No. 17-40936

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NATIONAL FOOTBALL LEAGUE PLAYERS ASSOCIATION,
ON ITS OWN BEHALF AND ON BEHALF OF EZEKIEL ELLIOTT,
PLAINTIFF-APPELLEE

v.

NATIONAL FOOTBALL LEAGUE; NATIONAL FOOTBALL LEAGUE MANAGEMENT COUNCIL,
DEFENDANT-APPELLANTS.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS, NO. 4:17-CV-00615

RESPONSE TO EMERGENCY MOTION FOR STAY PENDING APPEAL

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CERTIFICATE OF INTERESTED PERSONS

NFLPA, on its own behalf and on behalf of Ezekiel Elliott v. NFL & NFLMC
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. Petitioner-Appellee: The National Football League Players Association, on its own behalf and on behalf of Ezekiel Elliott. Pursuant to Federal Rule of Appellate Procedure 26.1, Appellee National Football League Players Association hereby certifies that it is a non-profit corporation organized under the laws of the Commonwealth of Virginia, that it has no parent corporation, and that no publicly held corporation owns ten percent or more of its stock.

2. Defendants-Appellants: The National Football League, The National Football League Management Council.

3. Counsel for Plaintiff-Appellee: Winston & Strawn LLP (Jeffrey L. Kessler, David L. Greenspan, Steffen N. Johnson, Thomas M. Melsheimer, Jonathan J. Amoona, Angela A. Smedley); Gibson, Dunn & Crutcher LLP (Andrew S. Tulumello); Jackson Walker LLP (David Folsom, David T. Moran).

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Appellee National Football League Players Association hereby certifies that it is a non-profit corporation organized under the laws of the Commonwealth of Virginia, that it has no parent corporation, and that no publicly held corporation owns ten percent or more of its stock.

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INTRODUCTION

The district court preliminarily enjoined an NFL player's suspension resulting from an arbitration proceeding that was "infected" by "fundamental unfairness … from the beginning," presenting circumstances "unmatched by any case this Court has seen"—including the NFL's conspiring to suppress exculpatory evidence. Ex.A18-19.[1] The NFL's Emergency Motion for Stay Pending Appeal ("Motion") seeks to upend the status quo and does not come close to meeting this Court's standards for such extraordinary relief.

It is for good reason that the Motion gives short-shrift to the equitable requirements for a stay: The NFL faces *no* irreparable harm should Ezekiel Elliott continue to practice and play pending appeal. If the NFL were to ultimately prevail, it could simply impose the suspension later this season or next. Elliott practiced and played for a *year* while the NFL investigated him; the NFL then permitted him to practice and play *after* his disciplinary appeal was denied; and it is the ordinary course for NFL players to play while challenging discipline. Maintaining this status quo weighs strongly against a stay.

Nor can the NFL carry its burden to demonstrate that a stay would not substantially injure Elliott or other interested parties (the Cowboys and its fans). This

[1]Exhibits herein are lettered as a continuation of the NFL's Ex. List (Doc. 0051415779483).

Court should defer to the district court's careful fact-finding: Elliott stands to lose nearly half a season in a career that is notoriously short and precarious, and competitive opportunities are irretrievable once lost.

The public interest also weighs against a stay. The Order *promotes* federal labor policy by enforcing Elliott's labor law rights to a fundamentally fair arbitration.

Unable to satisfy the mandatory requirement of irreparable harm or the other equitable requirements for obtaining a stay, the NFL attempts to change the subject. The NFL headlines its Motion with the assertion that "no court challenge may be filed until *after* the arbitrator has ruled." Motion 1. But the NFL supplies no authority supporting this claim, and it runs headlong into both established exceptions to exhaustion and a wealth of recent Supreme Court authority distinguishing between genuinely jurisdictional rules and claims-processing rules or equitable rules, like the one at issue here. *E.g.*, *Rabalais v. Dresser Indus., Inc.*, 566 F.2d 518, 519 (5th Cir. 1978) (per curiam) (employees "may bring suit without exhaustion" where "the employer's bad faith or misconduct in ignoring the grievance procedure" amounts to "a repudiation of the remedial procedures specified in the contract"); *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 502, 515-16 (2006) ("when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the

restriction as nonjurisdictional in character").[2] Indeed, the NFL's leading case *found* jurisdiction without exhaustion because the employer had "repudiated the contractual procedures" it asserted should have been followed. *Meredith v. La. Fed'n of Teachers*, 209 F.3d 398, 402-03 (5th Cir. 2000).

The Petition alleged *existing* CBA violations when it was filed, and that was sufficient to confer jurisdiction under the Labor Management Relations Act ("LMRA"). With respect to exhaustion, under the circumstances of *this* case, where the NFL conspired to suppress exculpatory evidence from the beginning of the appeal process, the district court properly found that Elliott did not have to exhaust given the NFL's repudiation. In any event, as the district court held, "the NFLPA properly exhausted its remedies." Ex.A8. As the NFL concedes, Henderson's evidentiary denials were "full, final and complete" when Elliott filed the Petition. Motion 4. The notion that Elliott must suffer irreparable harm from an arbitral suspension before even *seeking* judicial relief has no precedent. The NFL identifies not one court that has turned away a petitioner in circumstances like these, where the arbitral process was exhausted and rendered nugatory, and irreparable harm was imminent. Indeed, because exhaustion is an equitable doctrine—not a jurisdictional

[2]Unless otherwise noted, emphasis has been added to quotations and internal citations and quotations are omitted.

requirement—it does not apply here, where the arbitral award issued *before* preliminary relief was granted, rendering any exhaustion argument moot.

As for fundamental unfairness, the NFL concedes it is a recognized ground for vacating labor awards under binding Fifth Circuit precedent. Moreover, the district court respected that "it is a narrow exception and rare circumstance [in] which a court interferes with an arbitral award," but concluded that "this case presents unique and egregious facts, necessitating court intervention." Ex.A14. Indeed, if an arbitration proceeding involving a conspiracy to conceal exculpatory evidence and the denial of the most essential witnesses and documents does not constitute fundamental unfairness in accordance with the narrow and specific grounds set forth in the Federal Arbitration Act ("FAA") and LMRA, it is hard to imagine what would.

BACKGROUND

In July 2016, the Columbus, Ohio Police Department investigated allegations by Tiffany Thompson that Elliott had physically abused her several times during the week of July 16, 2016. Ex.A2. Law enforcement officers found no probable cause to arrest Elliott "[d]ue to conflicting variations of what happened." Ex.R7. Thereafter, the Columbus City Attorney's office conducted its own extensive investigation and concluded that "[a]fter reviewing the totality of the evidence," it was "declining to approve criminal charges . . . primarily due to conflicting and inconsistent information across all incidents . . . ." Ex.S1; *see also* Ex.A2.

The NFL nonetheless proceeded with its own investigation. NFL Commissioner Roger Goodell unilaterally promulgates a Personal Conduct Policy ("PCP") setting forth what he considers to be "conduct detrimental" to the NFL. The Commissioner takes the position that he may discipline a player for "conduct detrimental" in the absence of criminal charges, but only if "credible evidence establishes that [the player] engaged in conduct prohibited by th[e] [PCP]." Ex.A2.

The NFL's investigation was co-led by its Director of Investigations Kia Roberts and Special Counsel for Investigations Lisa Friel. Ex.A2. Roberts conducted all but one fact interview (22 in total)—including six with Thompson, the lone accuser. *See* ECF1-47 and 1-48.[3] League investigators took notes for all six interviews. *See* Ex.T2. Although Roberts' conclusion was concealed from Elliott, the NFLPA, the Cowboys, and the Commissioner, her review of the evidence and substantial experience as a former prosecutor led to her judgment that "Thompson's accusations were incredible, inconsistent, and without corroborating evidence to sufficiently support any discipline against Elliott." Ex.A3.

Roberts and Friel's investigation lasted nearly one year, culminating in the June 6, 2017 Investigation Report ("Elliott Report"). Ex.A2; ECF#1-47 and #1-48.

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

The Elliott Report "made an unusual departure from what [the NFL] had done in past investigations and did not include recommendations from either investigator." Ex.A16. The decision to exclude Roberts' and Friel's recommendations from the Elliott Report was made by "Friel, along with counsel"—not the Commissioner, as the NFL implies. *Id.*

The NFL held a meeting to present the findings of the Elliott Report to the Commissioner, but Roberts was excluded. Ex.A16-17. At that meeting, Friel offered the Commissioner her contrary opinion that discipline should be imposed. *Id.*

On June 26, the NFL convened another meeting—attended by NFL personnel, a panel of outside expert advisors to the Commissioner, Elliott, and NFLPA counsel. Ex.U1-3. Roberts was excluded from this meeting too. Ex.A17. One of Goodell's advisors asked Friel about the NFL investigators' conclusions about the credibility of Thompson's allegations and Friel again chose not to disclose Roberts' conclusion that Thompson's allegations were incredible and unsupported by corroborating evidence. Ex.U152-53.

On August 11, Commissioner Goodell suspended Elliott for six games. Ex.A2. Elliott appealed his discipline under Article 46 of the CBA. The NFL could

not effectuate the discipline until "after giving [Elliott] the opportunity for a hearing." NFL Player Contract ¶ 15;[4] *see also* Ex.G .

Article 46 provides that Goodell or his designee may serve as the arbitrator. Goodell appointed Harold Henderson—the former head of Respondent NFL's Management Council—to serve as arbitrator for Elliott's appeal. Henderson's partiality is beyond question, but it is not the basis of Elliott's vacatur claim.

Elliott had the burden to show that "Goodell's disciplinary decision was arbitrary and capricious." Ex.A3. The heart of the appeal under the PCP's "credible evidence" standard was whether Thompson, or Elliott, was lying about the alleged abuse. Before the hearing, Elliott moved to compel the production of Thompson as a witness and the investigation notes of her six interviews. Henderson denied both requests. *Id.*

Elliott also sought Roberts' testimony, although neither Elliott nor the NFLPA knew then about Roberts' conclusion that the NFL lacked credible evidence to impose discipline. The NFL had refused to produce Roberts as a witness, arguing her testimony "was cumulative and unnecessary." *Id*. Henderson ultimately ordered Roberts to testify. *Id.*

[4]Available at https://nfllabor.files.wordpress.com/2010/01/collective-bargaining-agreement-2011-2020.pdf.

Elliott first discovered Roberts' conclusion that there was insufficient credible evidence to support discipline during the arbitration, while examining Roberts and Friel. Ex.A7-8, 16-17. This evidence was startling and exculpatory, not "cumulative and unnecessary." Ex.A3.

The arbitration exposed that "the NFL, at the *very least*, turned a blind eye to Roberts's dissenting opinion," and at worst conspired to conceal her conclusions from Goodell. *Id.* at 16-17. Indeed, "not only were Roberts's recommendations excluded from the [Elliott] report, they were also kept from Commissioner Goodell and his advisors." *Id.* at 17.[5] "Following this revelation, the NFLPA asked Henderson to compel Commissioner Goodell to testify to determine whether critical facts were concealed from Commissioner Goodell during the decision-making process" because Henderson had indicated he would defer to the Commissioner's fact-finding.[6]

On August 31, the arbitration ended, the record closed, and Henderson announced that his decision would follow shortly. Ex.A4. As the NFL concedes, Henderson's previous rulings on "compelling witnesses, conducting cross-examination, [and] introducing evidence" "constitute[d] 'full, final and complete disposition'" of

[5]The NFL's assertion that "Friel also testified that the Commissioner was made aware of Roberts' concerns" is belied by Friel's actual testimony. Ex.A17n.9.

[6]Goodell has previously been ordered to testify in Article 46 appeals. Ex.X2.

those matters. Motion 4. At the time, Elliott was threatened by an imminent suspension from practicing or playing for the Cowboys. That night, Elliott filed the Petition to prevent this irreparable harm.

On September 5, Henderson issued the arbitral award affirming Elliott's six-game suspension. Ex.B ("Award"). Henderson emphasized deference to the Commissioner's findings. *Id.* at 7-8. However, because Henderson's evidentiary rulings left the arbitral record devoid of evidence that Goodell even knew about Roberts' conclusion that Thompson was incredible and the NFL otherwise lacked corroborating evidence to impose discipline, Henderson resigned himself to blindly "support *whatever* determinations [the Commissioner] made." *Id.* at 8.

Three days *after the Award came down*, based upon "unique and egregious facts necessitating court intervention," the district court granted a preliminary injunction. Ex.A14. The district court recognized that review of arbitration decisions is limited, but "[t]he circumstances of this case are unmatched by any case this Court has seen." *Id.* at 18. "Fundamental unfairness is present throughout the entire arbitration process. . . . At every turn, Elliott and the NFLPA were denied the evidence or witnesses needed to meet their burden. Fundamental unfairness infected this case from the beginning, eventually killing any possibility that justice would be served." *Id.* at 19.

STANDARD OF REVIEW

A stay is an "intrusion into the ordinary processes of administration and judicial review." *Nken v. Holder*, 556 U.S. 418, 427 (2009). The NFL carries the burden to establish (1) it has made a "strong showing" that it is likely to succeed on the merits; (2) it will be irreparably injured absent a stay; (3) issuance of a stay will not substantially injure other parties interested in the proceeding; and (4) a stay aligns with the public interest. *See Patino v. City of Pasadena*, 677 F. App'x 950, 951 (5th Cir. 2017). "[T]he maintenance of the status quo is [also] an important consideration in granting a stay." *Barber v. Bryant*, 833 F.3d 510, 511 (5th Cir. 2016).

This Court has further instructed that "if the balance of equities . . . is not *heavily tilted* in the movant's favor, the movant must then make a *more substantial showing* of likelihood of success on the merits in order to obtain a stay pending appeal." *Ruiz v. Estelle*, 650 F.2d 555, 565–66 (5th Cir. 1981); *see also Ibe v. NFL*, 2015 WL 11110849, at *1 (N.D. Tex. May 7, 2015).

The Court reviews the issuance of a preliminary injunction for an abuse of discretion. *See Daniels Health Scis., L.L.C. v. Vascular Health Scis., L.L.C.*, 710 F.3d 579, 582 (5th Cir. 2013); *United States v. Transocean Deepwater Drilling, Inc.*, 537 F. App'x 358, 360 (5th Cir. 2013). "Findings of fact that support the district

court's decision are examined for clear error, [and] conclusions of law are reviewed *de novo*." *Daniels*, 710 F.3d at 582.[7]

ARGUMENT

I. The NFL's Motion Is Premature and Deficient.

One-upping its demonstrated disregard for due process, the NFL declined to wait for Judge Mazzant—who has been presiding over a complex, bifurcated, three-week jury trial—to rule on its stay motion. The Motion fails to comply with Federal Rule 8(a)(2)(A)(ii). "As an appellate court, we cannot take evidence or hear matters initially. We are dependent entirely on the record made in a trial court." *In re Montes*, 677 F.2d 415, 416 (5th Cir. 1982); *Ruiz*, 650 F.2d at 567. As shown below, the preliminary injunction imposes no threat to the NFL, and there is nothing to justify departing from Rule 8. The NFL's failure to wait supports denying a stay.

[7]The NFL's contention that this court should depart from its "typical[]" preliminary injunction standard is without merit and based on inapposite cases. NFL Mot. at 15 (citing *United Offshore Co. v. S. Deepwater Pipeline Co.*, 899 F.2d 405, 407 (5th Cir. 1990) (order enjoining arbitration proceeding reviewed *de novo* because central issue was arbitrability of dispute); *Forsythe Int'l v. Gibbs Oil*, 915 F.2d 1017, 1020-21 (5th Cir. 1990) (reviewing final vacatur decision *de novo*); *Prestige Ford v. Ford Dealer Comput. Servs.*, 324 F.3d 391, 393 (5th Cir. 2003) (same)).

II. The Balance of Equities Tilts Heavily *Against* The NFL.

The equities likewise favor denial of a stay. As here, "[p]reliminary injunctions commonly favor the status quo and seek to maintain things in their initial condition so far as possible until after a full hearing permits final relief to be fashioned."*Wenner v. Texas Lottery Comm'n*, 123 F.3d 321, 326 (5th Cir. 1997). The NFL does not dispute that a stay would undo the district court's preservation of the status quo, or that it must establish equitable considerations justifying a stay.

1. The NFL Faces No Irreparable Harm

One of "the most critical" factors in obtaining a stay is whether the movant "will be irreparably injured absent a stay." *Barber*, 833 F.3d at 511. This is an unbending requirement: "simply showing some 'possibility of irreparable injury' fails to satisfy" the NFL's burden. *Nken*, 556 U.S. at 434.

The NFL argues it is harmed by judicial intrusion into the CBA arbitration process. Motion 20-21. But the LMRA expressly contemplates judicial intervention to enforce—not undermine—CBA arbitration. Indeed, the district court found that an injunction would *benefit* the NFL because it has an "interest in ensuring that suspensions meted out under the [PCP] are not tainted by [fundamental unfairness] and wrongdoing." Ex.A20. This was not clear error.

The NFL is unharmed from Elliott's participation in practices and games during the pendency of this appeal. Indeed, it is standard practice for NFL players to

play games while they challenge pending discipline—through grievance procedures and, occasionally, through the courts. The CBA authorizes conduct detrimental suspensions "only after giving Player the opportunity for a hearing," illustrating that practicing and playing while challenging discipline does not harm the NFL.

For example, in *NFL Mgmt. Council v. NFLPA*, 125 F. Supp. 3d 449 (S.D.N.Y. 2015), a district court vacated a four-game suspension which was re-instated seven months later by the Second Circuit. *NFL Mgmt. Council v. NFLPA* ("*Brady*"), 820 F.3d 527 (2d Cir. 2016). In the interim, Brady played the entire NFL season. The NFL neither sought a stay nor claimed irreparable harm. It simply suspended Brady later.

Here, the NFL investigated Thompson's accusations against Elliott for nearly a *year*, during which Elliott practiced and played. Even after Henderson upheld Goodell's discipline, the NFL decided to permit Elliott to play in the Cowboys' opening game regardless of the outcome of the district court's preliminary injunction ruling. The NFL cannot now credibly claim it will suffer irreparable harm if Elliott plays while its appeal is considered.

2. A Stay Will Substantially Injure Other Interested Parties

Elliott, by contrast, would be irreparably harmed by a stay. Elliott presented testimony—and the district found—that NFL careers are "short and precarious," and

a suspension will "deprive[] Elliott of the ability to achieve individual successes and honors," and compound the injury to his reputation. Ex.A19-20; Ex.V¶¶6-10.

The district court thus "join[ed] the long line of cases that have previously held that improper suspensions of professional athletes can result in irreparable harm to the player." Ex.A19-20 (collecting cases); *Haywood v. NBA*, 401 U.S. 1204, 1205 (1971). By way of rejoinder, the NFL offers nothing more than a straw man argument about lost wages.

The NFL also ignores the undisputed evidence that a stay would substantially harm one of its members —the Cowboys, who would lose a central player to the team's competitive success. *See NFLPA v. NFL* ("*Williams*"), 598 F. Supp. 2d 971, 982 (D. Minn. 2008) ("*Williams*"); Ex.W¶7.

3. The Public Has No Interest In Enforcing Fundamentally Unfair Arbitrations

The NFL concedes the public's interest in Elliott playing in Cowboys games. Motion 22. What the NFL ignores is the public's interest in fundamentally fair dispute resolution—upholding an arbitration award "infected" by fundamental unfairness that "kill[ed] any possibility that justice would be served" is anathema to public interest. Ex.A19.

Preserving the status quo further weighs against a stay. *Texas v. United States*, 809 F.3d 134, 187 (5th Cir. 2015), *aff'd by an equally divided court*, 136 S. Ct. 2271 (2016).

III. The NFL Has Not Made A "Substantial Showing" Of Success.

A. The Court Possessed Jurisdiction Over The Petition.

Section 301 of the LMRA provides district courts with subject-matter jurisdiction over "[s]uits for violation of contracts between an employer and a labor organization." 29 U.S.C.A. § 185(a), (c). A "[S]ection 301 claim must satisfy three requirements: (1) a claim of violation of (2) a contract (3) between an employer and a labor organization." *Carpenters Local Union No. 1846 of United Bhd. of Carpenters & Joiners of Am., AFL-CIO v. Prat-Farnsworth, Inc.*, 690 F.2d 489, 500 (5th Cir. 1982). "An allegation of a labor contract violation is *sufficient* to support subject-matter jurisdiction under [S]ection 301(a)." *Hous. Refining, L.P. v. United Steel, Paper & Forestry, Rubber, Mfg.*, 765 F.3d 396, 402 (5th Cir. 2014). As the district court held, the NFL and Henderson had violated the CBA *before* Elliott filed the Petition, at which point Henderson's (un)fairness rulings were "full, final and complete" (Motion 4), the arbitral record was closed, and jurisdiction was satisfied. *See* Ex.A8

The NFL attempts to impose a jurisdictional bar on Elliott that does not exist. Citing *Meredith*, the League contends the district court lacked subject matter jurisdiction because Elliott purportedly failed to exhaust the CBA's contractual remedies. Motion 10-11. This is wrong on several levels.

First, the NFL conflates exhaustion with subject matter jurisdiction. Exhaustion is a prudential doctrine that yields in the face of a showing of futility, inequity or mootness. *Meredith* itself *found* jurisdiction without exhaustion because the employer had "repudiated the contractual procedures" it asserted should have been followed. 209 F.3d at 402-03. Indeed, *Meredith* held that the employer was "*estopped* from raising the defense of non-exhaustion" —further confirming that exhaustion is *non*-jurisdictional and equitable. *Id*. at 402; *see also Vaca v. Sipes*, 386 U.S. 171, 185 (1967) ("the employer is *estopped* by his own conduct"). "Subject-matter jurisdiction can never be waived." *Gonzalez v. Thaler*, 565 U.S. 134, 141 (2012).

Recent Supreme Court authority further compels the conclusion that exhaustion is not a jurisdictional prerequisite under the LMRA. As that authority explains, the term "jurisdictional" has been distorted by overuse. *Arbaugh*, 546 U.S. at 511 ("this Court and others have been less than meticulous" in using the term "jurisdictional"). And "[b]ecause the consequences that attach to the jurisdictional label may be so drastic," the Court has undertaken "to bring some discipline to the use of this term" and has "encouraged federal courts and litigants to facilitate clarity by using the term 'jurisdictional' only when it is apposite." *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 435 (2011); *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 161 (2010).

The leading case is *Arbaugh v. Y&H Corp.*, which sets forth a "readily administrable bright line" test for determining whether a threshold requirement may be considered jurisdictional:

> If the Legislature clearly states that a threshold limitation on a statute's scope shall count as jurisdictional, then courts and litigants will be duly instructed and will not be left to wrestle with the issue. … But when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character.

546 U.S. at 502, 511, 515-16; *see also id.* at 511; *cf. Reed*, 559 U.S. at 161–62 (courts have been careless in "mischaracteriz[ing] claim-processing rules or elements of a cause of action as jurisdictional limitations"). Reviewing the LMRA's exhaustion requirement under *Arbaugh* and its progeny, "[courts] look to see if there is any 'clear' indication that Congress wanted the rule to be 'jurisdictional.'" *Henderson*, 562 U.S. at 435-36. Here, there is not.

The LMRA's discussion of the grievance process contains no jurisdictional label, and the LMRA's jurisdictional provision contains no mention of exhausting *any* remedies. 29 U.S.C. §§ 171(c), 173(d), 185(c).. Where the disputed "jurisdictional" requirement does not "speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts," "nonjurisdictional treatment" is warranted. *Reed*, 559 U.S. at 165-66; *accord Gulf Restoration Network v. Salazar*, 683 F.3d 158, 171-72 (5th Cir. 2012) (finding that a requirement to "exhaust … administrative remedies

before seeking judicial review" was "not a jurisdictional limitation, but rather is a jurisprudential provision").[8]

Second, that exhaustion is nonjurisdictional is confirmed by the fact that it is not required where it "would be futile." *Rabalais*, 566 F.2d at 519; *see also*, *e.g.*, *Glover v. St. Louis-San Francisco Ry. Co.*, 393 U.S. 324, 330 (1969). Moreover, it is well established that employees "may bring suit without exhaustion" where "the employer's bad faith or misconduct in ignoring the grievance procedure" amounts to "a repudiation of the remedial procedures specified in the contract." *Rabalais*, 566 F.2d at 519.

That exception applies in spades here. The district court found the LMRA exhaustion exception applicable because "[t]he allegations that the NFL withheld evidence from the NFLPA and Elliott amount to a repudiation of the required procedures specified in the CBA."Ex.A6-7. This included the NFL's efforts "to ensure that the NFLPA and Elliott would never find out about Roberts's opinions," which they did not until "the end of the second day of arbitration." *Id.* at 8. In such unique circumstances, where the arbitral process was rendered nugatory, and the player

[8]This Circuit has repeatedly applied *Arbaugh* to identify non-jurisdictional requirements. *E.g. Geophysical Serv., Inc. v. TGS-NOPEC Geophysical Co.*, 850 F.3d 785, 791 (5th Cir. 2017) ("[b]ecause the [Copyright Act's] domestic boundary is not 'clearly state[d] … as jurisdictional,' we 'treat the restriction as nonjurisdictional'"); *E.E.O.C. v. Agro Distrib., LLC*, 555 F.3d 462, 469 (5th Cir. 2009) ("To the extent that older cases … hold that failure to conciliate can deprive courts of subject matter jurisdiction, they have been implicitly overturned by *Arbaugh*.").

faced imminent and irreparable harm, the district court properly found that equitable considerations rendered exhaustion unnecessary.

Indeed, this Circuit has expressly recognized that, in extraordinary cases, courts may "intervene into the arbitral process prior to issuance of an award," including in circumstances where an arbitration procedure "so skewed the process in [the employer's] favor that [the employee] has been denied arbitration in any meaningful sense of the word. To uphold the promulgation of this aberrational scheme under the heading of arbitration would undermine, not advance, the federal policy favoring alternative dispute resolution." *Gulf Guar. Life Ins. Co. v. Conn. Gen. Life Ins. Co.*, 304 F.3d 476, 486, 488 n.8 (5th Cir. 2002); *accord* 13D C. Wright, A. Miller, & E. Cooper, *Fed. Prac. & Proc.* § 3581 (3d ed. 2017). As the district court correctly found, after carefully reviewing the unique facts presented, this is one such extraordinary case.

Third, as the district court held, "even if the Court required exhaustion in this case, the NFLPA properly exhausted its remedies." Ex.A8. Before filing the Petition: Elliott initiated the arbitration; presented his requests for pertinent and material—indeed, essential and exculpatory—evidence to the arbitrator; the arbitrator rendered "full, final and complete" orders denying Elliott's requests; and the arbitral record was closed. Thus, when Elliott filed this suit, there was nothing left for him to exhaust.

Moreover, the district court still did not act until *after* the Award issued—mooting any equitable exhaustion concern. The NFL has not identified a single case requiring that an employee do anything more to exhaust his arbitral remedies.

B. The Arbitration Was So Fundamentally Unfair That It Violated The LMRA

The NFL does not deny that this Circuit recognizes fundamental unfairness as a ground for vacating labor arbitrations. Motion 15-20. Courts in LMRA actions look to the FAA, Section 10(a)(3), which provides that "[a]n arbitration is fundamentally unfair when, among other things, 'the arbitrators [were] guilty of misconduct … in refusing to hear evidence *pertinent and material* to the controversy.'" Ex.A14 (quoting 9 U.S.C. § 10(a)(3)); *Gulf Coast Indus. Workers Union v. Exxon Co., USA*, 70 F.3d 847, 850 (5th Cir. 1995) (confirming vacatur of labor award based on FAA Section 10(a)(3)). Arbitrators' duties of fundamental fairness arise not from their interpretation of a CBA, but on courts' interpretation of the LMRA (as informed by the FAA).

While "not bound to hear all of the evidence tendered by the parties … [the arbitrator] must give each of the parties to the dispute an adequate opportunity to present its evidence and arguments." *Forsythe*, 915 F.2d at 1023. "The arbitrator must also ensure that each party has all relevant documentary evidence, and if a party shows prejudice, the failure to do so can constitute grounds to vacate under the

FAA." Ex.A14 (citing *Universal Comput. Sys., Inc. v. Big Bell 21, LLC,* 2014 WL 12603178, at *4 (S.D. Tex. Jan. 29, 2014)).

The NFL wrongly portrays judicial deference to arbitration as a rubber stamp for arbitrator misconduct. And it wrongly portrays the district court's injunction as cavalier, apparently unable to come to grips with the court's reasoned findings that the arbitral proceedings were "egregious," "unmatched by any case this Court has seen," and "kill[ed] any possibility that justice would be served." Ex.A14,18-19. Far from applying "its own personal conception of fundamental fairness" (Motion 18), the court employed a case-specific and FAA-grounded approach, concluding that the denial of "material and pertinent" evidence under the unique circumstances of this case "amounts to serious misconduct by the arbitrator"—*i.e.*, the very test embodied in the FAA. Ex.A15,18. The NFL chastises Judge Mazzant for reviewing the arbitral record in making these findings, but how else would a court fulfill its duty to assess fundamental fairness?

Further, the NFL's argument rests on an inapposite test—whether "the arbitrator is even arguably construing or applying the contract." Motion 16 (citing *Albemarle Corp. v. United Steelworkers,* 703 F.3d 821, 824 (5th Cir. 2013)). *Albemarle*, however, concerned a vacatur decision based on the arbitrator's alleged defiance of the "essence of the agreement," *i.e.*, ignoring CBA provisions. Essence-of-the-agreement is *not* the vacatur ground that the district court applied here. *Gulf*

Coast Industry Workers, a leading case in this Circuit assessing fundamental fairness in labor arbitrations, does not employ the inapplicable "arguably construing"/essence-of-the-agreement test. *See generally* 70 F.3d 850.

Against the *sui generis* backdrop of the NFL's suppression of exculpatory evidence, the district court correctly held that "Henderson breached the CBA" by denying Elliott "access to the investigators' notes, Thompson's cross-examination, and the examination of Commissioner Goodell" because "each was of utmost importance and extremely relevant to the hearing." Ex.A8.

First, with respect to Henderson's denial of Elliott's request for testimony from his accuser, the court explained that "where credibility is questioned and a dissenting opinion regarding the case and the credibility of Thompson are withheld from, at a minimum, the NFLPA and Elliott, the ability to cross-examine Thompson is both material and pertinent." Ex.A18.

Second, the fundamental unfairness of Henderson's refusal to compel Thompson's testimony was compounded by his refusal to compel the NFL to produce the notes of its interviews with her. If those notes were not exculpatory, why else would the NFL refuse to disclose such obviously material and pertinent documents?

Third, the denial of Elliott's request for testimony from Goodell regarding what he knew about Roberts' conclusions—when the Arbitrator was deferring to Goodell's fact-finding, "whatever" that might have been (Ex.B8)—deprived Elliott

of fundamental fairness because it was "material and pertinent to question Commissioner Goodell" where "the evidence that was in front of the Commissioner still remains unclear." Ex.A18.[9]

The NFL's claim that Goodell "understood and considered the investigators' credibility concerns" because they were "detailed" in the investigative report is misleading. Motion 19. Friel's and Roberts' "credibility concerns" about Thompson are far different from Goodell knowing Roberts' *conclusion*—based on the 22 witness interviews *she* conducted, her review of the medical and forensic evidence, and her experience as a prosecutor—that there was no credible evidence to discipline Elliott. That conclusion—and Roberts herself—were concealed from Goodell and his advisors.

Brady supports no different result. There, the Second Circuit found that the witness that was denied was merely "*collateral to* the issues at arbitration." *Brady*, 820 F.3d at 546-47. *Brady* does, however, reinforce how the NFL improperly conflates the "arguably construing"/essence-of-the-agreement standard with the fundamental fairness test:

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[9]Henderson's witness denials underscore why the NFL's "arguably construing" the CBA test does not fit. In denying Elliott's motions to compel, Henderson held that "Article 46 does not address the scope of witness testimony at appeal hearings, leaving to the discretion of the hearing officer determination of the scope of the presentations necessary for the hearing to be fair, including compelling the attendance of witnesses." Ex.C2. In other words, there was no CBA provision about witness attendance for Henderson to "arguably construe."

> There is little question that the exclusion of the testimony was consistent with the Commissioner's broad authority to regulate procedural matters and comported with the CBA. *Thus, the Commissioner's ruling can be revisited in court only if it violated fundamental fairness.*

Id. at 545-46.

The district court respected that judicial interference is the exception not the rule, but correctly found that this case "presents unique and egregious facts, necessitating court intervention." Ex.A14.

CONCLUSION

The NFL's stay application should be denied.

Respectfully submitted,

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SEPTEMBER 16, 2017

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was served upon counsel for all parties to this proceeding as identified below through the Court's electronic filing system in accordance with FED. R. APP. P. 25.

/s/ *Thomas M. Melsheimer*
Thomas M. Melsheimer

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Dated: September 16, 2017

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