IN THE

SUPREME COURT OF THE UNITED STATES

SPRING TERM 2017

AVON BARKSDALE, OMAR LITTLE, and
STRINGER BELL, individually and on behalf of all
others similarly situated,
Petitioners,

v.

NATIONAL BASKETBALL ASSOCIATION,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENT

Team 12

Counsel for Respondent

QUESTIONS PRESENTED

I. Did the Court of Appeals properly uphold the Arbitration Award that NBA Commissioner Ervin Burrell imposed pursuant to his authority under Article 46 of the Collective Bargaining Agreement?

II. Did the Court of Appeals correctly hold that the nonstatutory labor exemption applies to the NBA lockout, thus insulating it from scrutiny under section 1 of the Sherman Act?

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OPINIONS BELOW

The opinion of the United States District Court for the District of Tulania is reported at *Barksdale v. NBA*, No. 11-CV-1215 (D. Tul. Oct. 25, 2016). The opinion of the United States Court of Appeals for the Eighth Circuit is reported at *Barksdale v. NBA, Inc.*, No. 11-831720 (8th Cir. 2016).

JURISDICTIONAL STATEMENT

This Court has jurisdiction to review the decision of the Eighth Circuit Court of Appeals upon granting a petition for a writ of certiorari pursuant to 28 U.S.C. § 1254(1).

STANDARD OF REVIEW

Judicial review of arbitration cases arising under the Labor Management Relations Act ("LMRA") and the Federal Arbitration Act ("FAA") is limited. *MLB Players Ass'n v. Garvey*, 532 U.S. 504, 509 (2001). Vacatur of an arbitrator's decision is only appropriate when "the arbitrator strays from interpretation and application of the agreement and effectively 'dispense[s] his own brand of industrial justice[.]'" *Id.* (quoting *United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 597 (1960)).

This Court reviews questions of law *de novo*. *Pierce v. Underwood*, 487 U.S. 552, 558 (1988).

FEDERAL STATUTES INVOLVED

The relevant language from the Labor Management Relations Act, Federal Arbitration Act, Sherman Antitrust Act and National Labor Relations Act can be found in Appendices A, B, C and D, respectively.

STATEMENT OF THE CASE

Statement of the Facts

Arbitration Award

On May 30, 2016, Petitioner Avon Barksdale's ("Barksdale") team, Tune Squad, and the Monstars competed against each other in game seven of the National Basketball Association ("NBA") Western Conference Finals. (R. 1.) During the game, a referee noticed that the basketball appeared to be underinflated. (R. 2.) The basketball belonged to the Monstars and the referee summoned a member of the team's equipment staff to measure the basketball's pressure. (R. 2.) The member of the Monstars' staff determined that the ball was inflated to approximately 11 psi, which was below the range of 12.5 to 13.5 psi mandated in the 2014 NBA Official

Playing Rules ("Playing Rules"). (R. 2.) At halftime, NBA officials the measured pressure in the Monstars' other basketballs and determined that they were within league parameters for pressure. (R. 2.) However, all eleven of Tune Squad's basketballs were inflated below 12.5 psi, in violation of the Playing Rules. (R. 2.)

On June 1, 2016, the NBA publicly announced it would be conducting an independent investigation regarding the underinflated basketballs, pursuant to the NBA Policy on Integrity of the Game & Enforcement of Competitive Rules ("Competitive Integrity Policy"). (R. 1.) The NBA retained Maurice Levy ("Levy") and his law firm to lead the investigation, with assistance from NBA General Counsel Cedric Daniels ("General Counsel"). (R. 1.) On July 15, 2016, Levy released his findings from the investigation. (R. 2.) The Levy Report detailed the circumstances which prompted the NBA's investigation and concluded that "it [was] more probable than not that Tune Squad personnel participated in violations of the Playing Rules and were involved in a deliberate effort to circumvent the rules." (R. 2.)

Additionally, the report stated that "it [was] more probable than not" that Barksdale knew that Tune Squad's employees had been improperly deflating basketballs, but noted that there was "less direct evidence linking Barksdale" to the tampering. (R. 3.) On July 18, 2016, William Rawls, the NBA Executive Vice President, sent a letter ("Rawls Letter") to Barksdale informing him that "pursuant to the authority of the Commissioner under Article 46 of the CBA and the NBA Player Contract, [he was] suspended without pay for the first four games of the 2016-17." (R. 3.)

Barksdale appealed the suspension through the NBA Player's Association ("NBPA") and also moved to compel the testimony of the General Counsel, as he was involved in Levy's investigation. (R. 3.) Commissioner Ervin Burrell ("Commissioner") denied the motion, stating

that it was "within the reasonable discretion of the hearing officer to determine the scope of the presentations and, where appropriate, to compel the testimony of any witnesses whose testimony is necessary for a hearing to be fair." (R. 3.) The Commissioner citied the General Counsel's lack of "first-hand knowledge" and his minor role in the investigation as reasons for denying the motion. (R. 3.)

One week after the arbitration hearing on July 26, 2016, the Commissioner upheld the four-game suspension, publishing his decision in the Award and Final Decision on Article 46 Appeal of Avon Barksdale ("Award"). (R. 3.) In the Award, the commissioner concluded that Barksdale had not only been an active participant in the "scheme" to deflate the basketballs, but also obstructed the subsequent investigation by "affirmatively arranging for destruction of his cellphone knowing that it contained potentially relevant information that had been requested by the investigators." (R. 3.) The Commissioner declared that these actions "constitute[d] conduct detrimental to the integrity of, and public confidence in, the game of professional basketball." (R. 3.)

Lockout

The NBA operates as a "multiemployer bargaining unit," the rules and policies of which are governed by the NBA's Collective Bargaining Agreement ("CBA") (R. 3.) The NBA exercised its option to opt out of the final two years of the most recent CBA, which meant the agreement would expire on October 11, 2016. (R. 3.) The owners and players attempted to negotiate a new CBA, which the NBPA and players hoped would include an altered personal conduct policy that would permit a player to engage in the types of activities that led to Barksdale's suspension without consequence. (R. 4.)

Before the CBA expired, a "substantial majority" of players voted to end the NBPA's collective bargaining status, as the union's leadership thought that to be most beneficial to the players. (R. 4.) After the vote, the NBPA informed the NBA of its desire to cease representing the players under the current CBA. (R. 3). Additionally, the NBPA notified the National Labor Relations Board ("NLRB") to "terminate its status as a labor organization and additionally filed an application with the Internal Revenue Service to be reclassified for tax purposes as a professional association." (R. 4.)

In response, the NBA filed a complaint with the NLRB, alleging that the NBPA's disclaimer of interest was a "sham . . . intended to be used as leverage at the bargaining table and part of the collective bargaining process." (R. 4.) When the CBA expired on October 11, 2016 at 11:59 p.m., the NBA imposed a lockout, effective the following day, which prevented all players from working. (R. 4.)

Procedural History

On October 12, 2016, Barksdale filed suit in the United States District Court for the District of Tulania on behalf of himself and other similarly situated players (collectively "Barksdale"). (R. 4.) Barksdale alleged that the Award mandating his four-game suspension should be vacated because the NBA did not give him adequate notice that his conduct could lead to suspension and improperly denied Barksdale the opportunity to examine the General Counsel about the league's investigation at the arbitration hearing. (R. 5, 6.) Additionally, Barksdale alleged that the lockout violated federal antitrust law under section 1 of the Sherman Act because it was no longer insulated under the nonstatutory labor exemption due to the NBPA's disclaimer of representation. (R. 4.)

The district court granted Barksdale's motion to vacate the Award on October 25, 2016, concluding that Barksdale did not have reasonable notice that his conduct would be subject to a four-game suspension. (R. 7.) Pertaining to the lockout, the district court held that NBPA's disclaimer sufficed to end the collective bargaining relationship between the NBA and the players, thus rendering the NSLE inapplicable and the lockout "an unlawful restraint of trade in violation of section 1 of the Sherman Act. (R. 18.)

The NBA appealed to the United States Court of Appeals for the Eighth Circuit. The court of appeals reversed the district court's granting of vacatur of the Award, holding that Barksdale had sufficient notice of the Commissioner's discretion to impose the four-game suspension under Article 46 of the CBA. (R. 24.) Additionally, the court concluded that Commissioner had the discretion to make the procedural decision to exclude the General Counsel's testimony. (R. 26, 27.) Furthermore, the court held that the NSLE applied to the lockout and was thus insulated from scrutiny under section 1 of the Sherman Act. (R. 30, 31.)

SUMMARY OF ARGUMENT

This Court should affirm the decision of the United States Court of Appeals for the Eighth Circuit because the Commissioner's Award draws its essence from the CBA and, therefore, must be upheld. Article 46 of the CBA grants the Commissioner broad discretion to take disciplinary action against any player who exhibits "conduct detrimental to the integrity of, and public confidence in, the NBA." The Commissioner's decision was plausibly grounded in the CBA, which he applied in accordance with the "industrial common law" of the NBA by providing Barksdale with adequate notice of prohibited conduct potential discipline under the CBA. Barksdale had advance notice of the Commissioner's Article 46 power via the NBA Player Contract and the League Policies for Players.

Additionally, the broad discretionary power granted to the Commissioner under the CBA includes procedural rulings such as decisions over which evidence to admit or exclude at arbitration. An arbitration award requires vacatur under the FAA only when the arbitrator fails to consider evidence both pertinent and material to the case. The Commissioner determined that testimony from the General Counsel was not pertinent or material to the case because his role was limited to facilitating access to witnesses and documents for the independent investigation. The Commissioner acted within the scope of his authority under the CBA in making this determination. This Court's precedent recognizes a highly deferential standard of review for arbitration cases, supported by the public policy interest of giving effect to the intent of private parties in collective bargaining. Accordingly, this Court should continue to protect an efficient mechanism for private dispute resolution.

Furthermore, the claim that the NBA lockout violated antitrust laws is meritless. This Court's jurisprudence has established that the nonstatutory labor exemption insulates the lockout from antitrust scrutiny. The NBA lockout was not sufficiently distant in time or circumstance from the collective bargaining process with the NBPA. Furthermore, a union disclaimer a day after the CBA expired cannot disrupt the bargaining process or destroy the bargaining relationship; to hold otherwise would frustrate fundamental notions of labor policy, which favors free and private collective bargaining. Finally, this Court should wait for the NLRB to determine whether the NBA's conduct was sufficiently distant in time or circumstance before adjudicating the matter.

ARGUMENT

I. THE AWARD MUST BE UPHELD BECAUSE THE COMMISSIONER ACTED WITHIN HIS AUTHORITY PURSUANT TO THE CBA.

This Court has established that the judicial standard of review for arbitration decisions is "among the narrowest known to the law." *Union Pac. R.R. v. Sheehan*, 439 U.S. 89, 91 (1987). Courts may not review arbitration decisions on the merits notwithstanding "allegations that the decision rests on factual errors or misinterprets the parties' agreements." *See Garvey*, 532 U.S. at 509 (citing *United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 36 (1987)). Even "serious error" by the arbitrator does not justify overturning an arbitration decision. *Id.* at 510. Rather, the court must enforce an arbitrator's award so long as the decision is "plausibly grounded in the parties' agreement" and the arbitrator offers "even a barely colorable justification for the outcome reached." *Wackenhut Corp. v. Amalgamated Local 515*, 126 F.3d 29, 31-32 (2d Cir. 1997) (quoting *Andros Compania Maritima, S.A. v. Marc Rich & Co.*, 579 F.2d 691, 704 (2d Cir. 1978)).

A. Barksdale Had Adequate Notice of the Commissioner's Ability to Discipline Him for Conduct Detrimental to the League, Pursuant to Article 46 of the CBA.

The district court correctly identified that it is the "law of the shop" to provide professional athletes with prior notice of prohibited conduct and potential disciplinary action. (R. 5.) Here, the Commissioner relied on the authority granted in Article 46 of the CBA to discipline Barksdale, which permits "disciplinary action" against players who engage in "conduct detrimental" to the league. (R. 21.) All players were made aware of this provision because it was contained in the NBA Player Contract and the League Policies for Players. (R. 21.) Therefore, it is undisputable that Barksdale had prior notice that conduct considered

detrimental to the league was prohibited and carried the possibility of disciplinary action issued by the Commissioner at his discretion.

1. The NBA Player Contract and the League Policies for Players provided Barksdale with adequate notice that the Commissioner had the discretion to suspend him for his conduct.

The Eighth Circuit acknowledged that the terms of a CBA similar to the NBA's gives a commissioner broad discretion to "impose fines and suspensions for conduct detrimental to the game" while also providing players with adequate notice of potential punishment. *NFL Players Ass'n on Behalf of Peterson v. Nat'l Football League*, 831 F.3d 985, 994 (8th Cir. 2016). The district court analogized Barksdale's suspension to an NFL player who was suspended indefinitely after pleading no contest to reckless assault against his four-year-old son. 831 F.3d at 989. Shortly before the suspension, the NFL had implemented an enhanced Personal Conduct Policy, which mandated harsher penalties for domestic violence cases. *Id.* at 990. After an arbitrator affirmed the NFL's decision, the player appealed, claiming a lack of notice of the new policy. *Id.*

The United States District Court held that the player did not have requisite notice of the new Personal Conduct Policy, and therefore could not be punished pursuant to it. *Id.* at 992. However, the Eighth Circuit reversed the ruling of the court, stating that even if the player's punishment came under the enhanced Personal Conduct Policy, it was within the NFL commissioner's discretion under the league's CBA to implement it. *Id.* at 994-95. The court concluded that the arbitrator had not ignored "the law of the shop" in upholding the commissioner's decision and determining that the player had adequate notice of potential punishments under the Personal Conduct Policy. *Id.* at 995-96.

Similar to *Peterson*, the Commissioner's authority to suspend Barksdale for "conduct detrimental" was previously established in Article 46 of the CBA, and was also noted in the NBA Player Contract and the League Policies for Players. (R. 21.) Barksdale argued that he was not given the requisite notice that "[f]ailure to cooperate in an investigation shall be considered conduct detrimental to the League" because the Competitive Integrity Policy was only published in the Game Operations Manual, which was not distributed to players. (R. 2.) However, it was not Barksdale's simple failure to cooperate in an investigation that satisfied the standard of "conduct detrimental to the League" under Article 46, but rather his knowledge of a scheme to deflate basketballs used in a playoff game.

Additionally, the Rawls Letter informed Barksdale that he was being sanctioned "pursuant to the authority of the Commissioner under Article 46 of the CBA and the NBA Player Contract," and not for an equipment violation under the Player Policies. (R. 3, 22.)[1] Because the Commissioner's authority was grounded in Article 46 of the CBA, and all players were made aware of Article 46 via the NBA Player Contract and the League Policies for Players, Barksdale had advance notice of potential discipline.

Furthermore, as noted by the Court of Appeals, the Commissioner properly used the information regarding Barksdale's destruction of his cell phone to draw an adverse inference of culpability involving the deflation of the basketballs. (R. 24.) However, it is immaterial that Barksdale did not have notice of the Game Operations Manual, which contained details regarding the potential discipline he faced for refusing to cooperate in the league's investigation. (R. 2.) Barksdale's involvement in the deflation scheme was the "conduct detrimental" at the heart of his discipline, not the destruction of the cell phone. "The League in its initial punishment

[1] *See* discussion *infra* Section I.A.2.

and the Commissioner in his arbitration award were both clear that Barksdale was disciplined pursuant to Article 46." (R. 26.) Players are made aware of the Commissioner's authority under Article 46 and accordingly, the Commissioner properly interpreted the CBA in accordance with the industrial common law of the NBA, by providing all players with advance notice of his broad disciplinary authority. (R. 21.)

2. The Commissioner acted within the broad scope of his authority under the CBA in suspending Barksdale for conduct detrimental to the league.

Article 46 grants the Commissioner broad authority "to take disciplinary action against a player whom he "reasonably judge[s] to have engaged in 'conduct detrimental to the integrity of, or public confidence in, the [NBA].'" (R. 21.) When parties agree to arbitrate their labor disputes, "it is the arbitrator's view of the acts and of the meaning of the [CBA] that they have agreed to accept." *Misco*, 484 U.S. at 37-38. This Court stressed the importance of deferring to an arbitrator's "informed judgment" to address "the need . . . for flexibility in meeting a wide variety of situations[.]" *Enter. Wheel*, 363 U.S. at 597.

Flexibility is particularly critical in an arbitrator's decision regarding "what specific remedy should be awarded to meet a particular contingency." *Id.* This Court has confirmed that "'courts . . . have no business weighing the merits of the grievance [or] considering whether there is equity in a particular claim.'" *Misco*, 484 U.S. at 37 (quoting *Enter. Wheel*, 363 U.S. at 564). Instead, the Commissioner's arbitration award must only be "plausibly grounded" in the CBA for this Court to affirm it. *Wackenhut Corp.*, 126 F.3d at 32.

In cases where an arbitrator's decision is not plausibly grounded in an interpretation of a CBA, but instead dispenses the arbitrator's own brand of justice, vacatur is warranted. *Enter. Wheel*, 363 U.S. at 597. Vacatur is appropriate when an arbitrator violates an express term found within the CBA. *See Leed Architectural Prods., Inc. v. United Steelworkers of America*, 916

F.2d 63, 66 (2d Cir. 1990) (vacating an arbitration award because the arbitrator violated an express term of the CBA). Vacating an arbitration award is also proper when the award is based on grounds entirely outside the terms of the contract. *See Harry Hoffman Printing, Inc. v. Graphic Comc'ns Int'l Union, Local 261*, 950 F.2d 95, 98 (2d Cir. 1991) (holding that an arbitration award required vacatur because the arbitration panel went beyond misinterpretation of the CBA and based the award on concepts of "elementary due process" not found within the agreement). Courts only vacate arbitration awards in extreme circumstances that are not present in this case.

In a case strikingly similar to Barksdale's, the Second Circuit reviewed and upheld an arbitration award suspending an NFL quarterback for four games for participating in a scheme to deflate footballs in an AFC Championship Game. *NFL Mgmt. Council v. NFL Players Ass'n*, 820 F.3d 527, 532 (2d Cir. 2016). The circuit court applied the rule articulated by this Court in *Misco*, stating that the court's task was "simply to ensure that the arbitrator was 'even arguably construing or applying the [CBA] and acting within the scope of his authority" and not ignoring "the plain language of the contract." *Id.* at 537 (citing *Misco*, 484 U.S. at 37-38.) The Second Circuit noted that a clause in the CBA gave the Commissioner broad authority to impose discipline for "conduct detrimental to the integrity of and public confidence in the game of professional football." *Id.* at 531. The court concluded that given the broad authority found in the plain language of the contract as well as this Court's longstanding deference regarding judicial review of arbitration, the discipline imposed against the quarterback should stand. *Id.*

Here, the Commissioner's authority to suspend Barksdale for four games is "plausibly grounded" in the "conduct detrimental" clause of Article 46 of the CBA. (R. 21.) Barksdale correctly argued at arbitration that "[he did not] believe [the Players Policies] applie[d]," because

the policies did not mention basketballs. (R. 22.) Indeed, the "Other Uniform/Equipment Violations" clause did not address ball tampering because that provision was written to impose fines for minor infractions like untucked jerseys or improper length of a player's tube socks. (R. 21.) The "Other Uniform/Equipment Violations" were inapplicable to the egregious conduct that led to Barksdale's four-game suspension. Barksdale's reliance on the inapplicability of the equipment policy, however, did not preclude the Commissioner from deriving his authority from other policies found within the CBA.

The Commissioner determined that Barksdale's participation in ball deflation was conduct detrimental to the NBA by degrading the integrity of the game and damaging public confidence in the quality of professional sportsmanship they pay to watch. Disciplinary action for "conduct detrimental" is not limited to fines and, therefore, the Commissioner was well within his authority under Article 46 to appropriately discipline Barksdale with a four-game suspension without pay.

B. The Commissioner Had the Authority to Exclude the Testimony of the General Counsel During Arbitration.

The Supreme Court has consistently held that when the subject matter of a dispute is arbitrable, procedural questions that arise from that dispute are left for the arbitrator to determine. *Misco*, 484 U.S. at 40; *see also John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 557 (1964).

The FAA provides a narrow exception to the deference afforded to arbitral decisions, allowing courts to vacate an arbitration award only on grounds enumerated in section 10 of the FAA. Section 10 provides, in relevant part, that a court may vacate an award "where the arbitrator[] [is] guilty of . . . refusing to hear evidence pertinent and material to the controversy." 9 U.S.C. § 10(a)(3) (2012). "[V]acatur is warranted in such a circumstance only if 'fundamental

fairness is violated.'" *NFL Mgmt. Council*, 820 F.3d 527 at 545; citing *Tempo Shain Corp. v. Bertek, Inc.*, 120 F.3d 16, 20 (2d Cir. 1997).

1. The Commissioner has broad discretion under the CBA to make procedural rulings during arbitration.

In *Misco*, this Court held it was improper for the Court of Appeals to refuse to enforce an arbitration award because the arbitrator refused to consider certain evidence. *Id.* at 39. The standard for judicial review is whether the arbitrator's decisions are "even plausibly grounded in the parties' agreement." *Wackenhut Corp.*, 126 F.3d at 32. The parties who agreed to arbitration are free to *set* procedural rules for the arbitrator to follow, otherwise evidentiary matters are left to the arbitrator. *Id.* (emphasis added); *see also LJL 33rd St. Assocs., LLC v. Pitcairn Props. Inc.*, 725 F.3d 184, 194-95 (2d Cir. 2013) (stating that arbitrators are not bound by strict evidentiary rules, but instead have "substantial discretion to admit or exclude evidence.")

Here, the CBA "does not articulate rules of procedure for the [arbitration] hearing." (R. 21.) Therefore, the arbitrator was free to make evidentiary decisions pursuant to his own sound judgment under the broad authority granted by the CBA. "An arbitrator's factual findings are not open to judicial challenge, and we accept the facts as the arbitrator found them." *See Westerbeke Corp. v. Daihatsu Motor Co., Ltd.*, 304 F.3d 200, 213 (2d Cir. 2002). The Commissioner found that "The [General Counsel] did not play a substantive role in the investigation and the Levy Report made clear that it was prepared entirely by Levy's investigative team." (R. 26.)

The Commissioner grounded his decision to not compel independent testimony from the General Counsel in his understanding that the General Counsel did not have firsthand knowledge of the events at issue. The Commissioner noted that the General Counsel's role in the

investigation was "limited to facilitating access by Mr. Levy to witnesses and documents." (R. 3.) The parties' agreement to defer to the arbitrator on procedural rulings permitted the Commissioner to make this determination. Just as this Court found the Fifth Circuit improperly overturned an arbitration award for failing to consider certain evidence, this Court should also find that it was improper for the district court to overturn the arbitration award for the same reason.

In a factually indistinguishable case, *NFL Mgmt. Council*, the Second Circuit reversed the district court's vacatur of an arbitration award predicated on grounds that the commissioner of the NFL refused to hear testimony from the NFL's General Counsel. 820 F.3d at 548. Instead, the commissioner based his arbitration award against Tom Brady solely on an independent investigation memorialized in the Wells Report. *Id.* at 546. The Commissioner determined that the additional testimony of the NFL's General Counsel had little probative value beyond the findings of the Wells Report and, in turn, the Second Circuit opined that this decision fit comfortably within his broad authority to admit or exclude evidence. *Id.* The Second Circuit concluded that it saw "no such violation" of fundamental fairness. *Id.*

Here, the NBA Commissioner determined that the Levy Report was sufficient evidence to base his arbitration award and that additional testimony from the NBA's General Counsel was not required. (R. 3.) The district court erred in overturning the procedural rulings made by the Commissioner, specifically the ruling to exclude the General Counsel's testimony, because this Court's jurisprudence established that as the arbitrator, the Commissioner had broad discretion to make evidentiary decisions. Furthermore, the Commissioner's finding that the General Counsel's testimony was not material evidence is similar to the ruling that the commissioner in *NFL Mgmt. Council* made in excluding the testimony from the NFL's General Counsel at the

arbitration hearing. Just as the Second Circuit held the NFL commissioner's ruling fell within his broad authority to include or exclude evidence and did not violate fundamental fairness, this Court should also conclude that the Commissioner's decision to exclude the General Counsel's testimony also did not violate fundamental fairness. Accordingly, the Commissioner's vacatur of the Award based on a violation of section 10 of the FAA is unwarranted.

2. This Court's jurisprudence supports a public policy granting arbitrators broad discretion to make rulings during arbitration hearings.

The Supreme Court supported a deferential standard of review with policy justifications in *Misco*, explaining that the reason for insulating arbitration awards from judicial scrutiny was two-fold. *Misco*, 484 U.S. at 37. First, the arbitration agreement reflects the preferred method of dispute resolution that the parties have declared. *Id.* Private settlement through arbitration is given preference to government intervention under the well-established contract law principle to give effect to the parties' intent, which in this case is speedy and private dispute resolution. *Id.* Second, the arbitrator is in a more suitable position than a court to fully understand the dispute at issue and make appropriate rulings. *Id.* at 46.

Justice White, writing for the Court, explained that the "parties did not bargain for the facts to be found by a court, but by an arbitrator chosen by them who had more opportunity to observe" the parties involved and the dispute arising between them. *Id.* Arbitrators are selected by the parties because of their expertise in the business and their trusted judgment interpreting the CBA in accordance with the "industrial common law of the shop" and the intent of the parties. *NFL Mgmt. Council*, 820 F.3d at 536 (citing *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 53 (1974)).

This Court should shield the Commissioner's arbitration decision under the same public policy grounds. First, the parties have agreed to a framework of self-governance articulated in

the CBA, the terms of which the parties had an opportunity to negotiate. Because the CBA left evidentiary rules to the arbitrator's discretion, this Court should not interfere with those terms. Second, the parties agreed that the arbitrator for disputes arising under the CBA would be the NBA's Commissioner. As the commissioner of the NBA, his duty is to serve in a regulatory capacity for the league, including resolution of arbitration disputes arising under the CBA. The parties have contractually agreed to have him serve as an arbitrator, trusting his judgment to interpret the CBA in accordance with the industrial common law of the league. This Court should give effect to the parties' intent when they negotiated the CBA and refrain from engaging in the arbitration dispute.

The Commissioner relied on his informed judgment to interpret the evidence presented at arbitration, gathered from an independent investigation by Levy. He then concluded that Barksdale participated in conduct detrimental to the league, grounding his authority to suspend Barksdale in Article 46. Barksdale had advance notice of the "conduct detrimental" provision of Article 46 because it was distributed through the NBA Player Contract and the League Policies for Players and, therefore, he had advance notice of the potential discipline. This Court should follow its longstanding precedent of honoring arbitration decisions so long as they draw their essence from the intent of the parties, and accordingly uphold the sanctions imposed on Barksdale. By doing so, this Court will further, rather than hinder, the objectives of the NBA in promoting competitive fairness in the game of professional basketball.

II. THE NSLE APPLIES TO THE NBA LOCKOUT, THUS INSULATING THE LOCKOUT FROM SCRUTINY UNDER THE SHERMAN ACT.

The Sherman Antitrust Act proscribes any contract or agreement that unfairly restrains trade or commerce. 15 U.S.C. § 1 (2012). Federal labor laws require good-faith collective bargaining between employers and unionized employees over wages, hours, and working

conditions. *Brown v. Pro Football, Inc.*, 518 U.S. 231, 236 (1996). To further this end, this Court articulated an implied NSLE to antitrust liability for the collective bargaining process. *Connell Const. Co. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616, 622 (1975). "[A] proper accommodation between the congressional policy favoring collective bargaining . . . and the congressional policy favoring free competition in business markets requires that some union-employer agreements be accorded a limited nonstatutory exemption from antitrust sanctions." 421 U.S. at 622. The NSLE thus enables labor policy to supersede antitrust concerns within this particular context. Moreover, because lockouts are lawful tools employers may use during the bargaining process, the NSLE applies to NBA lockout.

An employer-instituted lockout resulting from a collective bargaining impasse, and in support of the employer's legitimate bargaining posture, is lawful due to an implicit exemption in antitrust laws. *Teamsters Local Union No. 455 v. NLRB*, 765 F.3d 1198, 1202 (10th Cir. 2014). "This implicit exemption reflects both history and logic." *Brown*, 518 U.S. at 236. Congress intended to prevent judicial use of antitrust law to resolve labor disputes—a dispute normally inappropriate for resolution under antitrust law. *Marine Cooks & Stewards, AFL v. Panama S. S. Co.*, 362 U.S. 365, 369 (1960). The collective bargaining process requires discussions that inherently restrict competition, such as negotiations regarding wage agreements, hours restrictions or other working conditions. *United Mine Workers v. Pennington*, 381 U.S. 657, 665-66 (1965).

The exemption for bargaining tactics, such as a lockout, is necessary in order to shield the bargaining process from antitrust scrutiny. The NLRB and courts indicate that labor law and

policy should not treat multiemployers differently from single employers.[2] Additionally, *Brown* held that the NSLE applies to professional sports leagues as it does to other multiemployers. 518 U.S. at 248-49.

The NBA is a professional sports league and operates as a multiemployer bargaining unit. (R. 3.) The NBA and NBPA were negotiating the terms of a new CBA up until the day the current CBA expired, but were unable to agree on a new personal conduct policy. (R. 4.) The NBA instituted the lockout the following day. (R. 4.) The NSLE thus insulates the NBA's decision to institute a lockout from antitrust scrutiny because the lockout was a component of the collective bargaining process.

A. The Lockout is Not Sufficiently Distant in Time or Circumstance From the Collective Bargaining Process and the Disclaimer Did Not Destroy the Bargaining Relationship.

The NSLE protects employer or unionized employee conduct that is inextricably related to the collective bargaining process from antitrust scrutiny. *Prepmore Apparel v. Amalgamated Clothing Workers of Am.*, 431 F.2d 1004, 1007 (5th Cir. 1970). The NSLE's applicability extends to an employer's good-faith unilateral imposition of terms upon a collective bargaining impasse. *Brown*, 518 U.S. at 250. Additionally, a lockout is a lawful, protected economic tool of good-faith collective bargaining. *NBA v. Williams*, 45 F.3d 684, 688 (2d Cir. 1995) (holding that Congress approves of multiemployer bargaining unit lockouts).

[2] *See, e.g., El Cerrito Mill & Lumber Co.*, 316 N.L.R.B. 1005, 1005-06 (1995) (stating that multiemployer bargaining "constitutes a vital factor in the effectuation of national labor policy promoting peace through collective bargaining[]"); *NLRB v. Truck Drivers Local Union No. 449, Int'l Bhd. of Teamsters*, 353 U.S. 87, 95-96 (1957) (recognizing the long history of multiemployer bargaining in a variety of industries); *Charles D. Bonanno Linen Service, Inc. v. NLRB*, 454 U.S. 404, 409 (1982) (noting that multiemployer bargaining provides substantial benefits to both management and labor, similar to single employer bargaining).

The employer bargaining unit must fail to meet two criteria in order for its conduct to be subject to scrutiny under antitrust law. *Brown*, 518 U.S. at 250. First, the employer's conduct must be "sufficiently distant in time or circumstance" from the parties' negotiations and thus not intimately connected to the bargaining process. *Id.* Second, the NLRB must determine that the collective bargaining relationship has ended before the employer engaged in the alleged unlawful conduct. *Id.* Here, the NBA's lockout grew out of the collective bargaining process, and is not sufficiently distant in time or circumstance. Additionally, the NBPA's union disclaimer did not destroy the collective bargaining relationship for NSLE purposes.

1. The NBA lockout is intimately connected to the bargaining process between the players and the NBA.

The NSLE applies until a point sufficiently distant in time or circumstance from the collective bargaining process. *Brown*, 518 U.S. at 249. The NSLE guards conduct, which "grew out of, and was directly related to, the lawful operation of the bargaining *process*." *Id.* at 250 (emphasis added). Neither a CBA's expiration, nor a negotiation impasse disrupts the bargaining process for NSLE purposes. *Id.* at 243-44. Indeed, they are a common and "integral" element of collective bargaining. *Id.* at 239. The employer's "duty to bargain survives" and "must stand ready to resume collective bargaining." *Id.* at 244. Employers may utilize, in good faith, negotiation tactics, such as a lockout, as leverage in the bargaining process. *E.g.*, *Am. Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 318 (1965); *Lodge 76, Int'l Ass'n of Machinists v. Wise Emp't Relations Comm'n*, 427 U.S. 132, 147 (1976).

This Court held in *Brown* that the NSLE shielded the NFL's unilateral imposition of a salary restriction from antitrust liability because it was inextricably connected to the collective bargaining process. 518 U.S. at 250. The NFL unilaterally imposed the salary restriction at impasse in an effort to maintain the status quo and because it was the last good-faith offer it

made to the players. *Id.* The players challenged this conduct as unlawful under the Sherman Act. *Id.* This Court concluded that the NSLE insulated the NFL's conduct because it occurred during and immediately following the collective bargaining impasse, grew out of the parties' bargaining process, involved a mandatory subject of negotiations, and concerned only the parties to the collective bargaining relationship. *Id. Cf. Mackey v. NFL*, 543 F.2d 606, 623 (8th Cir. 1976) (holding that the NSLE could not be invoked when the NFL's unilateral imposition of a wage and working condition rule was not part of prior collective bargaining negotiations).

The NBPA and the NBA negotiated up until the very moment the CBA expired. (R. 3.) The NBA instituted an employee lockout the following day. (R. 4.) The NBA employed a lawful negotiation tactic upon the expiration of the CBA in order to secure leverage in the bargaining process. (R. 4.) The NBA's imposition of a lockout furthers the federal labor policy goal of encouraging fair and private collective bargaining at the negotiation table. Because the NBA's conduct and bargaining position with its counterparty is substantially similar to the NFL's in *Brown*, the NSLE therefore also shields the NBA's lockout from antitrust scrutiny.

2. The NSLE remains in effect because the NPBA's disclaimer did not destroy the bargaining process.

This Court implied the NSLE from federal labor statutes, "which set forth a national labor policy favoring free and private collective bargaining." *Brown*, 518 U.S. at 236; *see also* 29 U.S.C. § 151 (2012). The NSLE thus enables the execution of federal labor laws and policies by encouraging meaningful collective bargaining to occur. *Id.* at 237. Otherwise, the anticompetitive negotiations and conduct that take place during collective bargaining processes would be susceptible to antitrust sanctions. *Connell*, 421 U.S. at 622 (noting that federal labor laws' goals would be impossible to effectuate if the anticompetitive effects of collective bargaining were held to violate antitrust laws).

Congress enacted the National Labor Relations Act to prevent judicial use of antitrust law to resolve labor disputes, illustrating a labor policy that favors bargaining at the negotiation table, rather than in the courtroom. *Local No. 189, Amalgamated Meat Cutters & Butcher Workmen v. Jewel Tea Co.*, 381 U.S. 676, 708-09 (1965). The NSLE, by shielding the bargaining process from antitrust scrutiny, therefore maintains a necessary stability and certainty for the collective bargaining process to occur. *Brown*, 518 U.S. at 236, 242.

Allowing for a union disclaimer to extinguish the NSLE's protection of lawful employer conduct during the bargaining process would disrupt the paradigm Congress, the NLRB, and this Court's labor jurisprudence have established. This Court articulated in *Brown* that courts should look to the *underlying purpose* of the NSLE when determining its applicability. 518 U.S. at 243; (R. 30.) (emphasis added). The underlying purpose is to shield otherwise anticompetitive conduct from antitrust liability in order to encourage private collective bargaining at the negotiation table, not in the courtroom.

The new labor policy platform for which Barksdale is arguing, allowing for a disclaimer to destroy the bargaining process, would place employers in a multiemployer bargaining unit in a catch-twenty-two. Individual employers, such as NBA teams, would be left with two options. *Brown*, 518 U.S. at 241. First, the teams could subject themselves to antitrust action by each unilaterally imposing "terms that are similar to their last joint offer." *Id.* Second, if any team individually imposed its own terms or tactics differing from the last joint offer, the team would invite an unfair labor practice charge. *Id.* at 241-42. Instantly triggering antitrust scrutiny upon a union disclaimer would subject employer bargaining units to legal sanctions regardless of their good-faith bargaining efforts.

Furthermore, Barksdale's position incentivizes employees to file suit to determine the strength of their bargaining leverage, as opposed to the existing labor framework, which is conducive to good-faith negotiations at the bargaining table. Allowing for the union disclaimer to extinguish the NSLE would be the antithesis of twentieth century labor policy, by discouraging employee bargaining units from fully participating in good-faith negotiations. Additionally, employers cannot bring antitrust claims against employee groups, consequently enabling a union disclaimer to become a litigation strategy exclusively for unions and other employee groups alike. Ultimately, this would result in unfairly disadvantaging employers in the bargaining process.

Lastly, this case is distinguishable from *McNeil v. NFL*, which the district court relied upon to hold that the NSLE did not apply to bargaining terms unilaterally imposed at impasse. (R. 17.) In *McNeil*, the court held that the NSLE did not apply to the NFL's post-impasse conduct because the NFL Players Association had disclaimed its representative interest, similar to the facts here. 764 F. Supp. 1351, 1358 (D. Minn. 1991). *McNeil*, however, concerned a union disclaimer years after the NFL's unilateral imposition of a pay scale agreement and the expiration of the most recent CBA. *Id.* at 1359. Based on the disclaimer, the district court in *McNeil* concluded the NSLE was inapplicable. *Id.*

Here, the NBA instituted its lawful lockout one day after the CBA expired and the NBPA disclaimed its representative interest. (R. 4.) The district court erred because it misconstrued the timing in *McNeil* as irrelevant to the present analysis. The analytical crux regarding whether the NSLE insulates conduct from antitrust scrutiny is whether the conduct "grew out of, and was directly related to, the lawful operation of the bargaining *process*." *Brown*, 518 U.S. at 250 (emphasis added). The NLRB General Counsel's letter stating that a valid union disclaimer

disrupts the bargaining relationship is not dispositive of the NSLE's applicability here. As *Brown* held, the analysis must focus on whether the challenged conduct organically flowed from the bargaining *process*, not necessarily the bargaining *relationship*. The NBA lockout here is lawful and protected from antitrust scrutiny because employer lockouts instituted at impasse are lawful and a CBA's expiration does not extinguish the NSLE's applicability.

B. The NSLE Applies to the NBA Lockout While Parallel Proceedings Are Pending Before the NLRB.

"The labor laws give the [NLRB], not antitrust courts, primary responsibility for policing the collective-bargaining process." *Brown*, 518 U.S. at 242. *See also International Union, United Auto., Aerospace and Agr. Implement Workers of America, Local 283 v. Scofield*, 382 U.S. 205, 221 (1965) (observing that, since 1947, the NLRB serves as the primary organ for adjudicating private labor disputes). The NLRB's proceedings effectuate labor policy ends rather than adjudicate private rights. *NLRB v. Industrial Union of Marine and Shipbuilding Workers of America, Local 22*, 391 U.S. 418, 424 (1968). One of the NLRB's objectives was to take from courts the authority to determine, through application of antitrust laws, what is socially or economically desirable collective-bargaining policy. *Brown*, 518 U.S. at 242.

The NSLE applies until the NLRB resolves any parallel proceedings before it. *Powell v. Nat'l Football League*, 930 F.2d 1293, 1303-04 (8th Cir. 1989). A court should not determine whether parties' conduct is "sufficiently distant . . . from the collective-bargaining process" to justify the NSLE's inapplicability "without the detailed views of the [NLRB], to whose 'specialized judgment' Congress 'intended to leave' many of the 'inevitable questions concerning multiemployer bargaining . . . .'" *Brown*, 518 U.S. at 250 (quoting *Truck Drivers*, 353 U.S. at 96).

In *Powell*, the court refused to resolve the labor issues before it because the NSLE applied up until the parties completed any proceedings and appeals before the NLRB. 930 F.2d at 1304. Notably, the court abstained from resolving the labor issues even though neither party had yet filed a claim with the NLRB. *Id.* Moreover, this Court in *Brown* indicated that courts should not determine whether the NSLE has lapsed without first allowing the NLRB to hear the claim. 518 U.S. at 250.

The NSLE's reach extends to the present labor dispute because the NBA has filed an unfair labor practice with the NLRB. (R. 4.) The NLRB's judgment about the dispute is integral to aiding a court in adjudicating this particular kind of claim. The NLRB proceeding is likely to be dispositive because if the NLRB determines that the disclaimer is a sham, then the bargaining relationship between the NBA and the players remains intact, and thus protected from antitrust law. The Court must therefore have the NLRB's informed assessment regarding whether the lockout is sufficiently distant from the collective bargaining process and consequently whether the NSLE applies.

Federal labor policy mandates that good faith, private collective bargaining take place at the negotiation table, not in the courtroom. Bargaining tactics are meant to impose leverage on a counterparty, not make them vulnerable to legal sanctions, regardless of their good faith bargaining conduct. This Court should not grant a party the ability to place its counterparty in a position between succumbing to the party's demands and defending itself from antitrust or unfair labor practice charges.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the Eighth Circuit and hold that the Commissioner acted within his discretion in suspending Barksdale. This Court

should also hold that the NSLE insulates the NBA lockout from scrutiny under section 1 of the Sherman Act.

Dated: January 13, 2017

Respectfully Submitted,

Team 12
Counsel for Respondent

APPENDIX A

LABOR MANAGEMENT RELATIONS ACT

The relevant language from the Labor Management Relations Act (specifically 29 U.S.C. § 185(a)) is as follows:

§ 185. Suits by and against labor organizations

(a) Venue, amount, and citizenship

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

APPENDIX B

THE FEDERAL ARBITRATION ACT

The relevant language from the Federal Arbitration Act (specifically 9 U.S.C. § 10(a)(3)) is as follows:

§ 10(a). Same; Vacation; Grounds; Rehearing

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

> . . . .
>
> (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or . . . .

APPENDIX C

THE SHERMAN ANTITRUST ACT

The relevant language from the Sherman Antitrust Act (specifically 15 U.S.C. § 1) is as follows:

§ 1. Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

APPENDIX D

THE NATIONAL LABOR RELATIONS ACT

The relevant language from the National Labor Relations Act (specifically 29 U.S.C. § 151) is as follows:

§ 151. Findings and declaration of policy

The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.