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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INTRODUCTION

The District Court's unprecedented order enjoining a lockout was precluded by at least three legal obstacles: the Norris-LaGuardia Act, primary jurisdiction, and the nonstatutory labor exemption. The only comparable order was swiftly reversed by the Seventh Circuit. Nothing in plaintiffs' lengthy submission does anything to dispel the "serious doubts" reflected in this Court's stay opinion or suggests why this order should escape the same fate.

Plaintiffs dedicate the bulk of their submission to elaborate efforts to escape the plain text of the Norris-LaGuardia Act. The length of that effort is a tribute to the clarity of the Act, which Congress expressly designed to put an end to creative efforts to circumvent Congress's intent that antitrust courts stay out of labor disputes. The dispute here self-evidently "involves or grows out of" a labor dispute, and every effort by plaintiffs to evade that commonsense conclusion is answered by an intentionally broadly-worded provision of the Act.

The Norris-LaGuardia Act precludes the injunction entered here, but the defects in the District Court's analysis run far deeper. The doctrine of primary jurisdiction precludes not just the order below, but any effort by an antitrust court to decide the validity of the purported disclaimer rather than deferring to the specialized expertise of the Board. And given the proximity in both time and circumstances of plaintiffs' lawsuit to the collective bargaining process,

this is a case where antitrust liability is precluded altogether by the non-statutory labor exemption. This Court should reverse the District Court's improper injunction, but should also make clear that the solution to this dispute over terms and conditions of employment lies with the labor laws and not in the antitrust courts.

ARGUMENT

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

This Court's "serious doubts" about whether, under the Norris-LaGuardia Act, the District Court had jurisdiction to enter the injunction were well-founded. (Stay Order 11.) Plaintiffs offer no basis to dispel those doubts. The statutory text resolves this appeal because this case "involv[es] or grow[s] out of a "labor dispute," and the Act prohibits injunctions against lockouts. 29 U.S.C. § 104.

A. This case involves or grows out of a labor dispute.

Plaintiffs are wrong to assume that only disputes involving unions are "labor disputes" within the meaning of the Act. The Act and Supreme Court precedent make clear that a union is not an essential ingredient of a "labor dispute." But even if a union were necessary for a "labor dispute," the Act would nonetheless apply here because this case "grow[s] out of" the labor dispute between the NFL clubs and the NFLPA. That the NFLPA has pur-

ported to disclaim any future role in collective bargaining is therefore irrelevant for purposes of the Act's application. Despite the inevitability of this conclusion, plaintiffs advance a plethora of arguments against it. None is persuasive.

1. The NFL and the players remain involved in a labor dispute.

The Act defines "labor dispute" broadly, providing that the term "includes *any controversy* concerning terms or conditions of employment." *Id.* § 113(c) (emphasis added). "A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry" and the dispute is "between one or more employers or associations of employers and one or more employees or associations of employees." *Id.* § 113(a). The Supreme Court has repeatedly recognized and emphasized the breadth of this language. (*See* NFL Br. 17-18.)

This case clearly falls within the Act's definition of a "labor dispute." Plaintiffs and defendants are engaged in the same industry; the dispute is between "one or more employers" and "one or more employees"; and 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." (*See* Stay Order 8.) Indeed, the purpose of plaintiffs' suit is to challenge the NFL's "terms and conditions of employment" not only for themselves but for all NFL players. (*Id.*)

Plaintiffs give top billing to *Ozark Air Lines, Inc. v. National Mediation Board*, 797 F.2d 557 (8th Cir. 1986). They contend (Br. 21) that *Ozark* established that an "individual challenge[] to antitrust violations" by definition does not "involv[e] or grow[] out of a labor dispute." *Ozark* held no such thing; indeed, it did not even involve the antitrust laws. The complaint there sought to enjoin an airline retirement board from reconsidering an employee's previously-denied request for disability benefits. 797 F.2d at 558-60. The Court found the Norris-LaGuardia Act inapplicable because the dispute "ha[d] nothing to do with terms and conditions of employment *or* concerted labor activities," and because the Supreme Court had declared that "the specific provisions of the [Railway Labor Act ("RLA")] take precedence over the more general provisions of the Norris-LaGuardia Act." *Id.* at 563 (emphasis added, internal quotations omitted).

Thus, at most, *Ozark* stands for the proposition that the Norris-LaGuardia Act does not apply to a suit that (i) invokes a distinct and more specific federal labor statute, and (ii) that involves *neither* (a) a dispute over terms and conditions of employment *nor* (b) a "strike or other concerted labor activity," *i.e.*, one of the specifically-enumerated activities as to which the Norris-LaGuardia Act forbids injunctions. *Id.* But as this Court has already determined and as the "district court apparently did not question," the dispute here "is a 'controversy

concerning the terms and conditions of employment.'" (Stay Order 8 (quoting 29 U.S.C. § 113(c)).) Moreover, unlike the "more specific" provisions of the RLA, Congress most assuredly *did* intend for the Norris-LaGuardia Act to take precedence over claims brought under the antitrust laws. *See* 29 U.S.C. § 105. *Ozark* is thus of no relevance here.[1]

Next, plaintiffs contend that the term "labor dispute" should be considered a "term of art" that requires the involvement of organized labor. Plaintiffs argue that the "Court must 'assume' that 'Congress intended' the term 'to have its established meaning.'" (Br. 23 (quoting *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 342 (1991).) But that interpretive rule typically applies only when the statute does not define the term at issue. *See McDermott Int'l*, 498 U.S. at 342 ("The Jones Act does not define 'seaman.'"); *see also, e.g.*, *Green Tree Fin. Corp.-Ala. v. Randolph,* 531 U.S. 79, 86 (2000); *Nationwide Mut. Ins. Co. v. Darden*, 503

[1] The need to reconcile the RLA with the Norris-LaGuardia Act also explains the result in *Brotherhood of Locomotive Engineers v. Baltimore & Ohio Railroad Co.*, 310 F.2d 513 (7th Cir. 1962), which involved an injunction barring attempted imposition of new work rules by an employer subject to the RLA. If read to apply outside the RLA context, the Seventh Circuit's decision would conflict with *Local Union No. 884 v. Bridgestone/Firestone, Inc.*, 61 F.3d 1347, 1352 (8th Cir. 1995), in which this Court vacated an injunction against an *employer* because the challenged conduct was covered by Section 4 of the Act and did not implicate the *Boys Markets* exception necessary to "preserve the arbitration process." *See also Powell v. NFL*, 690 F. Supp. 812, 817-18 (D. Minn. 1988) (refusing to issue antitrust injunction due to lack of jurisdiction under the Act).

U.S. 318, 322 (1992); *United States v. Turley*, 352 U.S. 407, 411 (1957). Here, the Norris-LaGuardia Act *does* provide a consciously broader definition of the term "labor dispute," explicitly stating that the term is "*defined* in this section." 29 U.S.C. § 113(a) (emphasis added); *see also id.* § 104 ("as these terms are herein defined"). Accordingly, the principle on which plaintiffs rely does not apply.

Plaintiffs also argue that courts must look to a term's "ordinary meaning" "[e]ven when construing a statutory definition." (Br. 24.) But "ordinary meaning" cannot limit the scope of a term as to which Congress consciously adopted an extraordinarily broad definition, as it did in the Norris-LaGuardia Act. *See, e.g.*, *Bodecker v. Local Union No. P-46*, 640 F.2d 182, 185 (8th Cir. 1981) (rejecting proposed narrow definition of "labor dispute" that would "conflict with the statutory definition of the relevant terms").

Any preexisting narrow interpretation of "labor dispute" could not override the clear language of the statute, which commands, in no uncertain terms, that a "case *shall be held* to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry … whether such dispute is (1) between one or more employers or associations of employers and *one or more employees or associations of employees*." 29 U.S.C. § 113(a) (emphasis

added). "The Act does not specify that the employees must be members of a union for the case to involve or grow out of a labor dispute." (Stay Order 8-9.)

Plaintiffs emphasize Section 13(c)'s use of the verb "includes," but that term—especially when followed by the expansive phrase "any controversy concerning terms or conditions of employment"—merely confirms Congress's intent to define the phrase as broadly as possible. Whatever inference one might draw from a definition in which "includes" is followed by one or more narrowing terms, "includes" followed by a broad term is a hallmark of statutory breadth and inclusiveness.

Nor is plaintiffs' position supported by Section 2 of the Act, which describes the relevant "public policy of the United States." 29 U.S.C. § 102. Plaintiffs misunderstand the role of Section 2 in the Act's overall framework. Under Section 1,

> [n]o court of the United States … shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this chapter; *nor* shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this chapter.

29 U.S.C. § 101 (emphasis added). Thus, the Act bars not only the types of injunctions specifically forbidden by the Act's various provisions, such as Section 4, and injunctions that do not strictly conform with Section 7's re-

quirements, but *also* injunctions that are not specifically covered by the Act but nonetheless undermine the public policy defined in Section 2. Section 2 thus imposes an *additional* constraint on courts' authority to issue an injunction, but it does not give courts interpretive license to ignore or contort the plain language of the Act's other provisions. Furthermore, Section 2 *confirms* that the Act's protections do not require the presence of a union, as it observes 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).

Plaintiffs place great emphasis on the Act's legislative history, which is not nearly as one-sided as they contend. *See, e.g.,* 75 Cong. Rec. 4507, 4509 (1932) ("Wherever it can be done this bill applies equally to organizations of labor and to organizations of capital. Organizations of employees and organizations of capital are treated exactly the same. … [The bill] asks for the laboring man nothing that it does not concede to the corporation.") (remarks of Sen. Norris); S. Rep. No. 163, 72d Cong., 1st Sess. 19 (1932) ("it will be observed that this section [Section 6], *as do most all of the other prohibitive sections of the bill*, applies both to organizations of labor and organizations of capital") (emphasis added); *see also* Edward B. Miller, ANTITRUST LAWS AND EMPLOYEE RELATIONS 22 (1984) ("The legislative history of the Clayton and Norris-LaGuardia Acts

seems to support the availability of the exemption to employers as well as unions."); *id.* at 15-25.

In all events, it is now well-established that when plain statutory text is inconsistent with legislative history, courts "follow the text, rather than the legislative history." *United States v. Gonzales*, 520 U.S. 1, 8 (1997). As the Supreme Court has cautioned with respect to *this statute*: "[I]t is not our province to define the purpose of Congress apart from what it has said in its enactments, and if [a party's] activities fall within the classes defined by the [Norris-LaGuardia Act], we are bound to accord [the party] … the benefit of the legislative provisions." *Am. Med. Ass'n v. United States,* 317 U.S. 519, 535 (1943).

Plaintiffs assert that "[c]ourts have uniformly recognized that the [Act's] scope is limited to disputes involving *organized* labor," (Br. 29), but that assertion is incorrect. Some of the cases plaintiffs cite hold that the Act applies to disputes involving unions—which no one denies—but not a single one holds that the Act is *limited* to such disputes. And, of course, the biggest problem with plaintiffs' assertion is *New Negro Alliance v. Sanitary Grocery Co.*, 303 U.S. 552 (1938), which held that the Act applied even though there was no union involved.

Plaintiffs strain mightily to distinguish the case without success. They claim that "the *only* question the Court addressed was whether racial discrimination

could be the proper subject of a 'labor dispute'" (Br. 30), but the Court answered that question "yes" in the absence of a union, rejecting Respondent's argument that the Act was inapplicable because no union was involved. (*See* NFL Br. 22-23.) That the Court "did not discuss whether the [Act] applies to employees who are not collectively organized" (Br. 30) even though the argument was advanced is compelling confirmation that the Court found the argument unpersuasive. And plaintiffs' contention that the result in *New Negro Alliance* was premised on Section 2 is mystifying, given that the Court did not cite or discuss that provision.

Finally, plaintiffs contend that "[a]dopting the NFL's view of 'labor dispute' … would disrupt settled expectations confirmed by more than 80 years of judicial interpretation." (Br. 32.) As a threshold matter, it bears emphasis that none of the cases plaintiffs cite to support this argument even mentions the Norris-LaGuardia Act. But more importantly, plaintiffs attack a straw man by suggesting that the NFL's position is that *all* suits involving an employer and an employee implicate the Act. For example, Congress has explicitly exempted from the Act's prohibitions injunctions requested under the ADA and Title VII, *see* 42 U.S.C. § 2000e-5(h) & 42 U.S.C. § 12117(a), and this Court has recognized that reinstatement orders for individual employees are a permissible equitable relief for violations of the LMRA. *See Tatum v. Frisco Transp. Co.*, 626

F.2d 55, 60 (8th Cir. 1980). Whatever need the courts may have to reconcile the Act with later-enacted or more specific employment laws, its primacy over the antitrust laws—which preexisted and prompted the Norris-LaGuardia Act—is clearly addressed in Section 5 of the Act itself. 29 U.S.C. § 105.

At bottom, plaintiffs are simply wrong to claim that "there is no evidence that Congress intended the [Act] to apply to disputes in which nonunionized employees act as individuals, whether alone or as representatives of a class of individuals, rather than through collective organizations." (Br. 29.) "[T]he best evidence of what Congress wanted is found in the statute itself," *Bread Political Action Comm. v. Fed. Election Comm'n*, 455 U.S. 577, 584 (1982), and the statute shows that Congress intended to cover disputes involving "employees *or* associations of employees"—*i.e.*, disputes involving individual employees or collective associations of employees. 29 U.S.C. § 113(a) (emphasis added).

2. At the very least, this case grows out of a labor dispute.

Even under the District Court's mistaken view that the purported disclaimer means that this controversy is no longer a labor dispute, the Norris-LaGuardia Act would still apply because the case indisputably "grow[s] out of" a labor dispute. 29 U.S.C. §§ 101, 104, 107. When an employer locks out employees immediately after a failed attempt to reach a new collective bargaining agree-

ment with their union, there can be no doubt that the controversy "grow[s] out of" a labor dispute.

Against this natural reading of the phrase "grow[s] out of," plaintiffs offer *Philadelphia Marine Trade Ass'n v. Int'l Longshoremen's Ass'n, Local 1291*, 368 F.2d 932 (3d Cir. 1966), which was reversed by the Supreme Court, 389 U.S. 64 (1967). Plaintiffs read the case too broadly. As one of three reasons a distinct provision of the Act was inapplicable, the Third Circuit observed that a labor dispute between a union and an employer "was no longer alive" when it "had been settled by [an] arbitrator's award in accordance with the bargaining agreement." *Id.* at 934. *Philadelphia Marine* stands, at most, for the proposition that when a labor dispute has been definitively *resolved*, such as by binding arbitration, disputes cannot be said to "grow[] out of" it.[2] It does not address the situation where a labor dispute between the union and an employer is *unresolved*. When employees disclaim union representation in the midst of an unresolved labor dispute, the employees' continued effort to seek improved "terms and conditions of employment" through litigation self-evidently "grow[s] out of" the earlier dispute.

[2] In reversing on other grounds, the Supreme Court expressly reserved whether the injunction implicated the Norris-LaGuardia Act. *See* 389 U.S. at 73, 75.

Plaintiffs contend that "the NFL is unable to formulate any coherent limiting principle for its theory that the 'grows out of' language is a temporal extension of the" Act. (Br. 36.) Terms like "grow[s] out of" or "arises under" may require some line drawing when it comes to the outer boundaries. At the same time, such terms provide a clear and ready answer in a case like this one where it is obvious that even if there is no longer a "labor dispute," the case grows directly out of one. This antitrust suit against employers by their employees followed literally minutes after the employees' union walked away from collective bargaining and assails some of the very terms and conditions of employment to which the parties had previously agreed in collective bargaining and that were then under discussion at the bargaining table. This is not the case to draw an outer line.

It is also worth recognizing that the outer limit here may be largely self-enforcing. The League's decision to employ the labor law tool of a lockout underscores the League's own sincere belief (well-supported by current statements of the NFLPA leadership as well as the NFLPA's history) that the disclaimer is temporary and tactical, and that the collective bargaining process is not over.

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

Section 4(a) flatly prohibits the injunction here because it bars issuance of an "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 … [c]easing or refusing … to remain in any relation of employment." 29 U.S.C. § 104(a). This Court has already indicated its likely assent to this reading of the statute (*see* Stay Order 11), and none of plaintiffs' arguments provides any reason to reconsider that view.

Once again, plaintiffs' first insuperable obstacle is the text. By locking out employees, an employer "ceas[es] or refus[es] … to remain in any relation of employment." Plaintiffs' argument that "any relation of employment" refers only to conduct of employees makes no sense. Employment is a two-way street, and a "relation," by definition, involves at least two parties. Moreover, Section 4(a) is not silent on which parties are protected from injunctions: The protection extends to "any person or persons participating or interested in" the dispute, a phrase expressly defined to include employers. 29 U.S.C. § 113(b). And the Act itself contemplates that "[e]ither party to [an employment] con-

tract," *i.e.,* employees *or* employers, can "withdraw from an employment relation." 29 U.S.C. § 103(b).[3]

Plaintiffs argue that Section 4(a) cannot apply because the NFL clubs are only temporarily refusing to allow the players to work, but that argument also cannot be squared with the text. "[R]efusing … to remain in any relation of employment" demands neither finality nor complete severance. "Any relation of employment" would include an employer that refuses to pay overtime or adhere to terms of an expired CBA, as well as employers that refuse to negotiate with or hire new employees.

As plaintiffs' complaint alleges (Add. 65-66 (¶138)), the NFL clubs are not paying players, allowing them to come to work, or communicating with them about their work, and thus are "refusing … to remain" in any relation of employment with the players. That both sides expect employment relationships to resume once this labor dispute is resolved does not mean that there has been no temporary cessation of the employment relationship. Indeed, just as "per-

[3] *See also Heheman v. E.W. Scripps Co.*, 661 F.2d 1115, 1125 (6th Cir. 1981) (recognizing that the terms of the Act "do not distinguish between injunctions against labor and injunctions against management," holding that Section 4(a)'s prohibition on injunctions against "refusing … to remain in any relation of employment" barred an injunction against an employer); *Congresio de Uniones Industriales v. VCS Nat'l Packing Co.*, 953 F.2d 1, 2 (1st Cir. 1991) (holding that Section 4 barred an injunction against a plant closure).

manent" strikes often end with the striking workers returning to work, so too do lockouts.

Surely, if Section 4(a) was designed to reach only strikes, Congress would have said so. But instead, it protects both strikes ("[c]easing or refusing to perform any work") and the employer counterpart, *i.e.,* a lockout ("[c]easing or refusing … to remain in any relation of employment"). Other parts of Section 4 have a similar structure. For example, Section 4(c) bars injunctions prohibiting "[p]aying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value." 29 U.S.C. § 104(c). This clearly protects both the union's ability to receive strike benefits and the employer's ability to receive strike insurance, or to withhold employee salaries during a dispute about the terms and conditions of their employment.

Next, plaintiffs argue that the Clayton Act proves that the Norris-LaGuardia Act does not prohibit injunctions against lockouts. But the opposite is true—both the Clayton Act and the Norris-LaGuardia Act "permit multiemployer lockouts." *NBA v. Williams,* 45 F.3d 684, 689 (2d Cir. 1995); *Brown v. Pro Football Inc.*, 50 F.3d 1041, 1055 (D.C. Cir. 1995) (quoting *Williams*). Plaintiffs' cases do not hold to the contrary, but, much like their Norris-LaGuardia cases, *see* page 9 *supra*, merely apply the Clayton Act to employees.

And indeed, the legislative history of Section 20 of the Clayton Act (29 U.S.C. § 52) demonstrates that the provision *was* in fact understood to apply to both employers and employees. *See* 51 Cong. Rec. 14333-34 (1914) ("The corporation therefore has the same authority as the individual under this clause to terminate relations of employment."); *see also* Bernard Meltzer, *Labor Unions, Collective Bargaining, & the Antitrust Laws*, 32 U. CHI. L. REV. 659, 672 n.53 (1965) (citing legislative history showing that Congress understood Section 20 of Clayton Act to insulate employer conduct); Miller, *supra,* at 22. Moreover, the Norris-LaGuardia Act was designed to reinforce the Clayton Act. Aside from contravening the text of the two statutes, it would be utterly frustrate Congress's will to treat the Clayton Act as a limitation on the applicability of the Norris-LaGuardia Act.

Plaintiffs also have no answer to the fact that the Labor-Management Relations Act (LMRA) of 1947 specifically states that the Norris-LaGuardia Act does not apply to presidentially-initiated injunctions against lockouts that threaten national security. 29 U.S.C. § 178(b). All they can muster in response is the notion that "[t]he exemption for lockouts is necessary because, in a unionized workplace, they would otherwise be subject to Section 7." (Br. 43 n.3.) But if all that stood between injunctions against lockouts was compliance with Section 7, a presidential override would be unnecessary. Any suggestion

that the President would invoke his emergency powers to override the requirement of an evidentiary hearing is wholly implausible. The strong medicine of presidential override was reserved for two things that otherwise cannot be enjoined because of Section 4—strikes and lockouts.

As for the argument that Section 4(a) applies only to any "relation of employment" with current but not prospective players, its focus is too narrow. Congress's use of the word "remain" is not a license for courts to enjoin lockouts at their periphery, but not their core. The District Court enjoined the lockout as a whole in an order that it lacked jurisdiction to enter. A lockout, by definition, has its primary focus on existing workers, but if it lasts long enough it will necessarily impact some prospective workers as well, as here with plaintiff Miller, a selection in this year's draft.

Finally, plaintiffs argue that precedent supports their position. They cite two cases holding that Section 4(a) does not forbid injunctions ordering an employer to reinstate an employee who proved in a suit brought under Section 301 of the LMRA, 29 U.S.C. § 185, improper discharge in contravention of a collective bargaining agreement. (*See* Br. 47 (citing *de Arroyo v. Sindicato de Trabajadores Packinghouse*, 425 F.2d 281 (1st Cir. 1970); *Lumber & Sawmill Workers Union v. Cole*, 663 F.2d 983 (9th Cir. 1981))).

Of course, neither *de Arroyo* nor *Lumber & Sawmill Workers* considered the applicability of Section 4(a) to a lockout. Moreover, the reinstatement context is significantly different from the situation presented here. First, enjoining a lockout interferes with an employer's traditional labor law rights and with the collective bargaining process as a whole. Refusing reinstatement of a single employee to remedy a violation of the LMRA is not a labor law right; indeed, ordering reinstatement "vindicates the [collective bargaining] agreement and strengthens the entities and processes that produced it." *Lumber & Sawmill Workers*, 663 F.2d at 986-87.

Second, the cited cases involve labor statutes, such as the LMRA, postdating the Norris-LaGuardia Act, not claims brought under the preexisting antitrust laws, which the Norris-LaGuardia Act expressly trumps. 29 U.S.C. § 105. Accordingly, no reconciliation with a subsequently-enacted statute is required here.

In the end, plaintiffs cannot escape one simple fact: Prior to the ruling below, other than the District Court reversed in *Chicago Midtown Milk Distributors, Inc. v. Dean Foods Co.,* 1970 WL 2761, at *1 (7th Cir. July 9, 1970) (per curiam), *no* federal court had ever enjoined a lockout. And every court to address the specific question of whether Section 4 prohibits injunctions against multiem-

ployer lockouts has suggested that it does. *See, e.g.*, *Brown*, 50 F.3d at 1055; *Williams*, 45 F.3d at 689.[4]

C. At a minimum, Section 7 bars the injunction.

Even if the Act does not flatly prohibit injunctions against lockouts, the District Court's order would still violate the Norris-LaGuardia Act and would need to be reversed. Holding the Act wholly inapplicable post-disclaimer, the District Court did not make the findings or hold the evidentiary hearing required under Section 7. 29 U.S.C. § 107.

As for *Mackey v. NFL*, 543 F.2d 606 (8th Cir. 1976), plaintiffs' contention that it forecloses the applicability of (and lack of compliance with) Section 7 here is baseless. In *Mackey*, which did not involve a lockout, the District Court conducted a 55-day trial before entering an injunction against a rule limiting player free agency. *See id.* at 609. There were no such proceedings in this case, which raised substantial disputed factual issues with respect to the validity of the purported disclaimer—the predicate for plaintiffs' contention that the

[4] Plaintiffs' assertion that *Purex Corp. v. Automotive Employees Union*, 705 F.2d 274 (8th Cir. 1983), held that Section 4(a) does not apply to employer conduct can be dismissed out of hand. The Court there observed that "Section 4 of the Norris-LaGuardia Act … generally prohibits federal courts from enjoining strike activities." *Id.* at 276. That statement is indisputably correct, but in no way suggests that Section 4 prohibits *only* injunctions against strikes. *See, e.g.*, *Bridgestone/Firestone*, 61 F.3d at 1352, 1357.

lockout is an "unlawful" act—as well as issues relating to asserted injury to plaintiffs' "property." 29 U.S.C. § 107.

Plaintiffs' argument that the NFL waived Section 7's requirements is specious. The District Court asked, "should I decide that Section 7 applies under Norris-LaGuardia, would that require a hearing or not?" Counsel for the NFL replied that it "[a]bsolutely would require a hearing." (App. 521.)[5]

* * * *

The District Court lacked jurisdiction under the Norris-LaGuardia Act to enjoin the lockout. That is sufficient reason to reverse. But the District Court's Order also fully addressed the issues of primary jurisdiction and the nonstatutory labor exemption, and in the interest of judicial efficiency this Court should as well. Because the District Court's legal determination was incorrect on both issues, the alternative is to compound the inevitable legal error that would continue on remand.

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[5] The District Court did not treat the issue as having been waived. (*See* Add. 56 n.41.) Plaintiffs did not argue waiver below. And courts of appeals can and should consider the applicability of and compliance with Section 7 even if the issue is not raised below, as this Court did in *Ozark. See* 797 F.2d at 562. Even the treatise on which plaintiffs rely acknowledges the importance of compliance with Section 7 and the dangers of dismissing its protections as mere procedural niceties. *See* Felix Frankfurter & Nathan Greene, THE LABOR INJUNCTION 201-02 (1930).

II. *The District Court's Order Invaded the Primary Jurisdiction of the NLRB.*

A. This case presents an issue within the Board's primary jurisdiction.

The District Court and plaintiffs both insist that the Union's unilateral disclaimer was perfectly valid and that the validity of the disclaimer is a question for an antitrust court and not the NLRB. That position cannot be reconciled with the Supreme Court's general approach to primary jurisdiction or its specific discussion of this very industry. As the Supreme Court has recognized, Congress "intended to leave" to the "specialized judgment" of the National Labor Relations Board the "inevitable questions concerning multiemployer bargaining bound to arise in the future." *Brown v. Pro Football, Inc.*, 518 U.S. 231, 250 (1996).

This case presents such a question: Is this union's disclaimer, announced in the midst of collective bargaining and indisputably undertaken to enhance its members' negotiating leverage with their employers, legitimate under the labor law? If the parties have not—as the District Court erroneously assumed—"moved beyond collective bargaining entirely" (Add. 45), the plaintiffs' antitrust claims are dead on arrival. With respect, no student of the history of this industry—and no one familiar with the NFLPA leadership's very recent statements of purpose and intent—believes that the Union is gone, let alone gone forever. But as relevant to primary jurisdiction, the critical point is not that the

District Court answered the question erroneously, but that it answered the question at all.

The validity of the disclaimer is a labor law question that requires the Board's expert consideration and uniform resolution. Plaintiffs offer no arguments that should lead the Court to conclude otherwise.

Unable to distinguish *Ricci v. Chicago Mercantile Exchange*, 409 U.S. 289 (1973), plaintiffs attempt to dismiss it. While plaintiffs are correct that *Ricci* did not "dilute" the primary jurisdiction standard (Br. 73), the NFL has not contended otherwise. Rather, *Ricci* is an application of the traditional primary jurisdiction standard—indeed, one that the Supreme Court itself has cited as paradigmatic. *See Reiter v. Cooper*, 507 U.S. 258, 268 (1993) (citing *Ricci*, 409 U.S. at 291, 302). And as such, it is the primary jurisdiction case most analogous to this one. *Ricci,* like this case, posed the "recurring" problem that "arises when conduct seemingly within the reach of the antitrust laws is also at least arguably protected … by another regulatory statute enacted by Congress." 409 U.S. at 299-300. Given that plaintiffs have offered no way to distinguish this case from *Ricci*, this Court should reach the same result on the primary jurisdiction question here that the Supreme Court did in *Ricci*.

Alpharma, Inc. v. Pennfield Oil Co., 411 F.3d 934, 938 (8th Cir. 2005), on which plaintiffs rely, actually cuts against their position. *Alpharma* involved a

Lanham Act claim; one manufacturer of animal antibiotic feed additives alleged that the other was falsely claiming approval for uses that the FDA had not, in fact, approved. Relying on a preexisting FDA stipulation that it had *not* approved the additives for these uses, this Court determined that it did not need to refer that factual question to the FDA. *See id.* at 938-39. This Court noted, however, that the legal question of whether the FDA *should* approve the additives for additional uses would have been within the agency's specialized expertise and primary jurisdiction. *See id.* at 939.

Here, the validity of the disclaimer is a legal question of the kind on which administrative expertise should be brought to bear. There is no dispute about any *fact* relating to what the Board has or has not approved; the Board has *not* yet determined whether the disclaimer is valid, and that is the problem. The Board, and not the District Court, should assess the facts pertaining to this disclaimer in light of the policies underlying the NLRA—especially as they apply to multiemployer bargaining.

Plaintiffs assert that there is no basis to defer to the Board's primary jurisdiction because they doubt that the Board will issue a complaint on the NFL's pending charge. Speculation and wishful thinking are no substitute for agency expertise. Plaintiffs concede (Br. 77) that the principal "authority" on which they rely, a 1991 Division of Advice Memorandum, is not binding Board

precedent. And the Division of Advice could not have considered in 1991 the highly relevant evidence of the Union's "resurrection," nor of the statements of the NFLPA leadership shortly before and after this purported disclaimer. (*See* NFL Br. 8-10; pages 33-34 *infra*.)[6]

Plaintiffs' reliance on *Connell Construction Co. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616 (1975), is also misplaced. *Connell* addressed the *exclusivity* of the NLRB's jurisdiction. (*See* NFL Br. 33.) *Connell* did not address whether the NLRA issues in that case should have been referred to the Board prior to being considered by a court. Furthermore, *Connell* concerned a type of "hot cargo" agreement that is void *ab initio* under the labor laws, 29 U.S.C. § 158(e), and the Court observed that there was no indication that Congress intended to preclude antitrust suits challenging such agreements, which primarily affect *product* markets. *See* 421 U.S. at 634. But it is equally clear that the multiemployer bargaining process established by the NLRA would not work if the parties to the bargaining relationship could, at the flick of a switch,

[6] Plaintiffs also complain that Board proceedings take time. Of course, if plaintiffs are correct in arguing that the NFL's charge is without merit, the Board presumably will decline to issue a complaint in short order, and claims of harm due to delay will prove misplaced. But if—as the League believes, and as the facts show—there is probable cause to find that the disclaimer violates the NLRA, a complaint will issue, and further District Court proceedings would create the very real prospect of inconsistent results that the primary jurisdiction doctrine seeks to avoid.

bring an antitrust claim concerning the *labor* market. *See, e.g.*, *Brown*, 518 U.S. at 237. The latter is what is at issue here, and the disclaimer's validity is every bit as much at the core of the Board's primary jurisdiction as "hot cargo" contracts are at its periphery.

There is good reason to think that the Board will issue a complaint that will be resolved in the NFL's favor. In light of the ample evidence that the disclaimer was undertaken solely for tactical reasons, as well as the pre- and post-disclaimer comments of the NFLPA's leadership reflecting their continuing resolve to secure a collective bargaining agreement, there is every reason to believe that the Board will conclude that the disclaimer does not "contemplate a sincere abandonment, with relative permanency" of collective bargaining. *Retail Associates, Inc.*, 120 NLRB 388, 394 (1958).

Among other things, the Board will be aware that the player votes purporting to delegate to the NFLPA the "authority" to disclaim were made at the same meetings in which NFLPA members elected their union representatives. (App. 425.) Needless to say, that circumstance hardly reflects "a sincere abandonment, with relative permanency" of collective bargaining. The Board has also held that "the timing of an attempted withdrawal … is an important lever of control in the sound discretion of the Board to ensure stability of [multiemployer] bargaining relationships." *Retail Associates*, 120 NLRB at 395. The

Board will be aware that the attempted withdrawal came literally in the midst of collective bargaining negotiations, and is likely to conclude that the NFLPA may not abandon multiemployer bargaining at this juncture on the paper-thin basis of a disclaimer admittedly done for tactical purposes.

B. Plaintiffs' waiver argument lacks merit.

Plaintiffs are simply wrong that the NFL waived its right to challenge the NFLPA's disclaimer, in part because they ignore (and fail to quote) the entirety of the provision on which they rely, CBA Article LVII, Section 3(b):

> *[A]fter the expiration of the express term of this Agreement*, in the event that *at that time or any time thereafter* a majority of players indicate that they wish to end the collective bargaining status of the NFLPA on or after expiration of this Agreement, the NFL ... waive[s] any rights [it] may have to assert any antitrust labor exemption defense based upon any claim that the termination by the NFLPA of its status as a collective bargaining representative is or would be a sham, pretext, ineffective, requires additional steps, or has not in fact occurred.

(App. 331-32 (emphasis added).)

By its plain terms, this provision applies only when the decision "to end the collective bargaining status of the NFLPA" is made "at … or any time []after" the "express term" of the CBA. It is undisputed that the NFLPA's (purported) disclaimer occurred *before* the CBA expired (App. 42-43 (¶¶54-61).) The predicate for Section 3(b) is therefore not met; the provision cannot apply.

Plaintiffs know this; the NFLPA told its membership that it needed to disclaim interest *before* expiration of the CBA to avoid application of companion provision Section 3(a), which provides that "if the NFLPA is in existence as a union [*following* expiration of the CBA], the Parties agree that no ... player represented by the NFLPA shall be able to commence an action, or assert a claim, under the antitrust laws for" at least six months. (App. 331.) The NFLPA's *Guide to the Lockout,* in a section by its General Counsel, could not be more explicit: "Q. Can we remain a union after expiration, see how collective bargaining goes, and then renounce our union status later if collective bargaining doesn't work? A. We could, but there are … important reasons why we should not. First, the current CBA says that we cannot sue for six months if we remain as a union at any time after expiration." (App. 300.)

Their union having made the tactical election to avoid the six-month bar of Section 3(a), plaintiffs cannot attempt to invoke the companion provision in Section 3(b).[7] And even if the predicate for Section 3(b) were met, the provision cannot waive the NFL's right to pursue (or the Board's right to remedy) an unfair labor practice. *E.g.*, *J.I. Case Co. v. NLRB*, 321 U.S. 332, 337 (1944).

[7] The purported post-expiration "reaffirmation" of the disclaimer is irrelevant. If the prexpiration "vote" was effective "to end" the union's status, Section 3(b) cannot apply; if it was not, plaintiffs' suit is barred by Section 3(a).

There is similarly no basis for plaintiffs' contention that the NFL "forced" the players to unionize in 1993 against their will. That is a serious charge that amounts to an unfair labor practice. It is directly contradicted by Judge Doty's findings on two occasions that the NFL neither "hindered or supported" that "recertification"—*see White v. NFL*, 836 F. Supp. 1458, 1465 & n.16 (D. Minn. 1993) and *White v. NFL*, 822 F. Supp. 1389, 1435 (D. Minn. 1993)—and by the absence of any charge (then or now) with the NLRB.

III. *The Nonstatutory Labor Exemption Bars Plaintiffs' Antitrust Claims.*

A. Plaintiffs misread and misstate *Brown*.

Plaintiffs' brief makes clear that they in fact contend that a disclaimer acts akin to a light switch that can make the nonstatutory exemption instantly disappear. But *Brown* makes equally clear that multiemployer bargaining could not long survive if that were the case. Indeed, virtually every word of *Brown*'s operative language and certainly the rationale underlying the decision establish that the labor exemption cannot vanish upon a unilateral disclaimer.

There are two fundamental problems with plaintiffs' argument that the "nonstatutory labor exemption lasts only until the collapse of the collective-bargaining relationship." (Br. 57 (internal quotations omitted).) First, there is a serious question—raised at the NLRB and here—whether the collective bargaining relationship has, in fact, "collapsed," let alone that any "collapse" is

permanent. No authority suggests that a disclaimer issued during the course of collective bargaining, while the parties are literally at the bargaining table, effects an immediate, permanent collapse of collective bargaining.

Moreover, no one really believes that the Union is truly gone forever or that collective bargaining is over in this industry, not even the Executive Director of the NFLPA. "'Do people actually think that I really don't want to make a deal?' [Executive Director DeMaurice] Smith asked. 'We chose litigation because we knew they were going to lock us out, and I can only counter-punch.'" http://www.nfllockout.com/2011/05/18/silver-settlement-remains-the-most-prudent-option/.[8]

Second, and perhaps more importantly, *Brown* does not state that the exemption ends immediately upon collapse of the bargaining relationship, or anything of the sort. Plaintiffs reach their contrary interpretation only by taking out of context a parenthetical in one of the Court's citations and failing to read the Court's conclusion. In fact, the full "stated view" of the Court (Br. 57) was:

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[8] Player unions in other professional sports leagues have recognized—as the public statements of the NFLPA player representatives have acknowledged—that a collective bargaining agreement is inevitable in this industry: "Regardless of the outcome of litigation, some collective bargain will eventually be reached; no one believes that either the owners or players will permanently choose to forego their mutually dependent business opportunities." Br. for Appellants, *NBA v. Williams*, No. 94-7709 (2d Cir.), at 27 (Aug. 8, 1994).

> Our holding is not intended to insulate from antitrust review every joint imposition of terms by employers, 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. *See, e.g.*, 50 F.3d at 1057 (suggesting that exemption lasts until collapse of the collective-bargaining relationship, as evidenced by decertification of the union); *El Cerrito Mill & Lumber Co.*, 316 NLRB [1005,] 1006-07 [(1995)] (suggesting that "extremely long" impasse, accompanied by "instability" or "defunctness" of multiemployer unit, might justify union withdrawal from group bargaining). *We need not decide* in this case *whether*, or where, within these extreme outer boundaries *to draw that line*. *Nor would it be appropriate for us to do so without the detailed views of the Board*, to whose "specialized judgment" Congress "intended to leave" many of the "inevitable questions concerning multiemployer bargaining bound to arise in the future."

Brown, 518 U.S. at 250 (quoting *NLRB v. Truck Drivers*, 353 U.S. 87, 96 (1957) and citing *Meat Cutters v. Jewel Tea*, 381 U.S. 676, 710 n.18 (1965) (Goldberg, J.)) (emphases added). Thus, the Supreme Court clearly identified decertification as a *potential* outer boundary, but it expressly declined to adopt the D.C. Circuit's "suggest[ion]" that decertification would extinguish the exemption.[9]

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[9] Plaintiffs are wrong to assert that the NFL conceded in *Brown* that the exemption would end if the NFLPA tendered a *disclaimer*. Among other things, that assertion rests on the mistaken premise that disclaimers and decertification are synonyms. As explained by *amicus* NHL, they are materially different and have fundamentally different consequences. In *Brown*, the NFL argued vigorously that the exemption would *not* end "if decertification were intended merely to allow the union to gain additional leverage in collective bargaining." (Special Add. 376; *id.* at 370 (contrasting situations in which "the employees ultimately elect, in good faith, and not as a strategic matter to get additional leverage in the collective bargaining process, to give up their rights under the labor laws").

Equally important, the District Court indisputably ignored the Supreme Court's instruction that it would not "be appropriate" to "draw th[e] line" "without the detailed views of the Board." *Brown*, 518 U.S. at 250. The failure to seek the views of the Board cannot be squared with what the Supreme Court directed in *Brown*. In any event, even if "decertification" (which requires a Board-supervised secret-ballot election) were the "extreme outer boundary" of the exemption, there has been no decertification here. A unilateral disclaimer is far different from decertification and poses the same, if not a greater, threat to multiemployer bargaining than that which the Supreme Court found intolerable in *Brown*. Disclaimer, unlike decertification, can be undone as quickly as it is asserted, and thus raises the core concern that, if it were used to define the line between antitrust and labor law, it could be "manipulated by the parties for bargaining purposes." *Id.* at 246.

Plaintiffs also cannot demonstrate that the situation here is "sufficiently distant in time and in circumstances" from the collective bargaining process. They filed this lawsuit "the same day the union discontinued collective bargaining"; they "seek relief concerning terms and conditions of employment"; and they cannot dispute "the close temporal and substantive relationship linking this case with the labor dispute between the League and the Players' union." (Stay Order 10.)

Plaintiffs' answer is that their unilateral disclaimer changes everything. But that ignores the obvious fact that a rule permitting instantaneous assertion of antitrust liability at the moment of disclaimer would sound the death knell for multiemployer bargaining and is irreconcilable with *Brown.* If plaintiffs prevail here, disclaimer would become the tactic of choice at or even before impasse, resulting in disincentives for employers to engage in multiemployer bargaining in the first instance, and for unions to bargain in good faith. If plaintiffs prevail, disclaimer will become the new impasse in multiemployer bargaining.

Plaintiffs complain that if the exemption does not end immediately, employees would lose the rights "guaranteed to workers by Section 7 of the NLRA." (Br. 64.) But Section 7 of the NLRA is a *labor law* right; it does not "guarantee" an employee the right to file an *antitrust* claim immediately after a disclaimer. The fact that plaintiffs allege a violation of Section 7 undermines their position. Claims of violations of Section 7 belong before the Board, which can decide the closely-related issue of whether the NFLPA's disclaimer is valid. Federal labor law and policy would not be served by an immediate antitrust cause of action; supporting and favoring multiemployer collective bargaining process and its many benefits, *see Brown*, 518 U.S. at 240, requires more breathing room than that. *Cf. Credit Suisse v. Billing,* 551 U.S. 264, 276 (2007) (recognizing that the joint underwriting process encouraged by the

securities laws would be frustrated by imposing antitrust liability for colluding in the underwriting process).

And given the numerous statements by the NFLPA *leadership* that the disclaimer will enable them to achieve a more favorable *collective bargaining agreement*, it is far from clear that the employees have, in fact, elected to forgo forever (if at all) collective negotiation of terms and conditions of employment. (*See* NFL Br. 8-10; *see also* App. 422 ("we're all one voice"; "we are one as a players association"). For example, the NFLPA representative for the Atlanta Falcons said after this Court's Stay Order, "Hopefully, they can just turn their attention *to getting a collectively bargained for agreement* … . I think maybe its better that a decision was finally made about the stay and the lockout. Now, we can get down to the important matter at hand." http://www.ajc. com/sports/atlanta-falcons/falcons-respond-to-latest-94997.html (emphasis added).

As long as a negotiated bargaining agreement remains a prospect, *Brown*'s labor exemption should continue to apply to the actions of what the labor laws deem not a cartel—as plaintiffs assert throughout their brief—but rather a multiemployer bargaining unit, the formation and preservation of which is encouraged by federal labor policy. *See Brown*, 518 U.S. at 240.

Plaintiffs also contend that the exemption must dissolve at the instant of disclaimer on the theory that "once employees renounce their union and give

up their labor-law right to strike collectively without violating the antitrust laws, the employer's corresponding ability to lock out necessarily loses its derivative protection." (Br. 68.[10]) But a disclaimer does not prohibit employees from striking. *See, e.g.*, *Koch Supplies, Inc. v. NLRB*, 646 F.2d 1257, 1259 (8th Cir. 1981) (concerted activities under the NLRA "need not take place in union setting"). So there is no reason to conclude that, upon disclaimer, an employer loses its labor law right to lockout. *See, e.g.*, *Vic Tanny Int'l, Inc. v. NLRB*, 622 F.2d 237, 241 (6th Cir. 1980) ("The employer in this case, faced with a concerted walkout by unorganized employees over a condition of employment, had the same options available to him that would have been available to an employer faced with an economic strike by unionized employees.").

[10] Plaintiffs also argue that "every single player in the NFL sacrificed numerous rights and protections by terminating their union." (Br. 11.) These "sacrifices" are almost entirely illusory. The NFLPA continues to pursue a grievance on behalf of over 250 players asserting improper conduct with respect to contracts in the 2010 season. It has established trusts (i) to provide the players with legal representation for and to cover the costs of other grievances, (App. 301-02), and (ii) to assist players in applying for retirement benefits. *See* NFLPA Form LM-2 (File No. 065-533) (Apr. 8, 2011), Question 10, *available at* http://kcerds.dol-esa.gov/query/getOrgOry.do. But more importantly, these "sacrifices" do not eliminate all players' labor law protections and, in any event, are wholly irrelevant to the "sufficiently distant" test articulated in *Brown*.

B. The exemption applies to a lockout.

Plaintiffs argue that the exemption cannot apply to a lockout because "a lockout is not a substantive term or condition of employment." (Br. 69 (citing Op. 86).) This is the position that the D.C. Circuit opinion affirmed by the Supreme Court in *Brown* characterized as "incomprehensible." 50 F.3d at 1053. And plaintiffs nowhere explain how this argument can be squared with the statements of numerous courts, including this Court in *Powell*, the Supreme Court in *Brown*, and the Second Circuit in *Williams,* that a multiemployer lockout is protected under the labor laws, and thus cannot violate the antitrust laws. (*See* NFL Br. 51-52.) *See also Amalgamated Meat Cutters v. Wetterau Foods*, 597 F.2d 133, 136 (8th Cir. 1979) (holding that an employer's hiring of replacement workers, which plainly is not a "substantive term or condition of employment," is nonetheless protected by the nonstatutory labor exemption).

C. Plaintiffs fail to address *Powell*.

Relatedly, plaintiffs fail to come to grips with this Court's holding in *Powell* that the exemption applies "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 1293, 1303-04 (8th Cir. 1989). Given that the Board is "not compelled to find a valid and effective disclaimer just because the union uses the word," *Capitol Market No. 1*, 145 NLRB 1430,

1431 (1964)—any more than it is compelled to conclude that the parties are at impasse because one party says so—the holding of *Powell* and its compelling logic apply here. *Powell* confirms that, at the very least, the District Court erred in concluding that plaintiffs can state an antitrust claim against the lockout.

IV. *The Equitable Factors Cannot Justify an Injunction Here.*

Because the District Court lacked jurisdiction to enjoin the lockout, no balancing of the traditional factors can justify an injunction. (*See* NFL Br. 53-54.)

In any event, plaintiffs do not come close to rebutting this Court's assessment that the balance of equities does not tilt heavily in plaintiffs' favor. (Stay Order 13.) Their argument that the balance is "lopsided" (Br. 84 & n.16) rests on the unsupportable proposition that there is no harm to the NFL in the lockout being enjoined—a proposition that Congress and this Court have already rejected. (*See* Stay Order 11-13.)

It also ignores the indisputable fact that the duration of the lockout depends, in large part, on the parties' willingness to settle their labor dispute. The Norris-LaGuardia Act specifically and federal labor policy generally reflect the principle that keeping the injunctive power of the federal courts out of disputes over terms and conditions of employment will best promote their resolution. The lockout does not have to result in the loss of a season. To the contrary, the sooner the extraneous antitrust litigation threats are removed from the equa-

tion, the sooner the parties will resolve their labor dispute, and the sooner football will resume.

As to the public interest, this Court correctly observed in its Stay Order that it lies in the "proper application of the federal law regarding injunctions." (Stay Order 13.) Courts have long recognized that the long-term public interest is served by the federal courts staying out of disputes involving or growing out of labor disputes. (*See* NFL Br. 54-55.) The public interest is not served by placing the injunctive thumb of an antitrust court on negotiations over terms and conditions of employment.

CONCLUSION

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

Respectfully submitted,

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May 26, 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 tables of contents and authorities, certificates of service and compliance, but including footnotes) contains 8,952 words as determined by the word counting feature of Microsoft Word 2003.

I further certify that this brief complies with the typeface requirement of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirement of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in Century 14-point font.

Pursuant to Circuit Rule 28A(h), I also hereby certify that electronic files of this Brief 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 26th day of May, 2011, filed a copy of the foregoing 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 by sending them to the Court via Federal Express for delivery prior to noon on May 27th pursuant to the Court's Order of May 5, 2011.

I further certify that I have served two (2) paper copies of this Brief to each counsel of record for the Appellees by sending them via Federal Express for delivery prior to noon on May 27th to the address listed on the Court's CM/ECF system.

/s/ Benjamin C. Block
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