers found marijuana in the vehicle and cited both players on misdemeanor drug possession charges, although Gordon's charges were later dropped.<sup>16</sup> Gordon's problems followed him into his junior year when the team suspended him indefinitely from the program for violating team rules.<sup>17</sup> Although the team did not give the reason for the suspension, it was reported that Gordon had tested positive for marijuana.<sup>18</sup> Facing an indefinite suspension, Gordon transferred to the University of Utah in August 2011.<sup>19</sup> However, due to the NCAA's transfer rule, Gordon was not eligible to play until the 2012 season, forcing him to sit out the entire 2011 campaign.<sup>20</sup> Ultimately, Gordon never played a down for the Utes because, after missing the 2011 season, he declared for the NFL's 2012 Supplemental Draft, where the Cleveland Browns selected him in the second round.<sup>21</sup>

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15. See Associated Press, *Willie Jefferson, Josh Gordon Arrested*, ESPN (Oct. 7, 2010), <http://www.espn.com/college-football/news/story?id=5658519> [<https://perma.cc/BH42-3NBB>] (detailing Gordon's arrest for drug possession charges). Police found Gordon and his teammate asleep in the drive-through lane of the Taco Bell. See *id.* Gordon was in the passenger seat at the time of the arrest. See *id.*

16. See Iyer, *supra* note 14 (summarizing incident and stating charges were dropped against Gordon).

17. See Associated Press, *Josh Gordon Suspended Indefinitely*, ESPN (July 25, 2011), [http://www.espn.com/college-football/story/\\_/id/6796724/josh-gordon-baylor-bears-given-indefinite-suspension](http://www.espn.com/college-football/story/_/id/6796724/josh-gordon-baylor-bears-given-indefinite-suspension) [<https://perma.cc/5TKK-MKSE>] (announcing Gordon was suspended indefinitely while at Baylor for violating team rules).

18. See Iyer, *supra* note 14 (reporting that failed drug test was reason for suspension).

19. See *Former Baylor Wideout Josh Gordon Transfers to Utah*, SPORTING NEWS (Aug. 25, 2011), <http://www.sportingnews.com/ncaa-football/news/196528-former-baylor-wideout-josh-gordon-transfer-to-utah> [<https://perma.cc/9HCX-TJT8>] (reporting Gordon transferred to Utah). According to Utah coach Kyle Whittingham, Utah "felt [Gordon] deserve[d] a second chance," and that the Utes were willing to give him such a chance. *Id.*

20. See *id.* (noting that Gordon was only able to practice with team during 2011 season); see also *Want to Transfer?*, NCAA, <http://www.ncaa.org/student-athletes/current/want-transfer> [<https://perma.cc/Z4EX-RDRG>] (explaining transfer rule). The NCAA requires that athletes sit out a year before they are eligible to compete at their new schools. See *id.*

21. See Marc Sessler, *Josh Gordon Drafted by Cleveland Browns in Round 2*, NFL, <http://www.nfl.com/news/story/09000d5d82a808c0/article/josh-gordon-drafted-by-cleveland-browns-in-round-2> [<https://perma.cc/2NNB-76BM>] (last updated Aug. 3, 2012, 1:37 AM) (reporting that Browns selected Gordon in Supplemental Draft); see also Gary Davenport, *A Brief History of the NFL Supplemental Draft*, BLEACHER REP. (July 10, 2013), <http://bleacherreport.com/articles/1699772-a-brief-history-of-the-nfl-supplemental-draft> [<https://perma.cc/D3HS-89GV>] (explaining NFL Supplemental Draft). The NFL Supplemental Draft is an additional draft held each summer, which allows teams to select athletes who are no longer eligible to attend college—traditionally due to disciplinary issues. See *id.* Teams wishing to select a player must compensate a draft pick in the following year's

Gordon had a successful rookie season in 2012, playing in all sixteen games.<sup>22</sup> Unfortunately, the same problems that plagued his collegiate career reemerged during the offseason, and the NFL suspended Gordon for the first two games of the 2013 season for testing positive for codeine.<sup>23</sup> Despite playing in a shortened season, the second-year receiver still led the League in receiving yards, earning first-team All-Pro honors.<sup>24</sup> However, this success was short-lived.<sup>25</sup>

In July 2014, police arrested Gordon for suspicion of driving while impaired in Raleigh, North Carolina.<sup>26</sup> According to Raleigh Police, Gordon was pulled over for driving fifteen miles-per-hour over the speed limit, and had a blood alcohol content of 0.09.<sup>27</sup> In response, the NFL suspended Gordon for the entire 2014 season.<sup>28</sup> In September, however, the NFL and NFL Players Association (“NFLPA”) unveiled a revised substance abuse policy, which reduced Gordon’s suspension from sixteen games to ten.<sup>29</sup> Soon af-

draft. *See id.* For instance, the Browns used their 2013 NFL Draft second-round pick to select Gordon. *See id.*

22. *See Josh Gordon Stats, supra* note 3 (highlighting Gordon’s NFL success). During his rookie year, Gordon caught fifty passes for 805 yards and scored nine touchdowns. *See id.*

23. *See* Chris Wesseling, *Josh Gordon Suspended Two Cleveland Browns Games*, NFL, <http://www.nfl.com/news/story/0ap1000000210218/article/josh-gordon-suspended-two-cleveland-browns-games> [<https://perma.cc/94QQ-94J5>] (last updated June 8, 2013, 8:34 AM) (detailing Gordon’s suspension).

24. *See* Danny Kelly, *Reminder: Josh Gordon’s 2013 Season Was Incredible*, THE RINGER (July 25, 2016, 7:48 PM), <https://www.theringer.com/2016/7/25/16041898/josh-gordon-nfl-conditional-reinstatement-9473e2ae39d5> [<https://perma.cc/UZ2K-UYSN>] (“Gordon’s 2013 campaign for Cleveland was absurd: 87 catches for an NFL-best 1646 yards and nine touchdowns in just 14 games.”); *see also* Gregg Rosenthal, *2013 All-Pro Teams*, NFL (last updated Jan. 3, 2014), <http://www.nfl.com/news/story/0ap2000000308570/article/2013-allpro-teams> [<https://perma.cc/WSL3-P7FA>] (naming Gordon to 2013 All-Pro team).

25. *See* Iyer, *supra* note 14 (providing timeline of Gordon’s drug-related suspensions).

26. *See* Lindsay H. Jones, *Browns Wide Receiver Josh Gordon Arrested for DWI*, USA TODAY SPORTS, <https://www.usatoday.com/story/sports/nfl/browns/2014/07/05/josh-gordon-arrested-dwi/12249595/> [<https://perma.cc/5ZK8-SFC9>] (last updated July 5, 2014, 5:02 PM) (reporting Gordon was arrested on suspicion of DWI).

27. *See Browns’ Josh Gordon Arrested*, ESPN (July 7, 2014), [http://www.espn.com/nfl/story/\\_/id/11178895/josh-gordon-cleveland-browns-arrested-dwi](http://www.espn.com/nfl/story/_/id/11178895/josh-gordon-cleveland-browns-arrested-dwi) [<https://perma.cc/G6ML-EUHS>] (reporting details of arrest).

28. *See* Danny Cox, *Josh Gordon Pleads Guilty to DWI, Could Have Suspension Reduced*, CBS CLEVELAND (Sept. 17, 2014, 8:00 AM), <http://cleveland.cbslocal.com/2014/09/17/josh-gordon-pleads-guilty-to-dwi-could-have-suspension-reduced/> [<https://perma.cc/W7G4-ZNTM>] (reporting Gordon pleaded guilty to DWI charge and faced season-long suspension).

29. *See* Dan Hanzus, *Josh Gordon Ban Cut Under Terms of New Drug Policy*, NFL, <http://www.nfl.com/news/story/0ap3000000397165/article/new-drug-policy-in->

ter the completion of the 2014 season, ESPN reported that Gordon was facing another year-long suspension after he reportedly tested positive for alcohol.<sup>30</sup> The NFL confirmed these reports in February 2015, when the League announced Gordon's suspension for the entire 2015 season for the failed test.<sup>31</sup>

After sitting out the 2015 season, Gordon reapplied for reinstatement on January 20, 2016.<sup>32</sup> However, the NFL denied this petition after Gordon failed yet another drug test.<sup>33</sup> Despite originally denying his request, the NFL eventually reinstated Gordon in July 2016, but suspended him for the first four games of the 2016 season.<sup>34</sup> Although eligible to return in September 2016, Gordon surprisingly announced he was entering a rehab facility rather than

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place-josh-gordon-ban-shortened?campaign=twitter\_atn [https://perma.cc/QMR8-DBWF] (last updated Sept. 19, 2014, 4:18 PM) (announcing Gordon's suspension reduced to ten games).

30. See Adam Schefter, *Josh Gordon Facing 1-Year Ban*, ESPN (Jan. 26, 2015), [http://www.espn.com/nfl/story/\\_/id/12226738/josh-gordon-cleveland-browns-facing-one-year-suspension-failing-another-drug-test](http://www.espn.com/nfl/story/_/id/12226738/josh-gordon-cleveland-browns-facing-one-year-suspension-failing-another-drug-test) [https://perma.cc/852T-C9FD] (reporting Gordon failed drug test by testing positive for alcohol); see also NAT'L FOOTBALL LEAGUE POLICY AND PROGRAM ON SUBSTANCES OF ABUSE (2016), 1–41, available at [https://nflpaweb.blob.core.windows.net/media/Default/PDFs/Agents/2016SOAPolicy\\_v2.pdf](https://nflpaweb.blob.core.windows.net/media/Default/PDFs/Agents/2016SOAPolicy_v2.pdf) [https://perma.cc/DH8M-VU7K] (detailing NFL's discipline schedule). Under the NFL's Policy, a player previously suspended for ten games will be banished from the League if he tests positive for a banned substance. See *id.*

31. See Jordan Heck, *NFL Suspends Browns' Josh Gordon for at Least One Year*, SPORTING NEWS, <http://www.sportingnews.com/nfl/news/josh-gordon-suspended-nfl-2015-season-without-pay-statement-cleveland-browns-drug-test-alcohol/17pbwss151bde1dsg3e98zjcx9> [https://perma.cc/P8TV-3LMN?type=image] (last updated Feb. 4, 2015) (reporting Gordon was suspended for 2015 season).

32. See Jared Dubin, *Report: A Year After Suspension, Josh Gordon Applies for Reinstatement*, CBS SPORTS (Jan. 20, 2016) <https://www.cbssports.com/nfl/news/report-a-year-after-suspension-josh-gordon-applies-for-reinstatement/> [https://perma.cc/K3NC-FK84?type=image] (reporting Gordon applied for reinstatement and noting NFL had yet to decide on reinstatement decision).

33. See Joe Rodgers, *Josh Gordon's Petition for NFL Reinstatement Denied*, SPORTING NEWS (Apr. 12, 2016), <http://www.sportingnews.com/nfl/news/josh-gordons-denied-reinstatement-nfl-drug-test-browns-contract/19llzcyj6yl0415zc4c65514bj> [https://perma.cc/XZ4T-SNRJ] (stating NFL denied Gordon's reinstatement request). It was reported the day prior to the denial of his request that Gordon had failed another drug test in the previous month. See *id.*; see also NAT'L FOOTBALL LEAGUE POLICY AND PROGRAM ON SUBSTANCES OF ABUSE, *supra* note 30, at 18 (detailing reinstatement process). A banished player will have to apply for reinstatement with the League. See *id.* at 30. The Commissioner has the sole power to determine "if and when the [p]layer will be allowed to return to the NFL." *Id.*

34. See Marc Sessler, *Josh Gordon Reinstated, Will be Suspended Four Games*, NFL, <http://www.nfl.com/news/story/0ap3000000676568/article/josh-gordon-reinstated-will-be-suspended-four-games> [https://perma.cc/QV5L-EJU6] (last updated July 26, 2016, 2:01 PM) (reporting Gordon had been reinstated, but still subject to four-game suspension).

reporting to the Browns.<sup>35</sup> On October 30, Gordon exited rehab but was considered an inactive player, as he remained on the Commissioner Exempt List.<sup>36</sup>

Gordon's next attempt to resume his NFL career came in March 2017, when he reapplied for reinstatement.<sup>37</sup> However, on May 11, a source reported Commissioner Goodell denied Gordon's petition.<sup>38</sup> Gordon's luck changed in November 2017, when the League announced Gordon's reinstatement on a conditional basis.<sup>39</sup> According to the release, Gordon's reinstatement was "subject to compliance with clinical and other requirements," giving the team discretion to return Gordon to active status beginning November 27.<sup>40</sup> In December 2017, Josh Gordon played in his first game

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35. See Pat McManamon, *Browns' Josh Gordon Entering Rehab: 'Right Decision for Me'*, ESPN (Sept. 30, 2016), [http://www.espn.com/nfl/story/\\_/id/17671480/josh-gordon-cleveland-browns-entering-rehab](http://www.espn.com/nfl/story/_/id/17671480/josh-gordon-cleveland-browns-entering-rehab) [https://perma.cc/N2TG-LKRY] (stating Gordon desired to "gain full control over [his] life and continue on a path to reach [his] full potential as a person").

36. See Adam Schefter, *Browns WR Josh Gordon Released from Rehab Facility*, ESPN (Oct. 30, 2016), [http://www.espn.com/nfl/story/\\_/id/17925096/cleveland-browns-wr-josh-gordon-released-rehab-facility-awaits-potential-reinstatement](http://www.espn.com/nfl/story/_/id/17925096/cleveland-browns-wr-josh-gordon-released-rehab-facility-awaits-potential-reinstatement) [https://perma.cc/5FFW-9YQP] (reporting Gordon released from rehab but remains suspended); see also Kevin Patra, *What is the Reserve/Commissioner Exempt List?*, NFL, <http://www.nfl.com/news/story/0ap3000000396169/article/what-is-the-reserve-commissioner-exempt-list> [https://perma.cc/A35Z-CB2H] (last updated Oct. 21, 2016, 3:55 PM) (explaining Commissioner Exempt List). The Commissioner Exempt List (the "List") is a special status afforded to players declared temporarily exempt from being considered "active." See *id.* Only the Commissioner has the power to afford players this status, and only he has the authority to remove a player from the List. See *id.* Likewise, only the Commissioner can determine whether the player's tenure on the List will be finite or indefinite. See *id.*

37. See Harry Lyles, Jr., *Josh Gordon Denied Reinstatement by NFL*, SB NATION, <https://www.sbnation.com/2017/5/11/14876118/josh-gordon-denied-reinstatement-by-nfl-browns> [https://perma.cc/5U8D-7RGD] (last updated May 11, 2017, 12:30 PM) (reporting Gordon applied for reinstatement).

38. See *id.* (reporting Goodell denied Gordon's reinstatement); see also Tom Pelissero (@TomPelissero), TWITTER (May 11, 2017, 8:36 AM), [https://twitter.com/TomPelissero/status/862692925934907393?ref\\_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E862692925934907393&ref\\_url=http%3A%2F%2Fwww.sportingnews.com%2Fus%2Fnfl%2Fnews%2Fjosh-gordon-cleveland-browns-news-reinstatement-nfl-stats%2F14x6xs8jt6rbcz8d64u1mdwob](https://twitter.com/TomPelissero/status/862692925934907393?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E862692925934907393&ref_url=http%3A%2F%2Fwww.sportingnews.com%2Fus%2Fnfl%2Fnews%2Fjosh-gordon-cleveland-browns-news-reinstatement-nfl-stats%2F14x6xs8jt6rbcz8d64u1mdwob) [https://perma.cc/3KYX-AZT3] ("Source: The NFL has denied #Browns WR Josh Gordon's reinstatement petition. He can reapply this fall.").

39. See Nick Shook, *Josh Gordon to be Reinstated on Conditional Basis*, NFL, <http://www.nfl.com/news/story/0ap3000000870891/article/josh-gordon-to-be-reinstated-on-conditional-basis> [https://perma.cc/UUK8-RQKP] (last updated Nov. 1, 2017, 9:11 PM) (reporting NFL announced Gordon will be reinstated on conditional basis).

40. See Daryl Ruiter, *NFL Reinstates Suspended Browns WR Josh Gordon on Conditional Basis*, CBS CLEVELAND (Nov. 1, 2017, 6:27 PM), <https://cleveland.cbslocal.com/2017/11/01/nfl-reinstates-josh-gordon-on-conditional-basis/> [https://perma.cc/9BXS-YR4M] (announcing Gordon's activation).

since 2014, tallying four receptions for eighty-five yards.<sup>41</sup> Gordon went on to play in the Browns' final five games of the season, recording eighteen receptions for over three-hundred yards.<sup>42</sup>

### III. ANALYSIS: THE NFL'S APPROACH TO SUBSTANCE ABUSE

#### A. Overview

While Josh Gordon's struggles with substance abuse and his road to recovery are well-documented, the reasons his road to reinstatement was so difficult are less well-documented.<sup>43</sup> The current terms of the NFL's reinstatement process are found in the League's Policy and Program on Substance Abuse.<sup>44</sup> The NFL takes a much stricter approach to marijuana and other substances of abuse than other leagues.<sup>45</sup> The NFL justifies its staunch approach by stating that "substance abuse can lead to on-the-field injuries, to alienation of the fans, to diminished job performance, and to personal hardship."<sup>46</sup> In furtherance of its position, the Policy goes on to provide that the deaths of players have demonstrated "the potentially tragic

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41. See Associated Press, *Browns WR Josh Gordon Shows Speed in Return from Suspension*, FOX SPORTS (Dec. 3, 2017, 9:45 PM), <https://www.foxsports.com/nfl/story/browns-wr-josh-gordon-shows-speed-in-return-from-suspension-120317> [<https://perma.cc/N8UL-V6FB>] (recapping Gordon's first game back from suspension).

42. See *Josh Gordon Stats*, *supra* note 3 (listing Gordon's 2017 stats).

43. For further discussion of Gordon's documented struggles with substance abuse, see *supra* notes 14–42 and accompanying text.

44. See NAT'L FOOTBALL LEAGUE POLICY AND PROGRAM ON SUBSTANCES OF ABUSE, *supra* note 30, at 1–41 (detailing NFL's substance-abuse program). Gordon was disciplined under both the current and prior policies; see also Ken Belson, *N.F.L. Players Union Agrees to New Drug Policies*, N.Y. TIMES (Sept. 12, 2014), <https://www.nytimes.com/2014/09/13/sports/football/nfl-players-union-agrees-to-new-drug-policies.html> [<https://perma.cc/2LSZ-7Y6N>] ("[T]he N.F.L. Players Association unanimously approved new policies on substance abuse and performance-enhancing drugs on Friday, paving the way for an overhaul of a program that dates to 2006."); see also Nicole Yang, *A Timeline of Josh Gordon's History with Substance Abuse and Suspensions*, BOSTON.COM (Dec. 20, 2018), <https://www.boston.com/sports/new-england-patriots/2018/09/18/josh-gordon-drugs-suspension-timeline> [<https://perma.cc/Y9D3-EWXY?type=image>] (reporting Gordon served two suspensions before NFL reformed its Policy in 2014).

45. For a discussion on the NFL's Policy as compared to the MLB's and NBA's policies, see *infra* notes 183–205.

46. NAT'L FOOTBALL LEAGUE POLICY AND PROGRAM ON SUBSTANCES OF ABUSE, *supra* note 30, at 1 (explaining League's policy against substance abuse). Under the Policy, players are precluded from using, possessing, or distributing the following substances: "cocaine; marijuana; opiates and opioids; methylenedioxymethamphetamine (MDMA); and phencyclidine (PCP)." *Id.* Additionally, players are prohibited from abusing prescription drugs, over-the-counter drugs, and alcohol. See *id.*



consequences of substance abuse.”<sup>47</sup> While fans may associate the NFL’s substance abuse policy with player discipline, the NFL touts the Policy’s primary purpose is not discipline, but rather “to assist [p]layers who misuse [s]ubstances of [a]buse” through its Intervention Program.<sup>48</sup> The Policy further provides that it should be implemented and applied in a way toward “ensuring evaluation and treatment.”<sup>49</sup>

### B. Testing

There are four types of testing under the NFL’s Policy: pre-employment, pre-season, Intervention Program, and testing by agreement.<sup>50</sup> There are three instances when pre-employment testing applies.<sup>51</sup> First, a test may be administered to a player wishing to sign a contract with a team if he was not under contract with an NFL team at the end of the previous season.<sup>52</sup> Second, a player will be subjected to pre-employment testing if he was under contract with another team at the end of the previous season and he agrees with a new team, prior to signing a contract, to submit to a pre-employment test.<sup>53</sup> Third, any draft-eligible players may be tested during the annual draft combine.<sup>54</sup>

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47. *Id.* (justifying NFL’s position against substance abuse); *see also* Matt Conzales, *Substance Abuse and Professional Sports*, DRUG REHAB, <https://www.drugrehab.com/addiction/athletes/> [<https://perma.cc/XU5L-NL2X>] (last updated May 30, 2018) (listing professional football fatalities from substance abuse). Some notable football players who have died from substance abuse include: David Cruidip, David Waymer, Don Rogers, and Eugene Lipscomb. *See id.*

48. *See* NAT’L FOOTBALL LEAGUE POLICY AND PROGRAM ON SUBSTANCES OF ABUSE, *supra* note 30, at 2 (explaining Policy’s purpose). Although discipline is not touted as the purpose of the NFL’s Policy, the Policy does list various punishments that players are eligible to receive for violating League rules regarding prohibited substances. *See id.* at 42. Further, in addition to any punishment outlined in the Policy, the Commissioner has the authority to impose any other sanctions for conduct not covered in the Policy. *See id.* at 2.

49. *Id.* (explaining Policy’s purpose).

50. *See id.* at 8–9 (detailing types of testing authorized under Policy). All testing must be conducted under the direction of the medical advisor. *See id.* at 3. Under the Policy, the medical advisor must be a licensed physician and is to be jointly selected by NFL and NFLPA. *See id.* at 3–4. The medical advisor’s responsibilities include overseeing testing and advising the medical director regarding treatment plans. *See id.* at 3. The medical director is “responsible for developing and implementing all aspects of the Policy that relate to the treatment of [p]layers.” *Id.* at 2. This includes ensuring that players are complying with their treatment plans. *See id.*

51. *See id.* at 8 (describing pre-employment testing).

52. *See id.* (authorizing pre-employment testing to players meeting certain criteria).

53. *See id.* (detailing another category of players authorized to be tested under pre-employment testing).

54. *See id.* (describing pre-employment testing for college prospects).

Next, under pre-season testing, all players under contract with a team are to be tested once between April 20 through August 9.<sup>55</sup> Pre-season testing can be administered on a team-wide basis or by position groups, but not on an individual basis.<sup>56</sup> Next, under the Intervention Program, all players enrolled are required to provide a specimen.<sup>57</sup> The frequency of the Intervention Program testing depends on the stage of the program in which the player is enrolled.<sup>58</sup> Lastly, under testing by agreement, a team and a player “may agree that the [p]layer will submit to unannounced testing during the term of his NFL [c]ontract.”<sup>59</sup> However, the team must have a reasonable basis for requesting that a player enter into such an agreement.<sup>60</sup> Regardless of the type of testing, a player failing to appear for testing will be subject to discipline.<sup>61</sup>

### C. Intervention Program

A key characteristic of the NFL’s Policy is the Intervention Program (or “the Program”), which is a program for players struggling with substance abuse.<sup>62</sup> The Intervention Program is broken into three stages, and a player can enter into the program—beginning at Stage One—by a positive test result, specific behavior, or self-

55. *See id.* at 9 (establishing parameters for pre-season testing).

56. *See id.* (establishing parameters for pre-season testing).

57. *See id.* (detailing Intervention Program testing). For further discussion of the Intervention Program, see *infra* notes 62–106 and accompanying text.

58. *See* NAT’L FOOTBALL LEAGUE POLICY AND PROGRAM ON SUBSTANCES OF ABUSE, *supra* note 30, at 9 (explaining frequency of testing for players in various stages of Intervention Program). For players enrolled in Stage One of the Program, the medical director will determine the frequency of the testing. *See id.* at 14. The medical director will help “facilitate, coordinate, monitor, and assess [p]layers’ compliance with their Treatment Plans.” *Id.* at 2. For players enrolled in Stages Two or Three of the Intervention Program, the frequency of the testing will be determined by the medical advisor subject to the Policy’s terms. *See id.*

59. *Id.* at 15–17 (explaining testing by agreement). If a player and a team agree to this type of testing, the medical advisor, not the team, will conduct any subsequent testing. *See id.*

60. *See id.* (requiring team have reasonable basis for testing by agreement). The Policy neither defines “reasonable basis” nor sets any parameters to establish what might be considered a “reasonable basis.” *See id.*

61. *See id.* (noting that failure to appear for any type of testing will result in discipline). Under Appendix E of the Policy, if a player fails to appear for testing, the NFL, NFLPA, and the medical advisor will “determine the nature of the failure and the degree of the [p]layer’s culpability.” *Id.* at 33. If the player’s reason for missing the test was to evade or avoid testing, it will constitute a failed test. *See id.* If the reason for the missed test was not due to an effort to avoid testing, the player will be fined \$25,000 and placed in the Intervention Program. *See id.* If the player misses a second test, he will be fined two-seventeenths of his contract. *See id.* If the player misses a third test, he will be suspended without pay for four games. *See id.*

62. *See id.* at 2 (introducing Intervention Program).

referral.<sup>63</sup> Specific behavior refers to conduct, such as physical, behavioral, or psychological signs, indicating that the player is suffering from substance abuse.<sup>64</sup> A player may enter into the Intervention Program by self-referral, but only if he does so voluntarily, prior to testing positive for a banned substance.<sup>65</sup> Furthermore, a player's status may be changed from "self-referred" to "mandatory entrant" if he receives a positive test result, the medical director learns from an outside source that the player has engaged in new behavior, or an event occurs—such as an arrest for possession—that leads the medical director to learn of the player's behavior.<sup>66</sup>

### 1. *Stage One: Positive Tests, Behavior, Self-Referral*

Stage One is the entry level stage into the Intervention Program.<sup>67</sup> Players admitted into the Program will be subject to testing, and the medical director determines the frequency of the testing.<sup>68</sup> In severe cases, in addition to testing, a player may require clinical intervention or treatment.<sup>69</sup> Players in Stage One

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63. *See id.* at 12–13 (describing three ways in which players enter into Intervention Program).

64. *See id.* at 12 (explaining referral by behavior). If a player is referred to Stage One due to behavior, he will be subject to an evaluation in which the medical director will determine if the player requires clinical intervention or treatment. *See id.* at 13–14. If the medical director determines that the player does not require any intervention or treatment, he will be released from Stage One of the Program. *See id.* Conversely, if the medical director determines that the player needs clinical intervention or treatment, the player will be advanced to Stage Two of the Program. *See id.*

65. *See id.* at 12–13 (explaining entrance into Intervention Program via self-referral). Additionally, a player seeking to enter the Intervention Program via self-referral must not demonstrate behavior that indicates substance abuse. *See id.* If a player shows symptoms of substance abuse or tests positive, he will still enter the Program, but it will be deemed as a result of behavior or a positive test—not self-referral. *See id.*

66. *See id.* (explaining how player's status may be changed from "self-referral" to "mandatory entrant").

67. For a discussion of how players can enter into Stage One of the Intervention Program, see *supra* note 63 and accompanying text.

68. *See* NAT'L FOOTBALL LEAGUE POLICY AND PROGRAM ON SUBSTANCES OF ABUSE, *supra* note 30, at 13–15 (outlining Stage One testing procedures). For further explanation of the medical director's role, see *supra* notes 50 and 58 and accompanying text.

69. *See* NAT'L FOOTBALL LEAGUE POLICY AND PROGRAM ON SUBSTANCES OF ABUSE, *supra* note 30, at 13–15 (explaining treatment plans for players in Stage One). A player who is admitted into Stage One will be subject to an evaluation, which will be reviewed by the medical director. *See id.* The medical director will then determine whether testing is sufficient or whether the player would benefit from clinical intervention or treatment. *See id.* A recommendation of clinical intervention or treatment is not predicated on a diagnose of substance abuse disorder. *See id.* Rather, a player can be recommended for intervention or treatment if

may remain in this stage of the Program for only ninety days.<sup>70</sup> Upon the completion of Stage One, the player will either advance to Stage Two or will be discharged from the Intervention Program.<sup>71</sup> This decision depends on the initial reason for entry into Stage One.<sup>72</sup> A player who entered into the Program due to behavior will advance to Stage Two if (1) the medical director determines that the player requires clinical intervention or treatment, or (2) the player tests positive for a banned substance while in Stage One.<sup>73</sup> A player who entered into the Program due to a positive test will advance to Stage Two regardless of whether he is required to undergo clinical intervention or treatment.<sup>74</sup> Lastly, a self-referred player will remain in Stage One until he withdraws himself or the medical director discharges him.<sup>75</sup>

The Policy also lays out discipline for Stage One violations.<sup>76</sup> The medical director has discretion to determine whether a violation has occurred.<sup>77</sup> If the medical director determines that the player violated the evaluation process or his treatment plan, the player will be fined three-sevenths of his contract, and advanced to Stage Two.<sup>78</sup>

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the medical director merely determines that it may prevent the player's future misuse of banned substances. *See id.*

70. *See id.* (explaining duration requirements for Stage One). Further, the medical director may extend the duration by an additional ninety days if he or she deems it necessary. *See id.*

71. *See id.* at 14–15 (explaining advancement to Stage Two or discharge from Intervention Program depends on reason for entry into Intervention Program).

72. *See id.* (explaining players' options at conclusion of Stage One).

73. *See id.* at 15–17 (explaining advancement to Stage Two for players entered into Program for behavioral issues).

74. *See id.* at 16 (explaining advancement to Stage Two for players admitted due to positive test result). If it is determined that a player does not require clinical intervention or treatment, he will be subject to Stage Two testing, but will not have a treatment plan. *See id.*

75. *See id.* (explaining how to discharge self-referred player). For a discussion on how a player's status can be changed from "self-referred" to "mandatory entrant," see *supra* note 66 and accompanying text.

76. *See* NAT'L FOOTBALL LEAGUE POLICY AND PROGRAM ON SUBSTANCES OF ABUSE, *supra* note 30, at 15 (explaining medical director's role in deciding whether violation has occurred and ramifications of Stage One violation).

77. *See id.* (explaining medical director has discretion to determine whether "the failure or refusal to test or an attempt to alter the test results constitutes a [p]layer's failure to comply in Stage One subjecting him to discipline").

78. *See id.* (discussing punishment for Stage One violation). If the medical director determines that a violation did occur, he or she will then consult with the medical advisor and promptly notify the NFL Management Council and the NLPA that a violation has occurred. *See id.*

2. *Stage Two*

A player not discharged from Stage One of the Intervention Program will advance to Stage Two.<sup>79</sup> Unlike Stage One, all players in Stage Two are subject to unannounced testing, limited to ten tests per month.<sup>80</sup> A player in Stage Two will remain in the stage for twenty-four months or two seasons, whichever is shorter.<sup>81</sup> However, after twelve months in Stage Two, the player may be discharged if he has not had any additional positive tests.<sup>82</sup> Upon completion of Stage Two, the player will then either be discharged or advanced to Stage Three.<sup>83</sup> If a player successfully completes Stage Two, he will be discharged from the Program entirely and afforded the same status as a player who has never entered into the Intervention Program.<sup>84</sup>

Like Stage One, the Policy includes disciplinary measures for Stage Two violations.<sup>85</sup> A violation occurs if a player fails to comply with his treatment plan or any other requirements, or the player tests positive for a substance other than marijuana.<sup>86</sup> There are two available disciplinary measures for a first violation: if the player completed Stage One successfully, he will be fined four-seventeenths of his contract; if the player failed to complete Stage One

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79. *See id.* at 14–15 (explaining that player in Stage One will either be advanced to Stage Two or discharged from Intervention Program).

80. *See id.* at 15–17 (describing testing protocol under Stage Two). The medical advisor has the sole discretion to determine whether a player needs to be tested. *See id.* However, the medical advisor does have some limitations, such as the inability to test one player more than ten times in a calendar month. *See id.*

81. *See id.* at 16 (explaining Stage Two's duration). The duration begins from "the later of [the player's] date of entry into Stage Two or the date of his violation within Stage Two." *Id.*

82. *See id.* (explaining how player may be discharged from Stage Two prior to twenty-four-month duration). The medical advisor and the medical director will jointly assess the player's progress and determine whether he should be discharged from Stage Two. *See id.* If the player is not discharged after twelve months, he will be reassessed after an additional six months. *See id.*

83. *See id.* (explaining players' options at completion of twenty-four-month duration).

84. *See id.* (explaining status afforded to players successfully discharged from Stage Two).

85. For further discussion of discipline for Stage One violations, see *supra* notes 76-78 and accompanying text; see also NAT'L FOOTBALL LEAGUE POLICY AND PROGRAM ON SUBSTANCES OF ABUSE, *supra* note 30, at 16 (explaining discipline for Stage Two violations).

86. *See* NAT'L FOOTBALL LEAGUE POLICY AND PROGRAM ON SUBSTANCES OF ABUSE, *supra* note 30, at 16 (explaining how violation occurs). It is in the medical director's sole discretion to determine whether a player has failed to cooperate with the requirements imposed on him. *See id.* at 17.

successfully, he will be suspended without pay for four games.<sup>87</sup> Similarly, there are two available disciplinary measures for a second violation: if the player was fined four-seventeenths of his pay for his first violation, he will be suspended for four games without pay; if the player was suspended without pay for four games for his first violation, he will be suspended without pay for six games.<sup>88</sup> Regardless of the length of suspension, any player committing two violations will automatically be advanced to Stage Three.<sup>89</sup>

### 3. *Stage Three*

The last stage of the Intervention Program included in the Policy is Stage Three.<sup>90</sup> Stage Three testing mirrors that of Stage Two, in that tests are unannounced but cannot exceed ten per month.<sup>91</sup> Players failing to cooperate with their treatment plan or other requirements imposed on them will be subject to additional discipline.<sup>92</sup> Two of the key characteristics of Stage Three are banishment and reinstatement.<sup>93</sup> Typically, a player failing to comply with the Stage Three requirements will be banished from the League for at least one calendar year.<sup>94</sup> However, if a player tests positive for marijuana while in Stage Three, he will only be suspended without pay for ten games.<sup>95</sup> For any subsequent marijuana violation, the player will then receive banishment from the League for at least one calendar year.<sup>96</sup>

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87. *See id.* at 16 (outlining discipline for first violation). The suspensions included in the discipline include regular season and postseason games. *See id.*

88. *See id.* (outlining discipline for second violation).

89. *See id.* at 17 (stating two violations result in automatic advancement to Stage Three).

90. *See id.* at 18 (listing Stage Three as final stage in Intervention Program).

91. *See id.* at 17–18 (explaining Stage Three testing requirements). For further discussion on the Stage Two testing requirements, see *supra* note 80 and accompanying text.

92. *See* NAT'L FOOTBALL LEAGUE POLICY AND PROGRAM ON SUBSTANCES OF ABUSE, *supra* note 30, at 17–18 (listing discipline for Stage Three violations).

93. *See id.* at 18 (describing banishment and reinstatement criteria).

94. *See id.* (describing banishment). A player banished from the League must continue to “adhere to his Treatment Plan and the provisions of this Intervention Program during his banishment.” *Id.*

95. *See id.* (differentiating between marijuana and non-marijuana-related violations). The ten-game suspension includes regular season games, postseason games, and the Pro Bowl, if selected. *See id.*

96. *See id.* (discussing punishment for subsequent violations for players testing positive for marijuana). Subsequent violations include: “failure to comply with Treatment Plan; failure to cooperate with testing, treatment, evaluation or other requirements imposed by this Policy; or a Positive Test Result for any substance.” *Id.*

A banished player may seek reinstatement into the League, subject to the Commissioner's discretion.<sup>97</sup> When applying for reinstatement, the player must formally submit his application "no sooner than 60 days before the one-year-anniversary" of his suspension.<sup>98</sup> In his application, the player must include information regarding any treatment he received to combat the issue along with whether he remained abstinent from the substance, whether he had any incidents related to the substance abuse, and whether authorities arrested him for any criminal activity during the banishment period.<sup>99</sup>

A player's adherence to both his treatment plan and the medical director's requirements during his banishment period factors heavily into the Commissioner's reinstatement decision.<sup>100</sup> If the Commissioner deems it appropriate to grant reinstatement, he and the player will meet and the player must agree to comply with the conditions imposed by the Commissioner.<sup>101</sup> If the Commissioner reinstates the player, the player may return to the League but will remain in Stage Three and receive treatment under the Program.<sup>102</sup>

A player entering Stage Three will remain in this stage for the remainder of his playing career, unless the medical director elects to discharge him.<sup>103</sup> Discharge can only happen if the player does not have any additional positive tests after twenty-four months in the Program.<sup>104</sup> If the medical director decides that the player must remain in Stage Three, the director will reassess whether the

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97. *See id.* (explaining reinstatement process). For a discussion chronicling Josh Godron's journey to reinstatement, see *supra* notes 14–42 and accompanying text.

98. Michael DiRocco, *A Look at the NFL Reinstatement Procedure*, ESPN (Jan. 26, 2015), [http://www.espn.com/blog/jacksonville-jaguars/post/\\_/id/11048/here-is-the-nflreinstatement-procedure](http://www.espn.com/blog/jacksonville-jaguars/post/_/id/11048/here-is-the-nflreinstatement-procedure) [<https://perma.cc/A3AA-85QD>] (addressing when player may apply for reinstatement).

99. *See id.* (detailing application's contents).

100. *See id.* (explaining another factor in determining whether player should be reinstated).

101. *See id.* (providing player must agree to conditions imposed by Commissioner to be eligible to return).

102. *See* NAT'L FOOTBALL LEAGUE POLICY AND PROGRAM ON SUBSTANCES OF ABUSE, *supra* note 30, at 18 (explaining procedures after reinstatement). In addition to remaining in Stage Three, a reinstated player will be subjected to an indefinite ban if he fails a subsequent drug test. *See id.*

103. *See id.* (describing general rule that players in Stage Three remain in Stage Three for remainder of career).

104. *See id.* (explaining exception to requirement that players remain in Stage Three for remainder of career).

player should be discharged every twelve months thereafter.<sup>105</sup> A player discharged from Stage Three will receive the same status as a player who never entered the program.<sup>106</sup>

#### D. Discipline Schedule for Positive Tests

One element of the NFL's Policy is discipline stemming from a positive test result.<sup>107</sup> While some might believe that one positive test will result in a suspension, it actually requires four positive tests to result in a player missing playing time.<sup>108</sup> The first positive test is a player's ticket into the Intervention Program.<sup>109</sup> A second positive test results in a fine of two-weeks' pay for marijuana and four-weeks' pay for any other banned substance.<sup>110</sup> If the player received a fine for marijuana usage, and then fails another test, the League will fine the player four-weeks' pay.<sup>111</sup> Only after a player has received a fine of four-weeks' pay will a subsequent violation result in four-game suspension.<sup>112</sup> The next positive test results in a ten-game suspension for marijuana and banishment for any other positive test.<sup>113</sup> If a player is suspended ten games for marijuana usage and has another positive test, he will also be banished from the League.<sup>114</sup>

#### E. Violations of Law

In addition to testing positive for banned substances, players are subject to discipline for violations of law involving alcohol and other substances of abuse.<sup>115</sup> If a player admits to, or is convicted

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105. *See id.* (explaining subsequent evaluations). When reassessing a player, both the medical director and the medical advisor will determine whether the player should be discharged. *See id.*

106. *See id.* (describing status afforded to players discharged from Stage Three).

107. *See id.* at 41 (illustrating discipline for violations occurring in various stages of Intervention Program).

108. *See id.* at 16 (detailing what constitutes first violation). In addition to a positive test result, a violation is deemed to occur when a player fails to comply with his treatment plan or fails to cooperate with "testing, treatment, evaluation or other requirements imposed by th[e] Policy." *Id.* at 41 n.6.

109. *See id.* at 20 (describing discipline for first violation).

110. *See id.* (describing discipline for second violation).

111. *See id.* (detailing difference between discipline for marijuana and non-marijuana offenses).

112. *See id.* (detailing discipline for subsequent offense after player is suspended for four games).

113. *See id.* (describing discipline schedule). For further discussion on banishment under the Policy, see *supra* notes 91–96 and accompanying text.

114. *See id.* at 18 (describing how marijuana can also lead to banishment).

115. *See id.* at 19–20 (detailing discipline schedule for violations of law).



of, a violation of law, the Commissioner has the authority to review his case and impose a fine or suspension.<sup>116</sup> If the illegal activity involves alcohol but there are no aggravating circumstances, the player committing the offense will be subject to a two-game suspension for his first offense and an eight-game suspension for a second offense.<sup>117</sup> The Commissioner may increase the suspension if there is a finding of aggravating circumstances, or the player had a previous “drug or alcohol-related misconduct.”<sup>118</sup> For violations of law involving other banned substances, the player will be suspended four games for his first offense, and between six and ten games for a second or subsequent offense.<sup>119</sup> Similar to violations involving alcohol, the Commissioner has the power to increase the punishment upon a finding of aggravating circumstances.<sup>120</sup>

### F. Appeals

The last component to the Policy is the appeals process.<sup>121</sup> There are two types of appeals available: those heard by an arbitration panel, and those heard by the Commissioner.<sup>122</sup> First, players suspended for a positive test can file an appeal which third-party arbitrators will hear.<sup>123</sup> The NFL and the NFLPA jointly select between three and five arbitrators to hear such appeals.<sup>124</sup> The arbitrators have the authority to reduce a penalty below the minimums set forth under the Policy or vacate a penalty entirely.<sup>125</sup> Addition-

116. *See id.* at 20 (providing Commissioner has power to preside over cases involving violations of law).

117. *See id.* (detailing discipline schedule for violations of law involving alcohol). Aggravating circumstances include “felonious conduct, extreme intoxication (BAC of .15% or more), or property damage or serious injury or death to the Player or a third party.” *Id.*

118. *Id.* (providing Commissioner has discretion to increase punishment as deemed necessary).

119. *See* NAT’L FOOTBALL LEAGUE POLICY AND PROGRAM ON SUBSTANCES OF ABUSE, *supra* note 30, at 20 (outlining discipline schedule for “[v]iolations of [I]aw [i]nvolving [o]ther [s]ubstances of [a]buse”).

120. *See id.* (authorizing Commissioner to increase discipline for finding of aggravating circumstances).

121. *See id.* at 22–25 (detailing Policy’s appeal procedures).

122. *See id.* (distinguishing between appeals process for positive test result and for violation of law).

123. *See id.* (detailing appeals process for players suspended due to positive test result).

124. *See id.* (detailing selection of arbitrators). Appointed arbitrators will serve a two-year term and the NFL and NFLPA will equally share the arbitrators’ fees and expenses. *See id.*

125. *See id.* at 22–30 (describing arbitrators’ authority). For further discussion, and a listing, of the discipline schedule for positive test results, see *supra* notes 107–110 and accompanying text.

ally, prior to the completion of the appeal, the NFL Management Council may reduce the length of the suspension by fifty-percent.<sup>126</sup> However, this provision is incredibly limited, available only to players who can provide the Council with full and complete assistance “which results in the finding of an additional violation of the Policy by another [p]layer, coach, trainer or other person subject to [the] Policy.”<sup>127</sup>

Second, players suspended due to violations of law also have the right to appeal, but their appeal is heard by the Commissioner, the same person who originally suspended the player.<sup>128</sup> Players who have their suspensions upheld on appeal may further appeal the decision to the Appeals Panel.<sup>129</sup> However, these appeals are limited to either issues concerning due process or instances where the decision resulted in “an increased and disparate sanction when compared to other similarly situated [p]layers and the Hearing Officer failed to reasonably set forth the basis for the variation.”<sup>130</sup>

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126. See NAT'L FOOTBALL LEAGUE POLICY AND PROGRAM ON SUBSTANCES OF ABUSE, *supra* note 30, at 23 (allowing NFL Management Council to reduce discipline); see also *NFL Management Council Inc*, BLOOMBERG, <https://www.bloomberg.com/profiles/companies/0123595D:US-nfl-management-council-inc> [<https://perma.cc/RJ36-5ALD>] (last visited Dec. 28, 2018) (giving overview of NFL Management Council). The NFL Management Council “represents clubs and members in negotiations.” *Id.*

127. See NAT'L FOOTBALL LEAGUE POLICY AND PROGRAM ON SUBSTANCES OF ABUSE, *supra* note 30, at 23 (discussing remedy's applicability).

128. See *id.* at 22–25 (describing appeals process for players committing violation of law).

129. See *id.* at 23–24 (“A [p]layer shall have a right to appeal a decision affirming discipline to a member of the Appeals Panel established under Article 15 of the CBA.”); see also COLLECTIVE BARGAINING AGREEMENT art. 15 (Aug. 4, 2011), available at <https://nflpaweb.blob.core.windows.net/media/Default/PDFs/Active%20Players/2011%20CBA%20Updated%20with%20Side%20Letters%20thru%201-5-15.pdf> [<https://perma.cc/68C6-69JR>] (establishing Appeals Panel). Pursuant to Article 15 of the Collective Bargaining Agreement, the Appeals Panel is a three-member board whose members are jointly appointed by the NFL and NFLPA. See *id.* at 118. One of the three members must be a former judge. See *id.* The Appeals Panel is tasked with reviewing the arbitrator's finding of fact and determining all points of law before rendering a final decision. See *id.* at 116.

130. *Id.* at 24 (detailing procedural safeguard available for players). The Appeals Panel is established under Article 15 of the Collective Bargaining Agreement. See *id.* In regard to due process, players must: (i) be “provided with notice of the basis for the discipline”; (ii) not be denied the opportunity to present evidence or testimony; (iii) not be “denied the opportunity to cross-examine a witness whose testimony was offered . . . in support of the discipline imposed”; and (iv) not be “denied access to documents or evidence in the possession of the League or a Club and unavailable to the [p]layer . . . indicating that he did not violate the Policy or that a witness whose testimony was offered . . . was untruthful.” *Id.* In regard to an increased sanction, any suspension that falls within the range set forth in the discipline schedule for violations of law establishes a rebuttable presumption that the

## G. Josh Gordon's Disciplinary Schedule

Josh Gordon's journey through the Policy weaved through a number of the aforementioned phases.<sup>131</sup> The first of Josh Gordon's suspensions administered under the current Policy was the 2014 suspension for driving while impaired.<sup>132</sup> Under the previous policy, Gordon faced a year-long suspension; however, under the current Policy, because this was a crime involving alcohol and Gordon had previously tested positive for codeine, the Commissioner had authority to suspend Gordon ten games—eight more than what is typically administered under the Policy.<sup>133</sup> Gordon's 2015 suspension came as a result of a positive test for alcohol.<sup>134</sup> Although alcohol is not a prohibited substance under the Policy, discipline for alcohol use is "imposed . . . if a [p]layer's [t]reatment [p]lan prohibits alcohol."<sup>135</sup> As such, because the NFL tested and suspended Gordon for alcohol, his treatment plan presumably prohibited alcohol.<sup>136</sup> Accordingly, the NFL suspended Gordon, who was then in Stage Three following his two previous suspensions, for the entire year as a result of failing to comply with his treatment plan.<sup>137</sup>

As discussed above, a player receiving a year-long banishment must seek reinstatement into the League to play again.<sup>138</sup> The decision to reinstate the player rests solely with the Commissioner.<sup>139</sup> Although Gordon originally applied for reinstatement in January

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suspension is not disparate. *See id.* For further discussion of the discipline schedule for violations of law, see *supra* notes 115–120.

131. For further discussion of the Policy's stages, see *supra* notes 67–106 and accompanying text.

132. For further discussion of Gordon's first suspension, see *supra* notes 26–29 and accompanying text.

133. For further discussion of the Commissioner's authority to increase penalties for violations of law, see *supra* notes 118–120 and accompanying text.

134. For further discussion of the cause for Gordon's suspension, see *supra* notes 30–31 and accompanying text.

135. NAT'L FOOTBALL LEAGUE POLICY AND PROGRAM ON SUBSTANCES OF ABUSE, *supra* note 30, at 8 (discussing drugs for which players are tested).

136. *See id.* at 7 ("Alcohol is prohibited only if a [p]layer's [t]reatment [p]lan explicitly prohibits alcohol . . . . Discipline for alcohol use is imposed only if a [p]layer's [t]reatment [p]lan prohibits alcohol.").

137. *See id.* at 18 (providing that player who fails to comply with his treatment plan or tests positive for banned substance will be banished from NFL for at least one calendar year).

138. For further discussion of reinstatement proceedings, see *supra* notes 97–102 and accompanying text.

139. *See* NAT'L FOOTBALL LEAGUE POLICY AND PROGRAM ON SUBSTANCES OF ABUSE, *supra* note 30, at 18 (discussing reinstatement criteria and procedures after reinstatement).

2016, a failed drug test prompted the Commissioner to deny Gordon's petition for reinstatement.<sup>140</sup> Gordon later reapplied for reinstatement, which the Commissioner granted in July 2016, on the condition he sit out the first four games of the regular season.<sup>141</sup> After Gordon decided to forego his return and attend a rehabilitation clinic instead, he had to start the reinstatement process again.<sup>142</sup>

Seemingly unimpressed with Gordon's continuing troubles with substance abuse, the Commissioner, in his absolute discretion, once more rejected Gordon's petition for reinstatement.<sup>143</sup> However, the Commissioner later reinstated Gordon on a conditional basis, requiring Gordon to comply with clinical requirements prior to returning to the field.<sup>144</sup>

#### IV. ANALYSIS: SUBSTANCE ABUSE POLICIES AND THE PRIVATE SECTOR

While sports have long been an exception to many of the rules that govern the rest of society, the NFL's substance abuse policy falls in line with what is authorized under employment law.<sup>145</sup> The Supreme Court has helped shape drug testing policies in the public

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140. See Rodgers, *supra* note 33 (reporting Gordon's reinstatement request denied due to failed drug test).

141. See Shook, *supra* note 39 (reporting Gordon was conditionally reinstated).

142. See McManamon, *supra* note 35 (reporting Gordon elected to attend rehabilitation facility rather than report to Browns).

143. See Lyles, *supra* notes 37–38 (reporting Commissioner's denial of Gordon's latest petition for reinstatement).

144. See Shook, *supra* note 39 (reporting Gordon was reinstated on conditional basis).

145. See e.g., Ken Reed, *Why Does the U.S. Continue to Permit Unregulated Sports Leagues?*, HUFFINGTON POST (July 11, 2017), [https://www.huffingtonpost.com/entry/why-does-the-us-continue-to-permit-unregulated-sports\\_us\\_5965465fe4b0911162fc2f9c](https://www.huffingtonpost.com/entry/why-does-the-us-continue-to-permit-unregulated-sports_us_5965465fe4b0911162fc2f9c) [<https://perma.cc/AL7M-QMNJ>] (“The only industry in the United States in which you as a business owner can do pretty much whatever you want is the sports industry.”); see also Carl Hittinger & Adam Brown, *Antitrust Law Looms over Sports Contract Analysis*, PITT. POST GAZETTE (Feb. 14, 2011), <http://www.post-gazette.com/business/legal/2011/02/14/Antitrust-law-looms-over-sports-contracts-analysis/stories/201102140219> [<https://perma.cc/C9P8-3528>] (“Congress and the courts have carved out exceptions and exemptions to the Sherman Act that seek to protect professional sports leagues from . . . antitrust litigation.”); see also *How JFK's Signature Changed the NFL*, AMERICAN SPORTS, THE SPORT DIGEST (Nov. 22, 2013), <http://thesportdigest.com/2013/11/how-jfks-signature-changed-the-nfl-american-sports/> [<https://perma.cc/LC32-JV8X>] (“[The Sports Broadcasting Act of 1961] violated the Sherman Antitrust Law and gave leagues like the National Football League . . . the ability to bundle league or conference teams into one business package and sell that package to TV networks.”).

sector.<sup>146</sup> For instance, in *Skinner v. Railway Labor Executives Ass'n*,<sup>147</sup> the Court held that urine collecting and testing constitutes a “search” under the Fourth Amendment.<sup>148</sup> Also, in *Vernonia School District 47J v. Acton*,<sup>149</sup> the Court held that the “ultimate measure of the constitutionality of a governmental search is ‘reasonableness,’” and the “reasonableness” of a search is determined by “balancing its intrusion on the individual’s Fourth Amendment interests against its promotion of legitimate governmental interests.”<sup>150</sup>

However, the NFL is a private organization and there is “no comprehensive federal law that regulates drug testing in the private sector.”<sup>151</sup> In the absence of such a comprehensive federal law, the task of regulating drug testing by private employers has fallen squarely on the states.<sup>152</sup> Many states have passed legislation that establishes parameters on these substance abuse policies, but the extent of the regulation varies greatly amongst the states.<sup>153</sup> For instance, while the NFL is headquartered in New York City, New York has not passed any legislation limiting or banning random or

146. See Vanessa Gonzalez, *Employment Law Update: Drug Testing Employees, Applicants*, CTY. PROCESS (July 1, 2014), <https://countypprogress.com/employment-law-update-drug-testing-employees-applicants/> [<https://perma.cc/5ZY8-3YXW>] (summarizing Supreme Court’s rulings regarding drug testing policies).

147. 489 U.S. 602 (1989) (holding Fourth Amendment applies to drug testing authorized under Federal Railroad Administration regulations).

148. See *id.* at 617 (“Because it is clear that the collection and testing of urine intrudes upon expectations of privacy that society has long recognized as reasonable, the Federal Courts of Appeals have concluded unanimously, and we agree, that these intrusions must be deemed searches under the Fourth Amendment.”).

149. 515 U.S. 646 (1995).

150. *Id.* at 652–53 (quoting *Skinner v. Ry. Labor Exec. Assn.*, 489 U.S. 602 (1989)).

151. See *State-by-State Workplace Drug Testing Laws*, ACLU, <https://www.aclu.org/other/state-state-workplace-drug-testing-laws> [<https://perma.cc/LT3V-2WAD>] (last visited Oct. 17, 2018) (stating federal law does not regulate drug testing in private sector).

152. See *Drug and Alcohol Testing Laws by State*, EHS DAILY ADVISOR, [http://interactive.blr.com/Global/FileLib/Drug\\_Testing\\_Seminar/39318\\_DrugTesting\\_Report\\_EHSDA.pdf](http://interactive.blr.com/Global/FileLib/Drug_Testing_Seminar/39318_DrugTesting_Report_EHSDA.pdf) [<https://perma.cc/L9KC-M5ZS>] (last visited Oct. 19, 2018) (“Since there is no comprehensive federal drug-testing law, this leaves the field open to state regulation, and many states have enacted provisions imposing drug-testing restrictions of various kinds.”).

153. See *State-by-State Workplace Drug Testing Laws*, *supra* note 151 (providing state-by-state private employer drug testing laws).

suspicion-less drug testing.<sup>154</sup> As such, the NFL's Policy is compliant with what is required: nothing.<sup>155</sup>

However, not all states take such a laissez-faire approach to private employer drug testing.<sup>156</sup> For instance, if the NFL were headquartered in Massachusetts, its Policy would be subjected to heightened scrutiny.<sup>157</sup> In *Webster v. Motorola, Inc.*,<sup>158</sup> the Supreme Judicial Court of Massachusetts held that a Massachusetts employee's privacy is protected from "unreasonable, substantial, or serious interference."<sup>159</sup> With respect to drug testing, the court used a balancing test, weighing the "employees' interest in privacy against the employer's competing interest in determining whether its employees are using drugs."<sup>160</sup> In determining the employer's interest, the court recognized that an employer may have a legitimate interest in "aspects of an employee's health that could affect the employee's ability effectively to perform job duties."<sup>161</sup> If challenged, the NFL could attempt to prove its interest outweighed that of its players by citing the language provided in its Policy, specifically: "Substance abuse can lead to on-the-field injuries, to alienation of the fans, to diminished job performance, and to personal hardship."<sup>162</sup>

California follows a similar approach to Massachusetts.<sup>163</sup> Under California law, courts use a balancing test that weighs the strength of the employer's justification for the drug test against the

154. See Provision of Reasonable Accommodations 9 NYCRR § 466.11(h)(6)(ii) ("Nothing in these regulations is to be construed to . . . prohibit . . . the conducting of drug tests for the illegal use of drugs by job applicants or employees.").

155. See *id.* (reporting New York has not passed any laws limiting or restricting employer's power to conduct drug testing).

156. See Andrew Current, *5 Most Restrictive States for Drug Testing*, NAT'L DRUG SCREENING (Jan. 9, 2017), <https://www.nationaldrugscreening.com/show-blog.php?id=390> [<https://perma.cc/YE5E-5N2C>] (listing states with most restrictive drug testing policies). For example, "despite not having a mandatory drug testing statute on the books, California proves to be one of the trickiest states for crafting and maintaining a workplace drug testing policy." *Id.*

157. For further discussion of Massachusetts' approach to private sector drug testing, see *infra* notes 158–162 and accompanying text.

158. 637 N.E.2d 203 (Mass. 1994).

159. *Id.* at 207 (noting state laws are designed to protect individuals' expectations of privacy).

160. *Id.* (quoting *Folmsbee v. Tech. Tool Grinding & Supply, Inc.*, 630 N.E.2d 586, 589 (Mass. 1994)).

161. *Id.* (quoting *Bratt v. Int'l. Bus. Machs. Corp.*, 467 N.E.2d 126, 137 (Mass. 1984)).

162. NAT'L FOOTBALL LEAGUE POLICY AND PROGRAM ON SUBSTANCES OF ABUSE, *supra* note 30, at 1 (describing policy reasons behind NFL's Policy).

163. For further discussion of California's approach to private sector drug testing, see *infra* notes 164–170 and accompanying text.

intrusion on the employee's privacy interest.<sup>164</sup> In *Hill v. National Collegiate Athletic Ass'n*,<sup>165</sup> student-athletes at Stanford University sued the NCAA over the its drug testing policy as a violation of privacy.<sup>166</sup> The California Supreme Court found in favor of the NCAA, but held that an employer "must establish a 'legitimate' or 'important' reason" for its substance abuse testing policy.<sup>167</sup> In *Smith v. Fresno Irrigation District*,<sup>168</sup> the California Court of Appeals considered the validity of random drug testing and noted that courts generally hold suspicion-less drug testing unreasonable unless "the employee is in a safety-sensitive position."<sup>169</sup> As such, if an employer cannot establish that the employee is in a "safety[-]or security-sensitive position," courts are likely to find in the employee's favor.<sup>170</sup> Here, the NFL would undoubtedly claim that its players are in a safety-sensitive position, since the League has often claimed player safety is its top concern.<sup>171</sup> The NFL has even expressly stated in its Policy that "substance abuse can lead to on-the-field injuries."<sup>172</sup> And the numbers would certainly support the NFL's claim that its players are in a safety-sensitive position: "There were

164. See *Smith v. Fresno Irrigation Dist.*, 72 Cal. App. 4th 147, 159 (Cal. Ct. App. 1999) (citing *Loder v. City of Glendale*, 927 P.2d 1200 (Cal. 1997)) ("The constitutionality of a drug test is evaluated by weighing and balancing the legitimacy or strength of the justification for the conduct against the intrusion on a protected privacy interest.").

165. 865 P.2d 633 (Cal. 1994) (holding intercollegiate athletic association's testing of urine samples did not violate athletes' right to privacy).

166. See *id.* at 639 (detailing NCAA's drug testing policy). The NCAA conducted urine tests at its athletic events. See *id.* Additionally, individual student-athletes could be chosen randomly, or using selection criteria "such as playing time, team position, place of finish, or suspicion of drug use." *Id.*

167. *Id.* at 637 ("The NCAA's drug testing program does not violate plaintiffs' state constitutional right to privacy."); see also *Smith*, 72 Cal. App. 4th at 157-58 (citing *Hill*, 865 P.2d at 668) ("Instead of a compelling interest, the entity seeking the drug test must establish a 'legitimate' or 'important' reason for its drug testing program.").

168. 72 Cal. App. 4th 147 (Cal. Ct. App. 1999).

169. *Id.* at 159 (citing *Kraslawsky v. Upper Deck Co.*, 56 Cal. App. 4th 179, 189 (Cal. Ct. App. 1997)); see also *Kemp v. Claiborne Cty. Hosp.*, 763 F. Supp. 1362, 1367 (S.D. Miss. 1991) (discussing validity of random drug testing).

170. See Ryan McCoy, *Random Drug Tests (Still) Not Advisable in Most California Workplaces*, CALIFORNIA PECULIARITIES EMP. L. BLOG (May 2, 2017), <https://www.calpeculiarities.com/2017/05/02/random-drug-tests-still-not-advisable/> [<https://perma.cc/5J4Q-ZZCX>] ("[A] California employer may engage in random drug testing only if the employer can make a strong case that an employee works in a safety-sensitive position.").

171. See e.g., *Safety Rules & Regulation*, NFL, <http://www.nfl.com/news/story/0ap1000000228345/article/safety-rules-regulations> [<https://perma.cc/2HFB-RE3C>] (last updated Aug. 9, 2013) ("Player safety is the top priority for the NFL.").

172. NAT'L FOOTBALL LEAGUE POLICY AND PROGRAM ON SUBSTANCES OF ABUSE, *supra* note 30, at 1 (listing risks associated with substance abuse).

6.9 injuries per game on Thursday nights . . . [and] 6.3 injuries per game in Saturday, Sunday and Monday night.”<sup>173</sup> Therefore, even in a state such as California, which some consider to be one of the strictest states for private employer drug testing, the NFL’s Policy would likely be upheld.<sup>174</sup>

#### V. CHALLENGE BROUGHT AGAINST THE NFL’S SUBSTANCE ABUSE POLICY

As discussed above, the NFL is headquartered in New York, a state with no statute limiting or restricting a private employer’s ability to conduct drug testing.<sup>175</sup> Additionally, even if New York were to pass such a statute or the NFL were to relocate to a state more notorious for limiting employer rights, such as Massachusetts or California, the NFL’s Policy contains language establishing a legitimate interest for its testing policy.<sup>176</sup> Because the NFL’s Policy contains such language, challenges have not attacked the validity of its testing policies, but rather the appeals process.<sup>177</sup> In November 2016, Mike Pennel, a defensive tackle for the Green Bay Packers, sued the NFL and the NFLPA, seeking additional arbitrators to hear his appeal of his suspension.<sup>178</sup> As discussed above, under the

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173. See Mark Maske, *Concussions Suffered by NFL Players Up this Season; Injury Rate Higher for Thursday Games*, WASH. POST (Jan. 26, 2018), [https://www.washingtonpost.com/news/sports/wp/2018/01/26/concussions-suffered-by-nfl-players-up-this-season-injury-rate-higher-for-thursday-games/?utm\\_term=.89194bdf5f0a](https://www.washingtonpost.com/news/sports/wp/2018/01/26/concussions-suffered-by-nfl-players-up-this-season-injury-rate-higher-for-thursday-games/?utm_term=.89194bdf5f0a) [<https://perma.cc/T22K-9BUE>] (providing injury statistics from 2017 preseason and regular season). For comparison, during the 2016 season, “there were 5.3 injuries per game on Thursdays . . . [and] 6.5 injuries per game on other days.” *Id.* The 2017 season also saw the highest amount of diagnosed concussions in the NFL (281) since 2012. See *id.*

174. See Current, *supra* note 156 (listing California as one of five strictest states regarding private employer drug testing).

175. For further discussion of the implications of the NFL being headquartered in New York, which has no laws limiting employer’s ability to drug test, see *supra* notes 154–155 and accompanying text.

176. For further discussion of drug testing policy in other jurisdictions, including California and Massachusetts, see *supra* notes 154–174; see also NAT’L FOOTBALL LEAGUE POLICY AND PROGRAM ON SUBSTANCES OF ABUSE, *supra* note 30, at 1 (“Substance abuse can lead to on-the-field injuries, to alienation of the fans, to diminished job performance, and to personal hardship.”).

177. See Josh Alper, *Mike Pennel Sues NFL, NFLPA Over Suspension Appeal Arbitration*, PRO FOOTBALL TALK (Nov. 30, 2016), <https://profootballtalk.nbc.com/2016/11/30/mike-pennel-sues-nfl-nflpa-over-suspension-appeal-arbitration/> [<https://perma.cc/AZF9-SRVA>] (reporting Pennel alleged NFL “failed to abide by the arbitration selection and assignment provisions” of Policy).

178. See Eric Heisig, *Green Bay Packers Defensive Tackle Sues NFL Over Substance Abuse Discipline Appeal*, CLEVELAND.COM, [http://www.cleveland.com/court-justice/index.ssf/2016/11/green\\_bay\\_packers\\_defensive\\_en.html#incart\\_river\\_index](http://www.cleveland.com/court-justice/index.ssf/2016/11/green_bay_packers_defensive_en.html#incart_river_index) [<https://perma.cc/CJ4M-MQPL>] (last updated Nov. 29, 2016) (reporting Pennel



NFL's Policy players testing positive for a banned substance have a right to have their appeal heard by no less than three arbitrators.<sup>179</sup> Pennel initially appealed his ten-game suspension, but later filed suit to postpone the appeal after learning that only two arbitrators would be hearing his appeal.<sup>180</sup> In his lawsuit, Pennel asked the federal judge to appoint a third arbitrator and to delay his appeal until the additional arbitrator was appointed.<sup>181</sup> However, Pennel later settled the lawsuit in exchange for the NFL's agreement to reduce his suspension to four games.<sup>182</sup>

## VI. HOW OTHER LEAGUES HANDLE SUBSTANCE ABUSE

### A. Major League Baseball

While the NFL's substance abuse Policy seemingly complies with federal and New York employment law, it has often been scrutinized when compared to other sports leagues.<sup>183</sup> Of the major American sports leagues, Major League Baseball is perhaps most commonly associated with substance abuse issues.<sup>184</sup> The fallout of

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filed lawsuit after receiving email from league indicating only two arbitrators were available).

179. For further discussion of the appeal process available to players who tested positive for a banned substance, see *supra* notes 121–130 and accompanying text.

180. See Heisig, *supra* note 178 (stating Pennel asked federal judge to appoint third arbitrator and to postpone appeal until appointment of additional arbitrator); see also Sports Illustrated Wire, *Packers DT Mike Pennel Sues NFL, NFLPA Over Suspension Appeal*, SPORTS ILLUSTRATED (Nov. 30, 2016), <https://www.si.com/college-football/2016/11/30/mike-pennel-files-lawsuit-against-nfl-nflpa> [<https://perma.cc/W5CP-FX27>] (acknowledging Pennel previously served four-game suspension for violating substance abuse policy).

181. See Heisig, *supra* note 178 (detailing lawsuit against NFL). Pennel filed a restraining order along with the lawsuit to delay his upcoming appeal. See *id.* In the restraining order, Pennel noted that the average career length is 3.3 seasons and that “disciplinary suspensions further reducing already limited career opportunities represent a significant harm to [players].” *Id.*

182. See Scott Polacek, *Mike Pennel Settles Lawsuit Against NFL, NFLPA and NFLMC*, <http://bleacherreport.com/articles/2678942-mike-pennel-files-lawsuit-against-nfl-nflpa-and-nflmc-latest-details-comments> [<https://perma.cc/8QUL-U3XB>] (last visited Oct. 18, 2018) (reporting Pennel dropped lawsuit against NFL).

183. For further discussion of the legality of the NFL's Policy under federal and state employment law, see *supra* notes 145–174 and accompanying text; see also Mike Florio, *Is the NFL Softening its Stance on the Substance-Abuse Policy?*, PRO FOOTBALL TALK (July 23, 2018), <https://profootballtalk.nbcsports.com/2018/07/23/is-the-nfl-softening-its-stance-on-the-substance-abuse-policy/> [<https://perma.cc/FZY9-TW8M>] (“Maybe . . . the NFL finally has realized that its over-the-top obsession with players smoking marijuana hurts the game more than it helps the game, especially with marijuana no longer possessing the stigma it once did.”).

184. See Bell Malley, *The 20 Biggest Scandals in Sports History*, BLEACHER REP. (Sept. 27, 2011), <http://bleacherreport.com/articles/854416-the-20-biggest-scan>

the “Steroid Era” resulted in the MLB implementing one of the harshest substance abuse policies, allowing only two failed drug tests for performance-enhancing drugs before the player receives a lifetime ban.<sup>185</sup> A player testing positive for a performance-enhancing drug will receive an eighty-game suspension, followed by a 162-game suspension—the entire length of the regular season—for a second failed drug test.<sup>186</sup>

The MLB provides a very detailed testing policy, requiring players to submit a urine sample at least twice per season, and a blood sample at least once per season.<sup>187</sup> Players who previously tested positive for banned substances are subjected to six additional random urine tests and three additional blood tests annually.<sup>188</sup> The MLB offsets some of these harsh conditions by allowing for an independent arbitrator to hear appeals, with authority to reduce a suspension for a first or second violation by up to fifty-percent.<sup>189</sup> However, to be eligible for a suspension-reduction, a player is required to prove by clear and convincing evidence that his significant fault or negligence did not cause the positive test.<sup>190</sup> Further, arbitration is not an available remedy for positive tests resulting from muscle-building substances, such as testosterone or human growth hormone (“HGH”).<sup>191</sup>

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dals-in-sports-history [https://perma.cc/BXA7-9A9G] (listing baseball’s Steroid Era as sixteenth biggest scandal in sports history); *see also* *The Steroids Era*, ESPN, [http://www.espn.com/mlb/topics/\\_/page/the-steroids-era](http://www.espn.com/mlb/topics/_/page/the-steroids-era) (last updated Dec. 5, 2012, 4:23 PM) [https://perma.cc/7LSH-M2B2] (providing overview of Steroid Era). The Steroid Era is described as a roughly twenty-year span (from the late 1980s to the late 2000s) during which many of baseball’s “biggest” stars were accused of, or admitted to, taking performance-enhancing drugs. *See id.*

185. *See* *MLB Ups Length of Drug-Use Bans*, ESPN (Mar. 31, 2014), [http://www.espn.com/mlb/story/\\_/id/10690127/major-league-baseball-union-toughen-drug-agreement-provisions](http://www.espn.com/mlb/story/_/id/10690127/major-league-baseball-union-toughen-drug-agreement-provisions) [https://perma.cc/5Z5N-ZH5R] (detailing MLB’s substance abuse policy); *see also* *The Steroids Era*, *supra* note 184. Although the MLB originally banned performance-enhancing drugs in 1991, the League did not test for such drugs until 2003. *See id.* In the years leading up to the Steroid Era, home runs were not the defining feature of the game. *See id.* For instance, between 1961 and 1994, only three players hit fifty or more home runs in a season. *See id.* From 1995 to 2003, offensive output increased drastically throughout baseball, with many players hitting over fifty home runs in a single season, including Mark McGwire, who hit seventy home runs in 1997, and Barry Bonds who belted seventy-three in 2001. *See id.*

186. *See id.* (detailing discipline schedule for performance-enhancing drugs).

187. *See id.* (describing testing policy for performance-enhancing drugs).

188. *See id.* (describing additional testing requirements for players who previously tested positive for banned substance).

189. *See id.* (detailing appeal process available to players).

190. *See id.* (noting difficult burden players must overcome to reduce suspension).

191. *See id.* (noting additional parameter placed on appeal process).

However, in regard to marijuana, the MLB arguably has the most lenient policy amongst the major sports leagues.<sup>192</sup> Although MLB's Joint Drug Agreement lists marijuana as a banned substance, the policy does not test for recreational drugs like marijuana unless there is reasonable cause.<sup>193</sup> Because the league does not conduct random testing, it has been estimated that up to seventy-five percent of MLB players use marijuana.<sup>194</sup>

### B. National Basketball Association

The NBA follows a similar approach to Major League Baseball's marijuana policy, falling on the progressive side of the spectrum in regard to its testing procedures.<sup>195</sup> The NBA has two types of testing: random testing and reasonable cause testing.<sup>196</sup> All players are subject to four random tests throughout the season, and an additional two random tests in the offseason.<sup>197</sup> In addition to random testing, the NBA's policy provides for reasonable cause testing, triggered when the NBA or its players association receives information that provides reasonable cause to believe that a player is using, possessing, or distributing a banned substance.<sup>198</sup> Upon receiving such information, either party may then request a hearing with the player and an independent expert, who will determine whether rea-

192. See *Smokers, Jokers, Midnight Tokers: A Look at How the NFL, NBA, MLB and NHL Test For Marijuana*, N.Y. DAILY NEWS (July 30, 2016, 5:17 PM), <http://www.nydailynews.com/sports/i-team/nfl-nba-mlb-nhl-test-marijuana-article-1.2732129> [<https://perma.cc/8P6S-6W7G>] (comparing how four major sports leagues test for marijuana). The NHL has the second most lenient approach, which annually subjects one-third of its players to testing for recreation drugs, such as marijuana. See *id.*

193. See Andy Martino, *Major League Baseball Has a Cocaine Problem*, HUFFINGTON POST, [https://www.huffingtonpost.com/entry/major-league-baseball-cocaine\\_us\\_597b505ae4b02a4ebb75150b](https://www.huffingtonpost.com/entry/major-league-baseball-cocaine_us_597b505ae4b02a4ebb75150b) [<https://perma.cc/87CV-H4G7>] (last updated July 28, 2017) (stating MLB will not test players for recreational drugs unless there is reasonable cause).

194. See *id.* (estimating drug usage rates in MLB). To arrive at this estimate, the author of the article interviewed four players, two current and two recently retired. See *id.* The players also reported that between five and twenty-five percent of MLB players used cocaine. See *id.*

195. For further discussion of NBA's substance abuse policy, see *infra* notes 216–217 and accompanying text.

196. See CBA 101: HIGHLIGHTS OF THE 2011 COLLECTIVE BARGAINING AGREEMENT BETWEEN THE NATIONAL BASKETBALL ASSOCIATION (NBA) AND THE NATIONAL BASKETBALL PLAYERS ASSOCIATION (NBPA), 23, (Sept. 2012) [hereinafter CBA 101], available at [https://www.nba.com/media/CBA101\\_9.12.pdf](https://www.nba.com/media/CBA101_9.12.pdf) [<https://perma.cc/MT3G-GHHP>] (detailing NBA's proscribed methods of testing).

197. See *id.* (detailing testing policy).

198. See *id.* (discussing reasonable cause testing).

sonable cause exists, and, if it does, will authorize the testing.<sup>199</sup> The NBA also provides for an alternative to testing: adjudication without testing.<sup>200</sup> Under this approach, if either the NBA or its players association believes there is sufficient evidence indicating a player's usage, possession, or distribution of a substance, the matter may be taken directly to a grievance arbitrator, without requiring any testing—whether random or due to reasonable cause.<sup>201</sup>

What most distinguishes the NBA's approach from the NFL's Policy is the leniency of its disciplinary schedule.<sup>202</sup> Similar to the NFL's approach, a first violation for marijuana usage will merely result in admission into the NBA's substance abuse policy.<sup>203</sup> However, unlike the NFL, a second violation will merely result in a \$25,000 fine, a third violation will result in a five-game suspension, and every subsequent violation will result in a suspension five games longer than the player's immediately-preceding suspension.<sup>204</sup> Therefore, an NBA player would have to commit ten violations to be suspended for roughly half of the NBA season (forty games), whereas an NFL player need only commit five violations to be suspended for ten games, or 62.5-percent of the NFL's regular season.<sup>205</sup>

199. *See id.* (discussing procedure to determine whether reasonable cause exists). Within twenty-four hours of receiving the information giving rise to reasonable cause, the NBA or its players association must request the hearing. *See id.* If the independent expert authorizes the testing, the player will be tested four times during the following six weeks. *See id.*

200. *See id.* (analyzing adjudication without testing).

201. *See id.* (discussing adjudication without testing). If the arbitrator determines the player has used or possessed a banned substance, the player "will be dismissed and disqualified from the NBA." *Id.*

202. For further discussion on the NFL's discipline schedule, see *supra* notes 107–114.

203. *See* CBA 101, *supra* note 196, at 24 ("If a player tests positive for marijuana . . . he will be required to enter the [m]arijuana [p]rogram."); *see also* NAT'L FOOTBALL LEAGUE POLICY AND PROGRAM ON SUBSTANCES OF ABUSE, *supra* note 30, at 12 ("Players enter Stage One of the Intervention Program by . . . [p]ositive [t]est [r]esult.").

204. *See* CBA 101, *supra* note 196, at 25 (explaining discipline for subsequent violations).

205. *See id.* (explaining suspensions under NBA's discipline schedule); *see also* NAT'L FOOTBALL LEAGUE POLICY AND PROGRAM ON SUBSTANCES OF ABUSE, *supra* note 30, at 18 (explaining suspensions under NFL's discipline schedule). However, the NBA takes a much stronger stance against felony distribution of marijuana, stating that any player found guilty of such an act "will be dismissed and disqualified from the NBA." CBA 101, *supra* note 196, at 24.

## VII. HOW TO IMPROVE THE NFL'S APPROACH

No drug testing policy is perfect, but with a changing legal and social climate towards drug usage, the NFL and NFLPA can, and should, make improvements to the NFL's Policy, specifically regarding marijuana.<sup>206</sup> The recreational use of marijuana is legal in nine states and Washington D.C., and twenty-nine other states permit medical marijuana.<sup>207</sup> The NFL has softened its stance against the drug by increasing the threshold required to trigger a positive test, but the League's Policy is still behind the times.<sup>208</sup> In an article published in 2016, former NFL running back Ricky Williams claimed that he "believes 60-70% of NFL players smoke marijuana."<sup>209</sup> While there is no study reported that could accurately calculate the number, many former and current players have expressed a desire—often citing health reasons—to allow the drug.<sup>210</sup> In 2014, NFL Commissioner Roger Goodell expressed that he

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206. See Jessica Glenza, *Ten Million More Americans Smoke Marijuana Now Than 12 Years Ago: Study*, THE GUARDIAN (Sept. 1, 2016, 5:00 PM), <https://www.theguardian.com/society/2016/sep/01/marijuana-use-americans-study-lancet-legalization> [<https://perma.cc/ETQ5-3HZW>] (reporting Americans now view marijuana as less risky than previously thought); see also Scott Martin, *A Brief History of Marijuana in America*, TIME (Apr. 20, 2016), <http://time.com/4298038/marijuana-history-in-america/> [<https://perma.cc/3VNJ-3L97>] (detailing how America's perception of marijuana has changed since "War on Drugs").

207. See Melia Robinson, *Here's Where You Can Legally Smoke Weed in 2018*, BUS. INSIDER (Jan. 23, 2018, 1:46 PM), <http://www.businessinsider.com/where-can-you-can-legally-smoke-weed-2018-1> [<https://perma.cc/TCL2-BCCK>] (listing states which have legalized recreational usage and medical usage of marijuana).

208. See Erik Brady, *NFL Limits on Marijuana Still Strict, But Not Really*, USA TODAY SPORTS, <https://www.usatoday.com/story/sports/nfl/2014/10/23/national-football-league-marijuana-testing-policy/17784021/> [<https://perma.cc/R5FK-7JC2>] (last updated Oct. 23, 2014, 5:54 PM) (reporting NFL softened stance on marijuana). The current substance abuse policy raised the permitted threshold from "15 nanograms of carboxy THC per milliliter of urine to 35 nanograms." *Id.*

209. *Ricky Williams Believes 60-70% of NFL Players Smoke Marijuana*, SPORTS ILLUSTRATED (July 13, 2016), <https://www.si.com/nfl/2016/07/13/ricky-williams-nfl-players-percentage-smoke-marijuana> [<https://perma.cc/8N87-F3SC>] (reporting Williams' estimate of marijuana consumption amongst NFL players). Williams, who was suspended multiple times throughout his career for testing positive for marijuana, is now an advocate for its legalization and has voiced his belief that the drug can be used as a safer alternative than the currently-used opioids to manage pain. See *id.*

210. See Rick Maese, *NFL Players Fight Pain With Medical Marijuana: 'Managing it With Pills Was Slowly Killing Me'*, WASH. POST (May 2, 2017), [https://www.washingtonpost.com/sports/redskins/nfl-players-fight-pain-with-medical-marijuana-managing-it-with-pills-was-slowly-killing-me/2017/05/02/676e4e62-2e80-11e7-9534-00e4656c22aa\\_story.html?utm\\_term=.dbab4f4e8d91](https://www.washingtonpost.com/sports/redskins/nfl-players-fight-pain-with-medical-marijuana-managing-it-with-pills-was-slowly-killing-me/2017/05/02/676e4e62-2e80-11e7-9534-00e4656c22aa_story.html?utm_term=.dbab4f4e8d91) [<https://perma.cc/4HCF-AXN2>] (reporting former players now using medical marijuana to treat chronic pain).

would consider changing his stance on marijuana.<sup>211</sup> However, by 2017, Goodell had taken on a different tone, saying that the League “see[s] no medical benefits,” and “it may not be healthy for players long term.”<sup>212</sup> While it no longer appears that a change is imminent, should the NFL eventually wish to change its stance on marijuana, a simple solution would be to follow the NBA’s policy.<sup>213</sup>

Because Goodell has taken such a strong stance against the drug, it is unlikely that the NFL would consider doing away with its random testing policy to mirror the approach taken by the MLB.<sup>214</sup> However, the NFL can still improve upon its Policy by following the approach taken by the NBA.<sup>215</sup> The NBA tests for marijuana, and still considers the drug a “banned substance,” but the league takes a more liberal approach to its discipline schedule.<sup>216</sup> The NBA subjects players to a fine of \$25,000 for a second violation, and a five-game suspension for a third violation, that increases by an additional five games for every subsequent violation.<sup>217</sup> By testing for marijuana but focusing more on fines and lesser suspensions, the NFL can still achieve its goal of assisting players struggling with substance abuse, while ensuring that its stars remain on the field.<sup>218</sup>

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211. See Chris Strauss, *Goodell: NFL Would Consider Allowing Medical Marijuana*, USA TODAY, <https://www.usatoday.com/story/sports/nfl/2014/01/23/commissioner-roger-goodell-marijuana/4797267/> [<https://perma.cc/WDX2-SG7C>] (last updated Jan. 23, 2014) (“Commissioner Roger Goodell said . . . the NFL would consider allowing athletes to use marijuana to treat concussions and other injuries if medical experts deemed it a legitimate solution.”).

212. Chris Burke, *Roger Goodell: NFL May Allow Medical Marijuana if it Helps With Concussions*, SPORTS ILLUSTRATED (Jan. 23, 2014), <https://www.si.com/nfl/audibles/2014/01/23/roger-goodell-medical-marijuana-concussions> [<https://perma.cc/MN6W-RAK9>] (“We will follow medicine and if they determine [marijuana] could be a proper usage in any context, we will consider that.”); see also Kevin Seifert, *Roger Goodell Says NFL Sees No Medical Benefits from Marijuana*, ESPN (Apr. 28, 2017), [http://www.espn.com/nfl/story/\\_/id/19264404/commissioner-roger-goodell-says-nfl-sees-no-medical-benefits-marijuana](http://www.espn.com/nfl/story/_/id/19264404/commissioner-roger-goodell-says-nfl-sees-no-medical-benefits-marijuana) [<https://perma.cc/L2WZ-4W78>] (reporting on Goodell taking strong stance against marijuana).

213. For a discussion on the NBA’s policy regarding marijuana usage, see *supra* notes 195–205 and accompanying text.

214. For further discussion of Major League Baseball’s approach to marijuana, see *supra* notes 183–194 and accompanying text.

215. For a discussion on the NBA’s substance abuse policy, see *supra* notes 196–204 and accompanying text.

216. See CBA 101, *supra* note 196, at 22 (listing marijuana as a prohibited substance).

217. See *id.* at 24–25 (detailing NBA’s discipline schedule).

218. See NAT’L FOOTBALL LEAGUE POLICY AND PROGRAM ON SUBSTANCES OF ABUSE, *supra* note 30, at 2 (“The primary purpose of the Policy is to assist [p]layers who misuse [s]ubstances of [a]buse. As a result, the implementation and application of the . . . Policy should first be directed toward ensuring evaluation and treatment.”).

The NFL can also improve upon its Policy by following and honoring the terms to which it agreed.<sup>219</sup> The most recent challenge to the League's Policy has centered around procedural issues.<sup>220</sup> As chronicled above, in 2016, Mike Pennel brought a lawsuit against the NFL after it notified him that his appeal would only be heard by two arbitrators, which is less than what is required under the Policy.<sup>221</sup> As such, another simple solution to minimize litigation and appease the players is to merely adhere to what the parties agreed upon.<sup>222</sup>

The NFL can also improve its substance abuse Policy by allowing all appeals to be heard by independent arbitrators.<sup>223</sup> Under the Policy, players testing positive for a banned substance can have their appeal heard by a panel of independent arbitrators, an approach that is mirrored by the MLB.<sup>224</sup> However, for players violating a law pertaining to alcohol or other banned substances, their appeal is heard by the Commissioner: the same person who authorized the suspension initially.<sup>225</sup> As discussed above, the NFL provides a safeguard for players who have their appeal affirmed by the Commissioner, as they can appeal to an independent panel, but this remedy applies to a very limited set of circumstances: when the player is not granted due process, or when the player is subjected to an increased penalty.<sup>226</sup>

### VIII. JOSH GORDON'S FUTURE

After playing in the final five games of the 2017 season and making it through the offseason without any additional arrests or suspensions, Gordon seemed poised to return to form for the

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219. For further discussion of a recent lawsuit claiming that the NFL failed to abide by the Policy's terms, see *supra* notes 178–182 and accompanying text.

220. For further discussion of the most recent challenge to the NFL's substance abuse Policy, see *supra* notes 178–182 and accompanying text.

221. See Heisig, *supra* note 178 (providing overview of Pennel's claim against NFL).

222. For further discussion of the claims against the NFL and the remedies sought against the league, see *supra* notes 178–182 and accompanying text.

223. See NAT'L FOOTBALL LEAGUE POLICY AND PROGRAM ON SUBSTANCES OF ABUSE, *supra* note 30, at 24 (requiring Commissioner to hear appeals stemming from violations of law).

224. See *id.* at 23 (explaining appeal process for players testing positive for banned substance). For further discussion of the MLB's appeal process, see *supra* notes 189–191 and accompanying text.

225. See NAT'L FOOTBALL LEAGUE POLICY AND PROGRAM ON SUBSTANCES OF ABUSE, *supra* note 30, at 24 ("Appeals of discipline issued [for a violation of law] shall be heard by the Commissioner or his designee.").

226. See *id.* (allowing player whose discipline was affirmed to appeal to member of Appeals Panel in limited circumstances).

Cleveland Browns in 2018.<sup>227</sup> However, two days before the Browns kicked off their training camp, Gordon released a statement claiming that he would not be reporting to camp.<sup>228</sup> His absence, however, was not because of a suspension, it was because of his treatment plan, with which he had to comply.<sup>229</sup> Gordon even assured fans that he was “not only doing great physically but mentally as well.”<sup>230</sup>

News continued to look up for Gordon when he announced on August 18, that he would be reporting to the team.<sup>231</sup> Browns General Manager John Dorsey released a statement regarding Gordon’s return, in which he praised Gordon “for his hard work, commitment and focus on becoming the best version of himself.”<sup>232</sup> Unfortunately for the Browns and Gordon alike, this praise

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227. See Yang, *supra* note 44 (reporting no arrests or suspensions since Gordon’s reinstatement in 2017); see also Kevin Skiver, *Jarvis Landry Marvels at Fellow Browns Receiver Josh Gordon, Says He’s ‘Unstoppable’*, CBS SPORTS (July 6, 2018), <https://www.cbssports.com/nfl/news/jarvis-landry-marvels-at-fellow-browns-receiver-josh-gordon-says-hes-unstoppable/> [https://perma.cc/M59R-N2D5?type=image] (reporting teammates impressed by Gordon during summer workouts). Fellow wideout Jarvis Landry stated “[Gordon]’s unstoppable” and quarterback Baker Mayfield said he’s “never seen anybody like [Gordon], bar none. [Gordon]’s definitely gifted.” *Id.*

228. See John Breech, *Here’s the Reported Reason Josh Gordon Will Miss First Part of Browns Training Camp*, CBS SPORTS (July 24, 2018) <https://www.cbssports.com/nfl/news/heres-the-reported-reason-josh-gordon-will-miss-first-part-of-browns-training-camp/> [https://perma.cc/W8B9-DQNG?type=image] (reporting Gordon informed Browns he will not be reporting to first part of training camp); see also Kaylyn Hlavaty, *Browns Release 2018 Training Camp Schedule*, NEWS 5 CLEVELAND <https://www.news5cleveland.com/sports/browns/browns-release-training-camp-schedule> [https://perma.cc/WF9B-VL44] (last updated June 26, 2018) (reporting Browns training camp schedule).

229. See Breech, *supra* note 228 (providing explanation for Gordon’s absence); see also NAT’L FOOTBALL LEAGUE POLICY AND PROGRAM ON SUBSTANCES OF ABUSE, *supra* note 30, at 18 (describing reinstatement requirements). “A [p]layer allowed to return to the NFL following banishment must participate in continued treatment under this Intervention Program.” *Id.*

230. See Breech, *supra* note 228 (reporting Gordon’s statement). In his statement, Gordon addressed his fans, saying: “I am reaching out to you all personally and letting you know that I am not only doing great physically but mentally as well. You will notice that I will not be in Cleveland for the start of training camp. Rest assured, this, too is a part of my overall health and treatment plan.” *Id.*

231. See John Breech, *Josh Gordon Makes Surprise Announcement, Will Report to Browns After Long Absence*, CBS SPORTS (Aug. 18, 2018), <https://www.cbssports.com/nfl/news/josh-gordon-makes-surprise-announcement-will-report-to-browns-after-long-absence/> [https://perma.cc/RK4-Y87V?type=image] (reporting Gordon returning to Browns). In his statement, Gordon said: “As I humbly return to being a member of this team with an opportunity to get back to playing this game I love, I realize in order for me to reach my full potential my primary focus must remain on my sobriety and mental well-being.” *Id.*

232. See *id.* (reporting Dorsey’s statement in response to Gordon’s announcement).



was short-lived.<sup>233</sup> On September 15, the Browns made national headlines when the organization announced it planned to cut Gordon.<sup>234</sup> The decision to cut Gordon was not due to a relapse, but rather because Gordon injured his hamstring at a photo shoot and showed up late to practice.<sup>235</sup> As many reported, the Browns had simply lost trust in their star wideout.<sup>236</sup> Despite the high expectations going into the 2018 season, Gordon played in just one game for the Cleveland Browns, recording one reception for seventeen yards.<sup>237</sup>

However, Josh Gordon's story did not end in Cleveland.<sup>238</sup> Before the Browns officially cut ties with Gordon, the New England

233. See *Josh Gordon Statement from Browns General Manager John Dorsey*, 13 ABC, <https://www.13abc.com/content/sports/Josh-Gordon-Statement-from-Browns-General-Manager-John-Dorsey-493432411.html> [<https://perma.cc/XH3X-Q783>] (last updated Sept. 16, 2018) (announcing Browns' plan to cut Gordon). Unlike his previous statement regarding Josh Gordon, Dorsey's latest statement had a different tone: "This afternoon we informed Josh Gordon and his representatives that we are going to release him on Monday. . . . [U]nfortunately we've reached a point where we feel it's best to part ways and move forward." *Id.*

234. See, e.g., R.J. White, *Browns to Cut Ties with Josh Gordon After He Injures Hamstring, Reportedly Shows Up Late Saturday*, CBS SPORTS (Sept. 16, 2018) <https://www.cbssports.com/nfl/news/browns-to-cut-ties-with-josh-gordon-after-he-injures-hamstring-reportedly-shows-up-late-saturday/> [<https://perma.cc/RJ6P-JTU8?type=image>] (reporting Browns plan to cut Gordon following off-field injury). The decision to cut Gordon was described as "abrupt" and many NFL insiders and fans alike were left speculating on the cause, which did not come out until after the news broke. See *id.*

235. See *id.* (discussing reason for Browns' decision to cut Gordon). Prior to the reasons becoming known, some speculated that Gordon relapsed. See *id.* One reporter claimed that Gordon was "not himself" when he showed up to the Browns' facility Saturday morning, which was seen as a "red flag for substance use" by some members of the Browns organization. See *id.*

236. See Zac Jackson, *Sources: Josh Gordon Lost Browns' Trust After Misleading Them, Suffering Injury while Shooting Commercial*, THE ATHLETIC (Sept. 17, 2018), <https://theathletic.com/530633/2018/09/17/sources-josh-gordon-lost-browns-trust-after-misleading-them-suffering-injury-while-shooting-commercial/> [<https://perma.cc/3LJ6-2PYD>] (reporting Browns lost trust in Gordon). The cause of Gordon's injury also contributed to the Browns losing trust in their wideout. See *id.* The Browns granted Gordon permission to use their indoor facility for a photo shoot for his clothing line, but Gordon actually used their facility to film a promotional video that was to be released as a social-media commercial. See *id.*; see also ESPN.com News Services, *Browns to Part with Josh Gordon; Source Says WR Broke Team's 'Trust'*, ABC NEWS (Sept. 15, 2018), <https://abcnews.go.com/Sports/browns-part-josh-gordon-source-wr-broke-teams/story?id=57853780> [<https://perma.cc/3G8A-BM29>] ("A source told ESPN's Chris Mortensen that [Gordon] broke the team's 'trust' when he reported to the facility with a hamstring issue after being a full participant in practice all week.").

237. See *Josh Gordon*, PRO FOOTBALL REFERENCE, <https://www.pro-football-reference.com/players/G/GordJo02.htm> [<https://perma.cc/2799-HVE9>] (last visited Oct. 17, 2018) (recording Gordon's 2018 stats).

238. See *Josh Gordon's Tenure in Cleveland Ends With Trade to Patriots*, ESPN (Sept. 18, 2018), [http://www.espn.com/nfl/story/\\_/id/24714529/new-england-](http://www.espn.com/nfl/story/_/id/24714529/new-england-)

Patriots traded for the wideout, thereby giving him another chance at redemption.<sup>239</sup> Initially, it seemed like Gordon was not going to squander what might be his last opportunity in the NFL.<sup>240</sup> In his first three games with the Patriots, Gordon saw an increase in production and received praise for his work ethic and ability to learn the playbook.<sup>241</sup> However, Gordon's problems resurfaced on December 20, when he announced that he was stepping away from football to focus on his mental health.<sup>242</sup> Shortly thereafter, the NFL announced its decision to suspend Gordon indefinitely for violating the terms of his reinstatement.<sup>243</sup> The most recent suspension serves as the latest barrier along Gordon's ever-continuing road to redemption.<sup>244</sup>

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patriots-get-josh-gordon-trade-cleveland-browns [https://perma.cc/KXL2-KCPG] (reporting Browns traded Gordon to New England Patriots).

239. See Scott Davis, *Patriots Trade for Josh Gordon in Massive Upgrade to Their Offense*, BUS. INSIDER (Sept. 17, 2018) <https://www.businessinsider.com/patriots-josh-gordon-trade-rumors-browns-2018-9> [https://perma.cc/R9E2-HDAF] (detailing trade's terms). In exchange for Gordon, the Patriots sent to the Browns a fifth-round pick in the 2019 NFL Draft. See *id.*

240. See Oliver Connolly, *Josh Gordon May Turn Out to be Bill Belichick's Greatest Trade Ever*, THE GUARDIAN (Sept. 21, 2018, 8:26 AM), <https://www.theguardian.com/sport/2018/sep/21/josh-gordon-may-turn-out-to-be-bill-belichicks-greatest-ever-trade> [https://perma.cc/F6JQ-7WB3] ("The Patriots represent the last chance of Gordon's football career.").

241. See *Josh Gordon*, *supra* note 237 (listing Gordon's 2018 statistics). In his first game with the Patriots, Gordon was targeted twice, pulling in two receptions for thirty-two yards. See *id.* In his next game, Gordon caught two passes for fifty yards and a touchdown. See *id.* In his third game, Gordon was targeted nine times and recorded five receptions for forty-two yards. See *id.*; see also Andrew Callahan, *Tom Brady: What Josh Gordon Has Done in New England is So Impressive*, MASS LIVE, [http://blog.masslive.com/patriots/2018/10/tom\\_brady\\_what\\_josh\\_gordon\\_has.html](http://blog.masslive.com/patriots/2018/10/tom_brady_what_josh_gordon_has.html) [https://perma.cc/T234-DQUF] (last updated Oct. 15, 2018) (reporting Gordon has impressed teammates during short tenure with Patriots). New England quarterback Tom Brady spoke highly of Gordon, saying: "To come in, learn the offense, have the attitude he's had to do whatever the team needs him to do and for him to be in there for so many plays, in my mind, he was just so impressive." *Id.*

242. See Victor Mather, *Patriots' Josh Gordon Suspended Again For Violating N.F.L. Substance Abuse Policy*, N.Y. TIMES (Dec. 20, 2018), <https://www.nytimes.com/2018/12/20/sports/josh-gordon-new-england-patriots.html> [https://perma.cc/YW65-AVTH] (reporting Gordon released statement regarding absence from team). In his statement, Gordon made it seem as if the decision to leave was voluntary and accredited the absence to his desire to "focus on his mental health." See *id.*

243. See Kevin Patra, *Patriots' Josh Gordon Suspended Indefinitely by NFL*, NFL (Dec. 22, 2018, 10:16 AM), <http://www.nfl.com/news/story/0ap3000001002110/article/patriots-josh-gordon-suspended-indefinitely-by-nfl> [https://perma.cc/9UWE-ATVW] (reporting Gordon suspended for violating terms of reinstatement). The New England Patriots issued a statement following the announcement expressing their support for Gordon "in his continued efforts to focus on his health." *Id.*

244. For further discussion of Gordon's previous banishments and reinstatement, see *supra* notes 30–40 and accompanying text.

## IX. CONCLUSION

Despite only committing one criminal offense—pleading guilty to a driving while under the influence charge in September 2014—the NFL suspended Gordon for over two calendar years, making him the latest example of the unreasonable sternness of the NFL’s substance abuse Policy.<sup>245</sup> The Policy, while valid under federal and state employment laws, has frequently been criticized and occasionally challenged.<sup>246</sup> The NFL’s approach lacks the leniency of the NBA’s and MLB’s policies, and the legitimacy of the MLB’s appeal process.<sup>247</sup> With nine states legalizing recreational marijuana use, the NFL’s draconian approach to these violations can best be characterized as outdated.<sup>248</sup> With an increasing number of star players voicing their support of lessening the penalty for marijuana offenses, and a policy that keeps star-players like Gordon away from the field, the NFL needs to adopt a policy that reflects that of other sports leagues.<sup>249</sup>

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245. For further discussion of Gordon’s suspensions since entering the League, see *supra* notes 14–40 and accompanying text.

246. For further discussion of the validity of the NFL’s Policy and legal challenges brought against it, see *supra* notes 145–182 and accompanying text.

247. For further discussion of the NBA’s and MLB’s substance abuse policies, see *supra* notes 183–205 and accompanying text.

248. See Robinson *supra* note 207 (listing states legalizing recreational use of marijuana and medical marijuana).

249. For further discussion on how the NFL can improve its Policy, see *supra* notes 206–226 and accompanying text.

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