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

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF THE DEFENDANTS-APPELLANTS

ROBIN S. CONRAD
SHANE B. KAWKA
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

STEPHEN B. KINNAIRD
NEAL D. MOLLEN
ZACHARY D. FASMAN
PAUL, HASTINGS, JANOFSKY
& WALKER LLP
875 15th Street, N.W.
Washington, D.C. 20005
(202) 551-1700

Attorneys for Amicus Curiae
The Chamber of Commerce of the United States of America

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STATEMENT PURSUANT TO FRAP 29(c)(5)

Pursuant to Federal Rule of Appellate Procedure 29(c)(5), *amicus curiae*, the Chamber of Commerce of the United States of America, hereby states:

(1) No party's counsel authored this brief in whole or in part; and

(2) No person other than *amicus*, its counsel, or its members contributed money intended to fund preparation of this brief.

INTERESTS OF AMICUS CURIAE

1. The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. It represents 300,000 direct members and has an underlying membership of over three million businesses and business organizations of every size and in every industry sector and geographic region of the country. A central function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files briefs as *amicus curiae* in cases that raise issues of vital concern to the nation's business community.

2. Many members of the Chamber engage in multi-employer and other forms of coordinated bargaining. Multi-employer bargaining in this country is "as old as the collective bargaining process itself," and dates to at least the eighteenth century. M. Derber, *Employers Associations in the United States in Employers Associations and Industrial Relations: A Comparative Study*, 79 (J.P. Windmuller & A. Gladstone eds., Oxford 1984). It is the dominant form of labor negotiations in many sectors of the economy and is important on a national or regional basis in many others.

3. Although this case involves a dispute between an extraordinarily successful sports league and the well-paid individuals who play the game, multi-

employer bargaining most often occurs in sectors of the American economy that could hardly be further from the glamorous and highly visible setting presented here. In the typical setting, employers seek "through group bargaining to match increased union strength."[1] Employer-members of the Chamber in the garment, transportation, printing and publishing, mining, retail, construction, maritime, retail food, restaurant, hotel, and building service businesses engage in multi-employer bargaining on a local, regional, or national basis.

4. The court below enjoined a lockout implemented by the National Football League (NFL or League), a multi-employer bargaining association composed of professional football clubs, after negotiations with the players' union, the National Football Players Association (NFLPA), had reached an impasse. A lockout like the one employed here is not an end-game in the negotiations process; rather, it is part of the process intended to move the bargaining parties from a stalemate to further productive negotiations. National labor policy is predicated on the threat, and occasional use, of self-help methods like strikes and lockouts as measures to force bargaining parties to compromise their firmly held objectives.

5. For the collective bargaining process to work as Congress intended, the parties to the dispute must largely be left by the courts to their own devices.

[1] *NLRB v. Truck Drivers, Local Union No. 449*, 353 U.S. 87, 94-95 (1957); *see also Charles D. Bonanno Linen Serv., Inc. v. NLRB*, 454 U.S. 404, 409 n.3 (1982) (multi-employer bargaining "enables smaller employers to bargain 'on an equal basis with a large union.'").

The prospect of self-help forces the parties to make difficult choices. But if either party to such a dispute can be confident that the courts will come to its aid by entering an injunction against its adversary's use of self-help, the risks inherent in self-help cannot exert the pressure to compromise that Congress intended.

6. To ensure that courts refrained from becoming combatants in labor disputes in aid of either side, Congress (a) gave the National Labor Relations Board exclusive jurisdiction to resolve any assertion by a bargaining party that its counterpart had engaged in an unfair labor practice, for example, by refusing to bargain in good faith or by engaging in impermissible forms of self-help; and (b) in the Norris LaGuardia Act (NLGA), by expressly denying district courts jurisdiction in any matter "involving or growing out of a labor dispute."

7. Rather than leaving the parties to resolve their dispute as Congress intended, the district court in this case cut short the normal course of negotiations by involving itself in the bargaining process. The court failed to appreciate the fundamental national labor policies established by Congress. It held that federal antitrust law had displaced national labor policy as the rules of the game for resolving this dispute, but that was error.

8. By disregarding the NLRB's exclusive jurisdiction to consider unfair labor practice allegations — here, the League's assertion that the NFLPA has unlawfully renounced its duty to bargain — and by giving the NLGA's anti-

injunction command an unjustifiably narrow construction, the court has encouraged labor organizations to forgo the contest of economic strength that is part and parcel of collective bargaining and instead to pursue a litigation solution for their bargaining disputes.

9. If sanctioned by this Court, the district court's approach in this case would threaten the continued viability of multi-employer bargaining. That approach would allow — even encourage — a labor organization unilaterally and instantaneously to renounce its obligations under the NLRA and move a contest over the terms and conditions of employment from the bargaining table to the courtroom.

10. Although it has no interest in, and takes no position regarding, the end results of the NFL-NFLPA bargaining dispute, the Chamber and its members are vitally concerned about the continuing viability of the multi-employer bargaining process if the decision below is allowed to stand. As the Supreme Court quite accurately noted nearly forty years ago, the process of multi-employer bargaining became more prevalent after the Wagner Act of 1935 as smaller employers "sought through group bargaining to match increased union strength." *NLRB v. Truck Drivers*, 353 U.S. at 94-95. For small-scale manufacturers and for small employers in the restaurant, hotel, retail and printing industries, for example, the mutual aid and protection found in group bargaining is not merely beneficial, it can

be essential for economic survival. For these relatively small enterprises, the decision below poses particularly dire consequences.

11. Accordingly, the Chamber seeks to illuminate these threats to multi-employer bargaining by emphasizing not merely the errors made below, but how they will affect employers engaged in less glamorous enterprises.

STATEMENT OF THE CASE

This case grows out of a labor dispute between the National Football League and the NFLPA. For more than 40 years, the NFLPA has represented the league's players in collective bargaining. Beginning in June 2009, the parties have been negotiating in an attempt to reach a new labor contract. When direct negotiations failed, the parties solicited the help of the Federal Mediation and Conciliation Service (FMCS).

On the day the contract was to expire, and during the course of an FMCS-led bargaining session, the NFLPA announced that as of that moment it was renouncing its status as the bargaining representative of the players and thus that it had no further duty to bargain with the League. The NFLPA then immediately reconstituted itself as a "trade association" and funded a handful of players and one prospective player to bring this antitrust lawsuit against the League and its clubs, represented by the NFLPA's own counsel. NFL Br. at 7-8. Once the contract

expired, the NFL "locked out" the players in support of its bargaining position.[2] It then filed amended unfair labor practice charges it had already filed with the NLRB to allege that the NFLPA's disclaimer breached an ongoing duty to bargain in good faith.

The NFLPA's elected representatives and professional staff repeatedly admitted that its disclaimer of bargaining rights was an integral part of its effort to secure favorable terms and conditions of employment, a temporary tactical measure aimed at achieving "a fair CBA," *i.e.*, a collective *bargaining* agreement which they remained "willing to negotiate" with the NFL. After the injunction was entered below, one elected player representative praised the order because he thought that it might result in "new collectively bargained agreement."[3]

The Plaintiffs (NFL players and elected union representatives and one prospective player) sued the NFL claiming that the lockout was a restraint of

[2] A "lockout" is a commonplace, and entirely lawful, exercise of management self-help under the National Labor Relations Act, and is a measure often taken by employers *as part of the bargaining process* in an attempt to move the parties closer to an agreement. *See*, *e.g.*, *Brown v. Pro Football, Inc.*, 518 U.S. 231, 243-44 (1996); *NLRB v. Brown*, 380 U.S. 278, 284 (1965). Such an act of self-help is an integral part of the labor relations scheme on which national labor policy rests. *Brown*, 380 U.S. at 284.

[3] These and other quotes from the NFLPA's professional staff and elected union representatives are described in some detail at pages 8-10 of the NFL's principal brief.

trade.[4] They claimed that the NFLPA had lawfully and unilaterally undergone a transformation from labor organization to "trade association" by declaring that intention, and that in that instant the "non-statutory" labor antitrust exemption that otherwise would have shielded the NFL's lockout[5] was also instantly transformed into an illegal restraint of trade.

The district court enjoined the League's lockout. That injunction rested on two fundamental conclusions. First, the court agreed with the NFLPA's assertion that it had lawfully, unilaterally, and completely rid itself of the duty to bargain in good faith imposed on it by the National Labor Relations Act (NLRA) the instant it declared it was renouncing its status as a union. Purporting to apply standards established by the National Labor Relations Board (NLRB), the court held that the NFLPA's disclaimer was not a sham, but rather a *bona fide* and effective renunciation of NLRA bargaining rights and obligations. This, the court held, was true even if the union's disappearance as a union was only a transitory phase and

[4] Significantly, this has all happened before. In the early 1990s, the NFLPA disclaimed representation rights, with its Executive Director and General Counsel testifying that its renunciation of its status as a union was "permanent" and "irrevocable." *See* NFL Br. at 5-6. Yet, the NFLPA reconstituted itself as a union shortly thereafter and entered into a new collective bargaining agreement with the NFL. *See White v. NFL*, 585 F.3d 1129, 1134 (8th Cir. 2009).

[5] *See Brown v. Pro Football, Inc.*, 518 U.S. 231 (1996).

then only a means to achieve a labor-relations goal — to establish new and favorable terms and conditions of employment for NFL players.[6]

The court declared that it was entitled to make this determination even though that precise question was already being considered by the NLRB. Although the court expressly acknowledged that the NLRB has *exclusive* jurisdiction over unfair labor practice charges (including the League's claim that the NFLPA had violated its duty to bargain) (Add. 22-23), it nonetheless reasoned (a) that the question whether the NFLPA had violated its NLRA duty to bargain was merely "collateral" to the NFLPA's request for an injunction against the lockout; and (b) the NLRB's standards on what makes a disclaimer effective were so well-settled and easy to apply that the court would not materially benefit from the Board's substantive expertise in that area.

The court also rejected the NFL's assertion that the express terms of the NLGA deprived it of jurisdiction to enter an injunction. The NLGA expressly and broadly removes from the federal courts jurisdiction to enter injunctions in a case

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[6] The court also observed that "the defining attribute of a union is its function as a collective bargaining agent for its members," and said it was "unaware of any such activity still occurring here." (Add. 40 n. 28.) The court, however, had already ordered the parties into court-supervised mediation and the players were represented during at least some of those sessions by NFLPA Executive Director DeMaurice Smith, among others. Although these negotiations were at least ostensibly for the purpose of resolving the lawsuit, one must assume that the NFLPA and the NFL discussed the terms and conditions of player employment. *See* NFL Br. at 18.

that either "involves" or "grows out of" a labor dispute. The NLGA did not apply, it held, because a necessary precondition to any labor dispute — or any case "growing out of" a labor dispute — is a union, in place and functioning at the time the injunction is requested. The NFLPA, the court held, had ceased to be a union the moment it renounced its bargaining obligations under the NLRA, and with no currently functioning labor union at the time of the motion for injunctive relief, as a matter of law there could be no labor dispute.

Because the NFLPA's instantaneous transformation from union to "trade association" was legally effective, the court held, the non-statutory labor exemption to antitrust liability that otherwise would have immunized the NFL's lockout also instantly evaporated. This transformation, the court held, turned activity that otherwise unquestionably would have been protected conduct under federal labor law and insulated from antitrust liability into a violation of the Sherman Act.[7] And because the NLGA did not apply, the court had jurisdiction to enter the requested injunction. This appeal followed.

SUMMARY OF ARGUMENT

This case involves famous parties engaged in a highly visible, and underlying dispute has played out on the evening news and in every sports page around the country. When seen as a contest between America's most successful

[7] The court purported to apply only the "likely to succeed" standard applicable to preliminary injunctions.

sports league and some of its most highly compensated, most visible athletes, it would be easy to overlook the fundamental principals of labor law that lie at its core.

The Chamber did not seek leave to participate in this case to argue for a particular result on the merits of the underlying labor dispute between owners and players, or even a particular outcome on the substantive legal questions with which the district court attempted to grapple — whether the NFLPA could effectively free itself of its duty to bargain simply by announcing that it had done so, or whether, in the absence of the NLGA, the players had made the showing necessary to obtain equitable relief.

Rather, the Chamber seeks leave to participate here in order to underscore the serious threat the district court's order poses to the system of labor law enforcement envisioned by Congress. First, the court below assumed for itself the responsibility to decide the question whether the NFLPA retains a duty to bargain under the NLRA. That was an error. Congress gave the Board exclusive authority to decide questions regarding the scope of the duty to bargain. The National Labor Relations Act (a) embodies normative standards of conduct for bargaining parties and (b) imposes a mandatory administrative mechanism for enforcing those standards. In this case, the NFLPA unilaterally declared it had no duty to bargain in good faith with the League; whether this is true or not, Congress expected the

NLRB, and not a federal judge, to make that assessment. The NFL amended unfair labor practice charges it had already filed against the NFLPA raising this very issue, and the Board is currently, actively considering the merits of those charges.

The court below preempted that process. By doing so, it created a destabilizing precedent that undermines the vital interests of both labor and management in the reliable administration of the NLRA through the framework Congress established. Regardless of whether the NFLPA *in fact* remains obligated to bargain with the NFL on the facts of this case, it threatens Congress's scheme to have district judges, and not the agency with the requisite expertise, effectively deciding unfair labor practice charges. A predictable administration of the NLRA, on which labor and management both rely, would be impossible if the responsibility for devising and enforcing duty to bargain standards is distributed among hundreds of individual federal district judges around the country. If Congress's design is to work, the question whether a union has lawfully, effectively renounced its duty to bargain under the NLRA must be answered by the labor law experts at the Board, not by district judges.

The district court's unfamiliarity with the milieu of collective bargaining is also apparent in the construction it gave to the Norris LaGuardia Act (NLGA). Although the Act ousts federal court jurisdiction to enter injunctions in cases "involving or growing out of a labor dispute," Congress was most concerned with

"prevent[ing] judicial use of [injunctions in the context of] antitrust law [cases] to resolve labor disputes — a kind of dispute normally inappropriate for antitrust law resolution." *Brown*, 518 U.S. at 236; *see also Milk Wagon Drivers' Union, Local No. 753 v. Lake Valley Farm Prods.*, 311 U.S. 91, 101 (1940) ("many of the injunctions which were considered most objectionable by the Congress [that enacted the NLGA] were based upon complaints charging conspiracies to violate the Sherman Anti-trust Act"). "[U]nlike labor law, which sometimes *welcomes* anticompetitive agreements conducive to industrial harmony, antitrust law forbids all agreements among competitors (such as competing employers) that unreasonably lessen competition among or between them in virtually any respect whatsoever." *Id.* at 241 (emphasis added).

The nation's labor laws are effective at moving parties toward agreement in part because of the threat of — and, on occasion, the actual use of — economic weapons such as strikes and lockouts. The Norris LaGuardia Act was enacted to keep district judges — and most particularly federal judges hearing antitrust cases — from placing themselves between employees and their employers as they engage in tests of economic strength. Congress did so by denying the courts jurisdiction to enjoin the exercise of self-help.

Nonetheless, the court below entered into this test of economic power between the League and the NFLPA. It did so after concluding that as a matter of

law, *no case* can grow out of a labor dispute unless a duly certified union is at the center of the dispute at the time the matter comes before the judge. That conclusion is incompatible with the relevant statutory language and the Supreme Court's demand that the term "labor dispute" be given a broad construction. *Jacksonville Bulk Terminals, Inc. v. ILA*, 457 U.S. 702, 708 (1982).

These conclusions threaten fundamentals of federal labor policy on which management and labor have both come to rely. The Chamber's members value predictability and stability in application of those policies and procedures, and those values cannot be achieved if individual federal judges are permitted to decide issues reserved for the specialized agency created by Congress.

ARGUMENT

I. THE NATIONAL LABOR RELATIONS BOARD MUST DECIDE WHETHER THE NFLPA RETAINS ITS DUTY TO BARGAIN

The National Labor Relations Act prescribes the standards of conduct for parties to a collective bargaining relationship. By defining the scope of the duty to bargain, among other things, the NLRA specifies the things that management and labor must do, the things that they are permitted but not required to do, and those things that cannot lawfully be done in pursuit of a collective bargaining agreement.

More than that though, the NLRA establishes a comprehensive set of procedures for policing that conduct. The Supreme Court has explained:

> Congress did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. It went on to confide primary interpretation and application of its rules to a specific and specially constituted tribunal and prescribed a particular procedure for investigation, complaint and notice, and hearing and decision, including judicial relief pending a final administrative order. Congress evidently considered that *centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules* and to avoid these diversities and conflicts likely to result from a variety of . . . procedures and attitudes toward labor controversies . . . . A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law.

Garner v. Teamsters, 346 U.S. 485, 490-91 (1953) (emphasis added); *BE & K Constr. Co. v. United Bhd. of Carpenters & Joiners*, 90 F.3d 1318, 1327 (8th Cir. 1996) ("Congress has crafted a comprehensive statutory framework that reflects its determination that a uniform law of labor relations serves an important federal interest").[8]

Thus, Congress envisioned a "comprehensive national labor law" and "entrusted . . . its administration and development to a centralized, expert agency," recognizing the "incapacity of common-law courts . . . to provide an informed and coherent basis for stabilizing labor relations conflict and for equitably and

[8] *Talbot v. Robert Matthews Distrib. Co.*, 961 F.2d 654, 659 (7th Cir. 1992) ("the NLRB [has] exclusive jurisdiction to determine whether given conduct falls within the NLRA").

delicately structuring the balance of power among competing forces so as to further the common good." *Amalgamated Ass'n of St., Elec. Ry. & Motor Coach Emps. v. Lockridge*, 403 U.S. 274, 286 (1971). Because "it [will often not be] clear whether . . . particular activity [is within the scope of the conduct regulated by that NLRA,] in such ambiguous [circumstances] [i]t is essential to the administration of the Act that these determinations be left in the first instance to the National Labor Relations Board." *ILA v. Davis*, 476 U.S. 380, 389-90 (1986).

Because this case involves actions taken by a multi-employer bargaining association in pursuit of a collective bargaining agreement — coordinated action among industry competitors to achieve common labor costs — it lies at the fault line between labor law and the antitrust laws. The line separating these two fields of law can be uncertain. Because of this, the Supreme Court has said that it would be inappropriate for courts to decide "whether, or where, within these extreme outer boundaries, to draw that line." *Brown*, 518 U.S. at 250. Rather, that task is for the "Board [which possesses the] 'specialized judgment' [that] Congress intended to [inform] many of the 'inevitable questions concerning multiemployer bargaining bound to arise in the future.'" *Id.* Recognizing that "in principle, antitrust courts might themselves" attempt to mark out the boundaries between labor policy and antitrust law, the Court has cautioned that

> [A]ny such evaluation [by district courts] means a web of detailed rules spun by many different nonexpert antitrust

> judges and juries, not a set of labor rules enforced by a single expert administrative body, namely the Board. The labor laws give the Board, not antitrust courts, primary responsibility for policing the collective-bargaining process. And one of [Congress's] objectives was to take from antitrust courts the authority to determine, through application of the antitrust laws, what is socially or economically desirable collective-bargaining policy.

Brown, 518 U.S. at 242. In this arena, the business of line-drawing, then, belongs to the Board and not the courts.

The decision below disregarded this Congressional design. The district court saw no need to obtain the "specialized judgment" of the NLRB as to whether the NFLPA must continue to bargain in good faith (even though that precise question is currently pending before the Board). (Add. 45 n. 31.) Likewise, the court gave no particular weight to the value in "uniformity of resolution" that would have been assured had it deferred its own work until the NLRB had answered that threshold question. (*Id.* at 34.)

This was true, the court said, because the NLRB standard for determining the *bona fides* of a disclaimer like the NFLPA's was so "clear," and has been enforced by the Board in such a "consistent fashion," *id.*, that "application of the standard require[d] no specialized expertise." (*Id.*) Indeed, the court was so confident of its ability to decide the boundaries of the scope of the duty to bargain under the NLRA that it predicted that "it is likely that the Board will dismiss the

[League's pending] charge." (*Id.*) And because the scope of that bargaining duty was so clear to the court, it found it inconceivable that the NLRB might disagree with its conclusions. The court flatly declared that there was "no real risk [that its decision would] interfere[] with the Labor Board's primary jurisdiction to enforce the statutory prohibitions against unfair labor practices." (Add. 31.)[9]

The court erred in each of these conclusions. The NLRB's exclusive jurisdiction to police the duty to bargain is not limited to the hard cases; it applies to the routine ones as well. That task belongs to the Board even in cases where the standards are clear and the facts routine.

Moreover, the qualities that make a disclaimer of the duty to bargain effective are not as clear as the court below would have it. To support its assertion that the duty to bargain questions presented here are easy to answer (thus making the Board's specialized expertise unnecessary), the court cited four NLRB decisions that are between 46 and 53 years old and a 20 year old NLRB General Counsel's Advice Memorandum that was never adopted by the Board itself.

This reliance was misplaced for several reasons. First, none of these authorities dealt with anything like the sort of at-the-table disclaimer made by the NFLPA in this case. From all that appears, none of the authorities involved

[9] The court dismissed the existence *vel non* of an NFLPA duty to bargain as a mere "collateral issue" to this antitrust suit. (*Id.* at 26.) As the NFL argues at 31 – 39 in its principal brief, this was patent error. If the NFLPA has not effectively shed its duty to bargain, there *can be no* antitrust suit.

statements like those made here by elected union officials, admitting that the disclaimer was simply a tactic employed to "get a deal." Even if the court below had at its disposal recent and detailed Board guidance about the rules that govern disclaimers generally, the court would have been operating without precedent on the sort of facts presented here.[10]

Second, since the NLRB decided the four cases on which the court below relied, the Board has decided at least hundreds (and perhaps thousands) of cases on the duty to bargain. And virtually all of the Supreme Court's most significant labor/antitrust cases — from *Connell Construction*[11] to *Brown* — were decided after the cases on which the district court relied. These principles have particular application here, in the context of multi-employer bargaining — a form of bargaining that by definition involves an agreement among competitors to fix their labor costs. The Supreme Court has repeatedly emphasized the importance of

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[10] Similarly, it would be error to give controlling weight to the views of one of the Board's General Counsels, expressed in an Advice Memorandum in 1991. As stated above, the views of the NLRB General Counsel expressed in an Advice Memorandum do not constitute final agency action, as such a memorandum does not adjudicate the rights of any parties, and it is not subject to any form of judicial review. Moreover, since 1991, there have been nine additional General Counsels, each of whom had the same authority to announce his individual policy with regard to agency enforcement of federal labor law. There is no reason to assume that each of these individuals (and most particularly the current Acting General Counsel) would resolve these issues in the same fashion as one of his predecessors did two decades ago.

[11] *Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616 (1975).

multi-employer bargaining to national labor policy "as an instrument of labor peace." *Charles D. Bonanno Linen Serv., Inc.*, 454 U.S. at 412. "Congress saw multiemployer bargaining [and the sort of concerted employer conduct at issue here as] vital factor[s] in the effectuation of the national labor policy of promoting labor peace through strengthened collective bargaining." *Brown*, 518 U.S. at 241, *quoting NLRB v. Truck Drivers*, 353 U.S. 87, 95 (1957) (multi-employer lockout lawful). And because Congress understood that multi-employer bargaining was an essential feature of national labor policy, it left "to the Board's specialized judgment the resolution of conflicts between union and employer rights that were bound to arise in multiemployer bargaining." *Bonanno Linen*, 454 U.S. at 409.

In *Bonanno Linen*, the Board had concluded that an impasse in bargaining would not be sufficient to allow members of a multi-employer unit to withdraw, and the Supreme Court deferred to that Board rule. Recognizing that the Board is in a unique position to define and police the responsibilities of parties engaged in multi-employer bargaining, the Court emphasized that "assessing the significance of impasse and [the] dynamics of collective bargaining is precisely the kind of judgment that . . . should be left to the Board." *Id.* at 412-13.

The district court's decision did not acknowledge this central feature of national labor policy. Rather, the court announced a rule that permits a union unilaterally and instantaneously to remove a case from the collective bargaining

table and place it before an antitrust jury, even if doing so was part of a calculated design to obtain more favorable terms and conditions of employment. And it announced this rule without allowing the NLRB the opportunity to render the very delicate judgments that the Supreme Court said were the special province of the Board. It denied the Board any opportunity to determine whether the rule adopted below is consistent with its carefully crafted restrictions on withdrawal from multi-employer bargaining.

Finally, the court below clearly misunderstood the Board's existing standards for assessing a union's unilateral disclaimer of representational status. A union's disclaimer is ineffective if it is equivocal, made in bad faith, or is made for tactical advantage in an underlying bargaining dispute. As outlined at p. 7 *supra* and described in greater detail in the NFL's principal brief, elected union leaders and the NFLPA's paid professional staff members admitted repeatedly that the disclaimer was a long-planned part of the NFLPA's ongoing effort to obtain a new labor agreement.

The district court responded to this evidence in two ways. First, it dismissed these admissions as "inconclusive . . . anecdotal comments of individual players." (Add. 40 n. 28.) But the statements came not from rank and file players caught off guard; they came from the NFLPA's elected officers and representatives — the individuals selected by the rank and file to speak on the players' behalf — and at

least some of the statements came during interviews with the national press or on network television. In this appeal, the Chamber takes no position on how the Board would treat these admissions — whether they would be deemed by the Board to be conclusive — but the weight to be assigned them is itself a determination for the NLRB to make; it was not for the district court to dismiss their importance out of hand.

Perhaps more fundamentally, the court below seemed to think that it would be irrelevant if the NFLPA had renounced its duty to bargain as a strategic maneuver — a temporary way-station on the road to a new and "better" labor agreement. The court did not claim to find NLRB cases on this point; it simply observed that the League had failed to cite any "legal support for any requirement that a disclaimer be permanent." (Add. 35.)

But the asserted absence of authority on point[12] is inconsistent with the court's claim that the relevant Board law is settled and easy to apply, and it underscores the importance of resort to the Board's specialized expertise. If, as the

[12] The case law does, in fact, draw the NFLPA's conduct into serious question. *See*, *e.g.*, *Detroit Newspaper Publ'rs Ass'n v. NLRB*, 372 F.2d 569, 571 (6th Cir. 1967) ("[T]he Board could with propriety inquire into the good faith of withdrawals and whether they are harmful to either party, particularly where, as here, the unit has been in existence and has operated satisfactorily for so many years."); *id*. at 572 ("[I]t must be equally clear that a virtually unfettered [union] right of withdrawal . . . might also destroy the attractiveness of [multiemployer bargaining]. The Board might well find that the instability resulting from such conditions had undermined the multiemployer unit as an effective tool of labor relations.")

court claimed,[13] this is a question of first impression, *the Board* and not the court below, should be the one writing on the blank slate. A blank slate means an opportunity to make national labor policy. Ands the Supreme Court has emphasized again and again, that is a task that must be left to the Board, and not a subject for "a web of detailed rules spun by many different nonexpert antitrust judges and juries." *Brown*, 518 U.S. at 242.

The result reached below seriously threatens the viability of multi-employer bargaining. The court below wrote new rules for assessing the duty to bargain. That was not within its authority. This antitrust claim should wait until the NLRB decides whether it retains a duty to bargain.

II. THE NLGA DEPRIVED THE DISTRICT COURT OF JURISDICTION TO ENTER AN INJUNCTION

The NLGA broadly withholds from federal district courts jurisdiction to enter injunctions "in any case involving or growing out of any labor dispute." 29 U.S.C. § 104.[14] The court below held that the NGLA was inapplicable here

[13] The Chamber does not agree with the court's conclusion in this regard. As noted above, an effective disclaimer must be made "in good faith," and when a union claims to have renounced its duty to bargain as part of an effort to secure a new CBA under favorable terms, good faith is lacking.

[14] Section 104 of the NLGA contains an "enumeration of specific acts" that cannot be enjoined, but that list "is not an exclusive list." *Triangle Constr. & Maint. Corp. v. Our V.I. Labor Union*, 425 F.3d 938, 946 (11th Cir. 2005); *accord AT&T Broadband, LLC v. Int'l Bhd. of Elec. Workers*, 317 F.3d 758, 760 (7th Cir. 2003); *Tejidos de Coamo, Inc. v. Int'l Ladies' Garment Workers' Union*, 22 F.3d 8, 14

because this case neither "involved" nor "grew out of" a labor dispute. This conclusion is at odds with the facts and irreconcilable with controlling law.

"Labor dispute" is a defined term under the statute. Among other things, the statutory phrase "includes *any* controversy concerning terms or conditions of employment." 29 U.S.C. § 113(c). "The critical element in determining whether the provisions of the Norris-LaGuardia Act apply to a labor dispute is whether 'the employer-employee relationship [is] the matrix of the controversy.'" *Jacksonville Bulk Terminals, Inc. v. ILA*, 457 U.S. 702, 712 (1982) (citation omitted).

The question here is whether this case "grows out of" *any* controversy concerning terms or conditions of employment — whether the relationship between players and league owners is "the matrix" of this controversy. The answer to this question is indisputable. This case is a direct and undeniable consequence of a "dispute" between the NFL and the NFLPA over an ongoing attempt to set the "terms and conditions of employment" for league players. Indeed, the NFLPA repudiated its duty to bargain — the key event in the case according to the district court — while the parties were at the negotiating table in a

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(1st Cir. 1994); *In re Dist. No. 1-Pacific Coast Dist., Marine Engrs' Beneficial Assoc.*, 723 F.2d 70 (D.C. Cir. 1983).

session mediated by the FMCS, an agency that can only "proffer its services *in* [*a*] *labor dispute* in an[] industry affecting commerce." 29 U.S.C. § 173(a).[15]

The district court, however, held that the dispute between the NFLPA and the NFL fell outside the NLGA's coverage because the statute supposedly applies only to "dispute[s] between *a union* and an employer." (Add. 57-58.) (emphasis added). "[A]bsent the present existence of a union," the court held, the NLGA is irrelevant to the court's jurisdiction. (*Id.* at 61.)[16]

This was error for two reasons. First, it is incompatible with the Supreme Court's decision in *New Negro Alliance v. Sanitary Grocery Co.*, 303 U.S. 552 (1938). There, an organization formed to promote "civic, educational, benevolent, and charitable" causes — *not* a labor union —picketed a store for failing to hire African Americans for managerial and sales jobs. The lower courts found the

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[15] *See also* 29 U.S.C § 173(a) ("It shall be the duty of the [FMCS] to prevent or minimize interruptions of the free flow of commerce *growing out of labor disputes*").

[16] In dicta, the court also claimed to be skeptical of whether the NLGA can *ever* protect employers in any respect. (*Id.* at 55-56.) That skepticism was not justified; the statute's terms are not so limited, and courts have routinely applied the NLGA to claims for injunctive relief against employers. *See* S. Rep. No. 163, 72 Cong., 1st Sess. 19 (1932) ("The same rule throughout the bill, wherever it is applicable, applies to both employers and employees"); *Niagara Hooker Emps. Union v. Occidental Chemical Corp.*, 935 F.2d 1370 (2d Cir. 1991) (vacating injunction against employer because NLGA deprived court of jurisdiction); *Oil, Chemical & Atomic Workers Int'l Union, Local 2-286 v. Amoco Oil Co.*, 885 F.2d 697 (10th Cir. 1989) (applying NLGA to prayer for injunctive relief against employer); *UAW v. La Salle Mach. Tool, Inc.*, 696 F.2d 452 (6th Cir. 1982) (same).

NLGA inapplicable because the dispute "did not involve terms and conditions of employment, in the sense of wages, hours, *unionization*, or betterment of working conditions." *Id.* at 559 (emphasis added). The Supreme Court, however, reversed even though no union had ever been involved in the dispute.[17] If the NLGA was limited in the way the district court supposed, this result would not have been possible.

Second, the NLGA defines a labor dispute to include "cases that "involve[] one . . . employer[] and one . . . employee." 29 U.S.C. §113(a)(1). The district court did not even mention this statutory definition.

The injunction was improper for one final reason. Section 8 of the NLGA, 29 U.S.C. § 108, provides that even in those exceptionally limited circumstances where an injunction might otherwise be available:

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

Even assuming that the court had the authority to decide whether the NFLPA had a duty "imposed by law" to continue bargaining with the NFL *and* even if it correctly determined that the legal obligation disappeared as soon as the NFLPA

[17] The Act, the Court held, was intended to "embrace controversies *other tha*n those between employers and employees; *between labor unions seeking to represent employees* and employers; and between persons seeking employment and employers." *Id.* at 561 (emphasis added).

renounced it, the NLGA expressly conditions the court's authority to issue an injunction on a finding that the complainant had exerted *also* "every reasonable effort to resolve such dispute by negotiation." "One must not only discharge his legal obligations. He must also go beyond them and make all reasonable effort . . . . It clearly is not the section's purpose, therefore . . . to require only what one is compelled by law to do." *Bhd. of R.R. Trainmen v. Toledo, P. & W.R.R.*, 321 U.S. 50, 57 (1944).

Thus, even if NFLPA had no duty to bargain under the NLRA, it *still* had no right to an injunction absent a finding by the district court that negotiations could not reasonably have solved the underlying dispute. The court made no such finding, and, on the record before the court, it is difficult to imagine how it might have done so. As the NFL sets out in its brief, the NFLPA told its members that it intended to renounce its bargaining obligations long before any impasse was reached. It then walked out in the middle of an FMCS-led negotiating session to employ its renounce-and-litigate strategy.

In sum, the district court embraced unprecedented limitations on the scope of the NLGA. Although the Act's sweep is not unlimited, the particular threshold requirement imposed by the court below cannot be reconciled with the text of the statute or with controlling precedent. Thus, even if the court had the authority to determine whether the NFLPA had properly disclaimed its union status, and even

if the court correctly answered that question, it still did not have the jurisdiction to enjoin the NFL's player lockout. The decision below should be reversed.

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Respectfully submitted,

/s/ Stephen B. Kinnaird

Robin S. Conrad
Shane B. Kawka
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

Stephen B. Kinnaird
Neal D. Mollen
Zachary D. Fasman
PAUL, HASTINGS, JANOFSKY
& WALKER LLP
875 15th Street, N.W.
Washington, D.C. 20005
(202) 551-1700

Attorneys for Amicus Curiae
The Chamber of Commerce of the United States of America

CERTIFICATE OF COMPLIANCE WITH RULES 29 AND 32

Pursuant to Federal Rules of Appellate Procedure 29(a)(7) and 32(a), undersigned counsel hereby certifies:

(1) That this brief contains 6,628 words, excluding those portions of the brief that may be omitted from this count under Federal Rule of Appellate Procedure 32(a)(7)(B)(iii); and

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Date: May 16, 2011

/s/ Stephen B. Kinnaird

Stephen B. Kinnaird
PAUL, HASTINGS, JANOFSKY
& WALKER LLP
875 15th Street, N.W.
Washington, D.C. 20005
(202) 551-1700

Attorney of Record for Amicus Curiae The Chamber of Commerce of the United States of America

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Undersigned counsel hereby certifies (1) that this brief complies with Circuit Rule 28A(h) in that an electronic version of the brief was filed with the Court using the Portable Document Format (pdf) and was generated by printing the original WORD file to pdf; and (2) that the electronic version of this brief has been scanned for viruses and has been found to be virus-free.

Date: May 16, 2011

/s/ Stephen B. Kinnaird

Stephen B. Kinnaird
PAUL, HASTINGS, JANOFSKY
& WALKER LLP
875 15th Street, N.W.
Washington, D.C. 20005
(202) 551-1700

Attorney of Record for Amicus Curiae
The Chamber of Commerce of the United
States of America

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I hereby certify that on May 16, 2011, I electronically filed the foregoing with the Clerk of the Court of the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

I further certify that some of the participants in the case are not CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third-party commercial carrier for delivery within 3 calendar days, to the following non-CM/ECF participants:

Mr. Paul D. Clement
BANCROFT PLLC
1919 M Street, NW
Suite 470
Washington, DC 20036

Mr. Michael E. Jacobs
Mr. Daniel S. Mason
Mr. Shawn D. Stuckey
ZELLE HOFMANN
500 Washington Avenue South
Suite 4000
Minneapolis, MN 55415

Mr. Michael D. Hausfeld
Ms. Hilary K. Scherrer
HAUSFELD LLP
1700 K Street, NW
Suite 1650
Washington, DC 20006

Mr. Arthur N. Bailey, Jr.
Mr. John T. King
Mr. Michael Lehmann
HAUSFELD LLP
44 Montgomery Street
Suite 3400
San Francisco, CA 94104

Mr. Christopher R. Clark
Ms. Molly M. Donovan
Ms. Jennifer M. Stewart
DEWEY & LEBOEUF
1301 Avenue of the Americas
New York, NY 10019

Mr. DeMaurice F. Smith
NFL PLAYERS
ASSOCIATION
1133 20th Street, NW
Washington, DC 20036

Mr. David Boies
Mr. Robert M. Cooper
Mr. William A. Isaacson
BOIES & SCHILLER
5301 Wisconsin Avenue, NW
Washington, DC 20015

Mr. James M. Garland
COVINGTON & BURLING
5301 Wisconsin Avenue, NW
Suite 570
Washington, DC 20015

Mr. David Woodward
HEINS & MILLS
310 Clifton Avenue
Minneapolis, MN 55403

/s/ Stephen B. Kinnaird