No. 11-1898

In the

United States Court of Appeals

for the

Eighth Circuit

Tom **BRADY**, *et al.*,
Plaintiffs-Appellees,

vs.

NATIONAL FOOTBALL LEAGUE, *et al.*,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA,
NO. 0:11-CV-00639-SRN-JJG

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May 9, 2011

SUMMARY OF THE CASE

This is an appeal from a preliminary injunction issued in a case involving or growing out of a labor dispute between the National Football League and its member clubs (collectively, the "NFL") and their player-employees. The District Court enjoined the NFL clubs from exercising their federal labor law right to lock out those employees.

This case presents important legal issues addressing (i) whether, in light of the Norris-LaGuardia Act, the District Court had jurisdiction to issue the injunction; (ii) the doctrine of primary jurisdiction, because, notwithstanding a pending charge before the National Labor Relations Board challenging the validity of the purported disclaimer of the plaintiffs' union, the District Court concluded on its own that the disclaimer was valid; and (iii) the scope and contours of the nonstatutory labor exemption, which does not expire until a case is "sufficiently distant in time and in circumstances" from the collective bargaining process that a rule permitting antitrust liability would not undermine federal labor policy, a conclusion that a court should not reach "without the detailed views of the Board." *Brown v. Pro Football, Inc.*, 518 U.S. 231, 250 (1996).

This Court recognized the importance of the issues presented in its briefing order, which grants oral argument and allocates 30 minutes to each side.

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CORPORATE DISCLOSURE STATEMENT

The NFL is an unincorporated association, organized under the laws of New York, of 32 member clubs. The member clubs are:

Arizona Cardinals Football Club, LLC
Atlanta Falcons Football Club, LLC
Baltimore Ravens Limited Partnership
Buffalo Bills, Inc.
Panthers Football, LLC
The Chicago Bears Football Club, Inc.
Cincinnati Bengals, Inc.
Cleveland Browns Football Company LLC
Dallas Cowboys Football Club, Ltd
PDB Sports, Ltd. (d/b/a The Denver Broncos Football Club, Ltd.)
The Detroit Lions, Inc.
Green Bay Packers, Inc.
Houston NFL Holdings, L.P.
Indianapolis Colts, Inc.
Jacksonville Jaguars, Ltd.
Kansas City Chiefs Football Club, Inc.
Miami Dolphins, Ltd.
Minnesota Vikings Football, LLC
New England Patriots L.P.
New Orleans Louisiana Saints, L.L.C.
New York Football Giants, Inc.
New York Jets LLC
The Oakland Raiders, L.P.
Philadelphia Eagles, LLC
Pittsburgh Steelers LLC
The St. Louis Rams LLC
Chargers Football Company, LLC
San Francisco Forty Niners, Limited
Football Northwest LLC
Buccaneers Limited Partnership
Tennessee Football, Inc.
Pro-Football, Inc.

Two of the NFL clubs have parent corporations: KSA Industries, Inc. (Tennessee Football, Inc.); Washington Football, Inc. and WFI Group, Inc. (Pro-Football, Inc.). The other NFL member clubs do not have parent corporations.

No publicly-held corporation owns 10 percent or more of any of the above-listed member club's stock.

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JURISDICTIONAL STATEMENT

This appeal is from the District Court's order granting a preliminary injunction entered April 25, 2011. (Add. 1-89.[1]) The NFL filed its timely notice of appeal on April 25, 2011. (App. 471.) This Court has appellate jurisdiction under 28 U.S.C. § 1292(a)(1).

Plaintiffs alleged both federal and state law claims. The District Court had subject matter jurisdiction under 28 U.S.C. §§ 1331, 1337, and 1367. Under the Norris-LaGuardia Act, 29 U.S.C. §§ 101 *et seq.*, the District Court lacked jurisdiction to enter an injunction.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the District Court, by granting a preliminary injunction against the NFL clubs' lockout of their player-employees, exceeded the jurisdictional constraints of the Norris-LaGuardia Act, 29 U.S.C. §§ 101 *et seq.*

- 29 U.S.C. §§ 101-113
- *New Negro Alliance v. Sanitary Grocery Co.*, 303 U.S. 552 (1938)
- *Chi. Midtown Milk Distribs., Inc. v. Dean Foods Co.*, 1970 WL 2761 (7th Cir. July 9, 1970) (per curiam)

[1] "Add. _" refers to the Addendum to this Brief. "App. _" refers to Appellants' Separate Appendix, filed concurrently.

2. Whether the District Court erred by not staying the case pending resolution by the NLRB of a disputed issue, squarely within the Board's primary jurisdiction, addressing the essential predicate of plaintiffs' claims.

- *Ricci v. Chi. Mercantile Exch.,* 409 U.S. 289 (1973)
- *IBEW & Local 159 (Texlite, Inc.)*, 119 NLRB 1792 (1958), *enf'd* 266 F.2d 349 (5th Cir. 1959)

3. Whether the District Court erred by determining that plaintiffs' antitrust claims are not barred by the nonstatutory labor exemption.

- *Brown v. Pro Football, Inc.,* 518 U.S. 231 (1996)
- *Powell v. NFL*, 930 F.2d 1293 (8th Cir. 1989)

4. Whether the District Court erred in its application of the traditional injunctive relief factors by failing to recognize that plaintiffs have no likelihood of success on the merits and by improperly weighing the equities.

- *CDI Energy Servs., Inc. v. W. River Pumps, Inc.*, 567 F.3d 402 (8th Cir. 2009)
- *Int'l Ass'n of Bridge, Structural & Ornamental Iron Workers v. Pauly Jail Bldg. Co.*, 118 F.2d 615 (8th Cir. 1941)

STATEMENT OF THE CASE

On March 11, 2011, nine NFL players and one prospective player ("plaintiffs") filed a complaint against the National Football League and its member clubs alleging violations of the Sherman Act as well as state law claims. (App. 22-74.) The complaint also sought certification of a class. (*Id.*) The complaint challenged the NFL's decision to lock out the players as well as "any restrictions on free agency" to which the NFL clubs might agree. (*Compare id.* ¶¶125-30 *with id.* ¶¶131-36.)

At the same time, plaintiffs filed a motion seeking a preliminary injunction against the lockout. (App. 75.) The District Court heard oral argument on the motion on April 6. (App. 482.) Despite the NFL's express request, the District Court did not hold an evidentiary hearing as required by Section 7 of the Norris-LaGuardia Act. (App. 521, 600-05).

On April 25, the District Court granted the plaintiffs' motion and enjoined the lockout. (Add. 1-89.) The District Court rejected the NFL's threshold arguments that the Norris-LaGuardia Act eliminated jurisdiction to enter the injunction and that resolution of merits issues improperly intruded on the primary jurisdiction of the NLRB. (Add. 19-67.) Also rejecting the NFL's argument that plaintiffs' antitrust claims were barred on the merits by the nonstatutory labor exemption, the District Court concluded that plaintiffs had

a "fair chance of success on the merits" of their antitrust challenge to the lockout and that the balance of the equities favored an injunction. (Add. 71-87.)[2]

The NFL immediately filed a notice of appeal and moved for a stay pending appeal. (App. 471, 478.) On April 27, the District Court denied the NFL's request for a stay. (Add. 90-109.) That same day, the NFL moved in this Court for a stay pending appeal, a temporary stay, and an expedited appeal. On April 29, this Court granted a temporary stay of the District Court's order. On May 3, this Court granted the motion for expedited review.

STATEMENT OF FACTS

The Collective Bargaining Relationship

Since 1970, the National Football League Players Association ("NFLPA" or "Union") has been the sole and exclusive collective bargaining representative of all NFL players, including plaintiffs. The 32 NFL member clubs bargain with the Union through their multiemployer bargaining unit, the National Football League Management Council ("NFLMC").

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[2] Four retired players (the *Eller* plaintiffs) filed an antitrust claim on March 28; they moved for a preliminary injunction against the lockout on March 30. The two actions were consolidated. (App. 415.) In granting the *Brady* plaintiffs' motion for a preliminary injunction, the District Court denied the *Eller* plaintiffs' motion as moot (Add. 2, 89); they have not appealed.

Since 1970, the NFLPA and NFLMC have negotiated several collective bargaining agreements ("CBAs"), often after work stoppages, but their labor relations have been punctuated by antitrust litigation.

In 1987, after expiration of a CBA, the NFLPA filed an antitrust suit challenging NFL rules pertaining to free agency. In *Powell v. NFL*, 930 F.2d 1293, 1303-04 (8th Cir. 1989), this Court ruled that the suit could not proceed "as long as there is a possibility that proceedings may be commenced before the Board, or until final resolution of Board proceedings and appeals therefrom," because at least until such final resolution, the nonstatutory labor exemption to the antitrust laws barred the claims.

In response, the NFLPA purported to disclaim its role as the players' collective bargaining representative and then directed and financed further antitrust suits nominally brought first by individual players, and then as purported class actions. *See McNeil v. NFL*, D. Minn. No. 90-476; *Jackson v. NFL*, D. Minn. No. 92-876; *White v. NFL*, D. Minn. No. 92-906. In doing so, the NFLPA repeatedly and unambiguously represented to the district court that its disclaimer was *permanent* and *irreversible*, and not a bargaining tactic. For example:

- The NFLPA's counsel testified in an affidavit that "[T]he NFLPA's abandonment of collective bargaining rights was *permanent and irreversible*, and not designed to put pressure on the NFL to achieve a new collective bargaining agreement." (App. 156 (emphasis in original).)

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• The NFLPA's Executive Director, Gene Upshaw, testified that, "[A]s far as ever being a labor organization again, that is a permanent status. We have no intentions, in the future or in my lifetime, to ever return to be a labor organization again." (App. 211.)

Nonetheless, the NFLPA "resurrected" itself as a union immediately upon negotiating a litigation settlement (the "SSA"), *see White v. NFL*, 836 F. Supp. 1458, 1465 & n.16 (D. Minn. 1993), and then imported the SSA terms into a new CBA, *see White v. NFL*, 585 F.3d 1129, 1134 (8th Cir. 2009).

Expiration, Purported Disclaimer, Lawsuit and Lockout.

The NFLMC and NFLPA thereafter negotiated several extensions and amendments to the CBA with parallel extensions and amendments to the SSA; the most recent took effect March 7, 2006. *Id.*

Since June 2009, the NFLPA and NFLMC engaged in extensive negotiations toward a new CBA. (App. 41-42 (¶50); App. 96 (¶15).) They were unable to reach an agreement before the CBA expired at 11:59 pm on March 11, 2011.[3] (Add. 14-15.) At that time, the NFL clubs exercised their federal labor law right to lock out their player-employees. (Add. 15.)

During the course of the negotiations, the NFLPA actively sought and secured advance, conditional approval from its player-members to disclaim its

[3] Under the express terms of the CBA and SSA, provisions relating to the 2011 NFL Draft remain in effect; all other aspects of the agreements have expired.

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role in collective bargaining *if* the Union later found it tactically advantageous to do so.[4] At 4:00 pm on March 11—before the CBA's expiration and while the parties were literally still at the collective bargaining table, negotiating under the auspices of the Federal Mediation and Conciliation Service—the NFLPA purported to disclaim interest in representing NFL players in collective bargaining. (App. 97 (¶18).)

Within an hour of the purported disclaimer, nine NFL players as well as one prospective player—all represented by the NFLPA's counsel, including its Executive Director—filed this putative class action. (App. 22-74, 413.) The suit alleges that the lockout violates Section 1 of the Sherman Act *and* that other collective conduct of the NFL, such as the continued use of collectively-bargained rules relating to free agency—rules repeatedly agreed to by the NFLPA and approved by the District Court as reasonable—would also violate the antitrust laws.

Countless statements of NFLPA representatives, both before and after March 11, confirm that its current "disclaimer," the result of a *conditional* authorization, is a tactical ploy. The NFLPA is not *permanently* abandoning

[4] According to the official NFLPA publication, *The Huddle*, the players "were … asked to give the NFLPA permission to renounce its union status in case of a lockout." (App. 425.) Plaintiffs submitted no voting cards or other written documentation of this pre-expiration "vote."

collective bargaining, but instead is attempting *temporarily* to disclaim its union status in hopes of increasing its members' bargaining leverage by subjecting the NFL to antitrust suits over terms and conditions of player employment.

The *NFLPA Guide to the Lockout*, distributed by the Union to its members months ago, well in advance of the purported disclaimer, explains this strategy explicitly: "The NFLPA … would fund litigation with individual players, or classes of players, as named plaintiffs, just as we did in the *McNeil* and *White* cases. We would immediately fund a lawsuit which would seek an injunction … and ... claim treble damages on behalf of the players." (App. 300.)

Repeated statements from plaintiffs and other leaders of the NFLPA indicate that the disclaimer was not made in good faith and that it is not unequivocal. For example, the President of the NFLPA stated that "the whole purpose [of disclaimer] is to have that *ace in our sleeve.* … And at the end of the day, guys understand the strategy, it's been a part of the *union strategy* since I've been in the league … ." (App. 215 (at 10:23-11:11) (emphasis added).) Another NFLPA player representative, DeMeco Ryans, observed that disclaimer was "a good decision and a good strategy *on our part as a union*." (App. 221 (emphasis added).)

Derrick Mason, the Baltimore Ravens' NFLPA player representative, confirmed that disclaimer does not reflect a desire by players to abandon collective

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negotiations over terms and conditions of employment: "[S]till we stand behind DeMaurice [Smith, Executive Director of the Union] … . So are we a union? Per se, no. But we're still going to act as if we are one. We're going to still talk amongst each other and we're going to still try to as a whole get a deal done." (App. 225 (at 6:7-14).) And immediately after the Union had purported to disclaim, NFLPA representative Vonnie Holiday was asked in an interview, "what do you want?"; he replied, "*We* want a fair *CBA*. That's it … ." (App. 229 (at 2:22-24) (emphasis added).)

The day after the purported disclaimer, Jeff Saturday, the Vice-President of the NFLPA, also made clear that the Union views this litigation as part of the negotiation process: "[F]rom the players' perspective if we are going to negotiate this out and be locked out with a CBA expiration, then *it would be much better to be … negotiating while we're still playing football*. … [T]hat was the reason that we decertified. We decertified so that we could fight them from locking us out and go back to work. And we feel like … we can still negotiate this anytime you want." (App. 236 (at 11:19-12:4) (emphasis added).)

On March 18, plaintiff Mike Vrabel, another member of the Executive Committee, said in a televised interview with his fellow committee members (including co-plaintiff Drew Brees): "We are willing to negotiate. But we don't want to negotiate with [the NFL's lawyers] or Roger Goodell. *Our executive*

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committee needs to negotiate with … their executive committee. People that are willing *and can agree to a deal.*" (App. 241 (emphases added).)[5] And after the District Court entered its Order enjoining the lockout, another NFLPA player representative, Jay Feely, said that he hoped that the Order would lead to a settlement of the litigation, which "would hopefully become a new *collectively-bargained agreement*." (http://espn.go.com/losangeles/radio/show/_/showID /mikeandmike/postId/6436349/show-in-review).

In light of the mountain of evidence demonstrating that the NFLPA had long been planning a tactical, bad-faith conditional disclaimer, the NFL filed a charge with the NLRB on February 14, asserting that the NFLPA had violated its statutory obligation to bargain in good faith pursuant to the National Labor Relations Act, 29 U.S.C. § 158(b)(3). (App. 308-11.) On March 11, the NFL amended its charge to assert that the Union's purported "disclaimer" is invalid because it also violates this obligation. (App. 312-16.) Proceedings before the Board are ongoing.

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[5] On April 20, Mr. Vrabel said, in response to reports that some NFL players felt that their viewpoint was not being represented in the litigation, "We're players here to represent players and De [Smith, Executive Director of the NFLPA] works for us. They do (have a seat). And if they're unhappy with that seat, we have to vote in a new executive committee and a new board of reps" (http://profootballtalk.nbcsports.com/2011/04/20/report-group-of-players-want-to-intervene-into-mediation).

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STANDARD OF REVIEW

When evaluating the grant of a preliminary injunction, this Court "review[s] the district court's factual findings for clear error, its legal conclusions *de novo*, and its exercise of equitable judgment for abuse of discretion." *Gen. Motors Corp. v. Harry Brown's, LLC*, 563 F.3d 312, 316 (8th Cir. 2009). "A district court by definition abuses its discretion when it makes an error of law." *Koon v. United States*, 518 U.S. 81, 100 (1996); *accord Vonage Holdings Corp. v. Neb. Pub. Serv. Comm'n,* 564 F.3d 900, 904 (8th Cir. 2009).

There are three independent legal impediments to the District Court's Order: the Norris-LaGuardia Act, the doctrine of primary jurisdiction, and the nonstatutory labor exemption. This Court will review the District Court's decision as to each *de novo*. *See, e.g., In re Raynor*, 617 F.3d 1065, 1069 (8th Cir. 2010) ("We review questions of law *de novo*."); *Burlington N. Santa Fe Ry. Co. v. Int'l Bh'd of Teamsters Loc. 174,* 203 F.3d 703, 707 (9th Cir. 2000) (en banc) (applicability of Norris-LaGuardia Act reviewed *de novo*); *E. St. Louis Laborers' Local 100 v. Bellon Wrecking & Salvage Co.*, 414 F.3d 700, 708 (7th Cir. 2005) (same); *United States v. Rice*, 605 F.3d 473, 475 (8th Cir. 2010) ("We review the issue of primary jurisdiction *de novo*."); *N. Star Steel Co. v. MidAm. Energy Holdings Co.*, 184 F.3d 732, 738 (8th Cir. 1999) (applicability of an exemption to the antitrust laws is a question of law).

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SUMMARY OF ARGUMENT

There were three clear legal obstacles to the preliminary injunction. The Norris-LaGuardia Act removes jurisdiction for such an injunction altogether; the doctrine of primary jurisdiction required deference to the NLRB and deferral until the Board acts; and the nonstatutory labor exemption, as developed by the Supreme Court and this Court, protected the collective conduct that the District Court sought to enjoin.

The District Court concluded that all three obstacles vanished upon the union's unilateral disclaimer. That ruling, if affirmed, would work a revolution in labor relations. Federal courts, out of the labor injunction business since enactment of the Norris-LaGuardia Act, could be called upon by unions or employees whenever they determined that antitrust litigation would suit them better than the bargaining table. Multiemployer bargaining would not long survive. None of the three legal obstacles is so easily circumvented. The decision below cannot stand.

The order entered below fails at the jurisdictional threshold. In broad and unmistakable terms, the Norris-LaGuardia Act strictly limits injunctions in cases "involving or growing out of" a "labor dispute" and prohibits injunctions against lockouts altogether. The District Court did not even try to satisfy the Act's requirements, but rather deemed the statute wholly irrelevant in light of

the NFLPA's purported disclaimer. But the text of the Act and Supreme Court precedent make crystal clear that the Act applies to all labor disputes, not just those involving a union. Moreover, even if (i) a labor dispute required a union and (ii) one were to accept the NFLPA's disclaimer as unassailable (despite all the evidence to the contrary), it cannot change the *origins* of this case, which self-evidently grows out of a labor dispute. That is all that the Act requires.

The absence of jurisdiction itself is sufficient to require reversal, but this Court can and should go further. The District Court also violated the doctrine of primary jurisdiction. Antitrust courts may consider labor law issues that are collateral to an antitrust case, but there is nothing collateral about the validity of the Union's disclaimer. The District Court itself identified this issue as the linchpin to its entire decision. Yet that issue is not only squarely within the heartland of the NLRB's expertise; it is already pending before the Board. This case satisfies every one of the Supreme Court's criteria for deference to the primary jurisdiction of an administrative agency.

The District Court's failure to recognize the applicability of the nonstatutory labor exemption was also clear legal error. The Supreme Court has already considered the exemption's applicability to this very multiemployer unit and made clear that it continues to apply unless and until there is sufficient distance in time and in circumstances from the bargaining process. There

is no such distance here: The antitrust suit was filed during the term of a CBA, within minutes of a collective bargaining session, and it addresses some of the same terms and conditions of employment discussed at the bargaining table. The only conceivable basis for a contrary conclusion would be (i) that the disclaimer is valid *and* (ii) that it categorically and instantaneously ousts the exemption, but the Supreme Court specifically prohibited reaching such a conclusion without consideration of the Board's expert views.

These legal errors alone require reversal. The players have no likelihood of success on the merits; indeed the merits should never have been reached. Nor does the balance of equities favor the players. The League faces the precise irreparable harm that the Norris-LaGuardia Act exists to prevent—the loss of a legitimate labor law tool. The resulting distortion of the bargaining process is the prototypical irreparable injury in this context. The players, by contrast, are shielded by the *ne plus ultra* of protection against irreparable harm—treble damages. Finally, the public interest strongly counsels against returning to the bad old days of judicial intervention in ongoing labor disputes.

The decision below should be vacated, and the case remanded with instructions to dismiss the action or stay it pending a decision from the Board.

ARGUMENT

I. *The District Court Lacked Jurisdiction To Enjoin the Lockout.*

A. The background and framework of the Norris-LaGuardia Act.

Determined to preclude the conversion of labor disputes into antitrust suits, Congress enacted the Norris-LaGuardia Act, 29 U.S.C. §§ 101 *et seq.*, to "tak[e] the federal courts out of the labor injunction business" by the withdrawal of jurisdiction. *Marine Cooks & Stewards, AFL v. Panama S.S. Co.*, 362 U.S. 365, 369 (1960).

The Act was "was intended drastically to curtail the equity jurisdiction of federal courts in the field of labor disputes." *Milk Wagon Drivers' Union, Local No. 753 v. Lake Valley Farm Prods.*, 311 U.S. 91, 101 (1940). "[M]any of the injunctions which were considered most objectionable by the Congress were based upon complaints charging conspiracies to violate the Sherman Anti-Trust Act." *Id.* The Act has thus "been interpreted broadly as a statement of congressional policy that the courts must not use the antitrust laws as a vehicle to interfere in labor disputes." *H.A. Artists & Assocs., Inc. v. Actors' Equity Ass'n*, 451 U.S. 704, 714 (1981).

The Act has been successful. Injunctions against strikes are unheard of, and the only court to enjoin a lockout was swiftly reversed. *See Chi. Midtown Milk*

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Distribs., Inc. v. Dean Foods Co., 1970 WL 2761, at *1-2 (7th Cir. July 9, 1970) (per curiam).

Section 1 of the Act embraces a general policy disfavoring injunctions in all cases "involving or growing out of a labor dispute." 29 U.S.C. § 101. Section 4 enumerates activities that courts may never enjoin under any circumstances. As relevant here, it 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 ... from doing ... any of the following acts: (a) Ceasing or refusing to perform any work or to remain in any relation of employment." *Id.* § 104(a) (emphasis added).

Section 5 makes explicit that the restrictions in Section 4 apply to complaints charging antitrust violations: "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." *Id.* § 105.

Section 7 governs injunctions that arise in cases involving or growing out of labor disputes, but which are not flatly prohibited in Section 4; it requires that

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before any injunction issue, a court must hold an evidentiary hearing, including cross-examination, and make certain enumerated findings. *Id.* § 107. Section 13 defines relevant phrases, including "labor dispute." *Id.* § 113.

B. <u>This case involves and grows out of a labor dispute.</u>

This case quite obviously "involv[es] or grow[s] out of a labor dispute." The Act defines "labor dispute" broadly to include "*any* controversy concerning terms or conditions of employment." 29 U.S.C. § 113(c) (emphasis added). Congress underscored the breadth of the term by extending the bar on injunctive relief not only to cases "involving" such disputes, but also to cases "growing out of" such disputes. *Id.* §§ 101, 104, 107. A case "involve[s]" or "grow[s] out of" a labor dispute when, *inter alia*, "the case involves persons who are engaged in the same industry" and the dispute is "between one or more employers or associations of employers and one or more employees or associations of employees." 29 U.S.C. § 113(a).

These terms are all remarkable for their breadth. Congress "wanted [them] to be broad" and the Supreme Court has "consistently declined to construe [them] narrowly." *Burlington N. R.R. Co. v. Bh'd of Maint. of Way Emps.*, 481 U.S. 429, 441-42 (1987); *see also Jacksonville Bulk Terminals, Inc. v. Int'l Longshoremen's Ass'n*, 457 U.S. 702, 708 (1982) ("This Court has consistently given the anti-injunction provisions of the [Act] a broad interpretation … ."). "The

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language is broad because Congress was intent upon taking the federal courts out of the labor injunction business … .” *Marine Cooks*, 362 U.S. at 369.

The lockout challenged here self-evidently “involves or grows out of” a “labor dispute” under any common-sense meaning of those terms. The NFL clubs imposed the lockout as part of a dispute with their player-employees over the terms and conditions of their employment. Plaintiffs and the NFL clubs are “engaged in the same industry,” and the dispute is between “one or more employers” and “one or more employees.” Plaintiffs are suing to enjoin the NFL from exercising a labor law right in support of its position in negotiations over terms and conditions of employment; they filed this suit only hours before the CBA expired and only minutes after their union walked away from ongoing labor negotiations; and they seek relief concerning terms and conditions of employment.

Indeed, plaintiffs themselves concede that the purpose of the lockout is to encourage the clubs’ player-employees to agree to new terms and conditions of employment. (App. 23 (¶3), 42 (¶53).) *See, e.g.*, *Plumbers & Steamfitters Local 598 v. Morris*, 511 F. Supp. 1298, 1311 (E.D. Wash. 1981) (“The complaint itself contends that the lockout occurred as a means to force concessions to terms in negotiation of a collective bargaining agreement. It is clear this case grows out

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of a labor dispute as defined in the Norris-LaGuardia Act."). It is thus indisputable that this case "involv[es] or grow[s] out of a labor dispute."

C. The NFLPA's purported disclaimer is irrelevant.

The District Court rested its Norris-LaGuardia Act analysis on the notion that the NFLPA's disclaimer rendered the Act wholly inapplicable. (Add. 61, 67.) That legal conclusion was erroneous.

1. The Act applies regardless of whether a union is involved.

To begin, the District Court's reasoning cannot be squared with the plain text of the Act. Congress drafted the Act broadly to address "any controversy concerning terms or conditions of employment." 29 U.S.C. § 113(c). Congress could have easily limited the Act to disputes involving unions, but it did the opposite, using the disjunctive to cover disputes involving even an individual employee—"whether such dispute is … between one or more employers or associations of employers and one or more employees *or* associations of employees." *Id.* § 113(a) (emphasis added).

Consistent with this text, the Supreme Court has explained that the Act is triggered simply by "disputes affecting the employer-employee relationship." *Columbia River Packers Ass'n v. Hinton*, 315 U.S. 143, 145 (1942). Thus, even apart from the current status of the Union, this case involves and grows out of a labor dispute because the suit here is one between "employers [the teams] …

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and one or more employees [the player-plaintiffs]," 29 U.S.C. § 113(a), and because the issues in dispute include "terms or conditions of employment," *id.* § 113(c).

Despite the breadth of this language, the District Court asserted that Section 13 "casts a wide net, but not wide enough" to cover this dispute because it believed that Congress intended to reach only disputes involving unions. (Add. 58 n.43.) But the Act defines "labor dispute" broadly to include "*any* controversy concerning terms or conditions of employment." 29 U.S.C. § 113(c) (emphasis added). Controversies concerning terms or conditions of employment can and do occur whether or not employees are unionized. Indeed, Section 2 of the Act confirms this common sense reading, observing that an employee can negotiate the "terms and conditions of *his* employment" with or without associating with other employees. 29 U.S.C. § 102 (emphasis added). Section 13(a) is in accord, referring to disputes involving one or more "employees *or* associations of employees." 29 U.S.C. § 113(a) (emphasis added).

The District Court determined that when Section 13 says "employee," it should be read as "unionized employee." (Add. 58 n.43.) But the District Court did not explain what authorized it to add that qualification to the statute. The statute does not speak of "unions," it speaks of "employees or associations of employees." Regardless of whether the NFLPA is or is not now

a "union," it remains an association of employees, and plaintiffs are members of it.[6] In any event, as the Supreme Court recently admonished: "It is not for us to rewrite the statute so that it covers only what we think is necessary to achieve what we think Congress really intended." *Lewis v. City of Chicago*, 130 S. Ct. 2191, 2200 (2010). The Act's plain text reaches disputes between employers and employees generally, not merely disputes between employers and *unionized* employees.

Second, the District Court's view conflicted not just with the text, but with Supreme Court precedent. The District Court stated that "the broad definition of a 'labor dispute' has *uniformly* been interpreted by the courts as a dispute between a union and employer, or contextually, in relation to such a dispute." (Add. 57-58 (emphasis added).) This is plainly wrong. The Supreme Court has held that the Act barred an injunction in a case in which no union was involved at all. In *New Negro Alliance v. Sanitary Grocery Co.*, the Court held that a

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[6] In addition to being an "association of employees," the NFLPA is also a labor organization. A group is a "labor organization" under the NLRA if employee-members participate in it, and if it "deal[s] with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work." 29 U.S.C. § 152(5). *See NLRB v. Cabot Carbon Co.*, 360 U.S. 203, 210-13 (1959) (the term "dealing with" as used in Section 2(5) is more expansive than the term "bargaining with"). As members of the NFLPA's executive committee have stated post-disclaimer, their committee intends to "continue to negotiate" with the NFL about terms and conditions of NFL player employment while this lawsuit proceeds. (*See* Facts, *supra*.)

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dispute between an employer and a nonlabor organization that was protesting discriminatory conditions of employment was a labor dispute covered by the Act. 303 U.S. 552, 559-60 (1938); *see also Jacksonville Bulk Terminals,* 457 U.S. at 715 (Act applies "even in cases where the disputants did not stand in the relationship of employer and employee" (citing *New Negro Alliance*))*; Burlington N. Santa Fe Ry. Co.*, 203 F.3d at 709 n.6 ("Owing to this broad definition [of 'labor dispute'], the Supreme Court has found the term 'labor dispute' to capture a wide range of controversies," including "a dispute between an employer and a nonlabor organization" (citing *New Negro Alliance*)).

In *New Negro Alliance*, there was no indication that any of the employees were unionized, much less an indication that there was any dispute between the employer and a union out of which the controversy grew. Indeed, the Supreme Court explicitly noted that the defendant organization was not seeking to unionize employees. *See* 303 U.S. at 559. Yet the Norris-LaGuardia Act still barred the injunction.

Most significantly, the Supreme Court actually rejected the same argument that shaped the District Court's ruling. The Respondent attempted to distinguish prior cases that had barred injunctions on the ground that "a recognized labor union or unions or individual members thereof were involved and directly interested as parties to the causes [and] [*n*]*o such facts exist in the cause*

under review." Br. for Resp., 1938 WL 39106 (Feb. 10, 1938), at *24 (emphasis added). If this argument did not dissuade the Supreme Court from applying the Act, it should not carry the day here.

The District Court dismissed *New Negro Alliance* without reasoned analysis. Asserting that the case "does not ... hold" that "the Act bars injunctions in cases in which no union is involved at all" (Add. 62), the District Court proceeded to describe the facts of the case—in which the Supreme Court held that the Norris LaGuardia Act barred an injunction without even mentioning the involvement of a union—but failed to explain how its view that a union is a prerequisite to application of the Act could be squared with that decision. In the face of clear Supreme Court precedent, the District Court had no license to adopt its idiosyncratic interpretation of the Act.

2. *Even if a "labor dispute" requires a union, the Act applies because this case "grows out of" a dispute with the players' union.*

Even if the District Court were correct to read the Act as containing—contrary to its text—a requirement that a "labor dispute" involve a union, a disclaimer would nonetheless be irrelevant. The Act applies if a case "grow[s] out of" a labor dispute. 29 U.S.C. §§ 101, 104, 107. When an employer locks out employees immediately after the end of a failed attempt to bargain with

their union to reach a new CBA, there can be no doubt that the dispute over the lockout "grow[s] out of" a labor dispute.

Thus, even if one indulges the rather fanciful notion that there is no longer a "labor dispute" between the players and the NFL, there is no question that there *was* such a dispute, and that this case *grows out of* it. That is all that the Act requires. A disclaimer does not and cannot change the *origins* of this case.

The District Court faulted the NFL for failing to identify "legal support for its attempt to place a *temporal* gloss" on the term "labor dispute." (Add. 58.) But there is no need for a "temporal gloss" on that term because the statute addresses the temporal issue—and squarely refutes any notion that the Act becomes inapplicable the minute the "labor dispute" ceases—with its "growing out of" language, which clearly points back to the origins of the dispute. *See, e.g.*, RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 626 (1967) (defining "grow out of" to mean "to originate in; develop from"). Thus, even under the cramped interpretation of a "labor dispute" that the District Court adopted, this case "grow[s] out of" such a dispute, and the Act must apply.

D. Section 4(a) bars injunctions against lockouts.

Although the District Court expressed doubt that Section 4 of the Act prohibits injunctions of lockouts, it ultimately did not reach the question because of its erroneous conclusion that the Act was wholly inapplicable. In all events,

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Section 4(a) flatly prohibited the injunction here because it bars issuance of an injunction "to prohibit any person or persons participating or interested in [a labor] dispute ... from … [c]easing or refusing to perform any work or to remain in any relation of employment." 29 U.S.C. § 104(a). In short, Section 4 deprives courts of jurisdiction "to enjoin work stoppages in any case involving or growing out of any labor dispute." *W. Gulf Mar. Ass'n v. ILA Deep Sea Local 24*, 751 F.2d 721, 726 (5th Cir. 1985).

The provision covers lockouts. By locking out employees, an employer "ceas[es] or refus[es] ... to remain in [a] relation of employment." Although plaintiffs suggest that this provision applies only to strikes, that view cannot be squared with the statute's text, which clearly covers lockouts. Indeed, Section 4 prohibits injunctions against "persons participating or interested in" the activities enumerated therein, and Section 13(b) defines such persons to include both employers and employees. *See* 29 U.S.C. § 113(b). Congress would not have drafted the definition to apply to both if it intended the prohibitions on specific injunctions to apply only to one. And the Senate Report confirms the statute's plain meaning by emphasizing that "[t]he same rule throughout the bill, wherever it is applicable, applies to both employers and employees." S. Rep. No. 163, 72d Cong., 1st Sess. 19 (1932). Thus, the text and legislative history confirm that, even if Congress's primary *motivation* was to protect employees, its

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chosen *means* was to protect employers and employees alike from judicial interference in an even-handed manner.

Thus, by its plain terms, the Act bars injunctions against lockouts initiated by employers just as it bars injunctions against strikes initiated by employees. The courts have uniformly so concluded. *See Chi. Midtown Milk*, 1970 WL 2761, at *1; *Clune v. Publ'rs Ass'n*, 214 F. Supp. 520, 528-29 (S.D.N.Y. 1963), *aff'd*, 314 F.2d 343 (2d Cir. 1963) (per curiam); *Plumbers & Steamfitters*, 511 F. Supp. at 1311; *Auto. Transp. Chauffeurs, Demonstrators & Helpers, Local Union No. 604 v. Paddock Chrysler-Plymouth, Inc.,* 365 F. Supp. 599, 601-02 (E.D. Mo. 1973); *see also Dist. 29, United Mine Workers of Am. v. New Beckley Mining Corp.*, 895 F.2d 942, 945 (4th Cir. 1990) (noting that even courts that have adopted a narrow definition of "labor dispute" have concluded that the Act applies to "labor strike[s], or some action closely related to striking, such as boycotts or picketing by labor unions or *lockouts by management*" (emphasis added)); *accord NBA v. Williams,* 45 F.3d 684, 689 (2d Cir. 1995).[7]

[7] Courts have also concluded that Section 4 bars injunctions against other employer actions, such as plant closures. *See Congresio de Uniones Industriales v. VCS Nat'l Packing Co.*, 953 F.2d 1, 2-3 (1st Cir. 1991); *Spritzer v. Ford Instrument Div.*, 1969 WL 11148, at *2 (E.D.N.Y. July 28, 1969) ("Section 4(a) applies to injunctions sought against employers, as well as to injunctions sought against employees or labor unions.").

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In suggesting that the Norris-LaGuardia Act might not apply to lockouts, the District Court pointed to Section 2, which declares that the "public policy of the United States" in connection with the Act is effectuating the rights of individual workers. 29 U.S.C. § 102. However, the general purpose expressed cannot trump other, more specific provisions of the statute. There is no doubt that concerns about injunctions against labor unions, rather than injunctions against employers, were the principal catalyst for the bill. But the language that Congress used was not so limited. "[S]tatutory prohibitions often go beyond the principal evil [with which Congress was concerned] to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 79 (1998). The statute, as Congress wrote it, protects not just employees but employers as well.[8]

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[8] The Act was designed in part to reinforce and overcome judicial resistance to Section 20 of the Clayton Act, 29 U.S.C. § 52, which barred injunctions under the antitrust laws in disputes between employers and employees. *Burlington N. R.R. Co.*, 481 U.S. at 438; *United States v. Hutcheson*, 312 U.S. 219, 235-36 (1941). Section 20, like the Norris-LaGuardia Act, applies generally to disputes between employers and employees (without regard to whether the employees are unionized) and its text plainly covers injunctions against lockouts as well as strikes. 29 U.S.C. § 52 (barring injunctions prohibiting "any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor").

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If more confirmation were needed that the Norris-LaGuardia Act applies to lockouts and strikes alike, the Labor Management Relations Act (LMRA) of 1947 provides it. That Act allows the President to initiate procedures to enjoin "a threatened or actual strike or *lockout* affecting an entire industry or a substantial part thereof" if in his opinion it "imperil[s] the national health or safety." 29 U.S.C. § 176 (emphasis added). The Act goes out if its way to state that the Norris-LaGuardia Act does not apply to such Presidential actions. 29 U.S.C. § 178(b). By carving out a narrow category of injunctions against strikes and lockouts, the LMRA confirms that the Norris-LaGuardia Act generally applies equally to bar injunctions against "strikes and lockouts." *See Amazon Cotton Mill Co. v. Textile Workers Union of Am.,* 167 F.2d 183, 187 (4th Cir. 1948); *see also* Donald H. Wollett & Harry H. Wellington, *Federalism & Breach of the Labor Agreement*, 7 STAN. L. REV. 445, 456 n.59 (1955) ("Implicit in 29 U.S.C. § 178(b) is the proposition that the Norris-LaGuardia Act is, in the absence of specific statutory provisions to the contrary, applicable to any case growing out of a labor dispute, irrespective of whether employer or employee conduct is in question.").

In short, there is no doubt that the Norris-LaGuardia Act prohibits injunctions against lockouts. Before the District Court's ruling in this case, the only

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order enjoining a lockout was the one dissolved by the Seventh Circuit in *Chicago Midtown Milk*. The order under review here should suffer the same fate.

E. The District Court lacked jurisdiction even if Section 7, rather than Section 4, applies to injunctions against lockouts.

Even if the District Court were correct in suggesting that Section 4 does not categorically forbid injunctions against lockouts, it nonetheless lacked jurisdiction to issue the injunction. To obtain such relief, plaintiffs would still have to satisfy the separate requirements of Section 7, which provides, *inter alia*, that no injunction can issue in "any case involving or growing out of a labor dispute" except "after hearing the testimony of witnesses in open court (with opportunity for cross-examination)" and "except after findings of fact" by the court to the effect that "substantial and irreparable injury to complainant's property will follow" from the alleged unlawful act and that "the public officers charged with the duty to protect complainants' property are unable or unwilling to furnish adequate protection." 29 U.S.C. § 107.

All of the findings and procedures required by Section 7 are jurisdictional. *Lauf v. E.G. Shinner & Co.*, 303 U.S. 323, 329-30 (1938); *Donnelly Garment Co. v. Dubinsky*, 154 F.2d 38, 42 (8th Cir. 1946). And here, it is undisputed that none of those procedures was followed and none of the required findings was made.

Indeed, some of the required findings could not possibly be made here. For example, a "Federal District Court is without power to issue an injunction in an action growing out of a labor dispute in the absence of an allegation by the plaintiff and a finding by the court, supported by evidence, that local public officers are unable or unwilling to furnish plaintiff adequate protection against the violence or threat of violence against which the injunction is sought." *Donnelly Garment Co.*, 154 F.2d at 42; *see also Taylor v. Sw. Bell Tel. Co.*, 251 F.3d 735, 742-43 (8th Cir. 2001). Plaintiffs have not alleged and could not allege that any such violence was threatened; nor could they allege inadequate protection from such violence.

The failure to follow the requirements of Section 7 demonstrates all the more that the District Court lacked jurisdiction to enter a preliminary injunction. *See New Beckley Mining Corp.*, 895 F.2d at 947 (even if the challenged conduct "does not fall within one of the enumerated acts in § 4, the district court can issue no injunction without adhering to the strict procedural requirements of § 7").

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II. *The Doctrine of Primary Jurisdiction Required the District Court To Defer Consideration of the Issues in this Case Pending the Outcome of Board Proceedings.*

The District Court erred by refusing to apply the doctrine of primary jurisdiction to stay this case pending the NLRB's resolution of a predicate labor law issue to plaintiffs' claims—the validity of the NFLPA's disclaimer.

A. The doctrine of primary jurisdiction.

The Supreme Court has noted a "recurring" problem in that "conduct seemingly within the reach of the antitrust laws is also at least arguably protected or prohibited by another regulatory statute enacted by Congress." *Ricci v. Chi. Mercantile Exch.,* 409 U.S. 289, 299-300 (1973).

There is no dispute that, in certain circumstances, a court may decide labor law issues that emerge as collateral issues in antitrust litigation. *See, e.g.*, *Connell Constr. Co. v. Plumbers & Steamfitters*, 421 U.S. 616, 626 (1975); *Kaiser Steel Co. v. Mullins*, 455 U.S. 72, 85 (1982). But there are also circumstances in which the labor law issues are anything but collateral and a court errs by invading the Board's primary jurisdiction, deciding an issue without first allowing the agency to bring to bear its considered views on the subject.

Although "[n]o fixed formula exists for applying the doctrine" of primary jurisdiction," *United States v. W. Pac. R.R. Co.*, 352 U.S. 59, 64 (1956), the Court has laid out three criteria to guide its application in the context of anti-

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trust suits. Courts should ask (1) whether it is "essential for the antitrust court to determine whether [any provisions of the regulatory statute are] incompatible with the maintenance of an antitrust action"; (2) whether "some facets of the dispute … are within the statutory jurisdiction of the [regulatory agency]"; and (3) whether "adjudication of that dispute by the [agency] promises to be of material aid in resolving the immunity question." *Ricci*, 409 U.S. at 302. "The purpose of these considerations is to provide focus upon the controlling principle involved in the conflict of regulatory and judicial activity, which is that the courts must refrain from imposing antitrust sanctions for activities of debatable legality in order to avoid the possibility of conflict between the courts and agencies." *Int'l Travel Arrangers, Inc. v. W. Airlines, Inc.,* 623 F.2d 1255, 1259 (8th Cir. 1980) (internal quotation marks, ellipsis, and brackets omitted).

B. The doctrine of primary jurisdiction applies in this case.

This is a paradigmatic case for application of the primary jurisdiction doctrine. In the first place, the critical labor law issue—the validity of the union's purported disclaimer—can in no sense be described as collateral to this antitrust proceeding. Indeed, the District Court emphasized that its ruling upholding the validity of the disclaimer decided or rendered unnecessary resolution of every critical legal issue in this case.

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In addition, all three of the *Ricci* factors strongly favor application of the doctrine. First, it is well-established that certain provisions of the NLRA are "incompatible with the maintenance of an antitrust action." *Ricci*, 409 U.S. at 302. The "'nonstatutory' labor exemption from the antitrust laws" is derived "from federal labor statutes, which set forth a national labor policy favoring free and private collective bargaining." *Brown*, 518 U.S. at 235-36 (citing NLRA provisions including 29 U.S.C. §§ 151, 153, and 158). But for a valid disclaimer, there would be no question that this well-established exemption would apply here. *See* Part III *infra*. So the potential for incompatibility between the labor and antitrust laws is manifest.

Second, there is no dispute that at least "some facets" of this dispute are within the statutory jurisdiction of the NLRB. Although the federal courts have jurisdiction over antitrust suits that raise collateral labor issues, *see Connell*, 421 U.S. at 626, there is no doubt that if the labor law issues in this case were considered on their own, they would be within the NLRB's exclusive jurisdiction; indeed, the District Court's opinion so recognized, as it found it necessary to scrutinize a number of NLRB decisions in an effort to resolve the disclaimer issue. (Add. 34-43.) As the District Court itself understood, the disclaimer raises issues under the NLRA. (Add. 23.) And, in the District Court's view, the validity of the disclaimer was the linchpin of the entire case.

Finally, it is similarly clear that NLRB adjudication would "be of material aid in resolving the immunity question." *Ricci*, 402 U.S. at 302. Although this Court can and should find that the nonstatutory labor exemption continues even if the NFLPA's disclaimer was effective, *see infra* Part III, it would be absolutely clear that the plaintiffs' claims cannot proceed if the NLRB were to determine that the NFLPA's disclaimer is invalid.[9]

Rather than acknowledge the Board's primacy, the District Court engaged in a lengthy detour into NLRB precedents concerning the validity of disclaimers. The fact that the District Court felt the need to engage in that long excursion is a clear signal that the court was intruding into the Board's primary jurisdiction. Indeed, the District Court's assessment of the likely outcome of the NFL's pending charge (Add. 34, 42) "indicate[s] what the court believes is permitted by [the Board's] policy, prior to an expression by the [Board] of its

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[9] Certainly, "the question of immunity, as such, will not be before the agency." *Ricci*, 402 U.S. at 306. Nonetheless, the immunity question could be resolved completely by the Board's ruling on the NLRA issues in this case, particularly by a finding of invalid disclaimer. Moreover, as discussed further in Part III, the Supreme Court has held that antitrust courts cannot find the nonstatutory labor exemption *inapplicable* after even a valid decertification without "the detailed views of the Board." *Brown*, 518 U.S. at 250. This makes perfect sense because the nonstatutory exemption and primary jurisdiction both recognize the important role of the labor laws and the NLRB, and both require Board input before a court can determine that the antitrust laws would apply to the conduct of a multiemployer bargaining unit.

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view. *This is precisely what the doctrine of primary jurisdiction is designed to avoid.*" *Atchison, Topeka, & Santa Fe Ry. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 821 (1973) (plurality op.) (emphasis added) (reversing grant of injunction).

What is more, the District Court's misapplication of that precedent is Exhibit A when it comes to the importance of respecting the primary jurisdiction doctrine. Under the NLRA, a union's disclaimer of interest in collective bargaining is effective only if it was "unequivocal," "made in good faith," and not for tactical advantage. *IBEW (Texlite, Inc.)*, 119 NLRB 1792, 1798-99 (1958), *enf'd* 266 F.2d 349 (5th Cir. 1959); *see also, e.g.*, *News-Press Publ'g Co.*, 145 NLRB 803, 804-05 (1964); *Retail Assocs., Inc.*, 120 NLRB 388, 394 (1958).

The "Board is not compelled to find a valid and effective disclaimer just because the union uses the word, and regardless of other facts in the case. … The question must be decided in each case whether the union has in truth disclaimed, or whether its alleged disclaimer is simply a sham and for that reason not to be given force and effect." *Capitol Market No. 1*, 145 NLRB 1430, 1431 (1964). For example, the Board has previously rejected informal membership "votes" to terminate a union's labor organization status when the "votes" were part of a bad-faith strategy to achieve more preferable terms and conditions of employment. *See News-Press Publ'g Co.*, 145 NLRB at 804-05.

For purposes of the applicability of the primary jurisdiction doctrine here, it should have sufficed that there was ample evidence that this *conditional* disclaimer was neither unequivocal nor made in good faith, and there was further compelling evidence that the disclaimer was done for tactical reasons.

With respect to good faith, the Board will undoubtedly recognize that the Union's purported disclaimer is not motivated by a genuine desire to abandon unionism. Nor does it reflect dissatisfaction with the leadership or direction of the NFLPA; to the contrary, the membership some time ago authorized their leadership to purport to abandon collective bargaining if it deemed such a step advantageous. That fact—not to mention that the membership continues to stand with its leaders—confirms their continuing confidence in their Union.

With respect to the disclaimer being "unequivocal," the Board will also understand that the "vote" to give the authority to disclaim was conditional: the authority was given only in the event of a lockout. That is not an "unequivocal" renunciation of bargaining. Moreover, the Board will also know that with the NFLPA, past is prologue. Its purported disclaimer today does not mean that it will not collectively bargain in the future.

The District Court misread this Board precedent and instead focused primarily on a Division of Advice Memorandum (*see* Add. 37-41), which is not even binding on the Board, *see Chelsea Indus., Inc. v. NLRB*, 285 F.3d 1073,

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1077 (D.C. Cir. 2002); *USPS*, 345 NLRB 1203, 1214 n.17 (2005), *enf'd*, 254 Fed. Appx. 582 (9th Cir. 2007), and in any event is based on a very different factual record that pre-dated and thus could not account for the NFLPA's subsequent resurrection. Further compounding that error, the District Court misread that Memorandum to state that inconsistent conduct is the sole basis for rejecting a union's disclaimer; it actually states that unequivocality, good faith, *and* lack of inconsistent conduct are *separate* requirements: "In order for a union's disclaimer … to be valid, it must be unequivocal, made in good faith, *and* unaccompanied by inconsistent conduct." *Pittsburgh Steelers, Inc.*, 1991 WL 144468, at *2 n.8 (NLRB G.C. June 26, 1991) (emphasis added).[10]

[10] The District Court also erred by relying on the unreviewed decision of Judge Doty in *McNeil v. NFL (sub. nom Powell v. NFL)*, 764 F. Supp. 1351 (D. Minn. 1991). In *McNeil*, Judge Doty refused to consider the issue of the good faith of the disclaimer, reasoning incorrectly that good faith was not relevant. *See id.* at 1357 n.6. (He recognized, however, that his decision presented an issue as to which there was "substantial ground for difference of opinion." *Id.* at 1360.) Moreover, in *McNeil*, there was no pending unfair labor practice charge relating to the purported disclaimer. In contrast, this case is in the same posture as *Powell*, where Judge Doty appropriately stayed his decision on the nonstatutory labor exemption when an unfair labor practice charge related to a predicate issue had been filed, but the Board had not yet decided whether to issue a complaint. *See Powell*, 930 F.2d at 1296 (recounting procedural history). Finally, history now establishes what Judge Doty could not have known in 1991: When the NFLPA says it is no longer collectively bargaining, that does not mean that it will no longer collectively bargain.

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In sum, the District Court's order is a cautionary tale about the importance of leaving labor law issues that are central—not collateral—to the labor law experts at the Board.

The Board will likely conclude that the NFLPA has not engaged in the good faith, unequivocal renunciation that the NLRA requires, and it likely will issue an order requiring the Union to resume bargaining in good faith. But the NFL's burden is not to show that it will prevail before the Board; rather it need only show that this is an appropriate case for deferring to the Board's specialized expertise as required by the doctrine of primary jurisdiction.[11] The general factors that the Supreme Court identified in *Ricci* as well as the Court's specific admonition in *Brown* all point in the same direction: The District Court's

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[11] The situation here is therefore wholly unlike the cases of *Connell* and *Kaiser*, which involved challenges to "hot cargo" provisions (which obligate an employer to cease doing business with, or to stop handling the goods of, another employer). Such agreements are expressly deemed void *ab initio* under Section 8(e) of the NLRA (29 U.S.C. § 158(e)) and may therefore be prohibited by federal courts without the need to defer to Board proceedings. *See, e.g., Teamsters Local Union 682 v. KCI Constr. Co.*, 384 F.3d 532, 537, 540-41 (8th Cir. 2004). This case may, in fact, be a situation in which federal as well as state courts should view the Board's jurisdiction as exclusive. *See, e.g., San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959); *Brennan v. Chestnut*, 973 F.2d 644 (8th Cir. 1992). Here, whether the plaintiff-employees have an antitrust cause of action against their employers cannot be determined without resolving, *inter alia*, whether the multiemployer bargaining process is, in fact, over—a factually-intense, predicate labor law issue that falls directly within the Board's specialized expertise and is already pending with the Board.

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decision to wade into the validity of the disclaimer without deferring to the Board was clear legal error.[12]

III. *Plaintiffs' Antitrust Claims Are Barred by the Nonstatutory Labor Exemption.*

Even if the Norris-LaGuardia Act did not preclude the District Court's jurisdiction to issue an injunction, and even if the doctrine of primary jurisdiction did not require the District Court to stay the case pending resolution of the labor law issues before the Board, the injunction should still be reversed because plaintiffs cannot succeed on the merits of their antitrust claims. Under the Supreme Court's decision in *Brown* and this Court's decision in *Powell*, those claims are barred by the nonstatutory labor exemption to the antitrust laws *even if* the Union's disclaimer were ultimately deemed valid by the Board.

A. The legal principles underlying the exemption.

The nonstatutory exemption is a judicially-created doctrine that reconciles federal antitrust and labor law in order (a) to foster collective bargaining,

[12] The District Court's primary justification for not deferring to the Board was a concern that the Board's investigation into the disclaimer would be time-consuming. But other courts have recognized that such concerns are irrelevant. *See, e.g.*, *Ellis v. Tribune Television Co.*, 443 F.3d 71, 90 (2d Cir. 2006). In any event, the fact that the Board's deliberations are thorough and time-consuming only underscores the inappropriateness of a court's invading the Board's primacy. Moreover the Board itself has multiple tools to expedite its proceedings or to seek interim injunctive relief. *See, e.g.*, 29 U.S.C. § 160(j).

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including multiemployer bargaining, a "well-established, important, pervasive method of collective bargaining, offering advantages to both management and labor," and (b) to keep "instability and uncertainty [from entering] into the collective bargaining process." *Brown,* 518 U.S. at 240-42; *see also White*, 585 F.3d at 1137 (exemption reflects concern that the prospect of antitrust liability "would stifle behavior integral to the bargaining process").

The Supreme Court explained that "a limited nonstatutory exemption from antitrust sanctions" for certain labor-related agreements is necessary to make "a proper accommodation between the congressional policy favoring collective bargaining under the NLRA and the congressional policy favoring free competition in business markets." *Connell*, 421 U.S. at 622; *see also United Mine Workers of Am. v. Pennington*, 381 U.S. 657, 665 (1965). The Supreme Court inferred the exemption from several statutes, including Sections 6 and 20 of the Clayton Act (15 U.S.C. § 17 and 29 U.S.C. § 52) and the Norris-LaGuardia Act. *See, e.g.*, *Connell*, 421 U.S. at 621. The exemption protects not only collective bargaining agreements, but also agreements among employers regarding bargaining tools to be utilized by their multiemployer bargaining unit. *See Brown*, 518 U.S. at 246-48.

The bargaining tool challenged in *Brown* was the NFL clubs' decision to implement—without the union's consent and after impasse—a uniform salary

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for developmental squad players. *Id.* at 234-35. The Supreme Court held that the clubs' agreement to take that action was immune from antitrust scrutiny because it "took place during and immediately after a collective-bargaining negotiation" and "grew out of, and was directly related to, the lawful operation of the bargaining process." *Id.* at 250. "[T]o permit antitrust liability" in such circumstances, the Court concluded, would "threaten[] to introduce instability and uncertainty into the collective-bargaining process, for antitrust law often forbids or discourages the kinds of joint discussions and behavior that the collective-bargaining process invites or requires." *Id.* at 242.

The Court did not hold that *all* multiemployer agreements are exempt from the antitrust laws, "for an agreement among employers could be sufficiently distant in time and in circumstances from the collective-bargaining process that a rule permitting antitrust intervention would not significantly interfere with that process." *Id.* at 250. But the Court declined to "draw th[e] line" demarcating the "extreme outer boundaries" of the exemption. *Id.*

The Court further held that it would be inappropriate for it—and implicitly, for any federal court—to define those outer boundaries "without the detailed views of the [National Labor Relations] Board." *Id.* Indeed, the Court expressly refused to decide that the exemption would expire immediately upon the "collapse of the collective-bargaining relationship, as evidenced by decerti-

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fication of the union," recognizing that any such analysis should be informed by the expertise of the NLRB "to whose specialized judgment Congress intended to leave many of the inevitable questions concerning multiemployer bargaining bound to arise in the future." *Id.*

Brown therefore provides a double protection against a premature conclusion that the exemption has expired: *First*, the exemption continues until a point sufficiently distant in time and in circumstances from the collective bargaining process that the prospect of antitrust scrutiny would not interfere with the process; and *second*, the exemption cannot be deemed by a court to have ended without seeking and considering the detailed views of the NLRB. As described below, the District Court erred by overriding both protections.

B. The District Court misapplied *Brown*.

The Union's purported disclaimer was undertaken in the waning hours of the 2006 CBA and literally *during* a collective bargaining session. The District Court nonetheless held that the disclaimer *instantly* terminated the exemption, allowing plaintiffs to bring antitrust claims against a lockout that began literally hours after their union walked out of collective bargaining.

That holding cannot be squared with *Brown.* The lockout occurred "immediately after a collective-bargaining negotiation" and "gr[ows] out of, and was

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directly related to, the lawful operation of the bargaining process." Accordingly, the District Court erred in finding the exemption inapplicable.

First, it should be clear as a matter of law that the lockout is not sufficiently distant from the collective bargaining process in time or in circumstances to be subject to antitrust scrutiny. As for time, the NFLPA issued its disclaimer and the plaintiffs filed this suit *before* the previous CBA expired; the NFL locked out the players hours later, *immediately* upon the CBA's expiration. Events that overlap in time, or follow in immediate succession, are hardly "distant" from one another. The temporal continuity between the impasse in bargaining and the filing of plaintiffs' complaint is compelling proof that this suit is anything but distant in time from—and, indeed, that it grew out of—the collective bargaining process.

With respect to circumstances, it is no less clear that the purported disclaimer and this lawsuit, like the lockout, are steps in an ongoing process that will ultimately determine the terms and conditions of player employment in the NFL. That is exactly what happened the last time that this Union purported to disclaim: Antitrust suits were immediately filed and ultimately settled, with the litigation settlement imported into a collective bargaining agreement with a "resurrected" NFLPA. Given the substantial evidence of record that the NFLPA and the plaintiffs expect and seek the same process and

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result now, it ignores reality to say that the circumstances here are in any way distant from or unrelated to the collective bargaining process.

The District Court dismissed *Brown,* contending that "*Brown* concerned an impasse occurring within the context of a collective bargaining relationship that likely could continue. Here, in contrast, the parties have left the collective bargaining framework entirely." (Add. 84.) But while *Brown* involved an impasse, its reasoning and holding were not "confined" to that context. (*Id.*)

Rejecting the notion that the exemption should end at impasse, the Supreme Court in *Brown* emphasized the untenable, Catch-22 situation that would confront members of a multiemployer bargaining unit if, at the flip of a switch, they could be exposed to antitrust scrutiny for conduct related to, or growing out of, the collective bargaining process:

> If the antitrust laws apply, what are employers to do once impasse is reached? If all impose terms similar to their last joint offer, they invite an antitrust action premised upon identical behavior … as tending to show a common understanding or agreement… . *Indeed, how can employers safely discuss their offers together even before a bargaining impasse occurs?* A *preimpasse discussion* about, say, the practical advantages or disadvantages of a particular proposal *invites a later antitrust claim* that they agreed to limit the kinds of action each would later take should an impasse occur … . *All of this is to say that to permit antitrust liability here threatens to introduce instability and uncertainty into the collective-bargaining process … .*

Id. at 241-42 (emphases added).

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Virtually every word of that discussion—and certainly its underlying rationale—applies with no less force to the prospect that the exemption could disappear immediately upon a union's disclaimer, instantly exposing the members of a multiemployer bargaining unit to antitrust liability for bargaining-related conduct or agreements. In the context of multiemployer bargaining, the mere *potential* for antitrust scrutiny, activated at an unpredictable time by unilateral decision of the potential antitrust plaintiffs across the bargaining table, would frustrate federal labor law by inhibiting collective action and robust negotiations *throughout* the bargaining process.

Just as multiemployer bargaining could not function if the coordination inherent in and encouraged by the process could be assailed as an antitrust violation the moment an impasse was declared, multiemployer bargaining could not function if the exemption disappears upon the union's unilateral declaration of a disclaimer. In both situations, the exemption must continue not only because there is a prospect that collective bargaining will resume, but also because the prospect that the exemption could abruptly end due to a union's unilateral action would significantly impede, stifle, and hinder the collective bargaining process *from its outset*. Moreover, either can be readily "manipulated by the [union] for bargaining purposes." 518 U.S. at 246.

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Indeed, the concerns underlying *Brown* apply with more compelling force if the trigger for instantaneous antitrust scrutiny is disclaimer—which involves only unilateral conduct by the union—as opposed to impasse, which at least in theory is the product of negotiations for which both sides are responsible. And disclaimer can be asserted during the term of a collective bargaining agreement with the consequence, if the District Court is correct, that the collective bargaining relationship and the nonstatutory labor exemption would end instantly, before the end of the CBA term.[13]

The potential for manipulation is enhanced by the fact that a union's assertion of disclaimer does not necessarily make it so. *See, e.g., Capitol Market No. 1*, 145 NLRB at 1431 ("[T]he Board is not compelled to find a valid and effective disclaimer just because the union uses the word, and regardless of other facts in the case.") Lacking the formality of decertification—an employee-driven process supervised by the NLRB that includes a vote by secret ballot, *see* 29 U.S.C. § 159(c)—disclaimer is literally a paper-thin statement, issued unilaterally by a union, that may readily be overturned based on "other facts in the case." *Capitol Market No. 1*, 145 NLRB at 1431. In *Brown*, the Supreme Court ex-

[13] Here, the NFLPA purported to disclaim prior to CBA expiration because if it had waited until after midnight, its members would have been barred from bringing antitrust claims for at least six months. (App. 300.)

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pressed concerns about "the adverse consequences that flow from failing to guess how an *antitrust* court would later draw the impasse line." 518 U.S. at 246 (emphasis in original). The same is no less true of disclaimer, regardless of whether its validity is determined by a court or the NLRB. Indeed, at least with this Union, disclaimer has proven to be as temporary and fleeting as impasse.

If the leverage associated with potential antitrust claims were added to a union's arsenal, its incentives to bargain in good faith and to reach agreements would be diminished. At the same time, the risk of instantaneous and unpredictable antitrust exposure, triggered at will by the union, would be a powerful *disincentive* for employers to engage in multiemployer bargaining at all. Both consequences would undermine federal labor policy, which strongly favors multiemployer bargaining, and would introduce "instability and uncertainty into the collective bargaining process." 518 U.S. at 242.

The facts here show why. The District Court's view that the collective bargaining relationship has ended—and will not resume—ignores both history and the recent statements of the NFLPA's player leadership. Its conclusion that the disclaimer was not a tactic, because it had "consequences" for the plaintiffs (Add. 40, 47), ignores the fact that those "consequences" are at best temporary, if not wholly illusory, and can be readily reversed as they were in 1993. If this disclaimer is sufficient to defeat the exemption, then any unilateral

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disclaimer should suffice. The District Court's ruling would thus give employees a powerful new tool that they can use in multiemployer collective bargaining under the pretense that they have "left the collective bargaining framework entirely." (Add. 84.)

This does not mean that employees must remain unionized against their will. Indeed, *Brown* itself instructs that the nonstatutory exemption must end at some point, once the collective bargaining process has become a sufficiently distant memory. But the decision to engage in collective bargaining, especially multiemployer collective bargaining, has consequences. Even if a union purports to reverse that decision, it has no reasonable basis to assume that it can instantly and unilaterally shift the governing legal structure to the immediate disadvantage, if not peril, of the multiemployer bargaining unit. It cannot so immediately and easily convert collective conduct *encouraged* by the labor laws into collective conduct *condemned* by the antitrust laws.[14]

When, as in this case, an antitrust suit follows disclaimer by mere hours, when that disclaimer is a direct response to events at the collective bargaining

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[14] Such instantaneous conversion would be especially pernicious in the context of professional sports leagues whose member clubs "must cooperate in the production and scheduling of games[, which] provides a perfectly sensible justification for making a host of collective decisions." *Am. Needle, Inc. v. NFL*, 140 S. Ct. 2201, 2216 (2010).

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table, and even more when there are strong indications that the union will return and enter into a new collective bargaining agreement—the suit cannot be said to be "sufficiently distant in time and in circumstances" from the collective bargaining process unless those words have no meaning. And, as this Court held in *Powell*, until the "termination point for the exemption" is reached, it is proper for both parties to utilize their "offsetting tools, both economic and legal, through which they may seek resolution of their dispute. 930 F.2d at 1303, 1302. Those tools include the employers' right to lock out. *Id.* at 1302 (citing *Am. Ship Bldg. Co. v. NLRB*, 380 U.S. 300 (1965)).

The District Court erred further in determining that the exemption did not apply without seeking or obtaining the views of the NLRB. The District Court concluded that it did not need to seek the Board's input because it believed that the disclaimer was valid and that it instantly terminated the exemption. (Add. 44-48 & n.32.)

But the question decided by the District Court is precisely the issue that the Supreme Court reserved in *Brown*. The Court squarely held that *without* "the detailed views of the Board," courts should not determine "*whether*" the exemption ends immediately upon the "collapse of the collective bargaining relationship, as evidenced by decertification of the union." 518 U.S. at 250

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(emphasis added).[15] The District Court did here precisely what the Supreme Court held that it would not and could not do without the Board's input.

C. The exemption applies to multiemployer lockouts.

The District Court also clearly erred by concluding that the nonstatutory labor exemption does not protect a multiemployer lockout on the ground that a lockout does not concern "mandatory subjects of collective bargaining." (Add. 85-86.) That conclusion was flawed in several respects.

First, the District Court's reading of *Amalgamated Meat Cutters v. Jewel Tea,* 381 U.S. 676 (1965), was incorrect. *Jewel Tea* stands for the proposition that the nonstatutory labor exemption cannot be used to shield agreements between unions and employers that are intended to impose anticompetitive restraints on *product* markets—like the "hot cargo" cases discussed in Part II above. *Id.* at 690-92 (Opinion of White, J.); *id.* at 732-33 (Opinion of Goldberg, J.). It does not stand for the proposition that *only* agreements that facially concern mandatory subjects of collective bargaining are exempt. *See Am. Fed. of Musicians v. Carroll*, 391 U.S. 99, 110 (1968) (noting that whether "only mandatory subjects of bargaining enjoy the [nonstatutory labor] exemption" is "a question not in

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[15] There has been no decertification here. The reason is clear: Decertification, unlike a purported disclaimer, bars the Union's resurrection for at least twelve months. *See* 29 U.S.C. § 159(c)(3).

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this case and upon which we express no view" (citing *Jewel Tea,* 381 U.S. at 690 n.5 (Opinion of White, J.))).

Moreover, *Jewel Tea* made clear that the exemption should apply when an agreement "falls within the protection of the national labor policy." 381 U.S. at 690 (Opinion of White, J.). Multiemployer lockouts surely do, given that they have been repeatedly held to be an employer right granted by labor law. The Supreme Court expressly recognized this point in *Brown*: "Labor law permits employers, after impasse, to engage in considerable joint behavior, including *joint lockouts*." 518 U.S. at 245 (emphasis added); *see also id.* at 246 (rejecting rule that would shield lockouts from antitrust scrutiny only under certain circumstances).

This Court too has acknowledged that lockouts by members of a multiemployer bargaining unit are protected by the labor laws. *Powell*, 930 F.2d at 1302. Other courts are in accord. *E.g., Newspaper Drivers & Handlers' Local No. 372 v. NLRB,* 404 F.2d 1159, 1160 (6th Cir. 1968); *Williams,* 45 F.3d at 689. Indeed, in the opinion affirmed by the Supreme Court in *Brown*, the D.C. Circuit squarely rejected the District Court's premise that the exemption covers "terms" but not "tactics," characterizing that argument as "incomprehensible," and noting that the exemption protects any and all "lawful aspects of the col-

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lective bargaining process established by the NLRA." *Brown v. Pro Football, Inc.*, 50 F.3d 1041, 1053 (D.C. Cir. 1995).

D. Under *Powell*, the exemption must apply at least until the com pletion of Board proceedings.

In *Powell*, this Court held that the nonstatutory labor exemption applies to agreements among the NFL clubs "as long as there is a possibility that proceedings may be commenced before the Board or until final resolution of Board proceedings and appeals therefrom." 930 F.2d at 1303-04. That holding reflects the correct understanding—subsequently confirmed in *Brown*—that the antitrust laws should not be brought to bear on labor relations until some time after the Board declares (or the parties agree) that the bargaining process is over.

There is not just a possibility here that proceedings may be commenced before the Board; an unfair labor practice is pending. Plaintiffs' antitrust claims therefore are not actionable and should be dismissed or stayed.

While this appeal is of the grant of a preliminary injunction, this Court may "proceed further and address the merits" of the underlying dispute. *Munaf v. Geren*, 553 U.S. 674, 691 (2008). "Adjudication of the merits is most appropriate if the injunction rests on a question of law and it is plain that the plaintiff cannot prevail." *Id.* Rather than remand this case for proceedings clearly

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barred by the doctrine of primary jurisdiction or inconsistent with *Brown* and *Powell*, this Court should follow the model of *Munaf* and adjudicate this case by vacating the injunction and remanding with instructions to either dismiss or stay the action.

IV. *The District Court Erred in Applying the Factors for a Preliminary Injunction.*

The District Court awarded an injunction under Rule 65. But that Rule expressly does not apply to "any federal statute relating to [temporary injunctive relief] in actions affecting employer and employee." Fed. R. Civ. P. 65(e)(1). The District Court never should have reached the *Dataphase* factors both because it lacked jurisdiction to enter any injunction under the Norris-LaGuardia Act, and because it should have stayed the case under the doctrine of primary jurisdiction. But even if the District Court properly considered the plaintiffs' motion at all under Rule 65, it should not have granted it. Plaintiffs have no likelihood of success on the merits. And the District Court further erred in its balancing of the equities.

A. The District Court erred in assessing the likelihood of success.

Likelihood of success on the merits is the most important factor in deciding whether to issue a preliminary injunction. *CDI Energy Servs., Inc. v. W. River Pumps, Inc.*, 567 F.3d 398, 402 (8th Cir. 2009). Absent a showing of a "fair chance" of success on the merits, there is no need for a court to proceed to

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analyze the other factors. *See, e.g.*, *Planned Parenthood v. Rounds*, 530 F.3d 724, 732 (8th Cir. 2008) (en banc) (only if a party with the burden of proof makes a threshold showing of likelihood of success should a court "proceed to weigh the other *Dataphase* factors"). Here, plaintiffs have no chance of success on the merits because the nonstatutory labor exemption bars plaintiffs' claims. *See* Part III, *supra*.

B. The District Court improperly weighed the equities.

The District Court also erred in its weighing of the equities. It failed entirely to consider the serious, immediate and irreparable harm the injunction posed to the NFL, it vastly overstated both the harm to the plaintiffs and the nature of that harm, and it failed to properly consider the public interest.

As to harm to the NFL, federal labor law permits an employer to institute a lockout "for the sole purpose of bringing economic pressure to bear in support of his legitimate bargaining position." *Am. Ship Bldg. Co.*, 380 U.S. at 318; *see also Powell*, 930 F.2d at 1302. The injunction undercut that leverage (and, in turn, delayed the ability of the parties to bargain for a comprehensive agreement on terms and conditions of employment). That is the essence of irreparable harm in this context, and the *raison d'etre* of the Norris-LaGuardia Act's bar on injunctive interference in labor disputes. *See, e.g.*, *Int'l Ass'n of Bridge, Structural & Ornamental Iron Workers v. Pauly Jail Bldg. Co.*, 118 F.2d 615,

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616-17 (8th Cir. 1941) ("The fact must not be lost sight of, that however narrow the scope of injunctive relief may be in form, the issuance of the writ for any purpose in a labor dispute will generally tip the scales of the controversy. Plainly this was the very evil against with the Norris-LaGuardia Act was basically directed."); *In re Dist. No. 1*, 723 F.2d 70, 75 & n.4 (D.C. Cir. 1983) (federal labor policy is that of "unqualified *laissez-faire* in labor relations" and opposes "federal court intervention in private labor disputes" because of the heavy and irreparable skewing effect of an injunctive order).

In addition, the injunction—which, in effect, requires the clubs to conduct operations in contravention of their labor law right to temporarily shut down production in an effort to reach agreement on terms and conditions of employment—leads to the irreparable harm of which this Court has warned. (*See generally* App. 138 *et seq.* (Declaration of Peter Ruocco).) For example, effectively requiring the NFL clubs to resume football operations would likely lead to the more favorably-situated teams signing the best players. *Reynolds v. NFL*, 584 F.2d 280, 287 (8th Cir. 1978); *Powell v. NFL*, 690 F. Supp. 812, 818 (D. Minn. 1988) ("[T]he potential migration of many key players from less attractive clubs to more desirable ones could have a devastating, long-term impact on the competitive balance within the League."); *id.* at 816 (although such an injunction "would only be 'preliminary' pending final resolution of this matter,

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its effects may be felt for years since many players who moved undoubtedly would sign long-term contracts with their new clubs"); (App. 138-40 (¶¶6-9).)

It would be difficult, if not impossible, to unscramble the eggs and return those players to clubs that otherwise may have had contract arrangements with (or, at least, a greater ability to enter into contracts with) such players in the absence of an injunction. (App. 138-39 (¶¶6-7).)

As to harm to the players, they assert claims for *treble* damages; such damages would be more than adequate (trebly adequate) to remedy any possible harm caused by the lockout. *See Rittmiller v. Blex Oil, Inc.*, 624 F.2d 857, 861 n.4 (8th Cir. 1980) ("The availability of treble damage relief is an important consideration ... weighing against granting an interlocutory injunction."). A party with an adequate remedy at law cannot demonstrate irreparable harm. *See Gen. Motors*, 563 F.3d at 319. The District Court's lengthy discussion of the alleged inability of plaintiffs Mankins, Manning, and Jackson to test their worth in a "free market" (Add. 75-78) is not an analysis of *irreparable* harm; if their market value is diminished due to the lockout, they have an adequate remedy at law.

The District Court also relied on cases concluding—based principally on theories of harm to reputation, loss of ability to compete for postseason honors, or damage to one's career vis-à-vis other players—that professional athletes would suffer "irreparable harm" without preliminary injunctive relief

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permitting them to play in games. (*See* Add. 72-73 (citing, *inter alia*, *NFLPA v. NFL,* 598 F. Supp. 2d 971, 982-83 (D. Minn. 2008) (involving suspensions of two players under NFL steroid policy); *Jackson v. NFL*, 802 F. Supp. 226, 230-31 (D. Minn. 1992) (involving a challenge to free agency rules preventing some but not all players from signing with other clubs); *Denver Rockets v. All-Pro Mgmt, Inc.*, 325 F. Supp. 1049, 1057 (C.D. Cal. 1971) (eligibility rule would have prohibited player from participating in the playoffs).) The District Court erred in concluding that these cases "in effect" establish that irreparable harm is being suffered by the plaintiffs in this case. (Add. 71 n.54.) Those cases are inapposite: No plaintiff's reputation suffers because of the lockout; no plaintiff is disadvantaged vis-à-vis other players, as the lockout applies equally to all.

Moreover, although the District Court found that playing football imposes wear and tear on players' bodies, it ignored the unrebutted evidence submitted by the NFL on the relevant point here: "Because there are no practices or other organized football activities conducted during a lockout, no player suffers a risk of career-threatening injury or physical wear and tear." (App. 140.)

Finally, the District Court based its conclusion as to irreparable harm on a perceived likelihood that the entire 2011 season would be lost due to a lockout. (*E.g.*, Add. 16, 73-74, 75 ("lost playing season"; "loss of an entire year"; "sitting out a season").) But that speculative assessment assumes that the parties

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will not be able to negotiate mutually acceptable terms and conditions of employment (even temporary ones) in the interim. While a lockout or strike *can* result in the loss of a business cycle or season, there is no reason to assume that it *will*, particularly with the powerful economic incentive for *both* sides to come to a compromise. Indeed, in some circumstances, a lockout or strike may provide just the incentive to ensure an agreement is reached and a season is not lost. In all events, the policy of the Norris-LaGuardia Act is clearly to allow those forces to be brought to bear, not to have them enjoined based on a judicial prediction that they will cause a season to be lost, rather than a compromise to be forged.

As to the public interest, it lies in "fair, unfettered collective bargaining" and in supporting the multiemployer bargaining process that federal labor policy favors. *Glenwood Bridge, Inc. v. City of Minneapolis*, 940 F.2d 367, 372 (8th Cir. 1991); *see also Brown*, 518 U.S. at 236. Enjoining one side in a labor dispute from using the economic tools available to it under the labor laws would contravene the policy underlying the Norris-LaGuardia Act, the primary jurisdiction of the NLRB, and federal labor law generally, by replacing bilateral negotiation with a unilateral ability to place a judicial injunctive thumb on the collective bargaining scale. *See, e.g.*, *Pauly Jail*, 118 F.2d at 616-17 (injunctions would "tip the scale" in a labor dispute).

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In short, the public interest in a legal framework that promotes labor peace through collective bargaining, in preventing antitrust courts from roaming at large through the bargaining process, as well as the public interest in confining the courts to the jurisdiction granted by Congress all favor reversal of the decision below.

CONCLUSION

This Court should vacate the District Court's grant of a preliminary injunction and remand with instructions to dismiss or stay the action.

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May 9, 2011

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, I hereby certify that the textual portion of the foregoing brief (exclusive of the disclosure statement, tables of contents and authorities, certificates of service and compliance, but including footnotes) contains 13,760 words as determined by the word counting feature of Microsoft Word 2003.

Pursuant to Circuit Rule 28A(h), I also hereby certify that electronic files of this Brief and accompanying Addendum have been submitted to the Clerk via the Court's CM/ECF system. The files have been scanned for viruses and are virus-free.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to Rule 25 of the Federal Rules of Appellate Procedure, and Circuit Rule 25A(a), I hereby certify that I have this 9th day of May, 2011, filed a copy of the foregoing, along with the accompanying addendum, with the Clerk of the Court through the Court's CM/ECF system, which will serve electronic copies on all registered counsel.

I further certify that I have also filed with the Clerk of the Court ten (10) paper copies of this Brief and the accompanying Addendum and three (3) paper copies of Appellants' Separate Appendix by sending them to the Court via Federal Express for delivery prior to noon on May 10th pursuant to the Court's Order of May 5, 2011.

I further certify that I have served two (2) paper copies of this Brief and the accompanying Addendum and one (1) paper copy of Appellants' Separate Appendix to each counsel of record for the Appellees by sending them via Federal Express for delivery prior to noon on May 10th to the address listed on the Court's CM/ECF system.

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