No. 11-1898

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

TOM BRADY *et al.*,

Plaintiffs-Appellees,

v.

NATIONAL FOOTBALL LEAGUE *et al.*,

Defendants-Appellants.

On Appeal From The United States District Court
For The District Of Minnesota

BRIEF FOR APPELLEES

James W. Quinn
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, NY 10153
(212) 310-8000

Jeffrey L. Kessler
DEWEY & LEBOEUF LLP
1301 Avenue of the Americas
New York, NY 10019
(212) 259-8000

Theodore B. Olson
Counsel of Record
Andrew S. Tulumello
Scott P. Martin
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, DC 20036
(202) 955-8500
(202) 530-4238 (facsimile)

Counsel for Appellees
[Additional Counsel Listed on Inside Cover]

Barbara P. Berens
Justi Rae Miller
BERENS & MILLER, P.A.
3720 IDS Center
80 South Eighth Street
Minneapolis, MN 55402
(612) 349-6171

Timothy R. Thornton
BRIGGS & MORGAN, P.A.
2200 IDS Center
80 South Eighth Street
Minneapolis, MN 55402
(612) 977-8550

Bruce S. Meyer
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, NY 10153
(212) 310-8000

David G. Feher
David L. Greenspan
DEWEY & LEBOEUF LLP
1301 Avenue of the Americas
New York, NY 10019
(212) 259-8000

Travis D. Lenkner
John F. Bash
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, DC 20036
(202) 955-8500

Counsel for Appellees

SUMMARY OF THE CASE

The district court granted a preliminary injunction against a group boycott instituted by the NFL and its 32 member teams in the market for player services. The court concluded, among other things, that the boycott is a *per se* violation of the Sherman Act, and that it is causing severe and immediate harm to the players, which cannot be remedied by damages alone. The issue on appeal is whether the district court abused its discretion in granting the injunction.

The Court has scheduled this case for oral argument on June 3, 2011 and has allotted 30 minutes of argument per side.

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INTRODUCTION

This appeal presents the straightforward but immensely important question whether a federal law enacted to *protect* the rights of employees may be manipulated to preclude provisional, equitable relief intended to *prevent* irreparable injury to employees from a blatantly unlawful group boycott. That perverse outcome can be predicated only on a seriously erroneous construction of labor law, abetted by a misapprehension of the facts of this dispute.

The following propositions provide an indisputable foundation for this appeal:

1. The NFL is a cartel that the Supreme Court has repeatedly and, just last year, unanimously held to be subject to the restraints against anticompetitive conduct contained in the Sherman Act. *See Am. Needle, Inc.* v. *NFL*, 130 S. Ct. 2201, 2206–07, 2214 n.7 (2010); *Radovich* v. *NFL*, 352 U.S. 445, 452 (1957); *see also Mackey* v. *NFL*, 543 F.2d 606, 618 (8th Cir. 1976).

2. The collective bargaining agreement ("CBA"), which for many years bound the cartel members and their employees together, and which provided the NFL with a limited non-statutory antitrust exemption, was prematurely and unilaterally terminated by the NFL in the midst of its agreed-upon term, after which the NFL, also unilaterally, immediately imposed a lockout of its employees.

3. The NFL lockout is incontrovertibly a "*per se* unlawful group boycott and price-fixing agreement in violation of antitrust law." D.E. 99 ("Op."), at 83 (quotation marks omitted). Two district court opinions have found the NFL's lockout planning and implementation to be both unlawful and unconscionable. *Id.* at 83–84; *White* v. *NFL*, — F. Supp. 2d —, No. 4-92-906, 2011 WL 706319, at *8 (D. Minn. Mar. 1, 2011).

4. In the face of the NFL's unlawful and injurious conduct, the employees (the "players") legally, formally, and officially terminated their union and all their rights—and responsibilities—as members of a union. The players' decision to abandon their union was a legitimate exercise of their *absolute* and *unequivocal* statutory and constitutional right to "refrain" from "join[ing] . . . labor organizations" or "bar-

gain[ing] collectively." National Labor Relations Act § 7, 29 U.S.C. § 157; *see also* Norris-LaGuardia Act § 2, 29 U.S.C. § 102. Freed from the constraints imposed on them as members of a union, the players became fully entitled to assert their rights under the antitrust laws.

5. The players' decision to abandon their union was not only their lawful right, but the NFL contractually and unequivocally waived the right to challenge such a decision in the 1993 settlement of *White* v. *NFL*, 836 F. Supp. 1508 (D. Minn. 1993), *aff'd*, 41 F.3d 402 (8th Cir. 1994)—a position they reaffirmed in 1996, 1998, 2002, and 2006, in the CBA.

6. Neither the antitrust laws, nor the absence of a CBA or a union, will or should inhibit the NFL's ability to proceed to conduct professional football. *See Am. Needle*, 130 S. Ct. at 2216 ("Football teams that need to cooperate are not trapped by antitrust law."). Indeed, for much of its history, the NFL has operated its business without a unionized workforce.

7. The players—1,500 to 2,000 of them—are unquestionably sustaining immediate, daily, immeasurable, and irreparable injury as long as the unlawful boycott remains in place. On the other side of the eq-

uity scale, the profitable constituent business enterprises which comprise the NFL assert that they will suffer an intangible blow to their "negotiating position" and "leverage" in collective-bargaining negotiations that no longer exist, and that under federal labor law cannot lawfully take place. The overwhelming inequity in that imbalance is patently obvious.

In light of this stark background, the NFL's defense to the preliminary injunction cannot be sustained. The NFL's principal line of defense, while beguilingly simple, is simply wrong: the Norris-LaGuardia Act does not apply in the absence of organized labor activity. And even if the Act *does* apply to this antitrust lawsuit, this Court has held—in virtually identical circumstances—that the Act does not preclude the issuance of permanent injunctive relief. *See Mackey* v. *NFL*, 543 F.3d 606 (8th Cir. 1976). The NFL's arguments with respect to the labor exemption and primary jurisdiction also flatly contradict Supreme Court and controlling Eighth Circuit precedents, including cases in which the NFL was a party and argued positions directly contrary to those they now present to this Court.

COUNTER-STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the district court erred in concluding that the Norris-LaGuardia Act does not prohibit an injunction against a group boycott of nonunionized employees.

- Norris-LaGuardia Act, 29 U.S.C. § 101 *et seq.*
- *Mackey* v. *NFL*, 543 F.3d 606 (8th Cir. 1976)
- *Ozark Air Lines, Inc.* v. *Nat'l Mediation Bd.*, 797 F.2d 557 (8th Cir. 1986)
- *Bhd. of Locomotive Eng'rs* v. *Balt. & Ohio R.R.*, 310 F.2d 513 (7th Cir. 1962)
- *De Arroyo* v. *Sindicato de Trabajadores Packinghouse*, 425 F.2d 281 (1st Cir. 1970)
- *Lumber & Sawmill Workers Union* v. *Cole*, 663 F.2d 983 (9th Cir. 1981)

2. Whether the district court erred in rejecting the NFL's claim that its group boycott is exempt from the Sherman Act under the implied non-statutory labor exemption.

- Sherman Antitrust Act, 15 U.S.C. § 1 *et seq.*
- *Brown* v. *Pro Football, Inc.*, 518 U.S. 231 (1996)
- *Mackey* v. *NFL*, 543 F.2d 606 (8th Cir. 1976)
- *Powell* v. *NFL*, 930 F.2d 1293 (8th Cir. 1989)

3. Whether the district court abused its discretion in declining to stay or refer this case to the National Labor Relations Board.

- *United States* v. *W. Pac. R.R.*, 352 U.S. 59 (1956)
- *Alpharma, Inc.* v. *Pennfield Oil Co.*, 411 F.3d 934 (8th Cir. 2005)
- *Red Lake Band of Chippewa Indians* v. *Barlow*, 846 F.2d 474 (8th Cir. 1988)
- *Pittsburgh Steelers, Inc.*, No. 6-CA-23143, 1991 WL 144468 (N.L.R.B.G.C. June 26, 1991)

4. Whether the district court abused its discretion in assessing the balance of the equities and the public interest.

- *Silverman* v. *MLB Player Relations Comm., Inc.*, 67 F.3d 1054 (2d Cir. 1995)
- *Bowman* v. *NFL*, 402 F. Supp. 754 (D. Minn. 1975)
- *Jackson* v. *NFL*, 802 F. Supp. 226 (D. Minn. 1992)

STATEMENT OF FACTS

In 1968, the National Labor Relations Board ("NLRB") recognized the NFLPA as the exclusive bargaining representative of all NFL players. *Mackey* v. *NFL*, 543 F.2d 606, 610 (8th Cir. 1976). Although the NFL suggests this has continuously been the case, *see* Br. 4, that is incorrect: No union existed between 1989 and 1993. Following "organized strikes in 1982 and 1987" that "failed to win free agency or other desired changes in League rules," the NFLPA "chose to decertify as a union" in 1989, "abandon[ing] collective bargaining" in favor of "antitrust litigation." *White* v. *NFL*, 585 F.3d 1129, 1134 (8th Cir. 2009).

The NFLPA's abandonment of union status in 1989 flowed from this Court's decision in *Powell* v. *NFL*, which suggested—as the NFL conceded at the time—that any exemption to the Sherman Act "implied" from federal labor policy terminated when "the affected employees ceased to be represented by a certified union." 930 F.2d 1293, 1303 & n.12 (8th Cir. 1989). After *Powell*, the players could obtain the protections of the Sherman Act only by abandoning their union—which is precisely what they did. *See White*, 585 F.3d at 1134.

Following dissolution of the union in 1989, individual players pursued litigation against the NFL, resulting in a judgment that the NFL had violated the antitrust laws. *See McNeil* v. *NFL*, Civ. No. 4-90-476, 1992 WL 315292 (D. Minn. Sept. 10, 1992). Individual players also filed numerous other antitrust actions challenging NFL player rules, including *White* v. *NFL*, 822 F. Supp. 1389 (D. Minn. 1993), and *Jackson* v. *NFL*, 802 F. Supp. 226 (D. Minn. 1992). Facing liability in these cases, the NFL entered into a court-approved class action settlement in 1993 with the players in *White* v. *NFL*. *See* Op. 11; *see also White* v. *NFL*, 41 F.3d 402, 406 (8th Cir. 1994).

The NFL describes the players' re-entry into a union in 1993 as a "resurrection," Br. 37, but the formation of a new union was a condition of settlement demanded *by the NFL* in order to obtain the benefits of the non-statutory labor exemption, *see* Op. 11–12; *see also* App. 342–43 ¶ 14 (quoting *id.* at 364). The players only reluctantly agreed to that demand, and did so *only* on the explicit condition that the NFL unequivocally waive any challenge to the validity of any future union dissolution. *See* Op. 11–12. At the players' insistence, this waiver was

therefore included as a provision in the *White* settlement. App. 93–94 ¶ 8.

The parties thereafter entered into a CBA that replicated the terms of the *White* settlement agreement, with both documents governing their conduct going forward. Op. 11–12. The waiver provision is expressly set forth in Article LVII, Section 3 of the most recent CBA. *See* App. 331–32. Section 3 provides that, at expiration of the CBA's term or at any time thereafter, the players have the right to abandon the NFLPA as a union. In unambiguous language, that provision bars the NFL from contending that such a disclaimer is a "sham, pretext, ineffective, requires additional steps, or has not in fact occurred." *Id.* at 332.

As this Court recently observed, "[w]hen the settlement was approved, both the League and the Association were well aware that the existence of a collective bargaining relationship would preclude the players' antitrust lawsuits." *White*, 585 F.3d at 1137. "The applicability of the nonstatutory labor exemption was what caused the Association to decertify" in 1989, and "it is presumably what led the League to insist on recertification and resumption of collective bargaining as part

of the settlement." *Ibid.* The NFL and the union therefore have *long* understood—and contractually endorsed—the players' right to abandon the union and invoke the protections of the antitrust laws. This understanding formed the core of the *White* settlement in 1993. *See* App. 93–94 ¶ 8, 920–21.

The NFLPA and NFL amended and extended the CBA in 1996, 1998, 2002, and 2006, at which point the parties extended it to February 2013. Op. 12; *see also* App. 95 ¶ 12. In May 2008, however, the NFL unilaterally renounced the CBA two years before its scheduled expiration, triggering an expedited termination date of March 2011. As that termination date approached, the players once again confronted the stark choice that this Court in *Powell* recognized awaited them: continue as a union under the protective umbrella of federal labor law, or abandon the union to return to the protection accorded by the antitrust laws. The players overwhelmingly decided—twice—to dissolve the union, as the NFL had known for years they might. Op. 13–14; *see also* App. 97 ¶ 18, 347 ¶ 25, 372–412.

The NFL has inaccurately described the dissolution as "conditional." Br. 6. On the contrary, the players' vote most assuredly did not

say that the union would dissolve "only in the event of a lockout." *Id.* at 36. The players voted, unequivocally and unconditionally, to end the NFLPA's status as a union as of 4 p.m. on the day the CBA expired. *See* App. 97 ¶ 18. The dissolution was complete and effective, and it left the players unprotected by a union but at liberty to protect their rights under the antitrust laws.

The NFL characterizes the dissolution as "purported" and "tactical," and as a "ploy." Br. 7. Not only are those characterizations false, but the NFL made repeated and legally binding pledges as part of the *White* settlement and in the CBA that it would not raise such objections. Moreover, every single player in the NFL sacrificed numerous rights and protections by terminating their union. App. 99 ¶ 27. The players no longer: (1) have union representation in grievances and disciplinary appeals, *id.* at 98 ¶ 24; (2) benefit from union regulation of player agents, including enforcement of maximum fees charged to players for their services and union oversight of player-agent disputes in arbitration, *id.* at 98 ¶ 25; or (3) receive the union's assistance and advocacy in benefit applications to the NFL Player Retirement Plan and related plans, including for line-of-duty disability, football degenerative

disability, and dementia and other neurological disability, *id.* at 99 ¶ 26. Most fundamentally, they gave up *all* their rights to collectively bargain and strike, and "*all* other labor-law rights that are *only* available to unionized employees." *Id.* at 99 ¶ 27 (emphases added); *see also* 29 U.S.C. § 158(a)(5).

Having relinquished these labor-law rights, the players now seek the protections of the Sherman Act to challenge, as relevant here, the NFL's group boycott against all current and potential players.

SUMMARY OF ARGUMENT

The district court did not abuse its discretion in granting the preliminary injunction.

I. The Norris-LaGuardia Act ("NLGA") does not apply here because this is not a "labor dispute." The courts, including this circuit, have held that a "labor dispute" requires collectively organized employees engaged in "concerted labor activity." *Ozark Air Lines, Inc.* v. *Nat'l Mediation Bd.*, 797 F.2d 557, 563 (8th Cir. 1986). The NFL does not cite *any* case that has *ever* held that disputes between employers and individual nonunionized employees fall under the NLGA. Any such holding would vastly expand the reach of the statute to encompass in-

numerable routine employment disputes. Nor does this case "grow out of" a labor dispute. The statutory definition of "grow out of" makes clear that the phrase expands the universe of *parties* who can invoke the NLGA, but does not expand the NLGA's reach to *cases* where no "labor dispute" exists.

In any event, the injunction complies with the NLGA's requirements. The First, Seventh, and Ninth Circuits have held that Section 4(a) of the NLGA prohibits only injunctions against employee strikes—a conclusion that is squarely consistent with the text and history of Section 4(a). And the district court made the findings required by Section 7. Indeed, this Court held in *Mackey* v. *NFL*, 543 F.2d 606 (8th Cir. 1976), that materially indistinguishable findings complied with Section 7. The district court was not required to hold an evidentiary hearing because the NFL did not timely request one and because, in any event, there were no disputed material facts. *Kan. City S. Trans. Co.* v. *Teamsters*, 126 F.3d 1059, 1067–68 (8th Cir. 1997).

II. The non-statutory labor exemption does not immunize the NFL from the antitrust laws because the exemption does not apply after the collective-bargaining relationship has ended. *Brown* v. *Pro Foot-*

ball, Inc., 518 U.S. 231, 250 (1996). The exemption is designed to avoid placing employers in the Catch-22 of violating either the antitrust laws or the labor laws, but once a union is terminated, the employers do not violate the labor laws when imposing terms of employment outside the collective-bargaining process. Additionally, the group boycott is not protected by the non-statutory labor exemption because it does not concern a mandatory subject of collective bargaining. *Powell* v. *NFL*, 930 F.2d 1293, 1297 (8th Cir. 1989).

III. This case should not be stayed while the NLRB considers the NFL's meritless unfair-labor-practice charge. The NLRB's General Counsel has already validated a disclaimer in precisely analogous circumstances, and the NFL has waived the right to raise its "sham" argument. There is no reasonable likelihood that the agency will pursue the NFL's charge.

IV. The balance of the equities and the public interest decidedly favor the injunction. The NFL's only interest in preserving the lockout is to use its overwhelming bargaining power to force the players to reunionize. By contrast, the lockout is imposing immediate, career-

threatening harm on players and may deprive the public of the 2011 professional football season.

STANDARD OF REVIEW

The district court granted a preliminary injunction after considering "(1) the threat of irreparable harm to the movant; (2) the state of balance between this harm and the injury that granting the injunction will inflict on other parties litigant; (3) the probability that movant will succeed on the merits; and (4) the public interest." *Dataphase Sys., Inc.* v. *C L Sys., Inc.*, 640 F.2d 109, 114 (8th Cir. 1981) (en banc).

This Court reviews that decision for abuse of discretion. *Rogers Group, Inc.* v. *City of Fayetteville*, 629 F.3d 784, 787 (8th Cir. 2010). The Court reviews the district court's "material factual findings for clear error," *Goss Int'l Corp.* v. *Man Roland Druckmaschinen Aktiengesellschaft*, 491 F.3d 355, 362 (8th Cir. 2007) (quotation marks omitted), and may overturn those findings only "where, viewing the record as a whole," the Court is "left with the definite and firm conviction that a mistake has been committed," *United States* v. *Finley*, 612 F.3d 998, 1002 (8th Cir. 2010) (quotation marks omitted). The district court's legal conclusions are reviewed *de novo*. *Goss*, 491 F.3d at 362.

This Court has not squarely decided the standard for reviewing the denial of a stay request under the primary-jurisdiction doctrine. *See Access Telecomms.* v. *Sw. Bell Tel. Co.*, 137 F.3d 605, 608 (8th Cir. 1998) (reserving the question); *see also United States* v. *Henderson*, 416 F.3d 686, 691 (8th Cir. 2005). The overwhelming majority of other circuits review primary-jurisdiction issues for abuse of discretion. *See*, *e.g.*, *GCB Commc'ns, Inc.* v. *U.S. S. Commc'ns, Inc.*, — F.3d —, Nos. 09-17646 & 10-16086, 2011 WL 1613152, at *2 (9th Cir. Apr. 29, 2011); *see also* Op. 32–33 n.22.

ARGUMENT

I. THE NORRIS-LAGUARDIA ACT DOES NOT PRECLUDE THE DISTRICT COURT FROM ENJOINING THE NFL'S ILLEGAL GROUP BOYCOTT.

With the fullest respect for the seriousness with which this Court engaged the NLGA questions in the stay order, this is a case in which the Court's initial "doubts" (Stay Order 11) are more than adequately answered by the law. At several fundamental points, the NFL's reading of the NLGA conflicts with the plain text and controlling interpretations of that statute.

First, the NFL elides the widely accepted meaning in the NLGA of "labor dispute," which confines that term to cases involving collectively organized employees. Section 13(c), which the Court cited in the stay order, *does not* expand the definition of "labor dispute" beyond that settled meaning, but rather confirms that the NLGA applies to secondary boycotts—precisely the reason the NLGA was enacted. Similarly, the phrase "grows out of a labor dispute" does not mean that the NLGA applies when a labor dispute no longer exists. Instead, it describes the *reach* of the NLGA when there *is* a "labor dispute," extending the statute's coverage to cases involving parties other than the immediate participants in the dispute.

Second, if there were any ambiguity about the scope of Section 13, it would be resolved by Section 2. Section 2 prescribes how courts are to "interpre[t]" the NLGA, 29 U.S.C. § 102, and emphasizes that the statute was designed to "protect working men in the exercise of organized, economic power, which is vital to collective bargaining," *Bhd. of R.R. Trainmen* v. *Chi. River & Ind. R.R. Co.*, 353 U.S. 30, 40 (1957). Courts must take Section 2 "into consideration in interpreting the [NLGA]'s language and in determining the jurisdiction and authority of federal

courts." *Order of R.R. Telegraphers* v. *Chi. & Nw. Ry. Co.*, 362 U.S. 330, 335–36 (1960). Yet the NFL fails to consider the import and significance of this congressionally enacted mandate. Interpreting the NLGA as stretching beyond the context of organized labor would amount to a sweeping expansion of the statute that cannot be reconciled with Section 2's interpretive command.

Third, the NFL's analysis of Section 4(a) is novel, unprecedented, and contrary to both the text and purpose of that provision. In the 80 years since the NLGA was enacted, Appellees are aware of no appellate decision *ever* holding that lockouts fall within the "no injunction zone" of Section 4. To the contrary, the First, Seventh, and Ninth Circuits have concluded that Section 4(a) does not apply to employer conduct *at all*. Adherence to the stay order's preliminary analysis is incorrect as a matter of statutory construction and would bring this Court into direct conflict with the decisions of those circuits.

Fourth, the NFL ignores the controlling decision in *Mackey* v. *NFL*, 543 F.2d 606 (8th Cir. 1976). *Mackey* is the *only* decision of this Court that squarely resolved an NLGA challenge in professional football, and it did so against the position advanced by the NFL in this case.

In *Mackey*, this Court rejected the NFL's argument that the NLGA barred an injunction against restraints in the player market. This Court expressed considerable doubt about whether the case involved a "labor dispute" at all, but then *held* that the district court made the findings necessary to satisfy Section 7. *See id.* at 623. Because the findings in *Mackey* are materially indistinguishable from the district court's findings here, *see* Op. 71–81, *Mackey* forecloses the NFL's cursory argument that the court violated Section 7. Remarkably, and revealingly, the NFL's brief does not discuss—or even cite—*Mackey*.

Fifth, the stay order suggested that the district court might have erred in failing to hold an evidentiary hearing under Section 7. But this Court has joined numerous other courts of appeals in concluding that an evidentiary hearing is unnecessary where the facts are undisputed, as is the case here. *See Kan. City S. Transp. Co.* v. *Teamsters*, 126 F.3d 1059, 1067–68 (8th Cir. 1997). Indeed, the NFL never even made such a request except in passing references in response to questions at oral argument. *See*, *e.g.*, App. 521:4–7.

For all of these reasons, the NFL's interpretation of the NLGA cannot withstand scrutiny. Indeed, the NFL's failures to grapple with

the congressionally mandated canon of construction in Section 2 of the NLGA and the right of employee choice safeguarded by the National Labor Relations Act ("NLRA"), not to mention its failure to mention the controlling decision in *Mackey*, expose fundamental flaws in its approach. The NFL and its *amici* devote dozens of pages to "policy" concerns that are said to "emanate" from labor-law statutes. They ask this Court to invoke these notions of "good labor policy" as a basis for expanding a *judicially implied* exemption from the plain text of the Sherman Act. But with respect to the NLGA, the NFL and its *amici* urge this Court to adopt an interpretation of the statute that does violence not only to the language of the statute but also to the very interpretive policy Congress *enacted*. Whatever this Court's preliminary views, the Court should not let stand the interpretation of the NLGA reflected in the stay order and the NFL's brief.

A. THE NORRIS-LAGUARDIA ACT IS INAPPLICABLE BECAUSE THIS CASE DOES NOT "INVOLVE OR GROW OUT OF A LABOR DISPUTE."

The NFL propounds an interpretation of "labor dispute" that would bring within the NLGA *all* "disputes between employers and em-

ployees" *plus* any case "grow[ing] out of" such disputes. Br. 21, 23–24. That interpretation conflicts with binding circuit precedent.

This Court held in *Ozark Air Lines, Inc.* v. *National Mediation Board* that a claim by an employee to obtain a retirement benefit was not a "labor dispute" within the meaning of the NLGA. 797 F.2d 557, 563 (8th Cir. 1986). Even though the retirement benefit was set forth in a "labor agreement" negotiated by a union, *see id.* at 559, the NLGA was inapplicable because "[n]o strike or other concerted labor activity is enjoined," *id.* at 563.

This Court is bound by *Ozark Air Lines* and should affirm the district court's decision on that basis alone: This case involves individual challenges to antitrust violations, not "concerted labor activity." But even if the Court were somehow to consider the issue anew, the text, structure, history, and consistent judicial interpretation of the NLGA confirm that it applies only to disputes involving *collectively organized* employees.

1. The Term "Labor Dispute" Encompasses Only Disputes Involving Organized Labor.

The NFL seeks to extend the NLGA to all manner of cases "affecting the employer-employee relationship," Br. 19 (quotation marks omit-

ted)—cases the NLGA has *never*, in 80 years of judicial application, been held to reach. The irony of the NFL teams' position cannot be overstated: Seeking shelter for their antitrust violations, they cling to a statute that expressly protects *workers* "from the interference, restraint, or coercion of *employers*" in the context of collective bargaining. 29 U.S.C. § 102 (emphasis added). "[B]enefits to organized labor cannot," however, "be utilized as a cat's-paw to pull employers' chestnuts out of the antitrust fires." *United States* v. *Women's Sportswear Mfrs. Ass'n*, 336 U.S. 460, 464 (1949).

a. Text. When Congress enacted the NLGA, the phase "labor dispute" was a term of art connoting disputes involving *organized* labor—not *any* dispute touching *any* aspect of an employment relationship. Judicial opinions of the time consistently used the term in this manner. *See*, *e.g.*, *Texas & N.O. R.R.* v. *Bhd. of Ry.*, 281 U.S. 548, 560–62 (1930); *Truax* v. *Corrigan*, 257 U.S. 312, 366 (1921) (Brandeis, J., dissenting); *Pa. Sys. Bd. of Adjustment* v. *Pa. R.R.*, 1 F.2d 171, 176 (3d Cir. 1924); *Hall* v. *Johnson*, 169 P. 515, 517 (Or. 1917). Contracts frequently included "labor dispute clauses" setting forth the consequences if industrial strife impaired performance. *See*, *e.g.*, *U.S. Cartridge Co.* v. *United*

States, 62 Ct. Cl. 214, 229 (1926); *L. Vogelstein & Co.* v. *United States*, 56 Ct. Cl. 362, 373 (1921). And legal commentators similarly used "labor dispute" to refer only to organized labor. *See*, *e.g.*, Felix Frankfurter & Nathan Greene, *The Labor Injunction* 134 (1930) (Special Add. 109); Gerard C. Henderson, Book Review, 36 Harv. L. Rev. 1045, 1045 (1923).

This Court must "assume" that "Congress intended" the term "to have its established meaning." *McDermott Int'l, Inc.* v. *Wilander*, 498 U.S. 337, 342 (1991). And, indeed, Congress was acutely aware of this settled meaning: The Senate Report expressly noted that the NLGA would "limi[t] the injunctive powers of the Federal courts only in the *special type of cases*, commonly called *labor disputes*," "wherein the courts have been converted into policing agencies" to "coerce employees into accepting terms and conditions of employment desired by employers." S. Rep. No. 72-163, pt. 1, at 25 (1932) (Special Add. 25) (emphases added).[1]

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[1] The NLRA includes a virtually identical definition of "labor dispute," 29 U.S.C. § 152(9)—a term used throughout the NLRA to refer only to disputes involving unions and collective bargaining, not employment issues more generally. *See*, *e.g.*, *id.* § 158(d) ("Any employee who engages in a strike within any notice period specified in this sub-

[Footnote continued on next page]

The NFL attempts to escape the settled meaning of "labor dispute" by mischaracterizing it as a fully defined term under Section 13(c). Even when construing a statutory definition, a court "'cannot forget'" the "'ordinary meaning'" of the term being defined. *Johnson* v. *United States*, 130 S. Ct. 1265, 1271 (2010) (quoting *Leocal* v. *Aschroft*, 543 U.S. 1, 11 (2004)); *see also*, *e.g.*, *Reves* v. *Ernst & Young*, 494 U.S. 56, 62–63 (1990) ("the phrase 'any note' [in the definition of 'security'] should not be interpreted to mean literally 'any note'" because notes are "used in a variety of settings, not all of which involve investments"). More fundamentally, however, the NFL misunderstands Section 13(c).

Section 13(c) provides that "[t]he term 'labor dispute' includes any controversy concerning terms or conditions of employment, . . . regardless of whether or not the disputants stand in the proximate relation of employer and employee." 29 U.S.C. § 113(c). Unlike the other subsections of Section 13, subsection (c) takes as its operative verb the word

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[Footnote continued from previous page]

section . . . shall lose his status as an employee of the employer engaged in the particular labor dispute . . . .").

"includes"—not "means," as in subsection (d), or even "shall be held to [be]," as in subsections (a) and (b). This difference in language matters.

The term "includes" is often invoked to signal that the ordinary definition of a term is being expanded *only in one respect*. For example, a clause in a television-rights agreement providing that "'Monday Night Football Games' shall include any game originally scheduled for a Monday night, regardless of when it is actually played," could not reasonably be read to encompass *NBA games*—despite the phrase "any game." While "the word 'including'" might sometimes "indicate that what follows will be an 'illustrative' sampling of the general category that precedes the word," "[o]ften" what follows is "broader than the general category, and must be viewed as limited in light of that category." *Massachusetts* v. *EPA*, 549 U.S. 497, 556–57 (2007) (Scalia, J., dissenting) (*e.g.*, "any American automobile, including any truck or minivan" (quotation marks omitted)).

Section 13(c) expands the ordinary definition of "labor dispute" to "includ[e]" disputes where "the disputants [do not] stand in the proximate relation of employer and employee"—for example, secondary boycotts. In this respect, it directly responds to the Supreme Court's deci-

sion in *Duplex Printing Press Co.* v. *Deering*, 254 U.S. 443 (1921), which held that the NLGA's predecessor statute—Section 20 of the Clayton Act—protects only "activities [that] were directed against the employees' *immediate employers*," *Allen Bradley Co.* v. *IBEW*, 325 U.S. 797, 805 (1945) (emphasis added).

Section 13(c) thus "established that the allowable area of *union activity* was not to be restricted, as it had been in the *Duplex* case, to an immediate employer-employee relation." *United States* v. *Hutcheson*, 312 U.S. 219, 231 (1941) (emphasis added); *see also* Frankfurter & Greene, *supra*, at 216 & n.30 (Special Add. 135). But that does not remotely suggest that the statute abandoned the well-settled meaning of "labor dispute" in favor of the sweeping definition advanced by the NFL—a definition that would extend the statute to all manner of employment disputes, such as actions seeking enforcement of individual employment contracts. *E.g.*, *N.I.S. Corp.* v. *Swindle*, 724 F.2d 707, 710 (8th Cir. 1984) (upholding preliminary injunction enforcing covenants not to compete).

b. Section 2. Even if any ambiguity remained as to the meaning of "labor dispute," Section 2 of the NLGA conclusively resolves it by in-

structing this Court to adhere to the only definition that is consistent with the statutory purpose: construing the NLGA to reach only disputes involving "concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 102.

Section 2 is not legislative history; it is a congressionally enacted canon of construction to be followed "[i]n the interpretation of this chapter and in determining the jurisdiction and authority of the courts of the United States." 29 U.S.C. § 102. Although Congress sometimes goes "beyond the principal evil" to which a statute was directed to "cover reasonably comparable evils," *Oncale* v. *Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998), here Congress expressly declared the policy underlying the NLGA and provided an interpretive command that the Supreme Court has instructed courts to obey in construing the statute. *See R.R. Telegraphers*, 362 U.S. at 335–36. Section 2 forecloses the NFL's attempt to expand the scope of the NLGA far beyond its declared policy.

c. Legislative History. The NFL also ignores the legislative history and historical concerns that prompted the NLGA. But "[t]here are few pieces of legislation where the congressional hearings, committee

reports, and the language in the legislation itself more clearly point to the necessity for giving an Act a construction that will protect the congressional policy the Act adopted." *R.R. Telegraphers*, 362 U.S. at 335. Indeed, even in the face of "unambiguou[s]" statutory language, the Supreme Court has emphasized that congressional policy "has *particular* application in the construction of labor legislation." *Nat'l Woodwork Mfrs. Ass'n* v. *NLRB*, 386 U.S. 612, 619 (1967) (emphasis added).

The NLGA was designed "to correct the abuses that had resulted from the interjection of the federal judiciary into *union-management* disputes on the behalf of management." *Boys Mkts., Inc.* v. *Retail Clerks Union*, 398 U.S. 235, 251 (1970) (emphasis added). In the early 1900s, federal courts had routinely invoked the Sherman Act to enjoin "all manner of strikes and boycotts under rulings that condemned virtually every collective activity of labor as an unlawful restraint of trade." *Nat'l Woodwork*, 386 U.S. at 620.

Congress responded initially by enacting Section 20 of the Clayton Act, which "withdrew from the general interdict of the Sherman Law specifically enumerated practices of *labor unions* by prohibiting injunctions against them." *Hutcheson*, 312 U.S. at 229–30 (emphasis added).

Section 20 proved ineffective in stopping anti-strike injunctions against labor unions, *see* Frankfurter & Greene, *supra*, at 173–74 (Special Add. 114–15), and the Supreme Court held in *Duplex* that it did not reach secondary boycotts, 254 U.S. at 471–72. In the NLGA, Congress "responded directly to the construction of the Clayton Act in *Duplex*, and to the pattern of injunctions entered by federal judges." *Burlington N. R.R.* v. *Bhd. of Maint. of Way Employes*, 481 U.S. 429, 438 (1987).

The history of the NLGA thus confirms that it was focused specifically on *organized* labor—and, in particular, the difficulties that labor unions faced before *Lochner*-era judges. Contrary to the NFL's assertion, there is no evidence that Congress intended the NLGA to apply to disputes in which nonunionized employees act as individuals, whether alone or as representatives of a class of individuals, rather than through collective organizations.

d. Precedent. Courts have uniformly recognized that the NLGA's scope is limited to disputes involving *organized* labor. The Supreme Court has repeatedly made clear that "[t]he Norris-LaGuardia Act removed the fetters upon *trade union activities*." *Hutcheson*, 312 U.S. at 231 (emphasis added); *see also NLRB* v. *City Disposal Sys., Inc.*, 465

U.S. 822, 834 (1984) ("peaceful union activities"); *Connell Constr. Co.* v. *Plumbers & Steamfitters*, 421 U.S. 616, 622 (1975) ("union activities, including secondary picketing and boycotts"); *Int'l Ass'n of Machinists* v. *Street*, 367 U.S. 740, 772 (1961) ("activities of labor unions"). The courts of appeals have also recognized that the NLGA applies only to disputes involving organized labor.[2]

The NFL relies on *New Negro Alliance* v. *Sanitary Grocery Co.*, 303 U.S. 552 (1938), for its claim that disputes not involving collectively organized employees fall within the compass of the NLGA. Br. 21–23. But in *New Negro Alliance*, the *only* question the Court addressed was whether racial discrimination could be the proper subject of a "labor dispute," rather than only traditional issues like wages and hours. *See* 303 U.S. at 561. It did not discuss whether the NLGA applies to employees who are not collectively organized.

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[2] The Sixth Circuit, for instance, has explained that a "labor dispute" exists "where an employer and *a union* representing its employees are the disputants, and their dispute concerns the interpretation of the collective bargaining agreement that defines their relationship." *UAW* v. *Lester Eng'g Co.*, 718 F.2d 818, 823 (6th Cir. 1983) (emphasis added); *see also*, *e.g.*, *United Air Lines, Inc.* v. *Int'l Ass'n of Machinist & Aerospace Workers*, 243 F.3d 349, 362 (7th Cir. 2001); *Emery Air Freight, Corp.* v. *Int'l Bhd. of Teamsters*, 185 F.3d 85, 89 (2d Cir. 1999).

Moreover, the organization in *New Negro Alliance* was a body of collectively organized workers modeled on traditional labor unions. It adopted "the traditional tactics of organized labor" because the Alliance understood that "'equal opportunity to work' was coming to mean opportunity to engage in collective organizing analogous to that of labor unions." Kenneth W. Mack, *Rethinking Civil Rights Lawyering and Politics in the Era Before* Brown, 115 Yale L.J. 256, 319, 324 (2005). The Alliance's unique role was necessitated by the racial prejudice that prompted most labor unions in the 1930s to either exclude African-Americans entirely or offer them fewer benefits. *See*, *e.g.*, Herbert R. Northrup, *Organized Labor and the Negro* 2–5 (1944) (Special Add. 203–06); Harvard Sitkoff, *A New Deal for Blacks* 127 (2009) (Special Add. 219). Thus, in its brief to the Supreme Court, the Alliance—represented by Thurgood Marshall—explained that "the racial prejudice of white union members ha[d] discouraged the entrance of colored people into *established* unions," and that the New Negro Alliance had been "organized for more effective struggle on a broader base than is the *traditional* labor union." Pet'rs Br. 25, 28 (Special Add. 181, 184) (emphases added).

The application of the NLGA to the New Negro Alliance was therefore fully consistent with Section 2's command that the statute be construed in light of the national policy of ensuring each employee "full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment." 29 U.S.C. § 102. As a collectively organized body of African-American workers shut out of traditional labor unions, the New Negro Alliance directly advanced that objective. The decision in *New Negro Alliance* does not remotely support the proposition that private antitrust litigation involving no "concerted labor activity" falls under the NLGA. *Ozark Air Lines*, 797 F.2d at 563.

Adopting the NFL's view of "labor dispute," by contrast, would disrupt settled expectations confirmed by more than 80 years of judicial interpretation of the NLGA. Courts have often enjoined sports leagues in "controvers[ies] concerning terms or conditions of employment" with no regard for the NLGA. 29 U.S.C. § 113(c). Justice Douglas, who served on the Court in every significant NLGA case for 30 years, reinstated an injunction against the NBA permitting a college athlete signed in violation of league rules to play. *Haywood* v. *NBA*, 401 U.S.

1204 (1971) (in chambers). In *Law* v. *NCAA*, the Tenth Circuit affirmed injunctive relief barring the NCAA from enacting salary limitations on assistant coaching positions. 134 F.3d 1010 (10th Cir. 1998), *aff'g* 902 F. Supp. 1394, 1408 n.9 (D. Kan. 1995). These examples would plainly constitute a "labor dispute" under the NFL's definition.

Moreover, the NFL teams have *repeatedly* sought injunctive relief under circumstances that would constitute a "labor dispute" under their newly discovered, situation-driven definition of the term as extending to every "controversy" over a "term or condition of employment." Br. 17; *see*, *e.g.*, *New Eng. Patriots Football Club, Inc.* v. *Univ. of Colo.*, 592 F.2d 1196, 1198 (1st Cir. 1979) (affirming injunction preventing university from employing Patriots' head coach); *Houston Oilers, Inc.* v. *Neeley*, 361 F.2d 36, 38 (10th Cir. 1966) (granting injunction restraining player "from playing professional football" for other teams); *N.Y. Football Giants, Inc.* v. *L.A. Chargers Football Club, Inc.*, 291 F.2d 471, 474–75 (5th Cir. 1961) (declining to enjoin a player under an employment contract based on the plaintiff team's unclean hands).

2. A Case Cannot "Grow Out Of" A Labor Dispute That No Longer Exists.

As a fallback, the NFL contends that this case "grows out of" a labor dispute even if no labor dispute exists. Br. 23–24. Although Section 13(a) of the NLGA offers a complete definition of what it means to "grow out of" a labor dispute, the NFL ignores that definition and argues that a case may "grow out of" a terminated labor dispute if there is merely some relation between the current case and the prior, concluded dispute. That is wrong. As the district court determined, the NFL's "*temporal* gloss" has no support in the statute. Op. 58.

The plain text of Section 13(a) provides only that, when a labor dispute exists, a court action may "grow out of" that dispute even if the parties are not themselves the disputants, so long as they have some "indirect interes[t]" in the dispute or relationship to the disputants. 29 U.S.C. § 113(a); *see*, *e.g.*, *United Steelworkers of Am.* v. *Bishop*, 598 F.2d 408, 414–15 (5th Cir. 1979) (applying the NLGA to bar an injunction remedying a breach of contract caused by an ongoing strike). But Section 13(a) nowhere suggests that a case may "grow out of" a labor dispute that no longer exists. It would be inconsistent with the text and purposes of the NLGA to hold that it applies, even where a union has

ceased to exist, merely because the employees were once members of a union. *See supra* at 22–27.

That is why the few courts to consider the issue have held that a case does not "grow out of" a labor dispute that is *over*. In *Philadelphia Marine Trade Ass'n* v. *International Longshoremen's Ass'n*, 368 F.2d 932, 934 (3d Cir. 1966), *rev'd on other grounds*, 389 U.S. 64 (1967), the Third Circuit considered whether the district court had properly held a union in contempt for failing to comply with an arbitration award in a labor dispute. The union claimed entitlement to a jury trial under a provision of the NLGA that requires a jury trial for contempt proceedings in cases "involving or growing out of a labor dispute," 18 U.S.C. § 3692.

The Third Circuit rejected the union's argument because the contempt proceeding did not "involve or grow out of a labor dispute": The labor dispute "had been settled by the arbitrator's award" and "was no longer alive." 368 F.2d at 934. Rather, the contempt "order arose . . . from the union's conduct in failing to carry out the Court's order" enforcing the award. *Ibid.*; *see also Farrand Optical Co.* v. *Int'l Union of Elec. Workers*, 143 F. Supp. 527, 532 (S.D.N.Y. 1956) (holding that, be-

cause a settlement agreement had "terminated the labor dispute," a subsequent action enforcing a provision of the settlement agreement did not "grow out of [the] labor dispute"). It follows that here, where the labor dispute is "no longer alive" by virtue of the union's dissolution, the players' separate antitrust case does not "grow out of" a labor dispute.

Moreover, the NFL is unable to formulate any coherent limiting principle for its theory that the "grows out of" language is a temporal extension of the NLGA, as opposed to a description of the scope of the statute's coverage *during* a labor dispute. The NFL argued below (a) that there was no temporal "stopping point," App. 619:4, but then (b) that after some undefined period, a case would no longer "grow out of" a labor dispute, *see id.* at 516–18, 617:15–17. This is an unworkable and implausible reading of the statute. Tellingly, the NFL cannot cite *any* case concluding that antitrust claims will be deemed to "grow out of" a labor dispute depending on whatever a particular judge determines is the required number of days, months, or hours that must elapse after the collapse of collective bargaining and abandonment of the labor union. There is no principled basis on which courts could apply the NFL's ill-conceived test.

B. THE DISTRICT COURT'S INJUNCTION FULLY COMPLIES WITH THE NORRIS-LAGUARDIA ACT.

Even if the Court were to conclude that this case does involve a "labor dispute," or that it "grows out of" one, the district court's injunction should be affirmed. The NLGA "does not forbid the granting of injunctions in all cases of labor disputes; in fact, it clearly contemplates that injunctions may be granted in such cases." *Grace Co.* v. *Williams*, 96 F.2d 478, 480 (8th Cir. 1938). The NLGA draws a distinction between activities that may never be enjoined—setting forth "an unqualified 'no injunction' zone" in Section 4—and other activities that may be enjoined if the procedural requirements of Section 7 are satisfied. *Tejidos de Coamo, Inc.* v. *Int'l Ladies' Garment Workers' Union*, 22 F.3d 8, 14 (1st Cir. 1994) (Boudin, J). Contrary to the NFL's argument, employer lockouts are not among the narrow categories of activities enumerated in the "no injunction zone" of Section 4, and the injunction in this case fully complies with Section 7.

1. Section 4(a) Does Not Encompass Lockouts.

Section 4(a) forbids injunctions prohibiting persons from "[c]easing or refusing to perform any work or to remain in any relation of employment." 29 U.S.C. § 104(a). This provision is "merely declaratory of the

modern common law right to strike." Frankfurter & Greene, *supra*, at 217–18 (Special Add. 136–37), *cited as authoritative in*, *e.g.*, *Sinclair Ref. Co.* v. *Atkinson*, 370 U.S. 195, 203 n.16 (1962), H.R. Rep. No. 72-669, at 12 (1932) (Special Add. 51), *and* S. Rep. No. 72-163, pt. 1, at 8, 21 (Special Add. 8, 21).

a. Text. Section 4(a) differentiates between temporary work stoppages ("*perform* any work") and permanent work stoppages ("remain in *any* relation of employment"). 29 U.S.C. § 104(a) (emphases added). Thus, the statutory language clarifies that "employee strikes could not be enjoined either if the employees claimed to have ceased or refused to work temporarily or if they claimed to have completely ended their employment relation with their employer." *De Arroyo* v. *Sindicato de Trabajadores Packinghouse*, 425 F.2d 281, 291 (1st Cir. 1970).

"Ceasing or refusing to *perform* any work" is something only workers and employees can do; employees "perform" work, employers do not. *See Webster's New International Dictionary* 2349 (1933) (Special Add. 151) (defining "work" as "[e]xertion of strength or faculties for the accomplishment of something"). It follows that the phrase "or to remain in any relation of employment" describes other activities of *employees*.

There is no basis for reading Section 4(a) as referring only to employees in the temporary-stoppage clause but to both employers and employees in the permanent-stoppage clause. Instead, the word "employment" in the latter clause is most naturally read to mean the "state of being employed." *Webster's New International Dictionary*, *supra*, at 718 (Special Add. 150); *see also Black's Law Dictionary* 604 (9th ed. 2009) (defining "employment" as "[w]ork for which one has been hired and is being paid by an employer" or the "state of being employed"). It is, of course, *workers*—not employers—who become "employed."

Moreover, the language of Section 4(a) was drawn from Section 20 of the Clayton Act, which prohibits injunctions against "terminating any relation of employment," "ceasing to perform any work or labor," or "recommending, advising, or persuading others by peaceful means to do so." 29 U.S.C. § 52; *see also* Frankfurter & Greene, *supra*, at 217 (Special Add. 136) (noting that Section 4(a) is a "paraphrase of like language in the Clayton Act"). In the years before Congress passed the NLGA, the Supreme Court had authoritatively construed Section 20 as barring injunctions against "recommending, advising or persuading others by peaceful means to *cease employment and labor*," thus protecting "peace-

able persuasion *by employees*, discharged or expectant, in promotion of their side of the dispute." *Am. Steel Foundries* v. *Tri-City Cent. Trades Council*, 257 U.S. 184, 203 (1921) (emphases added). Other courts likewise construed the "relation of employment" language as limited to employees "peaceably leaving the service of their employer." *See*, *e.g.*, *Foss* v. *Portland Terminal Co.*, 287 F. 33, 36 (1st Cir. 1923).

"[W]hen judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate" those "judicial interpretations as well." *Merrill Lynch, Pierce, Fenner & Smith Inc.* v. *Dabit*, 547 U.S. 71, 85 (2006) (quotation marks omitted). That reasoning applies here and further confirms that Section 4(a) is limited—as was its predecessor statute—to employee strikes.

If further analysis were needed, the inapplicability of Section 4(a) is conclusively demonstrated by the fact that more than 1,000 players are *still under contract to NFL clubs*, and the NFL has made clear that those players are, in its view, *still in those employment relationships*. *See* App. 371 (advising players to "structure any alternative employment so you can return to the Club promptly after a new labor agree-

ment is reached"). For example, Patriots owner Robert Kraft has not terminated Tom Brady from his "employment" relationship with the New England Patriots, any more than Saints owner Tom Benson has released Drew Brees from his player contract. Even on their interpretation of the statute, the NFL teams are not refusing to "remain" in any employment relationship; they are simply banding together on a concerted basis, refusing to deal with these players, and boycotting their services, until the players accept a smaller share of the revenue their efforts generate.

Finally, it is difficult to imagine how Section 4(a) could be read to cover a lockout that applies to free agents or rookies. NFL teams cannot "refus[e]" to "remain" in an employment relationship that never existed for rookies and does not exist now for free agents. The word "remain" is yet another textual indication that Section 4(a) refers to the choices workers make to remain in an employment relationship with an employer or not.

Even if this Court were somehow to accept the NFL's awkward and unprecedented reading of the statute, Section 4(a) would (on this flawed view) at most encompass employers that *permanently* sever ties

with *existing* employees—but that would not apply to even a single NFL player. There is no rational reading of Section 4(a) that would shield the NFL's boycott.

b. Structure. Section 4(a) is silent as to employers, but other sections *expressly* apply to both employers and employees. *See De Arroyo*, 425 F.2d at 291 ("the drafters did specifically include employers when protection was intended for them"). Indeed, the very next subsection—Section 4(b)—applies to "employer[s]" as well as "labor." 29 U.S.C. § 104(b). Section 3, which governs promises to "withdraw from an employment relation," goes out of its way to refer to "[e]ither party" to an employment contract, and to "employer[s]" and "labor" alike. *Id.* § 103. "This shows that Congress knew how to be clear" in extending certain provisions of the NLGA to cover employers, "and it only highlights Congress's decision to limit" Section 4(a) to injunctions of employee activity. *Abuelhawa* v. *United States*, 129 S. Ct. 2102, 2107 n.4 (2009).

This structural analysis negates one premise of the stay order's reasoning, which is that the NLGA is "phrased in an evenhanded manner to protect employer conduct in labor disputes as well as that of unions." Stay Op. 11 (citing the discussion of the Clayton Act and Section

4(*b*) of the NLGA in *Brown* v. *Pro Football, Inc.*, 50 F.3d 1041, 1055 (D.C. Cir. 1995), *aff'd*, 518 U.S. 231 (1996)). While it may be true that some provisions of the NLGA are "evenhanded" in the sense that they address both employer and employee conduct, the text of each particular provision in the statute must be analyzed independently to determine its scope. It is inappropriate to impose a rule of "evenhanded[ness]" onto *every* provision of the NLGA when Congress expressly specified when employer conduct was protected.[3]

c. Section 2. Even if the text of Section 4(a) were ambiguous, the plain text of Section 2 commands that courts "interpre[t]" the Act in a manner to protect *employees* from "interference, restraint, or coercion" by employers. 29 U.S.C. § 102. The policy expressed in Section 2 provides no justification for placing lockouts within the "no injunction" zone of Section 4(a). To the contrary, immunizing employer lockouts

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[3] The NFL claims that provisions of the Labor Management Relations Act permitting the President to enjoin "a threatened or actual strike or lockout" (29 U.S.C. § 176) and exempting such action from the NLGA show that Section 4(a) applies to lockouts. *See* Br. 28. That makes no sense. The exemption for lockouts is necessary because, in a unionized workplace, they would otherwise be subject to Section 7 of the NLGA.

from injunctions, even where the procedural protections of Section 7 have been satisfied, is an outright repudiation of that policy. *See R.R. Telegraphers*, 362 U.S. at 335–36.

d. Legislative history. In addition to the plain text and structure of the NLGA, the legislative history confirms that Section 4(a) does not apply to employer lockouts.

Both House and Senate Reports reflect the clear understanding that Section 4(a) protects *employees*' right to strike—and nothing more. *See*, *e.g.*, H.R. Rep. 72-669, at 7 (Special Add. 46) (noting that Section 4(a) prohibits injunctions against employees' "ceasing to work"); S. Rep. No. 71-1060, pt. 1, at 8 (1930) (Special Add. 63) (considering an earlier, identical version of the bill and describing Section 4(a) as "confer[ring] an absolute right to strike"). And that is precisely how then-Professor Frankfurter described the pending bill—of which he was a "principal drafter," *Barry* v. *United States*, 528 F.2d 1094, 1100 (7th Cir. 1976)—that would become the NLGA upon passage in 1932. *See* Frankfurter & Greene, *supra*, at 217–18 (Special Add. 136–37). As drafter, Frankfurter's views are "an unusually persuasive source as to the meaning of

the relevant statutory language." *Carcieri* v. *Salazar*, 129 S. Ct. 1058, 1065 n.5 (2009).

The NFL cites a single phrase from the entire history of the NLGA: the "'same rule throughout the bill, wherever it is applicable, applies both to employers and employees.'" Br. 25. That statement is from a committee's discussion of "Section 6 of the bill," S. Rep. No. 72-163, pt. 1, at 19 (Special Add. 19), which by its terms applies to *any* participant on *any* side of a labor dispute—including employers, *see* 29 U.S.C. § 106. The committee report confirms only that the "same rule" applies to employers and employees where Congress expressly made it so—which it *did* in multiple sections of the Act but *did not* do in Section 4(a). *See supra* at 42–43.

The NFL complains that Section 4(a) is asymmetrical in its protection of employees, but that was by congressional *design*—just as employees, but not employers, are given the asymmetrical power in Section 7 of the NLRA to decide whether an industry will be unionized or subject to the forces of free-market competition. The NLGA was largely

one-sided for the simple reason that *courts* had been one-sided in issuing injunctions against unions in labor disputes.[4]

Indeed, the full Senate rejected an amendment to the NLGA *precisely because* it could have led courts to shield employers from injunctions of anticompetitive conduct. 75 Cong. Rec. 4766 (1932) (Special Add. 100). The proposal would have amended Section 2 to state that "both the employer and the employee shall" be "free from any interference, restraint, or coercion in their efforts toward mutual aid or protection." *Id.* at 4762 (Special Add. 96). The Senate rejected this amendment because there was no "obstruction" to employers' "associating with each other for the purpose of mutual aid and protection in the prosecution of their business, *so long as they do not violate the antitrust act*." *Id.* at 4763 (Special Add. 97) (emphasis added). The defeat of this amendment "makes it quite clear that in passing the Norris-LaGuardia Act Congress had no intent to relieve employers of any liability under

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[4] *See*, *e.g.*, S. Rep. No. 72-163, pt. 1, at 25 (Special Add. 97) (describing courts as "aiding employers to coerce employees"); 75 Cong. Rec. 5478 (1932) (Rep. LaGuardia) ("If the courts had administered even justice to both employers and employees, there would be no need of considering a bill of this kind now.").

the antitrust laws." James M. Altman, *Antitrust: A New Tool for Organized Labor?*, 131 U. Pa. L. Rev. 127, 153 (1982).

e. Precedent. The Stay Order surmised that the "most apposite authorities" make Section 4(a) applicable to employer lockouts. In fact, the "most apposite" authorities are two appellate decisions that extensively discuss the issue and hold that Section 4(a) does not apply to injunctions against employers. In *De Arroyo*, the First Circuit, after reviewing the NLGA's text and history, concluded that Section 4(a) "was not intended as a protection for employers." 425 F.2d at 291. The Ninth Circuit adopted that holding in *Lumber & Sawmill Workers Union* v. *Cole*, explaining that "section 4(a) was not intended as a protection for employers, and that when employers were intended to be protected, as in section 4(b), they were specifically named." 663 F.2d 983, 985 (9th Cir. 1981) (quotation marks omitted). That interpretation, the Court reasoned, "is supported by section 2 of the [NLGA]," which "commands the courts to apply" a pro-union "policy in the interpretation of the statute" and "is also consistent with prior Supreme Court pronouncements of the purpose of the Act." *Ibid.*

And nearly 50 years ago, the Seventh Circuit reached the same conclusion on even broader grounds, holding that "our study of th[e] history and the language" of the NLGA "convinces us that the purpose of Congress in this respect was to protect only employees and unions," and that there is "nothing in the statement of policy to indicate any intention to deny jurisdiction to issue injunctions against employers," aside from certain "isolated exceptions." *Bhd. of Locomotive Eng'rs* v. *Balt. & Ohio R.R.*, 310 F.2d 513, 518 (7th Cir. 1962). The "language used," the court held, "clearly negatives any intention to recognize any general reciprocity of rights of capital and labor." *Ibid.*

This Court could not hold that Section 4(a) is applicable here without directly conflicting with the First, Seventh, and Ninth Circuits on the scope of that provision. Nor could it do so consistent with this Court's *own* interpretation of Section 4(a) as "prohibit[ing] federal courts from enjoining *strike* activities." *Purex Corp.* v. *Auto. Employees Union*, 705 F.2d 274, 276 (8th Cir. 1983) (emphasis added); *see also John Morrell & Co.* v. *United Food & Commercial Workers*, 804 F.2d 457, 459 (8th Cir. 1986) (per curiam) (describing Section 4(a) as a "con-

gressional limitation on a federal court's jurisdiction to issue orders enjoining a strike").

In stark contrast, the unpublished decision in *Chicago Midtown Milk Distributors* v. *Dean Foods Co.*, Nos. 18577 & 18578, 1970 WL 2761 (7th Cir. July 9, 1970) (per curiam)—to which the NFL resorts as its *leading* authority—does not even cite Section 4, *see* App. 549:15–16, while the prior *published* decision of the Seventh Circuit in *Brotherhood of Locomotive Engineers* squarely held that Section 4(a) does not apply to employers. The other appellate decisions cited by the NFL do not so much as suggest that Section 4(a) applies to lockouts. *See*, *e.g.*, *United Mine Workers* v. *New Beckley Mining Corp.*, 895 F.2d 942, 945 (4th Cir. 1990).[5] And another of the NFL's cases analyzes a lockout under Section 7, which would have been unnecessary if the court believed that Section 4(a) applied. *See Auto. Transp. Chauffeurs* v. *Paddock Chrysler-*

[5] The NFL cites a First Circuit case because of a stray citation to Section 4 for the demonstrably incorrect *dictum* that the NLGA "prohibits federal courts from issuing injunctions in cases involving labor disputes," *Congreso de Uniones Industriales* v. *VCS Nat'l Packing Co.*, 953 F.2d 1, 2 (1st Cir. 1991)—a view the First Circuit clearly does not hold, *see Tejidos de Coamo*, 22 F.3d at 14. The First Circuit's authoritative construction of Section 4(a) is found in *de Arroyo*.

Plymouth, Inc., 365 F. Supp. 599, 601–02 (E.D. Mo. 1973). Similarly, the cases cited by the Chamber of Commerce (at 24 n.16) show only that the NLGA can *apply* to injunctions against employers, not that injunctions against lockouts fall within the NLGA's "no injunction zone." That is hardly the sort of persuasive authority that might justify adopting an interpretation of this important federal statute that is flatly inconsistent with the law of the First, Seventh, and Ninth Circuits.[6]

2. The Injunction Complies With Section 7 Of The Norris-LaGuardia Act.

Because the district court's injunction is not categorically prohibited by Section 4(a), it can easily be sustained under this Court's decision in *Mackey*—a case the NFL apparently has not read or has chosen to ignore. Br. viii. The latter possibility might be understandable be-

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[6] The few district-court decisions that offer even colorable support for the NFL's position are fatally flawed. The decision in *Plumbers & Steamfitters* v. *Morris*, 511 F. Supp. 1298 (E.D. Wash. 1981), to the extent its brief citation of Section 4 suggests that lockouts might fall under Section 4(a), was promptly abrogated by the Ninth Circuit in *Lumber & Sawmill Workers*. And the opinion in *Clune* v. *Publishers Ass'n*, 214 F. Supp. 520 (S.D.N.Y. 1963), block-quoted multiple subsections of Section 4 and held, with no analysis of text or history, only that it was "doubtful" that the lockout there could be enjoined.

cause *Mackey* forecloses the NFL's contention that Section 7 bars the district court's injunction.

a. As a threshold matter, the NFL forfeited its Section 7 argument when it did not raise that argument below. *See Drywall Tapers & Pointers* v. *Operative Plasterers & Cement Masons*, 537 F.2d 669, 674 (2d Cir. 1976) (finding no Section 7 violation where "[a]ppellants were obviously content to rest on [affidavit] evidence, as they never requested a further hearing"); *Ry. Express Agency, Inc.* v. *Bhd. of Ry. Clerks*, 437 F.2d 388, 395 (5th Cir. 1971) (finding no Section 7 violation where "appellants appear to have waived oral testimony by witnesses"). The NFL did not cite Section 7 in its district-court briefing, *see* App. 634–90, much less make an "express request" for an evidentiary hearing, as it now claims, Br. 3. Instead, its opposition relied *solely* on the Section 4(a) argument. *See* App. 655–57. The NFL first mentioned Section 7 well into *oral argument*, and only in response to questioning from the district court. *See id.* at 521:4–7.[7]

[7] Although the NFL included a fleeting reference to Section 7 in a footnote of its opposition brief in the later-filed *Eller* case, even there it made no request for a hearing. *See* App. 1070 n.2.

It was the NFL's tactical choice not to ask for discovery, cross-examination, or an evidentiary hearing until midway through oral argument in the district court, despite having had nearly a month to make such a request. Statutory rights like the right to a Section 7 hearing are plainly waivable. *See Grace Healthcare* v. *U.S. Dep't of Health & Human Servs.*, 603 F.3d 412, 416 n.4 (8th Cir. 2009).[8] The NFL cannot manufacture reversible error through a belated demand for a hearing. *See Twin Cities Galleries, LLC* v. *Media Arts Group, Inc.*, 476 F.3d 598, 602 n.1 (8th Cir. 2007) ("Because this point was raised for the first time at oral argument, and has not been briefed, it is waived.").

b. In any event, this Court has already rejected the Section 7 arguments advanced by the NFL. In *Mackey*, this Court affirmed an in-

[8] "Norris-LaGuardia is a limit on remedial authority, not subject matter jurisdiction." *Drywall Tapers & Pointers* v. *Natasi & Assocs. Inc.*, 488 F.3d 88, 93 (2d Cir. 2007) (quotation marks omitted). The Act "is facially a limitation upon the relief that can be accorded, not a removal of jurisdiction over 'any case involving or growing out of a labor dispute.'" *Rockwell Int'l Corp.* v. *United States*, 549 U.S. 457, 469–70 (2007) (quoting 29 U.S.C. § 104); *see also Avco Corp.* v. *Int'l Ass'n of Machinists*, 390 U.S. 557, 561 (1968) ("Any error in granting or designing relief does not go to the jurisdiction of the court." (quotation marks omitted)). Any historical suggestion to the contrary, *e.g.*, *Donnelly Garment Co.* v. *Dubinsky*, 154 F.2d 38 (8th Cir. 1946), has accordingly been superseded.

junction of an NFL free-agency rule that violated the Sherman Act. *See* 543 F.2d at 623. The NFL opposed the injunction on the ground that the district court "fail[ed] to comply with the limitations" contained in the NLGA, contending, as here, that the court had not made the requisite findings that the defendants committed "unlawful acts" or that "public officers" were unable to "furnish adequate protection." *See* NFL *Mackey* Br. 26, 28 (Special Add. 261, 263) (quoting 29 U.S.C. § 107). This Court nonetheless upheld the injunction under Section 7 because "the district court made the required findings of fact"—including that the players had "been injured in their business or property" based on "the effect of the [free-agency rule] upon player movement and salaries." 543 F.2d at 622–23.

Mackey is controlling in this case. Here, as in *Mackey*, the district court made detailed factual findings that the players are suffering irreparable harm to "their business or property," 543 F.2d at 623, and those findings are not clearly erroneous, *see infra* at 84–86. Indeed, the findings in *Mackey* mirror the findings made below. *Compare Mackey* v. *NFL*, 407 F. Supp. 1000, 1006–07, 1011 (D. Minn. 1975), *with* Op. 71–81.

The NFL claims that the players cannot obtain an injunction under Section 7 absent a showing of "violence." But the plain text of Section 7 requires a finding only of "unlawful acts," 29 U.S.C. § 107(a), not "violence," *see Tejidos de Coamo*, 22 F.3d at 13–14. There is no question that the players have challenged "unlawful acts" here; indeed, the NFL has not even argued that its lockout complies with either the antitrust laws or the players' tort-based and contractual rights. *See* App. 60–68. And again, the NFL's argument is foreclosed by *Mackey*, which involved the same type of injury as this case—and certainly did *not* involve "violence" or damage to physical property. *See* 543 F.2d at 623. *Mackey* is consistent in this respect with numerous decisions of this Court and others that have affirmed injunctions under Section 7 even absent any allegation of violent acts.[9]

c. The Court's stay order suggests that the district court was required to hold an evidentiary hearing under Section 7 with live testi-

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[9] *See Kan. City S. Transport Co.*, 126 F.3d at 1067–68; *Drywall Tapers & Pointers*, 537 F.2d at 674; *see also*, *e.g.*, *Tejidos de Coamo*, 22 F.3d at 13–14; *Wilkes-Barre Pub. Co.* v. *Newspaper Guild of Wilkes-Barre, Local 120*, 647 F.2d 372, 379 n.5 (3d Cir. 1981); *Carter* v. *United States*, 135 F.2d 858, 862 (5th Cir. 1943).

mony and cross-examination. Stay Order 11 n.*. That is not correct. An evidentiary hearing is "unnecessary" when "the relevant facts" are "undisputed." *Kan. City S. Trans.*, 126 F.3d at 1067–68.[10] Here, the facts supporting the district court's findings were set forth in undisputed affidavits submitted by the players. The NFL "offered little, if any, evidence to directly rebut the Players' affidavits." D.E. 117 ("Stay Op."), at 13.

* * *

After a five-hour hearing and an exhaustive inquiry into the record, the district court made the precise findings endorsed by *Mackey*, while following a procedure this Court has routinely approved. There is no procedural error.[11]

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[10] *Accord Otis Elevator Co.* v. *Int'l Union of Elevator Constructors*, 408 F.3d 1, 6–7 n.5 (1st Cir. 2005); *Int'l Ass'n of Machinists* v. *Panoramic Corp.*, 668 F.2d 276, 290 (7th Cir. 1981); *Drywall Tapers & Pointers*, 537 F.2d at 674; *Ry. Exp. Agency*, 437 F.2d at 395.

[11] Even if this Court were otherwise to agree with the NFL's arguments, it is limited to seeking a remand for additional factual findings under Section 7 of the NLGA.

II. THE IMPLIED LABOR EXEMPTION TO THE ANTITRUST LAWS DOES NOT PROTECT THE NFL'S BOYCOTT.

The NFL teams next contend that their boycott is immunized from antitrust scrutiny under an implied, judge-made "non-statutory labor exemption." *Connell Constr.*, 421 U.S. at 622. That argument is foreclosed by *Brown* v. *Pro Football, Inc.*, 518 U.S. 231 (1996), *Powell* v. *NFL*, 930 F.2d 1293 (8th Cir. 1989), and *Mackey*, 543 F.2d 606. Those cases make clear that any implied exemption to the Sherman Act does not apply where the collective-bargaining relationship has ended.

That is the precise interpretation of the federal labor laws that the NFL itself endorsed in *Brown*. The NFL represented to the Supreme Court that, "[o]nce the employees give up their bargaining rights, the employers could not take any affirmative steps, exercise their economic weapons under the bargaining process." *See Brown* Tr. 25 (Special Add. 370). Counsel for the NFL also engaged in the following exchange:

> The Court: [I]n this respect you are agreeing, if I understand you correctly, totally with Judge Edwards [in the ruling below] on that, it ends when the union decertifies so that there's no more bargaining regime?
>
> [Counsel]: I would like to add this wrinkle, Your Honor, that certainly *after the union decertifies . . . , affirmative exercise of economic weapons taken by the employers is not protected by the nonstatutory labor exemption*. There is a question

> which the courts have not addressed about what happens to steps that the employers have taken prior to decertification that remain in place after the union decertifies.

Id. at 31–32 (Special Add. 376–77) (emphasis added). That position was correct then, and it is correct now.

A. THE NON-STATUTORY LABOR EXEMPTION DOES NOT APPLY WHERE THERE IS NO COLLECTIVE-BARGAINING RELATIONSHIP.

The non-statutory labor "exemption lasts" only until the "collapse of the collective-bargaining relationship." *Brown*, 518 U.S. at 250. That was the stated view of at least eight Justices in *Brown*, all three D.C. Circuit judges in *Brown*, and three judges of this Court in *Powell*.

1. The non-statutory labor exemption is an "implied" repeal of the Sherman Act where imposing antitrust liability would conflict with "federal labor statutes." *Brown*, 518 U.S. at 236. "[T]he only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable." *Morton* v. *Mancari*, 417 U.S. 535, 550 (1974). Courts have therefore applied the non-statutory labor exemption only where "it would be difficult, if not impossible," to enforce the labor laws if the antitrust laws applied. *Brown*, 518 U.S. at 237.

The NLRA's requirement that employers and unions bargain over terms of employment, for instance, would be futile if any resulting agreement were deemed an antitrust violation. *See Amalgamated Meat Cutters* v. *Jewel Tea Co.*, 381 U.S. 676, 691 (1965) (plurality). Similarly, because the labor laws allow multiemployer bargaining, business competitors are permitted to act jointly in bargaining with a union even where the Sherman Act would otherwise bar them from doing so. *See United Mine Workers* v. *Pennington*, 381 U.S. 657, 664 (1965).

When employees are not represented by a union, however, there is *no* conceivable conflict between labor law and the Sherman Act because the labor-law provisions governing collective bargaining do not apply. Faced with no conflict, a court must enforce the antitrust laws as written. *See*, *e.g.*, *McNeil* v. *NFL*, 764 F. Supp. 1351, 1358 (D. Minn. 1991); *NBA* v. *Williams*, 857 F. Supp. 1069, 1078 (S.D.N.Y. 1994), *aff'd*, 45 F.3d 684 (2d Cir. 1995).

2. The NFL contends that, under *Brown* and *Powell*, the nonstatutory exemption continues to apply until "some point" (Br. 48) that is "'sufficiently distant in time and in circumstances from the collective-

bargaining process.'" *Id.* at 41 (quoting *Brown*, 518 U.S. at 250). That is wrong.

In *Brown*, the issue was whether the non-statutory exemption permits members of a multiemployer bargaining group to jointly implement their "last best bargaining offer" after reaching impasse with the union. 518 U.S. at 234. In holding that it does, the Supreme Court hewed closely to the rationale for the exemption: "to give effect to federal labor laws and policies and to allow meaningful collective bargaining to take place." *Id.* at 237.

Because of the "direc[t]" and "consider[able]" labor-law regulation of their conduct following impasse, employers in a multiemployer bargaining unit would find themselves with no lawful option unless the non-statutory labor exemption shielded the imposition of post-impasse terms from antitrust scrutiny. 518 U.S. at 238. "If all impose terms similar to their last joint offer, they invite an antitrust action premised upon identical behavior (along with prior and accompanying conversations)." *Id.* at 241. But "[i]f any, or all, of them individually impose terms that differ significantly from that offer, they invite an unfair labor practice charge." *Id.* at 241–42.

That tension between labor law and antitrust law does not exist where, as here, the parties "have moved beyond collective bargaining entirely." Op. 45. Unlike *Brown*, where a union still existed, NFL clubs that "individually impose terms" or take other individual action would *not* "invite an unfair labor practice charge." 518 U.S. at 241–42. By disbanding their union and terminating the collective-bargaining process, the players have given up the right to charge any individual team with an unfair labor practice for refusing to bargain collectively in good faith. *Brown*, 50 F.3d at 1057. The NFL teams are not forced to choose between complying with federal labor law and complying with the Sherman Act because their labor-law obligations to the union have been discharged, and their implied immunity from the antitrust laws has ended.

The "sufficiently distant" language in *Brown* addressed the entirely different issue whether, "after impasse but *within the still-existing collective bargaining framework*, it might be appropriate to lift the protection of the non-statutory exemption." Op. 45 n.31 (emphasis added). The Supreme Court acknowledged that some cases might be "sufficiently distant in time and in circumstances from the collective-

bargaining process that a rule permitting antitrust intervention would not significantly interfere with that process," but it deferred any decision "whether, or where, within . . . extreme outer boundaries to draw that line." *Brown*, 518 U.S. at 250. The Court identified "collapse of the collective-bargaining relationship, *as evidenced by decertification of the union*," as such an "*extreme* outer boundar[y]," *ibid.* (emphases added)—thus confirming that the non-statutory exemption *would no longer apply* once the union ceased to exist. The NFL is simply wrong to claim that the Supreme Court held—or even suggested—that the exemption endures for some unspecified period after de-unionization.

The NFL's reliance on *Powell* is similarly misplaced. Like *Brown*, *Powell* held that the non-statutory exemption continues to apply even when the parties reach impasse during an "*ongoing* collective bargaining relationship." 930 F.2d at 1303 (emphasis added). This Court acknowledged, as the Supreme Court had, that the exemption might eventually terminate *notwithstanding* the collective-bargaining relationship, *ibid.*, but it did not even begin to suggest (let alone hold) that the exemption would continue even after the collective-bargaining relationship had ended. To the contrary, *Powell* suggested, and the NFL

expressly conceded, that "the Sherman Act could be found applicable" if "the affected employees ceased to be represented by a certified union." *Id.* at 1303 n.12.[12]

The dissent observed that, under the Court's opinion, "the labor exemption will continue until the bargaining relationship is terminated *either* by a NLRB decertification proceeding *or* by abandonment of bargaining rights by the union." *Powell*, 930 F.2d at 1305 (Heaney, J., dissenting) (emphases added). That is exactly what happened on remand in *Powell*. *See White* v. *NFL*, 585 F.3d 1129, 1137 (8th Cir. 2009). The NFL indisputably understood after *Powell* what it now purports to dispute: The non-statutory exemption does not apply after collective bargaining has ended.

3. Unable to avoid the clear command of *Brown* and *Powell*, the NFL has marshaled a series of "labor law policies" that purportedly justify repeal of the Sherman Act for their boycott. According to the NFL,

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[12] As this Court recognized in *Powell*, the NFL conceded, as it did later in *Brown*, that the non-statutory exemption applied only where "the affected employees continue to be represented by a labor union vested with collective bargaining authority under the labor laws." NFL *Powell* Br. 17–18 (Special Add. 310–11).

"multiemployer bargaining could not function" if previously unionized employees could assert antitrust claims after abandoning their union because permitting such claims would "impede, stifle, and hinder the collective bargaining process *from its outset*." Br. 45. That view of labor policy conflicts with what the NFL told the Supreme Court in *Brown* and, in any event, contains a number of unstated and unproven assumptions, including that a union's disclaimer is merely a step to advance the employees' bargaining position that can easily be undone at a convenient opportunity. Precisely the opposite is true.

When a union dissolves, workers abandon their rights under the labor laws to challenge, as unfair labor practices, the refusal of individual employers to bargain collectively. *See NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 596 (1969); *Dow Chem. Co.* v. *NLRB*, 660 F.2d 637, 657 (5th Cir. 1981). Thus, following the disclaimer, individual employers are free to impose any terms and conditions they desire without collective bargaining, so long as they do not conspire with competitors in violation of the antitrust laws. They can fire employees, lower wages, and alter workplace rules in fundamental ways that otherwise would violate

the NLRA's ban on unfair labor practices if the employees were still unionized. *See* Op. 47–48; *see also supra* at 60.

The decision to disclaim is a weighty choice for another reason—it can be very difficult to reverse. When employees are organized as a union, their employer cannot refuse to collectively bargain with that union without committing an unfair labor practice. 29 U.S.C. § 158(a)(5). But when non-unionized employees attempt to reconstitute their union, the employer has the right to force them to seek an NLRB-supervised election, even if a majority of those employees have already signed authorization cards recognizing the union. *See Linden Lumber Div.* v. *NLRB*, 419 U.S. 301, 309–10 (1974). There is no guarantee that the workplace can be reorganized. A disclaimer is "not a mere tactic because it results in serious consequences for the Players." Op. 40.

The NFL's view of labor policy is premised on its belief that the right of the majority of a workforce to change or remove a union is unavailable once the union engages in collective bargaining. That position directly conflicts with the rights guaranteed to workers by Section 7 of the NLRA. *See BE & K Constr. Co.* v. *NLRB*, 23 F.3d 1459, 1462 (8th Cir. 1994) ("The right to refrain from joining or assisting a union is an

equally protected right with that of joining or forming a union."). Indeed, the NLRB has held that a valid disclaimer can occur *during the term of a CBA*—and that, if such a disclaimer occurs, the employees have the right to elect a new union that would not be bound by the predecessor's CBA. *See Am. Sunroof Corp.*, 243 N.L.R.B. 1128, 1129–30 (1979). It follows *a fortiori* that a disclaimer on or after expiration of the CBA—in this case, by early termination of the CBA *by the employer*—is both permitted and protected by Section 7 of the NLRA.

Moreover, it is *unlawful* under the NLRA for an employer and union to negotiate a new CBA after the parties are given notice that a majority of workers no longer authorize the union to represent them in collective bargaining. *See Dura Art Stone, Inc.*, 346 N.L.R.B. 149, 149 n.2 (2005); *see also Levitz Furniture Co.*, 333 N.L.R.B. 717, 724 (2001). Here the NFL plainly, and unlawfully, seeks to impose a collective-bargaining obligation on an unwilling group of workers for the singular purpose of escaping liability for a blatant violation of the antitrust laws. *See Int'l Ladies' Garment Workers' Union* v. *NLRB*, 366 U.S. 731, 737 (1961) ("There could be no clearer abridgment" of Section 7 of the NLRA than "impressing [a union] upon the nonconsenting majority.").

The NFL teams also contend that, absent an exemption, they would be "instantly expos[ed]" to "antitrust liability for bargaining-related conduct or agreements." Br. 45. That, too, is plainly not true. Pre-disclaimer activity would be protected by the non-statutory exemption under *Brown*; post-disclaimer activity would be regulated by the antitrust laws but would not put the teams in any "Catch-22" because their labor-law obligations would be relieved. They could impose terms or conditions of employment *individually* without any risk of liability under the labor or antitrust laws, and they could engage in concerted activity to impose rules of their business that steer clear of antitrust violations. *See Am. Needle, Inc.* v. *NFL*, 130 S. Ct. 2201, 2216 (2010) ("The fact that NFL teams . . . must cooperate in the production and scheduling of games . . . provides a perfectly sensible justification for making a host of collective decisions.").

By contrast, permitting antitrust immunity to endure even after the collective-bargaining relationship has ended would create a "law free" zone for workers' rights. If the non-statutory labor exemption applied even to *non*unionized employees for some unspecified period after they dissolved their union, they would have no remedy under the labor

laws *or* the antitrust laws—leaving employers free to engage in collusive activity to depress wages or to impose other anticompetitive restraints. Such a broad-ranging and standardless exemption from the antitrust laws cannot be reconciled with the policies that underlie the non-statutory exemption or the need for clear rules in this area. *Pac. Bell Tel. Co.* v. *Linkline Commc'ns, Inc.*, 129 S. Ct. 1109, 1120–21 (2009) ("We have repeatedly emphasized the importance of clear rules in antitrust law."). That is *precisely* why *Brown* identified the definitive end of the collective-bargaining process as the "extreme outer boundaries" where the exemption no longer applies. 518 U.S. at 250.[13]

Finally, the NFL protests that deeming multiemployer lockouts to be antitrust violations will violate the "employer right granted by labor law" to impose a lockout. Br. 51. Unlike the statutory rights to unionize and strike, *see* 29 U.S.C. §§ 157, 163, the ability of an employer to lock out employees is not guaranteed by the NLRA or any other statute.

[13] Only the rare union membership would forsake collective bargaining for protection under the Sherman Act, because most employee markets have workers who can readily be replaced; their unions are necessary to limit "wage competition" that "drives wages down." Douglas D. Leslie, *Essay*: Brown *v.* Pro Football, 82 Va. L. Rev. 629, 645 (1996) (contrasting sports labor markets).

Instead, employers' ability to lockout employees is implied as a counterbalance to the express right to strike. *See*, *e.g.*, *Am. Ship Bldg.* v. *NLRB*, 380 U.S. 300, 315 (1965); *NLRB* v. *Cont'l Baking Co.*, 221 F.2d 427, 436 (8th Cir. 1955) (stating that a lockout could "be justified as the assertion of the employer's corollary to the Union's right to strike"). Consistent with these holdings and the NLRA, the foremost purpose of both the NLGA and the non-statutory labor exemption is to protect union activities, including strikes, from antitrust scrutiny, while giving only derivative protection to employers' right to lock out. *See Connell Constr.*, 421 U.S. at 621–22; *Hutcheson*, 312 U.S. at 236. Thus, once employees renounce their union and give up their labor-law right to strike collectively without violating the antitrust laws, the employer's corresponding ability to lock out necessarily loses its derivative protection.[14]

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[14] The NFL's argument that allowing unionized employees to disclaim their collective-bargaining rights would give employees more rights than employers within multiemployer bargaining comes three decades too late. In *Charles D. Bonanno Linen Service, Inc.* v. *NLRB*, the Supreme Court approved the NLRB's approach of allowing employers to withdraw from multiemployer bargaining units only in "unusual circumstances." 454 U.S. 404, 411–12 (1982). In contrast, employees

[Footnote continued on next page]

B. THE LOCKOUT DOES NOT CONCERN A "MANDATORY SUBJECT OF BARGAINING."

The district court also correctly concluded that the NFL's boycott is not immune from the Sherman Act because "[a] lockout is not a substantive term or condition of employment." Op. 86. The district court's reasoning followed directly from the Supreme Court's and this Court's precedents.

In *Amalgamated Meat Cutters* v. *Jewel Tea*, a plurality of the Supreme Court concluded that an hours restriction was "so intimately related to wages, hours and working conditions that the unions' successful attempt to obtain that provision . . . falls within the protection of the national labor policy and is therefore exempt from the Sherman Act." 381 U.S. at 689–90. Thus, in *Mackey*, this Court held that "federal labor policy is implicated sufficiently to prevail" *only* where the "allegedly collusive activity concerns a mandatory subject of collective bargaining."

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may always exercise their Section 7 right to withdraw from collective bargaining, even in the multiemployer context, and their decision to do so has been never been subject to an "unusual circumstances" standard. *Cf. id.* at 421 (Burger, C.J., dissenting) (arguing that the "unusual circumstances" rule "create[s] an artificial and unwarranted imbalance of economic weapons").

543 F.2d at 614 (citing *Jewel Tea*) (emphasis added). This Court reaffirmed that rule in *Powell*, concluding that the exemption extended to the post-impasse imposition of terms on "a mandatory subject of collective bargaining." 930 F.2d at 1303. And the terms imposed in *Brown* also related to a mandatory subject of bargaining. *See* 518 U.S. at 250.

The group boycott here does not concern a mandatory subject of collective bargaining such as "wages, hours, and other terms and conditions of employment." 29 U.S.C. § 158(d). *Jewel Tea*, *Mackey*, *Powell*, and *Brown* foreclose the NFL's attempt to secure an antitrust exemption for conduct and practices outside mandatory subjects of collective bargaining.

III. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DECLINING TO STAY THIS LITIGATION UNDER THE PRIMARY-JURISDICTION DOCTRINE.

The NFL contends that the district court should have stayed this case to await the NLRB's resolution of an unfair-labor-practice charge filed by the NFL in an attempt to delay this litigation. Br. 13. The NFL's argument is utterly without merit. This antitrust suit does not require the expertise of the NLRB, and the NFL's charge has no chance of succeeding.

A. THE NFL MISSTATES THE STANDARD FOR APPLYING THE PRIMARY-JURISDICTION DOCTRINE.

The federal courts have a "virtually unflagging obligation" to "exercise the jurisdiction given them." *Colo. River Water Conservation Dist.* v. *United States*, 424 U.S. 800, 817 (1976). The Supreme Court has recognized a narrow exception to this rule where a case involves an issue within an agency's "special competence." *Reiter* v. *Cooper*, 507 U.S. 258, 268 (1993). In such a case, "a court otherwise having jurisdiction" may "stay or dismiss the action pending the agency's resolution" of that issue. *Alpharma, Inc.* v. *Pennfield Oil Co.*, 411 F.3d 934, 938 (8th Cir. 2005). This Court is "always reluctant" to invoke this "primary jurisdiction" doctrine, however, "because added expense and undue delay may result." *Access Telecomms.* v. *Sw. Bell Tel. Co.*, 137 F.3d 605, 608 (8th Cir. 1998).

The primary-jurisdiction doctrine is a *discretionary* doctrine that *permits* (but does not require) a district court to defer to an agency. *Wagner & Brown* v. *ANR Pipeline Co.*, 837 F.2d 199, 201 (5th Cir. 1988); *see also supra* at 16. The doctrine *can* be invoked only in "the rare case requiring expert consideration and uniformity of resolution." *Alpharma*, 411 F.3d at 939 (quotation marks omitted); *see also, e.g.*,

United States v. *W. Pac. R.R.*, 352 U.S. 59, 64 (1956); *DeBruce Grain, Inc.* v. *Union Pac. R.R.*, 149 F.3d 787, 789 (8th Cir. 1998). And even then, the district court may properly take account of the "added expense and delay" that would result from a stay. *Red Lake Band of Chippewa Indians* v. *Barlow*, 846 F.2d 474, 476 (8th Cir. 1988) (quotation marks omitted); *see also*, *e.g.*, *Alpharma*, 411 F.3d at 939 (same).

The NFL completely ignores these settled standards. Instead, it relies on *Ricci* v. *Chicago Mercantile Exchange*, 409 U.S. 289 (1973), as articulating a more permissive primary-jurisdiction standard in antitrust cases. *See* Br. 32. Yet the NFL never raised this argument in the district court; instead, it agreed that the standard turns on whether an issue "demands uniform resolution by the expert agency." App. 662. The district court did not abuse its discretion by considering the primary-jurisdiction issue under the standard both parties advanced.

In any event, the NFL's claim of a special standard for antitrust claims is foreclosed by precedent. The Supreme Court has consistently applied the expertise-and-uniformity standard in antitrust cases. *See*, *e.g.*, *United States* v. *Radio Corp. of Am.*, 358 U.S. 334, 346 (1959); *Far E. Conference* v. *United States*, 342 U.S. 570, 574–75 (1952). So have

the courts of appeals. *See*, *e.g.*, *Crystal Clear Commc'ns, Inc.* v. *Sw. Bell Tel. Co.*, 415 F.3d 1171, 1179 (10th Cir. 2005); *Am. Ass'n of Cruise Passengers* v. *Cunard Line, Ltd.*, 31 F.3d 1184, 1186–87 (D.C. Cir. 1994).

Ricci does not even use the words "primary jurisdiction," let alone purport to abandon the well established test. Rather, in discussing whether "agency adjudication of [the] dispute [would] be a material aid" to the court, *Ricci* relied on cases, including *Far East Conference* and *Western Pacific Railroad*, that applied the traditional expertise-and-uniformity standard. 409 U.S. at 305; *see also W. Pac. R.R. Co.*, 352 U.S. at 64. The NFL's attempt to dilute the primary-jurisdiction standard in antitrust cases should be rejected.

B. The District Court And This Court Have The Institutional Competence And Capability To Decide This Case.

The NFL concedes, as it must, that the primary-jurisdiction doctrine does not preclude a court from "decid[ing] labor law issues that emerge as collateral issues in antitrust litigation." Br. 31; *see also*, *e.g.*, *Connell Constr.*, 421 U.S. at 626. This Court need go no further to reject the NFL's primary-jurisdiction argument: The players seek relief under an "independent federal remed[y]," *Connell Constr.*, 421 U.S. at

626, and labor-law issues are relevant (if at all) "only as a defense in an antitrust and breach of contract action properly filed" in the district court, Op. 35 n.23. The NFL cannot transform this antitrust case into a labor dispute merely by declining to argue anything but labor issues.

Even if the non-statutory labor exemption were, as the NFL claims, "anything but collateral," Br. 31, that issue does not implicate the NLRB's expertise because "legal question[s] [are] for the courts to determine." *ICC* v. *Chi., Rock Island & Pac. R.R.*, 501 F.2d 908, 913 (8th Cir. 1974). "The nonstatutory labor exemption is a judicially created doctrine, and the definition of its scope and application must be made by the federal courts, not the NLRB." *White* v. *NFL*, 836 F. Supp. 1458, 1500 (D. Minn. 1993). This undoubtedly explains why the Supreme Court and this Court have *repeatedly* interpreted the scope of the exemption without seeking the views of the NLRB. *See*, *e.g.*, *Jewel Tea Co.*, 381 U.S. at 691; *Mackey*, 543 F.2d at 614.[15]

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[15] The NFL claims that, under *Brown*, "the exemption cannot be deemed by a court to have ended without seeking and considering the detailed views of the NLRB." Br. 42. *Brown* did not address any issue of primary jurisdiction, and in any event its discussion regarding the "views of the Board" referred to "whether, or where, within [certain] ex-

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In any event, the NFL admits that the validity of the NFLPA's disclaimer is governed by "longstanding Board precedent," Stay Mot. 11, and applying such a consistent line of opinions is "well within the 'conventional experience of judges,'" *Alpharma*, 411 F.3d at 939 (quoting *Access Telecomms.*, 137 F.3d at 608). Indeed, the NFL's invocation of NLRB expertise is particularly misplaced since, under settled law, "it is likely, if not inevitable, that the NLRB will dismiss th[e] charge" without initiating (let alone resolving) a formal complaint. Op. 42. And because the outcome of the NLRB proceeding is so clear, there is similarly no risk of inconsistent adjudication. *See id.* at 43.

1. There Is No Reasonable Argument That The NFLPA's Disclaimer Was A "Sham."

There is no reasonable argument that the disclaimer was a "sham." The real sham is the NFL's unfair-labor-practice charge, which alleges that the NFLPA "*purport*[*ed*] to 'disclaim interest' as the repre-

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treme outer boundaries to draw th[e] line." 518 U.S. at 250. *Brown* identified "collapse of the collective-bargaining relationship" as such an "extreme outer boundar[y]," *ibid.*, thus making clear that the NLRB's views would be helpful, at most, in line-drawing where the collective-bargaining relationship is ongoing, *see supra* at 61.

sentative of the NFL players" and that there is "no evidence whatsoever of any (let alone widespread) *disaffection* with the Union by its members." App. 314–15 (emphases added). But it is undisputed that the NFLPA *did* disclaim its interest in representing the players, *see id.* at 466–70, 1094; that a substantial majority of the players *twice* stated their desire to give up all of the rights and benefits associated with union representation, *see id.* at 97 ¶¶ 18–19, 346–47 ¶¶ 24–25; that the district court found no conduct by the NFLPA inconsistent with its disclaimer; and that the NFL has pointed to none. The NFL cites only statements by individual players, most of which it lifts entirely out of context. *Compare* Br. 9 *with* App. 229. But nothing in the record suggests that the NFLPA or the players have engaged in any activity inconsistent with the disclaimer.

The Office of the NLRB's General Counsel—which has ultimate authority to decide whether the NFL's charge merits the filing of a formal complaint—deemed a charge meritless in a case involving the same parties under nearly identical facts and circumstances. The ruling in *Pittsburgh Steelers, Inc.*, No. 6-CA-23143, 1991 WL 144468 (NLRB G.C. June 26, 1991), eliminates any argument that the NFLPA's disclaimer

here is a "sham."

Pittsburgh Steelers arose out of the players' disclaimer of the NFLPA as their collective-bargaining representative in 1989. The Office of General Counsel concluded that the NFLPA had "effectively disclaimed its representational rights" because its disclaimer was "unequivocal, made in good faith, and unaccompanied by inconsistent conduct." 1991 WL 144468, at *2 n.8, *4. Addressing the NFL's objection that the disclaimer was motivated by the players' intent to bring an antitrust lawsuit, *Pittsburgh Steelers* explained that "the fact that the disclaimer was motivated by 'litigation strategy,' i.e., to deprive the NFL of a defense to players' antitrust suits and to free the players to engage in individual bargaining for free agency, is *irrelevant* so long as the disclaimer is otherwise unequivocal and adhered to." *Id.* at *2 n.8 (emphasis added).

The NFL offers only halfhearted responses to this directly applicable authority. It first argues that *Pittsburgh Steelers* is not binding on the NLRB *itself*. Br. 36–37 (citing *Chelsea Indus., Inc.* v. *NLRB*, 285 F.3d 1073, 1077 (D.C. Cir. 2002)). That is irrelevant. The Office of the General Counsel—not the Board—has "unreviewable authority" to con-

sider a charge and "determine whether a complaint shall be filed." *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 138 (1975) (citing 29 U.S.C. § 153(d)); *see also* Stay Op. 17 n.5. In any event, *Pittsburgh Steelers* is no different from a host of well-settled NLRB cases dismissing unfair-labor-practice charges immediately upon the union's tender of a disclaimer. *See*, *e.g.*, *VFL Tech. Corp.*, 332 N.L.R.B. 1443, 1444 (2000); *Hartz Mountain Corp.*, 260 N.L.R.B. 323, 323 (1982); *see generally* 1 John E. Higgins, Jr., *The Developing Labor Law* 552–54 (5th ed. 2006).

The NFL next misleadingly asserts that *Pittsburgh Steelers* was "based on a very different factual record," Br. 37—evidently on the sole ground that, *after* the decision, the NFLPA was reconstituted as a union at the NFL's insistence. That, according to the NFL, means the General Counsel "likely" will reach a different conclusion in this case. *Id.* at 38. The NFL's brief is peppered with unfortunate and rather outrageous innuendo casting the players' integrity into doubt for acceding to the demands of the NFL to reconstitute their union as part of the *White* settlement. The reconstitution of a union—made at the insistence of the NFL, and *only* on the express condition that the NFL would not

challenge the validity of a later union disclaimer—does not render the present disclaimer in bad faith or provide any evidence that the disclaimer is not valid. In fact, the NFL clearly agreed in advance that such a decision would be legitimate and *would not* be challenged.

Instead of supporting its assertions with relevant precedent, the NFL has scraped together a handful of NLRB decisions that have nothing to do with the issue in this case and certainly do not undermine *Pittsburgh Steelers*. In *IBEW (Texlite, Inc.)*, for example, the NLRB held that a union that continued to exist but claimed it no longer represented one group of employees had disclaimed in bad faith. 119 N.L.R.B. 1792, 1798–99 (1958). There, however, the workers "continued to be members" of the union; the union restrained them from striking; the union continued to receive contributions from the employer on behalf of the supposedly disclaimed employees; and the union even offered to sign a new CBA with the employer. *Id.* at 1799. *IBEW* has no bearing on this case.

Similarly, the NFL mischaracterizes *News-Press Publishing Co.*, 145 N.L.R.B. 803 (1964), as holding that votes to terminate a union's status are ineffective where they are part of a strategy to obtain better

terms and conditions of employment. *See* Br. 35. What the decision actually said was that where "there was no real expression of the views of the employees" because most did not attend the vote, and where the members who did attend were motivated by a desire to eliminate the CBA, the union's disclaimer was not valid. 145 N.L.R.B. at 804. In this case, by contrast, a substantial majority of the employees *twice* stated their desire to end the union, and it is the *employers* who preemptively terminated the CBA and imposed their illegal boycott.

Having failed to identify any inconsistent conduct by the NFLPA, the NFL falsely characterizes the disclaimer as a "paper-thin statement" and claims the players should have pursued a decertification election supervised by the NLRB. Br. 46 (citing 29 U.S.C. § 159(c)). But under NLRB procedures, "no decertification election would be held in a case where a union does not wish to continue as a collective bargaining representative." *McNeil*, 764 F. Supp. at 1358 n.7; *see also* NLRB, *Casehandling Manual, Part 2—Representation Proceedings* § 11124.2 (2007) (providing that a union's "disclaimer unaccompanied by inconsistent action should result in a dismissal" of a decertification proceeding). A decertification election "may be conducted when either

an employer or a competing union seeks to contest a union's majority status and the union disagrees," but on these facts, "requiring a decertification proceeding makes no sense." *McNeil*, 764 F. Supp. at 1358 & n.7.

2. The NFL Waived Any Argument That The Disclaimer Was A "Sham."

In exchange for the players' agreement to re-unionize, the owners promised that if the "majority of players indicate that they wish to end the collective bargaining status of the NFLPA on or after expiration of [the CBA]," the NFL would "*waive any rights they may have to assert any antitrust labor exemption defense* based upon any claim that the termination by the NFLPA of its status as a collective bargaining representative is or would be a *sham, pretext, ineffective*." App. 331–32 (emphases added). A majority of players have now *twice* "indicate[d]" that they wish to disclaim the union, once "on" the day of the CBA's "expiration," and once "after expiration" of the CBA. The waiver provision, therefore, absolutely precludes the NFL's sham argument.

The NFL argued below that the waiver does not apply unless the players disclaim *after* expiration of the CBA. *See* App. 681. Even if that were the correct reading of the provision, the argument fails because

the players *did* unambiguously "indicate" the intention to disclaim "after" the expiration of the CBA. App. 346–47 ¶¶ 23–26. Regardless, the NFL's interpretation of the waiver provision is flawed: The waiver requires only that the players indicate that they wish to have the union disclaim "*at that time* [of the expiration of the CBA] or any time thereafter." *Id.* at 331 (emphasis added). That is precisely what the players did here.

The NFL argued below that the players were required to choose between disclaiming *before* the CBA expired without the benefit of the waiver provision, or disclaiming *after* the CBA expired, in which case a separate provision of the CBA would bar them from bringing an antitrust suit for six months, *see* App. 681–82, 1080. That is not accurate. The two provisions of the CBA are not alternatives. The six-month waiting period is inapplicable because the NFLPA was not "in existence as a union" after the CBA expired, *see id.* at 331; the waiver provision was triggered because a majority of the players indicated that they did not wish to be in a union following expiration, *id.* at 97 ¶ 18, 347 ¶ 25. The NFL cannot raise any assertion of a "sham" disclaimer because it unequivocally waived the right to assert such a claim.

C. Any Conceivable Benefit From Obtaining The NLRB's Views Is Far Outweighed By The Delay Involved.

Finally, even if this case raised the sort of expertise and uniformity issues that could conceivably warrant a stay in some circumstances, the district court did not err—let alone abuse its discretion—in concluding that "[t]he downside of staying the action plainly outweighs whatever value this Court might derive from an NLRB decision" because "the ensuing delay would simply exacerbate the irreparable harm the Players are incurring every day the so-called 'lockout' continues." Op. 43.

The NFL claims that "other courts have recognized" that potential delay is "irrelevant," Br. 39 n.12, but its focus on "other courts" ignores that *this Court* has repeatedly identified delay as a factor courts should consider in the primary-jurisdiction analysis. *See*, *e.g.*, *Alpharma*, 411 F.3d at 939; *Red Lake Band*, 846 F.2d at 476. And delay is a particularly acute concern here, where the players are suffering additional irreparable harm with each passing day. *See* Op. 71–79; Stay Op. 13.

IV. THE REMAINING PRELIMINARY-INJUNCTION FACTORS STRONGLY SUPPORT THE INJUNCTION.

In addition to likelihood of success on the merits, the other preliminary-injunction factors also support the injunction below.

A. THE GROUP BOYCOTT IS CAUSING THE PLAYERS IRREPARABLE HARM "NOW."

The district court made detailed findings about the "threat" of future irreparable harm absent an injunction, which is all the preliminary-injunction standard requires. *Rogers Group, Inc.* v. *City of Fayetteville*, 629 F.3d 784, 787 (8th Cir. 2010). The court also found that players are suffering irreparable harm under the group boycott "now." Op. 71. Those findings were based on sworn evidence that the NFL did not meaningfully challenge.[16] On such a lopsided record, the NFL could

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[16] The players submitted 11 sworn factual declarations establishing their irreparable harm. *See* App. 78–136, 337–412, 1086–1123. The NFL mustered only five paragraphs on the same topic, *see id.* at 140–41 ¶¶ 10–14, which did not even facially rebut the players' showings. That "no individual player is placed at a disadvantage vis-à-vis another" by the boycott (*id.* at 140) does not change the fact that the boycott harms *all* players. That some players "have chosen to work out on their own in the offseason" (*id.* at 141) does not negate the considerable and irreparable harm from the loss of the offseason. As the NFL Commissioner himself recently stated, teams "need that work and time in the offseason," which "is one of the reasons why we have to remove this uncer-

[Footnote continued on next page]

not possibly leave this Court with "the *definite* and *firm conviction* that a *mistake* has been committed"—the controlling standard for clear error. *United States* v. *Finley*, 612 F.3d 998, 1002 (8th Cir. 2010) (quotation marks omitted) (emphases added). Courts have repeatedly recognized the irreparable injury suffered by professional sports players in this context. *See*, *e.g.*, *Silverman* v. *MLB Player Relations Comm., Inc.*, 67 F.3d 1054, 1062 (2d Cir. 1995); *Jackson* v. *NFL*, 802 F. Supp. 226, 231 (D. Minn. 1992); *Bowman* v. *NFL*, 402 F. Supp. 754, 756 (D. Minn. 1975); *see also* Op. 72–74 (collecting cases). And in its stay order, this Court agreed that the players "will suffer some degree of irreparable harm." Stay Order 13.

The NFL proves too much by claiming there is *no* irreparable harm because the players "are shielded by the *ne plus ultra* of protection against irreparable harm—treble damages." Br. 14. If treble dam-

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[Footnote continued from previous page]

tainty as soon as possible." NFL, *Commissioner Goodell Kicks Off Series of Fan Conference Calls*, Apr. 14, 2011, *available at* http://nfllabor.com/2011/04/14/commissioner-goodell-kicks-off-series-of-fan-conference-calls. The players are entitled to an injunction, and the harm they are suffering today is not "minimize[d]" if this case ultimately is "resolved well before the scheduled beginning of the 2011 season." Stay Order 13.

ages were such a shield, private plaintiffs in antitrust actions could *never* obtain injunctions, which is directly contrary to the antitrust statutes. *See* 15 U.S.C. § 26. All of the players' evidence emphasized the fragility, brevity, and precariousness of professional football careers. To suggest that money damages, treble or otherwise, could fully redress the players' irreparable harm ignores the realities of the game.

B. THE NFL HAS NOT DEMONSTRATED IRREPARABLE HARM FROM THE INJUNCTION.

The NFL alleges that it is exposed to two types of irreparable harm. Neither allegation has merit.

First, the NFL claims that "federal labor law" grants employers a "right" to lock out employees as part of the bargaining process, and that enjoining the lockout will disrupt the bargaining power that labor law intended to bestow upon employers. Br. 54–55. The stay order appeared to endorse this form of "negotiation" harm, relying on cases it candidly acknowledged arose "in a different context." Stay Order 12. Because there is no union and no collective bargaining, however, there is no "negotiating environment" (*ibid.*) that labor law requires this Court to preserve. Indeed, because the players have de-unionized, it would be unlawful under the NLRA for collective bargaining to occur.

See supra at 65. The NFL plainly cannot claim "irreparable harm" from an alteration in its "negotiation position" in non-existent collective-bargaining discussions that would be unlawful to conduct.

Second, the NFL contends that enjoining the lockout would make it hard to "unscramble the eggs" of player transactions. Br. 55–56. That conclusion is incorrect. The NFL does not suffer irreparable harm from operating the game of football—especially at a profit. And its teams can cooperate where necessary to operate that game without violating the antitrust laws. *See Am. Needle*, 130 S. Ct. at 2216. Moreover, any harm to the NFL from a supposed inability to "unscramble the eggs" would be dwarfed by the injury faced by nearly 2,000 men who are out of work, whose careers last less than four years on average, and who must decide whether to take jobs, if they can find them, while their skill and opportunity to play the game diminish.[17]

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[17] This Court discounted the players' affidavit evidence because it was "untested by cross-examination." Stay Order 13 (citing 29 U.S.C. § 107). The NFL forfeited any request for an evidentiary hearing or live testimony, *see supra* at 51–52, but in any event courts routinely grant preliminary injunctions based on affidavit evidence and without an in-person hearing. *See*, *e.g.*, *Movie Sys., Inc.* v. *MAD Minneapolis Audio Distribs.*, 717 F.2d 427, 432 & n.6 (8th Cir. 1983).

C. THE PUBLIC INTEREST SUPPORTS THE INJUNCTION.

The relevant public-interest concerns cut strongly in favor of the injunction. As this Court stated, the public interest "surely favors" a result that "will permit professional football to be played in 2011." Stay Order 13. But the stay order saw "no reason to differentiate between the public interest and the proper application of the federal law regarding injunctions." *Ibid.* That statement equates the "public interest" consideration with the probability-of-success-on-the-merits inquiry. But the "public interest" is an equitable consideration separate and independent from the merits. *See*, *e.g.*, *Winter* v. *NRDC*, 129 S. Ct. 365, 376–77 (2008) (considering broad national interests in case arising under environmental law). Here, there is no question that the interest of the public—the fans, stadium workers, parking lot attendants, sports bars and restaurants, and local governments—favors an injunction to allow football to proceed on whatever *lawful* terms the NFL Defendants collectively impose.

CONCLUSION

The case for affirmance is overwhelming. The players face immediate, continuing, severe irreparable injury from unlawful conduct or-

chestrated to force them to re-unionize against their will and make immense financial concessions. The NFL, by contrast, claims only a temporary loss of leverage by members of a cartel that is no longer entitled to any exemption from the antitrust laws. The thoughtfully reasoned preliminary injunction issued by the district court should be affirmed.

Respectfully submitted,

/s/ Theodore B. Olson

Theodore B. Olson
Counsel of Record
Andrew S. Tulumello
Scott P. Martin
Travis D. Lenkner
John F. Bash
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, DC 20036
(202) 955-8500
(202) 530-4238 (facsimile)

Barbara P. Berens
Justi Rae Miller
BERENS & MILLER, P.A.
3720 IDS Center
80 South Eighth Street
Minneapolis, MN 55402
(612) 349-6171

James W. Quinn
Bruce S. Meyer
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, NY 10153
(212) 310-8000

Jeffrey L. Kessler
David G. Feher
David L. Greenspan
DEWEY & LEBOEUF LLP
1301 Avenue of the Americas
New York, NY 10019
(212) 259-8000

Timothy R. Thornton
BRIGGS & MORGAN, P.A.
2200 IDS Center
80 South Eighth Street
Minneapolis, MN 55402
(612) 977-8550

Counsel for Appellees

May 20, 2011

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B), as extended by this Court's order dated May 20, 2011, because it contains 17,927 words, as determined by the word-count function of Microsoft Word 2003, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14-point New Century Schoolbook LT font.

/s/ Theodore B. Olson
Theodore B. Olson
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, DC 20036

May 20, 2011

CERTIFICATE OF COMPLIANCE
WITH EIGHTH CIRCUIT RULE 28A(h)

Pursuant to this Court's Rule 28A(h), I hereby certify that the electronic version of this Brief for Appellees and the accompanying addendum have been scanned for virus and are virus-free.

/s/ Theodore B. Olson
Theodore B. Olson
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, DC 20036

May 20, 2011

ADDENDUM OF
STATUTORY PROVISIONS

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides in relevant part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . .

Section 16 of the Clayton Act, 15 U.S.C. § 26, provides in relevant part:

> Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue . . . .

Section 20 of the Clayton Act, 29 U.S.C. § 52, provides in relevant part:

> No restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law . . . .
>
> And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States.

Section 1 of the Norris-LaGuardia Act, 29 U.S.C. § 101, provides:

> No court of the United States, as defined in this chapter, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this chapter; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this chapter.

Section 2 of the Norris-LaGuardia Act, 29 U.S.C. § 102, provides:

> In the interpretation of this chapter and in determining the jurisdiction and authority of the courts of the United States, as such jurisdiction and authority are defined and limited in this chapter, the public policy of the United States is declared as follows:
>
> Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; therefore, the following definitions of and limitations upon the jurisdiction and authority of the courts of the United States are enacted.

Section 3 of the Norris-LaGuardia Act, 29 U.S.C. § 103, provides:

> Any undertaking or promise, such as is described in this section, or any other undertaking or promise in conflict with the public policy declared in section 102 of this title, is declared to be contrary to the public policy of the United States, shall not be enforceable in any court of the United States and shall not afford any basis for the granting of legal or equitable relief by any such court, including specifically the following:
>
> Every undertaking or promise hereafter made, whether written or oral, express or implied, constituting or contained in any contract or agreement of hiring or employment between any individual, firm, company, association, or corporation, and any employee or prospective employee of the same, whereby
>
> (a) Either party to such contract or agreement undertakes or promises not to join, become, or remain a member of any labor organization or of any employer organization; or
>
> (b) Either party to such contract or agreement undertakes or promises that he will withdraw from an employment relation in the event that he joins, becomes, or remains a member of any labor organization or of any employer organization.

Section 4 of the Norris-LaGuardia Act, 29 U.S.C. § 104, provides:

> No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:
>
> (a) Ceasing or refusing to perform any work or to remain in any relation of employment;
>
> (b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 103 of this title;
>
> (c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;
>
> (d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;
>
> (e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;
>
> (f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;
>
> (g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 103 of this title.

Section 5 of the Norris-LaGuardia Act, 29 U.S.C. § 105, provides:

> No court of the United States shall have jurisdiction to issue a restraining order or temporary or permanent injunction upon the ground that any of the persons participating or interested in a labor dispute constitute or are engaged in an unlawful combination or conspiracy because of the doing in concert of the acts enumerated in section 104 of this title.

Section 6 of the Norris-LaGuardia Act, 29 U.S.C. § 106, provides:

> No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof.

Section 7 of the Norris-LaGuardia Act, 29 U.S.C. § 107, provides:

> No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as defined in this chapter, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered, and except after findings of fact by the court, to the effect—
>
> > (a) That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained, but no injunction or temporary restraining order shall be issued on account of any threat or unlawful act excepting against the person or persons, association, or organization making the threat or committing the unlawful act or actually authorizing or ratifying the same after actual knowledge thereof;
> >
> > (b) That substantial and irreparable injury to complainant's property will follow;
> >
> > (c) That as to each item of relief granted greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief;
> >
> > (d) That complainant has no adequate remedy at law; and
> >
> > (e) That the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection.
>
> Such hearing shall be held after due and personal notice thereof has been given, in such manner as the court shall di-

rect, to all known persons against whom relief is sought, and also to the chief of those public officials of the county and city within which the unlawful acts have been threatened or committed charged with the duty to protect complainant's property: *Provided, however*, That if a complainant shall also allege that, unless a temporary restraining order shall be issued without notice, a substantial and irreparable injury to complainant's property will be unavoidable, such a temporary restraining order may be issued upon testimony under oath, sufficient, if sustained, to justify the court in issuing a temporary injunction upon a hearing after notice. Such a temporary restraining order shall be effective for no longer than five days and shall become void at the expiration of said five days. No temporary restraining order or temporary injunction shall be issued except on condition that complainant shall first file an undertaking with adequate security in an amount to be fixed by the court sufficient to recompense those enjoined for any loss, expense, or damage caused by the improvident or erroneous issuance of such order or injunction, including all reasonable costs (together with a reasonable attorney's fee) and expense of defense against the order or against the granting of any injunctive relief sought in the same proceeding and subsequently denied by the court.

The undertaking mentioned in this section shall be understood to signify an agreement entered into by the complainant and the surety upon which a decree may be rendered in the same suit or proceeding against said complainant and surety, upon a hearing to assess damages of which hearing complainant and surety shall have reasonable notice, the said complainant and surety submitting themselves to the jurisdiction of the court for that purpose. But nothing in this section contained shall deprive any party having a claim or cause of action under or upon such undertaking from electing to pursue his ordinary remedy by suit at law or in equity.

Section 8 of the Norris-LaGuardia Act, 29 U.S.C. § 108, provides:

> No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration.

Section 9 of the Norris-LaGuardia Act, 29 U.S.C. § 109, provides:

> No restraining order or temporary or permanent injunction shall be granted in a case involving or growing out of a labor dispute, except on the basis of findings of fact made and filed by the court in the record of the case prior to the issuance of such restraining order or injunction; and every restraining order or injunction granted in a case involving or growing out of a labor dispute shall include only a prohibition of such specific act or acts as may be expressly complained of in the bill of complaint or petition filed in such case and as shall be expressly included in said findings of fact made and filed by the court as provided in this chapter.

Section 10 of the Norris-LaGuardia Act, 29 U.S.C. § 110, provides:

> Whenever any court of the United States shall issue or deny any temporary injunction in a case involving or growing out of a labor dispute, the court shall, upon the request of any party to the proceedings and on his filing the usual bond for costs, forthwith certify as in ordinary cases the record of the case to the court of appeals for its review. Upon the filing of such record in the court of appeals, the appeal shall be heard and the temporary injunctive order affirmed, modified, or set aside expeditiously.

Section 11 of the Norris-LaGuardia Act, now codified at 18 U.S.C. § 3692, provides:

> In all cases of contempt arising under the laws of the United States governing the issuance of injunctions or restraining orders in any case involving or growing out of a labor dispute, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the contempt shall have been committed.
>
> This section shall not apply to contempts committed in the presence of the court or so near thereto as to interfere directly with the administration of justice nor to the misbehavior, misconduct, or disobedience of any officer of the court in respect to the writs, orders or process of the court.

Section 13 of the Norris-LaGuardia Act, 29 U.S.C. § 113, provides:

> When used in this chapter, and for the purposes of this chapter—
>
> > (a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; or who are employees of the same employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is (1) between one or more employers or associations of employers and one or more employees or associations of employees; (2) between one or more employers or associations of employers and one or more employers or associations of employers; or (3) between one or more employees or associations of employees and one or more employees or associations of employees; or when the case involves any conflicting or competing interests in a "labor dispute" (as defined in

this section) of "persons participating or interested" therein (as defined in this section).

(b) A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it, and if he or it is engaged in the same industry, trade, craft, or occupation in which such dispute occurs, or has a direct or indirect interest therein, or is a member, officer, or agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft, or occupation.

(c) The term "labor dispute" includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.

(d) The term "court of the United States" means any court of the United States whose jurisdiction has been or may be conferred or defined or limited by Act of Congress, including the courts of the District of Columbia.

Section 14 of the Norris-LaGuardia Act, 29 U.S.C. § 114, provides:

> If any provision of this chapter or the application thereof to any person or circumstance is held unconstitutional or otherwise invalid, the remaining provisions of this chapter and the application of such provisions to other persons or circumstances shall not be affected thereby.

Section 15 of the Norris-LaGuardia Act, 29 U.S.C. § 115, provides:

> All acts and parts of acts in conflict with the provisions of this chapter are repealed.

Section 3(d) of the National Labor Relations Act, 29 U.S.C. § 153(d), provides in relevant part:

> There shall be a General Counsel of the Board who shall be appointed by the President, by and with the advice and consent of the Senate, for a term of four years. The General Counsel of the Board shall . . . have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 160 of this title, and in respect of the prosecution of such complaints before the Board, and shall have such other duties as the Board may prescribe or as may be provided by law. . . .

Section 7 of the National Labor Relations Act, 29 U.S.C. § 157, provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

Section 13 of the National Labor Relations Act, 29 U.S.C. § 163, provides:

> Nothing in this subchapter, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.

CERTIFICATE OF SERVICE

I hereby certify that on May 20, 2011, I electronically filed the foregoing Brief for Appellees with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit through the CM/ECF system and served all parties via that system.

/s/ Theodore B. Olson
Theodore B. Olson
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, DC 20036

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