No. 17-40936

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NATIONAL FOOTBALL LEAGUE PLAYERS ASSOCIATION,
agent of on its own behalf and on behalf of EZEKIEL ELLIOTT,

Plaintiff-Appellee,

v.

NATIONAL FOOTBALL LEAGUE; NATIONAL FOOTBALL LEAGUE MANAGEMENT COUNCIL,

Defendants-Appellants.

On Appeal from the United States District Court
for the Eastern District of Texas,
No. 4:17-cv-00615

EMERGENCY MOTION FOR STAY PENDING APPEAL

ERIC GAMBRELL
PATRICK G. O'BRIEN
AKIN GUMP STRAUSS
HAUER & FELD LLP
1700 Pacific Avenue
Suite 4100
Dallas, TX 75201
(214) 969-2800
egambrell@akingump.com

PAUL D. CLEMENT
Counsel of Record
ERIN E. MURPHY
SUBASH S. IYER
MICHAEL D. LIEBERMAN
KIRKLAND & ELLIS LLP
655 Fifteenth Street, NW
Washington, DC 20005
(202) 879-5000
paul.clement@kirkland.com

Counsel for Defendants-Appellants

(*Additional Counsel Listed on Inside Cover*)

September 15, 2017

DANIEL L. NASH
NATHAN J. OLESON
AKIN GUMP STRAUSS
HAUER & FELD LLP
1333 New Hampshire Ave, NW
Washington, DC 20036
(202) 887-4000
dnash@akingump.com

CERTIFICATE OF INTERESTED PERSONS

NFLPA v. NFL, et al., No. 17-40936

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal:

1. Defendants-Appellants: The National Football League, The National Football League Management Council, and the 32 member clubs that compose both of those unincorporated associations. Those member clubs are:

CLUBS	ENTITIES
Arizona Cardinals	Arizona Cardinals Football Club LLC
Atlanta Falcons	Atlanta Falcons Football Club, LLC
Baltimore Ravens	Baltimore Ravens Limited Partnership
Buffalo Bills	Buffalo Bills, LLC
Carolina Panthers	Panthers Football, LLC
Chicago Bears	The Chicago Bears Football Club, Inc.
Cincinnati Bengals	Cincinnati Bengals, Inc.
Cleveland Browns	Cleveland Browns Football Company LLC
Dallas Cowboys	Dallas Cowboys Football Club, Ltd
Denver Broncos	PDB Sports, Ltd. d/b/a Denver Broncos Football Club
Detroit Lions	The Detroit Lions, Inc.
Green Bay Packers	Green Bay Packers, Inc.
Houston Texans	Houston NFL Holdings, L.P.

CLUBS	ENTITIES
Indianapolis Colts	Indianapolis Colts, Inc.
Jacksonville Jaguars	Jacksonville Jaguars, LLC
Kansas City Chiefs	Kansas City Chiefs Football Club, Inc.
Los Angeles Chargers	Chargers Football Company, LLC
Los Angeles Rams	The Los Angeles Rams, LLC
Miami Dolphins	Miami Dolphins, Ltd.
Minnesota Vikings	Minnesota Vikings Football, LLC
New England Patriots	New England Patriots LLC
New Orleans Saints	New Orleans Louisiana Saints, L.L.C.
New York Giants	New York Football Giants, Inc.
New York Jets	New York Jets LLC
Oakland Raiders	The Oakland Raiders, a California Limited Partnership
Philadelphia Eagles	Philadelphia Eagles, LLC
Pittsburgh Steelers	Pittsburgh Steelers LLC
San Francisco 49ers	Forty Niners Football Company LLC
Seattle Seahawks	Football Northwest LLC
Tampa Bay Buccaneers	Buccaneers Team LLC
Tennessee Titans	Tennessee Football, Inc.
Washington Redskins	Pro-Football, Inc.

2. Plaintiff-Appellee: The National Football League Players Association, on its own behalf and on behalf of Ezekiel Elliott.

3. Counsel for Defendants-Appellants: Kirkland & Ellis LLP (Paul D. Clement, Erin E. Murphy, Subash S. Iyer, Michael D. Lieberman); Akin Gump Strauss Hauer & Feld LLP (Eric Gambrell, Patrick G. O'Brien, Daniel L. Nash, Nathan J. Oleson).
4. Counsel for Plaintiff-Appellee: Winston & Strawn LLP (Thomas Melsheimer, Jeffrey L. Kessler, David L. Greenspan, Jonathan J. Amoona, Angela Smedley, Joseph A. Litman).

s/Paul D. Clement
Paul D. Clement
Counsel of Record
KIRKLAND & ELLIS LLP
655 Fifteenth Street, NW
Washington, DC 20005
(202) 879-5000
paul.clement@kirkland.com
Counsel for Defendants-Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statute

INTRODUCTION

Like any case involving a star athlete, this case has generated substantial attention and commentary. But, at bottom, this case involves a collateral challenge to a labor arbitrator's decision. While such collateral challenges generally may be brought, they face little prospect of success. The standard facing the party challenging the arbitrator's decision is among the most daunting known to the law. And when the gravamen of the challenge is procedural unfairness, the standard is more daunting still. But the most elementary aspect of the substantial deference owed to a labor arbitrator's decision is that no court challenge may be filed until *after* the arbitrator has ruled. The district court here lost sight of that most basic rule, and every other well-established principle of deference: The court not only entertained a blatantly premature challenge, but then found a likelihood of success in a procedural challenge to the arbitrator's decision. That precedent-defying decision will not stand, and nothing in the stay equities favors delaying an arbitrator's decision that will almost certainly be vindicated at the end of the proceedings (though likely by a court in a different district with jurisdiction over a timely filed action). The misguided order below should be stayed and then promptly reversed.

BACKGROUND

The Commissioner of the National Football League suspended Ezekiel Elliott, a running back for the Dallas Cowboys, for six games after finding that Elliott violated League policy by committing multiple acts of physical violence against a woman he had been dating. That suspension was the product of a year-long investigation that culminated in an exhaustive 164-page report and was conducted in careful adherence to the procedures set forth in the collective bargaining agreement ("CBA") between the League and the NFL Players Association ("NFLPA") and in a separate policy detailing additional procedures to address violence against women.

Elliott exercised his right under the CBA to appeal the Commissioner's decision to an arbitrator and took part in a three-day evidentiary hearing, during which he was allowed ample cross-examination, including of the League's two lead investigators. *Before the arbitrator could even issue his decision*, however, the NFLPA collaterally attacked the as-yet-unfinished arbitration process in federal court. In this indisputably premature lawsuit, which unabashedly challenged an award that did not yet exist, the NFLPA sought to temporarily restrain and preliminarily enjoin the League from enforcing the "forthcoming" arbitration award "to be issued" by the arbitrator. Article III alarm bells thus should have rung loudly from day one, as federal courts do not have jurisdiction to review un-issued and still-

pending arbitration awards. The NFLPA's premature lawsuit—filed in a blatant effort to obtain "first-filed" status in the player's preferred venue—therefore should have been dismissed immediately. The decision below, which not only exercised jurisdiction but also entered a preliminary injunction based on perceived unfairness, fundamentally misunderstands first principles of judicial review of labor arbitration awards.

1. For over 40 years, the CBA has given the Commissioner broad authority to discipline players for "conduct detrimental to the integrity of, or public confidence in, the game of professional football." CBA, Art. 46 ("Ex.G"), §1(a).[1] In 2014, the Commissioner issued a Personal Conduct Policy ("Policy") providing additional guidance about the League's procedures for domestic or dating violence incidents. Ex.H. The Policy made clear that players would face a baseline suspension of six games for such acts, even if "the conduct does not result in a criminal conviction." Ex.H2. If the player is not charged with a crime, he may still be found to have violated the Policy "if the credible evidence establishes that he engaged in [prohibited] conduct." Ex.H5.

Under the Policy, investigations into domestic violence accusations are run by a staff member with a criminal justice background, who is responsible for producing

[1] "Ex.__" refers to the Exhibits accompanying this motion.

an investigative report but need only "present a disciplinary recommendation" "if desired" by the Commissioner. Ex.H3, 5. The player must be given notice of the potential violation and furnished with the report and the documents on which it relies, and may respond both in writing and at an in-person meeting with the disciplinary officer. Ex.H6. When the investigation is completed, the Commissioner "review[s] the report (and recommendation if presented) and determine[s] the appropriate discipline, if any." Ex.H5.

Players found to have violated the Policy are entitled to an appeal, which is heard by the Commissioner or his designee. Ex.G, §2(a). At the appeal hearing, the player has a right to counsel and to "present, by testimony or otherwise, any evidence relevant to the hearing." §2(b). Article 46 imposes only one discovery obligation: Before the hearing, the parties shall "exchange copies of any exhibits upon which they intend to rely." §2(f)(ii). The CBA contains no procedures for compelling witnesses, conducting cross-examination, or introducing evidence. Such matters are committed to the sound discretion of the hearing officer, whose final decision constitutes a "full, final and complete disposition of the dispute," "binding" on all parties. §2(d).

2. On July 22, 2016, Tiffany Thompson reported to the Columbus Police Department that she had been physically abused by Ezekiel Elliott multiple times

during the prior week. ECF #1-47 at 7.[2] Thompson had been in a relationship with Elliott for over a year, during which time the Dallas Cowboys drafted him. *Id.* at 11-13. Although the Columbus City District Attorneys found Thompson's claims credible, they declined to prosecute because of the stringent criminal burden of proof. ECF #1-48 at 119-20 ("We generally believed [Thompson] for all of the incidents").

When the allegations came to light, the League opened an investigation led by Lisa Friel, a former Chief of the New York City Sex Crimes Prosecutor's office, who was assisted by Kia Roberts, a former New York State prosecutor with experience in domestic violence cases. ECF #1-47 at 1, 7-9. During the year-long investigation, they conducted 22 witness interviews (including multiple interviews of Thompson and Elliott); reviewed thousands of pages of documents; and considered extensive photographic and other evidence. *Id.* at 1-7. The NFL also retained medical and forensic experts to analyze text messages and Thompson's injury photographs. *Id.*

Friel and Roberts produced a 164-page report exhaustively detailing their findings. ECF #1-47, #1-48. Supported by 103 exhibits, the report included summaries of all witness interviews, photographs of Thompson's injuries, and Roberts' analysis of inconsistencies between Thompson's interview statements and

[2] "ECF __-__" refers to the district court docket entry and exhibit number.

other evidence. Ex.E4; ECF #2-9 at 70-74. The NFLPA and Elliott were given copies of the report and its exhibits, and they responded in person and in writing. *See* ECF #1-49 at 10-12; ECF #1-52.

After reviewing the evidence, the Commissioner determined that Elliott committed physical violence against Thompson on three occasions. Ex.F3-6. The Commissioner's decision acknowledged the concerns that Elliott had repeatedly raised about Thompson's credibility, but emphasized that "no finding, and no disciplinary action, was based simply on one individual's statements." Ex.F4-5. "Rather," the Commissioner's findings were "based on a combination of photographic, medical, testimonial and other evidence that is sufficiently credible in the Commissioner's judgment to establish the facts, even allowing for concerns ... about [Thompson's] credibility." Ex.F4. Putting an even finer point on it, the decision elaborated, "[i]rrespective of the characterization of Ms. Thompson's statements ..., the photographic and medical forensic evidence corroborates many critical elements of the allegations." *Id*. Based on his findings, the Commissioner suspended Elliott for six games. Ex.F5.

3. Elliott appealed, and the Commissioner designated Harold Henderson to serve as Arbitrator. The Arbitrator made several procedural rulings, some favoring the League, others favoring the NFLPA. As relevant here, he granted the NFLPA's motion to compel Friel and Roberts to testify, but denied its requests to compel

Thompson or the Commissioner to testify, or to compel production of Roberts' investigative notes. Exs.C, D.

The appeal was heard from August 29-31, 2017. Elliott called seven witnesses and submitted additional testimony by affidavit. He cross-examined Friel and Roberts, who testified that the report included their investigatory notes, all evidence that raised concerns about Thompson's credibility, as well as Roberts' summary of inconsistencies in Thompson's account. Ex.E1-4. Friel also testified that the Commissioner was made aware of Roberts' concerns before issuing his decision. Ex.E3.

On September 5, 2017, the Arbitrator affirmed the Commissioner's decision. Ex.B8. The Arbitrator rejected the NFLPA's claim that the League erred by not asking the investigators to include disciplinary recommendations in their report, explaining that the Policy's plain language states that the report will include a recommendation only "if desired" by the Commissioner. Ex.B5 (quoting Ex.H5). The Arbitrator also concluded that neither Friel nor Roberts revealed "new evidence" when they testified that they did not find Thompson sufficiently credible to support discipline for some of the incidents investigated because "all the statements and inconsistencies are included in the [i]nvestigative report and other materials provided to the Commissioner." Ex.B7. Finally, the Arbitrator emphasized that his role was not to second-guess the Commissioner's decision, but to "determine

whether the player was afforded adequate notice ..., the right to representation, opportunity to present evidence, and a decision which is fair and consistent." *Id.* The process and result here, he concluded, complied with those requirements "in every respect." *Id.*

4. On August 31, 2017, before the Arbitrator had even rendered his decision, the NFLPA filed this petition seeking to vacate the "forthcoming Arbitration Award," which at some point "will be issued." Ex.I1. The NFLPA also moved for a temporary restraining order and to preliminarily enjoin the NFL "from enforcing the forthcoming arbitration award to be issued." Ex.J1.

The NFL moved to dismiss, explaining that federal courts do not have jurisdiction to review arbitration awards that have not yet issued, and opposed the NFLPA's motions on jurisdictional grounds and on the merits. The court held a hearing on September 5, 2017, the same day as the Arbitrator issued his decision. Three days later, the court granted a preliminary injunction. *See* Ex.A.

The court acknowledged that "an individual is generally required to exhaust, or at least attempt to exhaust, any remedies provided for in the [CBA] before filing suit." Ex.A6. But it excused exhaustion based on an exception that the NFLPA never invoked that applies "when the employer's conduct amounts to a repudiation of the remedial procedures specified in the contract." Ex.A7. According to the court,

"allegations that the NFL withheld evidence from the NFLPA and Elliott amount to a repudiation of the required procedures specified in the CBA." *Id.*

On the merits, the court paid lip-service to its "very limited role," Ex.A1, but then asserted the sweeping power to vacate any arbitration award resulting from procedures it believed were "not fundamentally fair," Ex.A14. Relying not on the relevant CBA provisions, but on its own *ad hoc* judgment of what evidence should have been provided, the court faulted the Arbitrator for declining to compel production of the investigators' notes or testimony from Thompson or the Commissioner. Ex.A13-19. The court criticized the League for not including in the investigative report "a disciplinary recommendation for Commissioner Goodell's consideration" before conceding that neither the CBA nor the Policy requires it. Ex.A16. The court then resolved the remaining preliminary-injunction factors in the NFLPA's favor and enjoined the Arbitrator's decision. Ex.A19-22.[3]

[3] The NFL requested a stay from the district court on Monday, September 11, 2017, asking the court to rule immediately given the exigencies. ECF #30. Instead, the court issued a briefing schedule that allowed as much time for briefing the stay as for the preliminary injunction. ECF #6, #31. Although the schedule allowed the NFL until today to file a reply, the NFL filed on Wednesday evening (just hours after the NFLPA's response), asked the court to rule by yesterday, and informed that it would file in this Court this morning with or without a decision to allow this Court to issue prompt relief. ECF #35. As of this filing, the district court still has not acted.

ARGUMENT

A stay pending appeal may be granted when the movant is likely to succeed on the merits and the stay equities support immediate relief. *Planned Parenthood v. Abbott*, 734 F.3d 406, 410 (5th Cir. 2013). The decision below readily satisfies those factors, as it is an extraordinary overreach that is exceedingly unlikely to survive appeal and, in the meantime, will cause irreparable damage to the League's ability to enforce the parties' agreed-upon CBA in a timely and orderly fashion. Put differently, the six-game suspension approved by the arbitrator will ultimately stand, and no one's interests are served by delaying that discipline based on a misguided order by a district court that lacked jurisdiction.

I. The NFL Is Likely To Prevail On Appeal Because The District Court Plainly Lacked Subject-Matter Jurisdiction Over This Case.

This case should have been dismissed at the outset, as federal courts do not have subject-matter jurisdiction over arbitration awards that have not yet issued. As the district court acknowledged, subject-matter jurisdiction is determined by "the state of things at the time of the action brought," *Grupo Dataflux v. Atlas Glob. Grp.*, 541 U.S. 567, 570-71 (2004), and cannot arise based on post-filing developments, *United States ex rel. Jamison v. McKesson Corp.*, 649 F.3d 322, 328 (5th Cir. 2011). The district court premised its subject-matter jurisdiction on the Labor Management Relations Act ("LMRA"), 29 U.S.C. §185(a). But jurisdiction under the LMRA does not arise until the employee "has exhausted contractual procedures for redress."

Meredith v. La. Fed'n of Teachers, 209 F.3d 398, 402 (5th Cir. 2000); *see also Republic Steel v. Maddox*, 379 U.S. 650, 652 (1965) (employees "must attempt use of the contract grievance procedure agreed upon ... as the mode of redress"). Accordingly, when a CBA provides an arbitration proceeding as "the exclusive and final remedy" for a claimed breach, the employee may not resort to the courts until that procedure has run its course. *Daigle v. Gulf State Utils., Local Union No. 2286*, 794 F.2d 974, 977 (5th Cir. 1986); *see Vaca v. Sipes*, 386 U.S. 171, 184 (1967); Ex.G, §2(d) (Arbitrator's award constitutes "full, final and complete disposition of the dispute").

Here, it is undisputed that the Arbitrator had not issued an award when the NFLPA filed this lawsuit. The NFLPA therefore had not exhausted its contractual remedies, and the court should have dismissed for lack of jurisdiction. Although the district court acknowledged that clear rule, it nonetheless moved ahead, invoking an exception that applies when "the employer's conduct amounts to a repudiation of the remedial procedures specified in the contract." *Rabalais v. Dresser Indus.*, 566 F.2d 518, 519 (5th Cir. 1978). That is plainly wrong.

The "repudiation" exception applies only when the employer denies the existence of the grievance procedures altogether or refuses to provide the employee access to them. *See, e.g.*, *Sidhu v. Flecto Co.*, 279 F.3d 896, 899 (9th Cir. 2002) ("[W]e will excuse the requirement for exhaustion based on repudiation only if the

employer repudiates the specific grievance procedures provided for in the CBA."); *Bailey v. Bicknell Minerals*, 819 F.2d 690, 692 (7th Cir. 1987) ("When one party to an agreement proclaims that it no longer considers the obligation to arbitrate binding, then a request for arbitration is futile; the other party need not waste time but may proceed straight to court."). Finding repudiation when arbitral proceedings are ongoing and the plaintiff seeks to enjoin a "forthcoming" arbitration award "to be issued" is an oxymoron. The very facts that the proceedings are ongoing and an award forthcoming are sufficient to render the repudiation exception inapplicable. Put differently, the repudiation exception is a narrow exception that does not force an employee to await arbitral proceedings that will never happen because the employer has repudiated them. But that exception manifestly does not excuse exhaustion when the arbitral proceedings are ongoing and an award is "forthcoming." That is true no matter how flawed the employee thinks the ongoing proceedings, because the employee's chance to challenge those proceedings, like the award, is "forthcoming."

The law on this is crystal clear. "The fact that [the NFL] actually processed [Elliott's] grievances" fatally "undermines" his "argument ... that [the NFL] repudiated the contract's remedial procedures." *Bache v. Am. Tel. & Tel.*, 840 F.2d 283, 288 (5th Cir. 1988). And the fact that the NFLPA alleged—and the court found—that the NFL somehow breached the CBA by not asking Roberts to include

her personal opinion about Thompson's credibility in the report, Ex.A7-8, is entirely beside the point. That is a dispute about the particulars of the ongoing grievance process, not a repudiation of the process altogether. "An employer can obviously take a stance contrary to that of the employee during the grievance process without being deemed to have repudiated that process." *Rabalais*, 566 F.2d at 520. The district court did not cite a single case finding repudiation when a grievance proceeding was ongoing and the award forthcoming. The reason is obvious: The pendency of the ongoing proceedings is fundamentally inconsistent with a charge of repudiation, which likely explains why the NFLPA did not even make the argument.

The district court's contrary ruling "confuses repudiation of the grievance procedure and a refusal to accept an employee's position with respect to a grievance." *Id.* Converting every substantive disagreement about the CBA into a repudiation would let the repudiation exception swallow the exhaustion rule: "Every dispute would allow the complainant to bypass arbitration because the other side's failure to do as the complainant wishes 'repudiates' the agreement." *Bailey*, 819 F.2d at 692. "It is hard to see how a reasonably careful lawyer could miss the difference between repudiating the agreement to arbitrate (which excuses a demand for arbitration) and disagreeing about the continued effect of some substantive provision of the contract (which does not)." *Id.* Unfortunately, that is just the difference the district court missed. The resulting decision obliterates the first

principle of judicial deference to labor arbitration awards: A court has no jurisdiction to act when the grievance proceedings are ongoing and the award is forthcoming.

The district court alternatively ruled that "the NFLPA properly exhausted its remedies" because it "sought arbitration, submitted requests to the arbitrator, and received a decision from the arbitrator on these requests." Ex.A8-9. But that gets matters backwards. The very fact that Elliott was actively participating in ongoing proceedings underscores that there were viable, ongoing proceedings to exhaust. At most, Elliott had begun the process of exhausting those remedies when the suit was filed. But seeking arbitration and having evidentiary motions denied does not exhaust arbitral remedies any more than filing a lawsuit and having motions in limine denied produces a final judgment. "To be considered 'final,' an arbitration award must be intended by the arbitrator to be [a] complete determination of every issue submitted." *Anderson v. Norfolk & W. Ry. Co.*, 773 F.2d 880, 883 (7th Cir. 1985). It is thus no surprise that neither the NFLPA nor the court cited a single case in which a party was permitted to file suit under the LMRA about a dispute that was submitted to arbitration but not yet finally resolved.

Finally, this jurisdictional defect is not cured by the fact that the Arbitrator has now issued his decision. As the district court itself recognized, Ex.A5 n.4, the "jurisdiction of the court depends upon the state of things at the time of the action brought." *Grupo Dataflux*, 541 U.S. at 570-71. All agree that the Arbitrator had not

issued his ruling when the NFLPA sued. Accordingly, the court did not have jurisdiction, and its order is *ultra vires*. That alone is reason enough to enter a stay.

II. Even If The District Court Had Subject-Matter Jurisdiction, The NFL Is Likely To Succeed On The Merits.

Even assuming the district court had jurisdiction, its decision is manifestly wrong on the merits. Not only does it completely fail to respect the narrowly circumscribed role for courts in reviewing arbitration awards; its findings are also utterly divorced from the reality of the arbitration proceedings.

While this Court typically reviews a decision granting a preliminary injunction for abuse of discretion, this Circuit has endorsed a *de novo* standard of review when a court has enjoined an arbitration award. *United Offshore v. S. Deepwater Pipeline Co.*, 899 F.2d 405, 407 (5th Cir. 1990); *Forsythe Int'l v. Gibbs Oil*, 915 F.2d 1017, 1020-21 (5th Cir. 1990). Because the district court's review of an arbitration award should be "extraordinarily narrow," *de novo* review allows this Court "to assess whether the district court accorded sufficient deference in the first instance, an assessment that a more restrictive appellate review would cripple." *Prestige Ford v. Ford Dealer Comput. Servs.*, 324 F.3d 391, 393 (5th Cir. 2003).

Moreover, this Court's *de novo* review will accord great deference to the arbitrator (as the district court itself should have done). "[A] federal court's review of labor arbitration awards is narrowly circumscribed and highly deferential—indeed, among the most deferential in the law." *NFL Mgmt. Council v. NFLPA*

(*Brady*), 820 F.3d 527, 532 (2d Cir. 2016). "[A]s long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority," the court must enforce the arbitrator's decision—even if the "court is convinced he committed serious error." *Albemarle Corp. v. United Steel Workers*, 703 F.3d 821, 824 (5th Cir. 2013) (quoting *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 38 (1987)). And that deferential standard becomes still more deferential when, as here, an arbitrator's *procedural* rulings are attacked. "[W]hen the subject matter of a dispute is arbitrable," as here, "'procedural' questions which grow out of the dispute and bear on its final disposition are to be left to the arbitrator." *Misco*, 484 U.S. at 40.

Under the highly deferential standard that should have governed, this should have been an exceedingly easy case. The court's sole job was to make sure that the Arbitrator's decisions "even arguably constru[ed] or appl[ied] the contract." *Id.* at 38. Instead, the court engaged in a far different endeavor, unguided by precedent or the parties' agreement, to conduct an *ad hoc* evaluation of whether the Arbitrator's rulings comported with the court's own conception of what procedures would be "fair." Indeed, the district court's freeform, *de novo* "fundamental fairness" analysis did not identify a single aspect of the CBA that the Arbitrator even arguably failed to follow. In reality, the Arbitrator meticulously followed the procedures outlined in the CBA. The League provided Elliott and the NFLPA with an appeal hearing, in

which Elliott was accompanied by counsel and permitted to present relevant evidence, Ex.G, §2(b), and the Arbitrator promptly rendered a written decision, §2(d). The CBA requires nothing more.

The court faulted the Arbitrator for declining to compel production of Roberts' interview notes or of testimony from Thompson or the Commissioner. Each of those decisions, however, was not only *arguably*, but *actually*, grounded in the CBA. First, as for Roberts' notes, the Arbitrator explained that Article 46, §2(f)(ii) specifies what evidence must be disclosed in an arbitration hearing: "the parties shall exchange copies of any exhibits upon which they intend to rely." *See* Ex.C2. That is it. The Arbitrator sensibly interpreted that provision to rule that a party need not produce documents on which it does not intend to rely—an interpretation that he noted "has consistently been applied for many years." *Id.* The Second Circuit addressed this precise issue in *Brady*, holding that the arbitrator's refusal to compel production of the NFL's General Counsel's notes about his role in preparing an investigative report did not constitute "fundamental unfairness." 820 F.3d at 545-47. As that court explained, "had the [NFLPA and NFL] wished to allow for more expansive discovery, they could have bargained for that right." *Id.* at 547. But "they did not, and there is simply no fundamental unfairness in affording the parties precisely what they agreed on." *Id.* In all events, the Arbitrator's decision could not possibly have

undermined the fairness of the proceedings, as Roberts testified at the hearing that all the content of her notes was included in the report. Ex.E1.

As for Thompson's testimony, the CBA does not require the NFL to compel the presence of any witness; nor does it guarantee the player the right to cross-examine anyone. Indeed, Article 46 "does not address the scope of witness testimony at appeal hearings" at all, and instead "leav[es] to the discretion of the hearing officer determination of the scope of the presentations necessary for the hearing to be fair." Ex.C2. That is the best, and certainly at least an arguably correct, interpretation of the CBA. The district court had no authority to override the CBA based on its own personal conception of fundamental unfairness.

Moreover, the Arbitrator specifically considered Elliott's fairness objections, noting that Thompson's testimony was not essential because Elliott had access to all the affidavits, statements, and interview reports on which the Commissioner relied. *See* Ex.C1-2. The court was not permitted to second-guess that factual determination, as federal courts "do not sit to hear claims of factual or legal error by an arbitrator." *Misco*, 484 U.S. at 38. In all events, the Arbitrator's decision was plainly correct: Not only did he lack the authority to compel testimony from a non-party, but nothing was to be gained by forcing the victim of domestic abuse to endure cross-examination from Elliott's attorneys—particularly when the NFLPA's credibility concerns had already been disclosed and forcefully aired.

Finally, as for the Commissioner's testimony, again, the CBA does not require the testimony of *any* witnesses, let alone the Commissioner. If the parties had contemplated that the Commissioner would be required to personally justify his decision to the Arbitrator, surely they would have said so in their CBA. Instead, the CBA allows the Commissioner to consider an appeal of his own decision, Ex.G, §2(a), and presumably does not contemplate that he would provide testimony to himself. When, as here, the Commissioner delegates the appeal, that does not create any greater basis for him to testify. At a bare minimum, in declining to compel the Commissioner to testify, the Arbitrator articulated a contractually permissible approach, explaining that his testimony was unnecessary because the NFLPA had access to all the information on which he relied. The district court did not begin to explain how that ruling could be so far outside the bounds of what the CBA contemplates that it was not even arguably grounded in the CBA. Given that the CBA does not require *any* testimony, there is simply no argument that the Arbitrator flagrantly misapplied the CBA by declining the NFLPA's request.

At any rate, there was no need to compel the Commissioner's testimony to confirm that he understood and considered the investigators' credibility concerns. The investigative report not only exhaustively detailed all discrepancies in the evidence, but also included an exhibit prepared by Roberts herself specifically highlighting conflicts between Thompson's statements and other evidence. *See* ECF

#1-47, #1-48; ECF #2-9 at 70-74. And the disciplinary decision expressly addressed those credibility concerns, explaining that the Commissioner found the evidence as a whole "sufficiently credible ... *even allowing for concerns ... about the complaining witness's credibility*." Ex.F4 (emphasis added). The Arbitrator thus acted well within his broad discretion in finding that all information bearing on Thompson's credibility was before the Commissioner and that nothing would be gained from requiring the Commissioner to confirm what was already evident from his decision—namely, that there never was any conspiracy to shield him from the reality that this matter could not be resolved based on the statements of Elliott and Thompson alone. The district court's "fundamental fairness" ruling thus not only oversteps the judicial role, but is utterly divorced from the reality of what the arbitration proceeding entailed.

III. The Equities Favor A Stay.

The NFL will suffer irreparable harm absent a stay. The NFL and NFLPA collectively bargained for a disciplinary process that allows the Commissioner to discipline players for engaging in "conduct detrimental to the integrity of, or public confidence in, the game of professional football." Ex.G, §1(a). That agreement recognizes that unremedied misconduct is detrimental to the game of football, and that the Commissioner must be able to promptly and effectively remedy such misconduct. The district court's decision undermines that bargained-for authority,

communicating to the players and the NFLPA that the Commissioner's disciplinary authority (not to mention the first-filed rule) can be easily subverted by filing premature and meritless lawsuits. If Elliott is able to forestall the Commissioner's decision by filing prematurely in his favored forum and asserting that every missed game is an irreparable injury, it is difficult to fathom any case in which a player could not delay his discipline for a full season simply by filing a lawsuit—which would undermine the CBA's disciplinary process and Congress' preference for "private settlement of labor disputes." *Misco*, 484 U.S. at 37.

By contrast, the NFLPA and Elliott will not suffer irreparable harm if a stay is granted. The NFLPA claims that Elliott's suspension will cause him to miss work and cost him current and future earnings. Ex.K12-13. But "temporary loss of income ... does not usually constitute irreparable injury." *Sampson v. Murray*, 415 U.S. 61, 90 (1974). That rule applies with full force to professional athletes; there is no "satisfactory basis for distinguishing football players from other organized workers," *Brown v. Pro Football, Inc.*, 518 U.S. 231, 249-50 (1996), all of whom could allege the exact same harm if suspended or fired.

Nor is the "reputational harm" that Elliott alleged "the type of irreparable injury ... predicate to the issuance of a temporary injunction." *Sampson*, 415 U.S. at 91-92. And to the extent Elliott has suffered reputational harm, that is due principally to his own decision to publicly release the League's investigative report

detailing his misconduct, not from the suspension imposed as a consequence of that misconduct.

Finally, while there is public interest in a player's participation in six of his team's football games, that interest pales in comparison to the public's interest in preventing domestic violence and the Commissioner's ability to punish and deter such violence. Moreover, given that the order below faulted the arbitral process for its procedural unfairness, not for missing some substantive obstacle to a suspension, there is every prospect that Elliott will have to serve his suspension sooner or later. And no one—not the fans, the League, or Elliott himself—will be served by having that suspension served later in the season or even next season, rather than now.

The bottom line is that the order below, which deviates from the most basic principles of deference to bargained-for arbitral processes, is exceptionally unlikely to stand. It is both *ultra vires* and deeply flawed on the merits. In recognition of that reality, this Court should stay the order immediately and promptly reverse it. To minimize disruptive uncertainty, the NFL requests a stay ruling ideally by September 19, 2017 (when Week 3 practices begin), but no later than September 26, 2017 (Week 4). The NFL stands ready to brief the appeal with whatever degree of expedition this Court deems appropriate. But the process of remedying the district court's massive overreach should begin as promptly as possible by staying its unprecedented and indefensible order.

CONCLUSION

This Court should stay the injunction.

Respectfully submitted,

s/Paul D. Clement

PAUL D. CLEMENT
Counsel of Record
ERIN E. MURPHY
SUBASH S. IYER
MICHAEL D. LIEBERMAN
KIRKLAND & ELLIS LLP
655 Fifteenth Street, NW
Washington, DC 20005
(202) 879-5000
paul.clement@kirkland.com

ERIC GAMBRELL
PATRICK G. O'BRIEN
AKIN GUMP STRAUSS
HAUER & FELD LLP
1700 Pacific Avenue
Suite 4100
Dallas, TX 75201
(214) 969-2800
egambrell@akingump.com

DANIEL L. NASH
NATHAN J. OLESON
AKIN GUMP STRAUSS
HAUER & FELD LLP
1333 New Hampshire Ave, NW
Washington, DC 20036
(202) 887-4000
dnash@akingump.com

Counsel for Defendants-Appellants

September 15, 2017

CERTIFICATE OF COMPLIANCE

Pursuant to Fifth Circuit Rule 27.3, I hereby certify that the facts supporting emergency consideration of the motion are true and complete.

Pursuant to Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure, I hereby certify that the textual portion of the foregoing motion (exclusive of the disclosure statement, tables of contents and authorities, certificates of service and compliance, but including footnotes) contains 5,197 words as determined by the word counting feature of Microsoft Word 2016.

I certify that the required privacy redactions have been made pursuant to 5th Cir. R. 25.2.13, the electronic submission is an exact copy of the paper submission, and the document has been scanned for viruses with Windows Defender, last updated September 15, 2017, and is free of viruses.

s/Paul D. Clement
Paul D. Clement

CERTIFICATE OF SERVICE

I hereby certify that on September 15, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the CM/ECF system. I certify that service will be accomplished by the CM/ECF system or by electronic mail.

s/Paul D. Clement
Paul D. Clement