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,
DEFENDANTS-APPELLANTS.

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

MOTION TO RECALL MANDATE

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October 13, 2017

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The NFLPA hereby moves this Court for an immediate recall of the mandate on the panel's divided October 12 decision. Mandate, *NFLPA v. NFL et al.*, No. 17-40936 (5th Cir. Oct. 13, 2017). Respectfully, issuing the mandate "forthwith" sua sponte—in the absence of any motion or briefing, and when the Clerk's office had expressly represented to the NFLPA's counsel that it would not issue until the ordinary rehearing process had run its course—is highly irregular and inconsistent with the Court's rules and processes. The mandate must be recalled "to prevent injustice" to the NFLPA and Elliott here. *See* 5th Cir. R. 41.2; *BHTT Entm't, Inc. v. Brickhouse Café & Lounge, L.L.C.*, 858 F.3d 310, 314 n.5 (5th Cir. 2017) ("As long as the motion to . . . recall the mandate is timely, the clerk, a single judge, or a panel of three judges can grant the motion as appropriate.").

Pursuant to Fifth Circuit Rule 41 and the corresponding Fifth Circuit internal operating procedures, "mandates will issue promptly on the 8th day after the time for filing a petition for rehearing expires." 5th Cir. R. 41 IOP; *see also* Fed. R. App. P. 41(b) ("The court's mandate must issue 7 days after the time to file a petition for rehearing expires, or 7 days after entry of an order denying a timely petition for . . . rehearing en banc, or motion for stay of mandate, whichever is later. . . ."). Here, however, the mandate issued less than 24 hours after the panel's split decision was entered, and only a few business hours after the NFLPA had called the Clerk's Office to inform the Court of its intention to seek rehearing and confirm its timetable in

which to do so. *See* Ex. A, Decl. of Stephanie Maloney, submitted herewith. In responding to that call, the Clerk's Office reiterated the standard timetable set forth in Rule 41, informing the NFLPA in no uncertain terms that the mandate would not immediately issue and that the NFLPA would have the full 14 days within which to petition for rehearing. Maloney Decl. ¶ 6. Further, the Court then set a firm mandate pull date of November 2, 2017 on the docket. *See* Ex. B, Docket Sheet.

To be sure, there are limited circumstances in which the Court "may shorten or extend the time" for issuance of a mandate, Fed. R. App. P. 41(b) or "immediately issue the mandate," but that approach is reserved for "exception[al]" circumstances, 5th Cir. R. 41 IOP, and typically is done in response to a request of a party that has been briefed. Here, there was no motion and there were no exceptional circumstances, yet the Court abruptly reversed course from its express representations to counsel and issued the mandate without warning on October 13. And had the NFLPA been told that the mandate would issue immediately, it would have filed its petition sooner with a request to stay the mandate.

Respectfully, the panel's issuance of the mandate sua sponte, outside of the ordinary and established rules governing rehearing and issuance of the mandate and contrary to its own explicit representations to counsel, is an affront to the rule of law and the policies behind the establishment of such rules and operating procedures. The panel's approach deprives litigating parties of the "general principle of decision:

predictability," which "is a needful characteristic of any law worthy of the name." Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1179 (1989). Moreover, the panel's action not only deprived the NFLPA and Elliott of the predictability provided by the written rules, but also put Elliott at imminent risk of irreparable harm should the district court act on the mandate prior to this Court's consideration of any petition for rehearing. And issuing the mandate prematurely is even more extraordinary where, as here, the panel was divided and one judge, in a written dissent, found that intervening Supreme Court authority has undermined Fifth Circuit precedent at the heart of the majority's decision.

As the NFLPA informed the Court upon issuance of the October 12 decision, the NFLPA intends to file a timely petition for rehearing en banc, pursuant to Federal Rule of Appellate Procedure 35, Fifth Circuit Rule 35, and the corresponding Fifth Circuit Internal Operating Procedures. *See* Fed. R. App. P. 35, 40; 5th Cir. R. 35 & IOP. The panel's 2-1 October 12 decision vacated the district court's preliminary injunction and ordered dismissal for lack of subject matter jurisdiction on the basis that "the exhaustion of remedies is a jurisdictional prerequisite" to an action for breach of a collective bargaining agreement. Op. at 6. As the dissent confirms, this holding is a prime candidate for en banc review under this Circuit's Internal Operating Procedures because it "directly conflicts with prior Supreme Court . . . precedent"—specifically, *Arbaugh v. Y&H Corp.*, 546 U.S. 500 (2006) and its progeny.

5th Cir. R. 35 IOP; *accord* Fed. R. App. P. 35(a), (b). Moreover, the majority ruling also conflicts with other circuits' decisions holding that exhaustion is *not* a jurisdictional requirement in these circumstances. *See, e.g., Union Switch & Signal Div. Am. Standard Inc. v. United Elec., Radio & Mach. Workers of Am., Local 610*, 900 F.2d 608, 612 (3d Cir. 1990) ("the complete arbitration rule, while a cardinal and salutary rule of judicial administration, is not a limitation on a district court's jurisdiction" under the LMRA); *Millmen Local 550, United Bhd. of Carpenters & Joiners of Am. v. Wells Exterior Trim*, 828 F.2d 1373, 1377 (9th Cir. 1987) ("Even if the arbitrator's determination of liability in this case is not a final and binding award, review of the determination might nevertheless be available should the circumstances warrant."); *Dreis & Krump Mfg. Co. v. Int'l Ass'n of Machinists & Aerospace Workers, Dist. No. 8*, 802 F.2d 247, 251 (7th Cir. 1986) ("A suit to set aside an arbitration award under section 301 of the Taft–Hartley Act is a suit for breach of contract, the contract being the arbitration clause of the collective bargaining agreement; and the suit is ripe as soon as the breach is definitive.").

This Court has previously recognized the import of preserving an appellee's right to seek rehearing of an adverse determination, and in so doing "denied" "the request for immediate issuance of mandate." *Brookshire Bros. Holding Inc. v. Dayco Prod., Inc.*, 2009 WL 8518382, at *2 (5th Cir. Jan. 23, 2009); *id.* at *1 ("We refuse to issue the mandate instanter because this would interfere with the right of

the plaintiffs-appellees to have the en banc court consider their en banc request."). A fortiori, that approach should govern here, where a party may suffer irreparable injury from the issuance of the mandate and, as the dissent confirms, there are serious grounds for en banc review.

Respectfully submitted,

/s/ *Jeffrey L. Kessler*

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OCTOBER 13, 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/ *Jeffrey L. Kessler*
Jeffrey L. Kessler