

# Basketball On Strike: The All-Stars of the Fight for Racial Equality

## ABSTRACT

*National Basketball Association players have a long history of fighting against racial injustice. In August 2020, players participated in the most attention-grabbing endeavor to date: a league-wide strike against racial discrimination in the United States. Refusing to play games entails financial risk for players because of a no-strike clause in the collective bargaining agreement between the National Basketball Players Association and National Basketball Association team governors. Team governors can fine, bench, or fire players for refusing to play. However, it may be infeasible to discipline players for attempting to fight for racial equality—players are extremely important to the well-being of the league, and team governors could face public backlash given society’s overwhelming support of the players’ efforts. The National Labor Relations Board, the federal agency overseeing labor disputes, has yet to determine the legality of a professional athlete political strike. Legal scholars are divided as to whether union employees, including National Basketball Association players, can successfully strike against racial injustice.*

*Waiting for the National Labor Relations Board to make a decision can be a lengthy and costly process. Accordingly, this Note proposes that team governors and the National Basketball Players Association proactively agree to include provisions regarding racial equality in their collective bargaining agreement. These provisions should address racial discrimination in the United States and strike a balance between each party’s interests. In reaching a contractual agreement, both parties can collaborate in the fight for racial equality and avoid potential conflict or work stoppage altogether.*

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The year 2020 brought necessary attention to the racial inequality faced every day by Black and African-American people in the United States.<sup>1</sup> Voices echoed across the nation, and local authorities and legislatures were called upon to implement steps towards real change through economic and social reform.<sup>2</sup> In the midst of this, an unexpected group of individuals—National Basketball Association (NBA) players—took the fight for racial equality to unprecedented

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1. The terms “equality” and “equity” are often used interchangeably despite their different meanings. See, e.g., *Activity: Visualizing Equality vs. Equity*, RISE, <https://risetowin.org/assets/pdf/Equality-vs-Equity.pdf> [https://perma.cc/7HMH-Q6KA] (last visited Oct. 25, 2021). Both are rooted in fairness. *Id.* However, equality is based on the idea that individuals should have exactly the same opportunities to be successful, whereas equity determines what is fair by considering factors such as historical disadvantages. *Id.*; see Manon DeFelice, *Navigating a Pandemic and a Social Justice Movement in the Workplace*, FORBES (Aug. 3, 2020, 2:46 PM), <https://www.forbes.com/sites/manondefelice/2020/08/03/navigating-a-pandemic-and-a-social-justice-movement-in-the-workplace/#55f419097bcd> [https://perma.cc/NRR3-MYKG]. This Note will reference equality because it is the term most often used by the National Basketball Association and its players. See, e.g., Randi Richardson, *‘Up the Ante’: What Players, NBA Are Doing for Racial Justice*, NBC NEWS (Dec. 29, 2020, 2:52 PM), <https://www.nbcnews.com/news/nbcblk/ante-what-players-nba-are-doing-racial-justice-n1252471> [https://perma.cc/ZQL7-FMXC].

2. See, e.g., Martin Austermuhle, *Here’s What Black Lives Matter D.C. Is Calling for, and Where the City Stands*, NPR (June 9, 2020), <https://www.npr.org/local/305/2020/06/09/872859084/here-s-what-black-lives-matter-d-c-is-calling-for-and-where-the-city-stands> [https://perma.cc/7XZL-QC6C].

levels.<sup>3</sup> Basketball superstars used their platforms to disrupt a multibillion-dollar business by protesting injustice and refusing to play in the league's 2020 playoff games.<sup>4</sup>

Labor laws and collective bargaining play a large role in the analysis of NBA players' ability to protest. NBA players are union workers and are therefore provided employment protections through a collective bargaining agreement (CBA) between the National Basketball Players Association (NBPA) union and NBA team governors.<sup>5</sup> Union employee disputes are governed by the National Labor Relations Act (NLRA).<sup>6</sup> While the NLRA protects certain strikes discussed below, protection is limited when a no-strike clause exists in a CBA.<sup>7</sup> The current NBA CBA includes such a clause.<sup>8</sup> Consequently, any strike that is legally protected under the NLRA would have to occur upon the expiration of the CBA after the 2023–2024 season.<sup>9</sup>

The NLRA protects employees who, unconstrained by a no-strike clause, strike in an effort to improve their working

3. See, e.g., Chris Mannix, *'Our Voices Were Heard': Inside the 48 Hours that Brought Back the 2020 NBA Playoffs*, SPORTS ILLUSTRATED (Aug. 28, 2020), <https://www.si.com/nba/2020/08/29/players-owners-agreement-successful-protest> [<https://perma.cc/LGZ9-ERBA>].

4. See, e.g., Kevin Arnovitz, *What Experts Say NBA Players Should Do with This Power*, ESPN (Aug. 28, 2020), [https://www.espn.com/nba/story/\\_id/29754941/what-experts-say-nba-players-do-power](https://www.espn.com/nba/story/_id/29754941/what-experts-say-nba-players-do-power) [<https://perma.cc/4LR7-YUCY>].

5. See, e.g., Michael Macklon, *How Labor Unions Changed Pro Sports*, INVESTOPEDIA, <https://www.investopedia.com/financial-edge/0711/the-rise-of-labor-unions-in-pro-sports.aspx> [<https://perma.cc/QP5E-F9WL>] (June 25, 2019). The NBA moved away from the term “team owner” to “team governor” several years ago due to potential insensitivity that comes with the title “team owner.” See Michael Kaskey-Blomain, *Adam Silver on NBA Using ‘Governor’ in Place of ‘Owner’ Title: We Moved Away from That Term Years Ago*, CBS SPORTS (June 24, 2019, 11:26 AM), <https://www.cbssports.com/nba/news/adam-silver-on-nba-using-governor-in-place-of-owner-title-we-moved-away-from-that-term-years-ago/> [<https://perma.cc/JDX8-6XCB>]; see also *Collective Bargaining Agreement*, NAT'L BASKETBALL PLAYERS ASS'N (Jan. 19, 2017), <https://cosmic-s3.imgix.net/3c7a0a50-8e11-11e9-875d-3d44e94ae33f-2017-NBA-NBPA-Collective-Bargaining-Agreement.pdf> [<https://perma.cc/U45K-UGT5>]. This Note will utilize the NBA's “team governor” terminology.

6. See Naomi B. Sunshine, *Labor Rights for Platform Workers: A Response to Social Change's 2016 Symposium*, 41 HARBINGER 241, 243 (2016).

7. See *The Right to Strike*, NAT'L LAB. RELS. BD., <https://www.nlr.gov/strikes> [<https://perma.cc/4QQ8-UR5T>] (last visited Oct. 25, 2021); see also *infra* Section I.C.

8. Edward Ongweso Jr., *Why the NBA Wildcat Strike Is So Important*, VICE (Aug. 27, 2020, 2:11 PM), <https://www.vice.com/en/article/ep47pj/why-the-nba-wildcat-strike-is-so-important> [<https://perma.cc/9U3U-RPM9>].

9. If NBA players and team governors exercise the CBA's mutual early opt-out, the CBA will expire after the 2022–2023 season. See Adrian Wojnarowski, *Sources: NBA, NBPA Agree to Extend CBA Termination Deadline Through September*, ESPN (May 11, 2020), [https://www.espn.com/nba/story/\\_id/29161104/nba-nbpa-agree-extend-cba-termination-deadline-september](https://www.espn.com/nba/story/_id/29161104/nba-nbpa-agree-extend-cba-termination-deadline-september) [<https://perma.cc/ZZ76-HUEH>].

conditions.<sup>10</sup> Strikes are typically protected when they are related to employees' workplace concerns.<sup>11</sup> However, despite the NLRA's tendency to solely cover work-related protests, employees have increasingly expressed their opinions on issues beyond the workplace.<sup>12</sup> In 2017, the National Labor Relations Board (NLRB)—the federal agency tasked with enforcing the NLRA—affirmed its long-established interpretation of “work-related” protests in response to an increased prevalence of political strikes, and it deemed the 2017 Day Without Immigrants protest to be sufficiently related to employee working conditions.<sup>13</sup> On Juneteenth 2020, members of the International Longshore and Warehouse Union protested the mistreatment of Black and African-American people in the United States.<sup>14</sup> The following month, thousands of essential workers across the United States participated in the Strike for Black Lives to promote equality.<sup>15</sup> Employment law attorneys offered guidelines to employers and generally recommended that employers not discipline employees for participating in the Strike for Black Lives.<sup>16</sup>

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10. See Sunshine, *supra* note 6, at 243–44; *The Right to Strike*, *supra* note 7.

11. See *The Right to Strike*, *supra* note 7.

12. See, e.g., Bill Chappell, 'A Day Without Immigrants' Promises a National Strike Thursday, NPR (Feb. 16, 2017, 9:30 AM), <https://www.npr.org/sections/thetwo-way/2017/02/16/515555428/a-day-without-immigrants-promises-a-national-strike-thursday> [<https://perma.cc/UFC4-FP55>]; Vin Gurrieri, *NLRB Memo Says Immigration Protest Was Protected Activity*, LAW360 (Mar. 13, 2018, 8:01 PM), <https://www.law360.com/articles/1021548/nlr-b-memo-says-immigration-protest-was-protected-activity> [<https://perma.cc/84ME-NFAX>]; Jim McMahan, *Seattle Longshore Workers Stop Work on Juneteenth*, WORKERS WORLD (June 22, 2020), <https://www.workers.org/2020/06/49574/> [<https://perma.cc/Q4E8-AKF6>].

13. See, e.g., Gurrieri, *supra* note 12. The 2017 Day Without Immigrants protest was a combination of a boycott and strike in support of immigrants' contribution to US society amidst a backdrop of robust immigration enforcement and increased workplace raids. See, e.g., Chappell, *supra* note 12.

14. See, e.g., McMahan, *supra* note 12.

15. The Strike for Black Lives was a nationwide labor strike on July 20, 2020 that occurred during the George Floyd protests where tens of thousands of workers sought to draw attention to societal racism and racial inequality in the United States. See Jacob Bogage, *Thousands of U.S. Workers Walk Out in 'Strike for Black Lives'*, WASH. POST (July 20, 2020), <https://www.washingtonpost.com/business/2020/07/20/strike-for-black-lives/> [<https://perma.cc/9KRJ-88KY>].

16. See Mark J. Foley, Matthew A. Fontana, Conor J. Hafertepe & Maria L. H. Lewis, *Political Strike Guidance for Employers: Preparing for 'Strike for Black Lives'*, NAT'L L. REV. (July 17, 2020), <https://www.natlawreview.com/article/political-strike-guidance-employers-preparing-strike-black-lives> [<https://perma.cc/NJ78-XUEE>].

On August 26, 2020, NBA players decided to take a stand of their own.<sup>17</sup> Two Milwaukee Bucks players refused to play their next playoff game in response to the police shooting of Jacob Blake, an unarmed Black man, in Kenosha, Wisconsin.<sup>18</sup> Their teammates followed suit and remained in their locker room through tip-off.<sup>19</sup> When word spread to the rest of the league, every NBA player participating in the playoffs decided to protest alongside the Bucks, forcing all games to be postponed indefinitely.<sup>20</sup>

NBA players have a long history of confronting racial inequality, but the 2020 strike is the most eye-catching measure to date.<sup>21</sup> It showed that, in the wake of the NLRB's extended strike protections and society's increased awareness of racial injustice, professional athletes like NBA players can stimulate change throughout the nation.<sup>22</sup>

This Note addresses the connection between the NLRB's strike protections and NBA players' ability to protest upon the expiration of their current CBA. Part I discusses the history of political and social activism in professional sports. It then discusses the typical structure of NBA employment agreements, along with the legal background of the NLRA and union employee strikes. Part II analyzes the different approaches the NLRB or the NBA could take in response to players' political protests. Part III then proposes that NBA team governors and players proactively resolve the uncertainty surrounding a potential strike through collective bargaining negotiations.

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17. See Mannix, *supra* note 3.

18. See Shaun Powell, *Bucks Take Stand that Sends Shockwaves Across Sports World*, SPORTING NEWS (Aug. 27, 2020), <https://www.sportingnews.com/au/nba/news/milwaukee-bucks-take-stand-that-sends-shockwaves-across-sports-world/1fghdvujy1knv1nip3rg1txpyb> [<https://perma.cc/R6EG-9W29>].

19. See *id.*

20. See Dylan Scott, *The Night the NBA Suddenly Stopped – and Why It Matters*, VOX (Aug. 27, 2020, 1:30 PM), <https://www.vox.com/2020/8/27/21403891/nba-playoff-games-boycott-bucks-lakers-jacob-blake> [<https://perma.cc/2Y5M-YEC9>].

21. See Matt Whitener, *A History of Athletes and Activism*, YARDBARKER, [https://www.yardbarker.com/general\\_sports/articles/a\\_history\\_of\\_athletes\\_and\\_activism/s1\\_32219363#slide\\_1](https://www.yardbarker.com/general_sports/articles/a_history_of_athletes_and_activism/s1_32219363#slide_1) [<https://perma.cc/8GRR-X4VB>] (Nov. 8, 2021).

22. This analysis could apply in some parts to other professional athletes and leagues. However, because NBA players are trailblazers in the fight against racial injustice, and because members of the NBA community are high-profile, influential individuals, this Note will focus primarily on the NBA. See, e.g., John Branch, *Why the N.F.L. and the N.B.A. Are So Far Apart on Social Justice Stances*, N.Y. TIMES (June 22, 2018), <https://www.nytimes.com/2018/06/22/sports/nfl-nba-social-justice-protests.html> [<https://perma.cc/W4D5-V229>]; Nick Dimengo, *Ranking the 25 Most Influential People in Sports*, BLEACHER REP. (May 9, 2013), <https://bleacherreport.com/articles/1633493-ranking-the-25-most-influential-people-in-sports> [<https://perma.cc/D4S8-DU4E>].

I. A BRIEF HISTORY OF HALFTIME: ATHLETE ACTIVISM, COLLECTIVE BARGAINING, AND FEDERAL LABOR LAW

A. *Political Protests in Professional Sports*

Protesting racial inequality has long been a pillar of athlete activism.<sup>23</sup> Athletes often possess a worldwide following and generate millions of dollars for their respective sports leagues.<sup>24</sup> This was not always the case, though—athlete platforms have grown exponentially with the arrival and expansion of television, the internet, and social media.<sup>25</sup> These outlets have provided athletes with limitless opportunities to make their opinions heard.<sup>26</sup>

Athlete activism in the United States dates back to 1883 when the Chicago White Sox insisted that the Blue Stockings Black catcher, Moses Fleetwood Walker, not play in an exhibition baseball game.<sup>27</sup> The Stockings refused to give in to the White Sox's demands, and Walker played despite threats from the White Sox team manager.<sup>28</sup> The White Sox manager held a meeting with baseball executives the following year, and they agreed to unofficially ban Black and African-American players from joining league teams.<sup>29</sup>

Despite the Blue Stockings' failed efforts to promote equality, the twentieth century brought a new era of high-profile athletes who confronted racial injustice.<sup>30</sup> Jackie Robinson, Elgin Baylor, and Jim

23. See, e.g., Steve Wulf, *Athletes and Activism: The Long, Defiant History of Sports Protests*, THE UNDEFEATED (Jan. 30, 2019), <https://theundefeated.com/features/athletes-and-activism-the-long-defiant-history-of-sports-protests/> [<https://perma.cc/3E8X-9A27>].

24. See, e.g., Jeff Agrest, *Though Sports Viewership Is Down, Games Still Are Among Most-Watched Broadcasts*, CHI. SUN-TIMES (Oct. 29, 2020, 4:43 PM), <https://chicago.suntimes.com/2020/10/29/21540993/sports-tv-ratings-viewership-world-series-nba-finals-stanley-cup-final-us-open> [<https://perma.cc/T7UF-LPGM>].

25. See Michael Kutzer, *Professional Athletes Role in Society via Social Media*, LOY. UNIV. MD.: EMERGING MEDIA 360, <https://www.loyola.edu/academics/emerging-media/blog/2016/professional-athletes-social-media> [<https://perma.cc/9FQE-R9D4>] (last visited Oct. 25, 2021).

26. See Erit Yellen, *Athletes Have More Power than Ever to Change the World*, THE UNDEFEATED (July 29, 2016), <https://theundefeated.com/features/athletes-have-more-power-than-ever-to-change-the-world/> [<https://perma.cc/B6SP-UPJ8>].

27. See Wulf, *supra* note 23.

28. See *id.*

29. See Brian Gramman, *Moses Fleetwood Walker: Major League Baseball's Forgotten Hero*, BLEACHER REP. (Mar. 20, 2012), <https://bleacherreport.com/articles/1089267-moses-fleetwood-walker-major-league-baseballs-forgotten-hero> [<https://perma.cc/SZR8-P4GX>].

30. See *id.*; Tim Ott, *The Activism of Jackie Robinson*, BIOGRAPHY, <https://www.biography.com/news/jackie-robinson-civil-rights-facts> [<https://perma.cc/WY75-MG3D>] (Sept. 11, 2020); Jeff Rivers, *Today's NFL Players See the Same Injustices that Prompted Jim Brown to Be an Activist*, THE UNDEFEATED (Aug. 13, 2018),

Brown became heavily involved in the 1960s civil rights movement and spoke out against racial discrimination in the United States.<sup>31</sup>

### 1. Athlete Activism and Player Hurdles

As sports leagues became more popular in the late twentieth century, athlete activism was met with increased hostility.<sup>32</sup> NBA and National Football League (NFL) players who used their platforms to address racial inequality faced particularly strong backlash from their respective leagues.<sup>33</sup> In 1992, Craig Hodges, a Chicago Bulls NBA champion and two-time league leader in 3-point percentage, was invited to the White House with his team after the Bulls won the 1992 NBA championship.<sup>34</sup> Hodges expressed his concern about racial injustice by handing President George H.W. Bush a letter that explained his feelings and experiences of racism in the United States.<sup>35</sup> That summer, he was released by the Bulls, and no other team signed him.<sup>36</sup> In 2016, the San Francisco 49ers starting quarterback Colin Kaepernick refused to stand for the national anthem to protest the mistreatment of Black and African-American people in the United States.<sup>37</sup> Kaepernick became a free agent in 2017, and, as of March 2022, has not been signed by another NFL team.<sup>38</sup>

Athletes like Hodges and Kaepernick were ostracized after they used their platforms to stand for something other than the sports they played.<sup>39</sup> Despite suffering in their professional careers as a result of their actions, Hodges and Kaepernick brought attention to racial injustice. Today's athletes have larger—and thus more impactful—

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<https://theundefeated.com/features/jim-brown-is-still-my-hero-because-of-how-he-carried-himself-on-the-field-and-in-protest/> [<https://perma.cc/W6E3-QPTJ>].

31. See Ott, *supra* note 30; Rivers, *supra* note 30; see also Whitener, *supra* note 21.

32. See, e.g., Wulf, *supra* note 23.

33. See, e.g., *id.*

34. *Id.*

35. *Id.*

36. Justin Tinsley, *Craig Hodges Is Still Shooting His Shot*, THE UNDEFEATED (July 17, 2020), <https://theundefeated.com/features/craig-hodges-is-still-shooting-his-shot/> [<https://perma.cc/FFA7-X2AU>].

37. See, e.g., Wulf, *supra* note 23.

38. See Chuck Schilken, *Colin Kaepernick, Still Out of the League in Real Life, Is Back in 'Madden NFL 21'*, L.A. TIMES (Sept. 8, 2020, 12:38 PM), <https://www.latimes.com/sports/story/2020-09-08/colin-kaepernick-jobless-back-madden-nfl-21> [<https://perma.cc/VU44-PRN8>].

39. Tinsley, *supra* note 36; Adam Jude, *How Colin Kaepernick Inspired Activism, Awareness and Seattle Athletes to Speak Out Against Racial Injustice*, SEATTLE TIMES, <https://www.seattletimes.com/pacific-nw-magazine/aug-30-cover-story/> [<https://perma.cc/TD9A-AZSB>] (Aug. 28, 2020, 10:44 AM).

platforms than ever before, which allows them to continue to use their celebrity to fight for racial equality.<sup>40</sup>

## 2. A Unified Stand on the Basketball Court

NBA players have historically been champions of civil rights, but most of their actions take place outside of the workplace and off the court.<sup>41</sup> Examples include social commentary by Kobe Bryant on positive change in society, Michael Jordan's \$100 million pledge to the Black community, and efforts by LeBron James to combat voter suppression.<sup>42</sup> Before 2020, there were only two instances in the NBA where players' protests resulted in their refusal to play.<sup>43</sup> In 1959, Elgin Baylor sat out after he and his two Black teammates were denied hotel rooms and restaurant service in Charleston, West Virginia, on the night of their game.<sup>44</sup> Two years later, five Black Boston Celtics players, including league MVP Bill Russell, were denied restaurant entry in both Lexington, Kentucky, and Marian, Indiana on their way to an

40. See Yellen, *supra* note 26; Kalhan Rosenblatt, *A Summer of Digital Protest: How 2020 Became the Summer of Activism Both Online and Offline*, NBC NEWS (Sept. 26, 2020, 5:00 AM), <https://www.nbcnews.com/news/us-news/summer-digital-protest-how-2020-became-summer-activism-both-online-n1241001> [<https://perma.cc/7F7G-N9SW>].

41. See Ben Rohrbach, *The Brief History of NBA Player Protests, a Trail Blazed by Elgin Baylor and Bill Russell*, YAHOO! SPORTS (Aug. 27, 2020), <https://sports.yahoo.com/the-brief-history-of-nba-player-protests-a-trail-blazed-by-elgin-baylor-and-bill-russell-205734051.html> [<https://perma.cc/CFA3-V83Y>]; Kurt Helin, *Carmelo Anthony, Chris Paul, Dwyane Wade Launch Fund for Social Justice*, NBC SPORTS (July 22, 2020, 5:00 PM), <https://nba.nbcsports.com/2020/07/22/carmelo-anthony-chris-paul-dwyane-wade-launch-fund-for-social-justice/> [<https://perma.cc/S8L7-XYVE>]; Andrew Lopez, *Jrue, Lauren Holiday Using Pelicans Guard's Game Checks to Launch Social Justice Fund*, ESPN (July 15, 2020), [https://www.espn.com/nba/story/\\_/id/29468125/jrue-lauren-holiday-using-pelicans-guard-game-checks-launch-social-justice-fund](https://www.espn.com/nba/story/_/id/29468125/jrue-lauren-holiday-using-pelicans-guard-game-checks-launch-social-justice-fund) [<https://perma.cc/9PCD-6WFW>].

42. David Silversmith, *Lebron James's Recent Efforts to End Voter Suppression*, VAND. J. ENT. & TECH. L.: BLOG (Sept. 20, 2020), <https://www.vanderbilt.edu/jetlaw/2020/09/20/01-22/> [<https://perma.cc/6UNC-DA9S>]; Nick DePaula, *Michael Jordan, Jordan Brand Pledge \$100 Million to Racial Equality and Education Initiatives*, ESPN (June 5, 2020), [https://www.espn.com/nba/story/\\_/id/29272682/jordan-brand-pledges-100-million-racial-equality-education-initiatives](https://www.espn.com/nba/story/_/id/29272682/jordan-brand-pledges-100-million-racial-equality-education-initiatives) [<https://perma.cc/H8AY-Z6XF>]; Satchel Price, *Kobe Bryant Discusses Wearing 'I Can't Breathe' Shirt*, SB NATION (Dec. 10, 2014, 2:23 PM), <https://www.sbnation.com/nba/2014/12/10/7371943/kobe-bryant-i-cant-breathe-shirt-eric-garner> [<https://perma.cc/F46A-9EHH>]; Eric Pincus, *Kobe Bryant, Steve Nash Express Outrage on Ferguson Decision*, L.A. TIMES (Nov. 25, 2014, 1:30 PM), <https://www.latimes.com/sports/lakers/lakersnow/la-sp-ln-kobe-bryant-steve-nash-outrage-ferguson-20141125-story.html> [<https://perma.cc/DTV6-XF6P>]. Additional examples include social justice funds raised by modern NBA stars like Dwyane Wade, Carmelo Anthony, Jrue Holiday, and Chris Paul. See, e.g., Helin, *supra* note 41; Lopez, *supra* note 41.

43. See Rohrbach, *supra* note 41.

44. See *id.*

exhibition game against the St. Louis Hawks.<sup>45</sup> The Black players on both the Hawks and Celtics refused to play that night, but their white teammates played the game.<sup>46</sup>

On August 26, 2020, fifty-nine years after Bill Russell sat out his game in St. Louis, the Milwaukee Bucks made an unprecedented statement.<sup>47</sup> The Bucks players, led by George Hill and Sterling Brown, refused to leave their locker room minutes before tip-off in response to the shooting of unarmed Black man and Wisconsin native, Jacob Blake.<sup>48</sup> Instead of playing the game, they spent hours in their locker room discussing racial inequality in their community.<sup>49</sup> The players expressed their concerns to Wisconsin Attorney General Josh Kaul and Lieutenant Governor Mandela Barnes on a Zoom call facilitated by the team governors.<sup>50</sup> Discussions of short-term and long-term substantial change ensued.<sup>51</sup> The Bucks' protest set off a nationwide movement in sports.<sup>52</sup> Every NBA player followed the Bucks' lead and participated in the strike, and athletes from professional leagues across the nation, including the NFL, National Hockey League, and Major League Baseball (MLB), joined the protest and refused to participate in their respective contests.<sup>53</sup> In their efforts to raise awareness about racial inequality, NBA players harnessed their potential to disrupt the sports industry and put pressure on lawmakers to implement change.<sup>54</sup>

The 2020 NBA strike differed from previous instances of athlete activism in a number of ways. First, the players displayed an overwhelming sense of unity.<sup>55</sup> The strike also coincided with a societal recognition of racial inequality that was not as prevalent during

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45. *See id.*

46. *See id.*

47. *See* Scott, *supra* note 20.

48. *See id.*

49. *See id.*

50. *See* Ramona Shelburne & Tim Bontemps, *Wisconsin Lieutenant Governor Tells Bucks to Call 'for Action at Every Level of Government'*, ESPN (Aug. 26, 2020), [https://www.espn.com/nba/story/\\_/id/29749584/wisconsin-lieutenant-governor-tells-bucks-call-action-every-level-government](https://www.espn.com/nba/story/_/id/29749584/wisconsin-lieutenant-governor-tells-bucks-call-action-every-level-government) [<https://perma.cc/7REH-P9AU>].

51. *See id.*

52. *See* Paul Frymer & Jacob M. Grumbach, *The NBA Strike Is a Big Moment for Athlete Activism – and the Labor Movement in America*, VOX (Sept. 4, 2020, 7:00 AM), <https://www.vox.com/first-person/2020/9/4/21420033/jacob-blake-nba-strike-2020-black-lives-matter> [<https://perma.cc/6C2B-Z6JB>].

53. *See id.*

54. *See id.*

55. *See, e.g.*, Ricky O'Donnell, *The Day NBA Players Decided to Strike for Social Justice*, SB NATION (Aug. 26, 2020, 6:06 PM), <https://www.sbnation.com/nba/2020/8/26/21403189/nba-boy-cott-player-strike-milwaukee-bucks-lakers-george-hill> [<https://perma.cc/H4XK-85Y7>].

previous protests.<sup>56</sup> Additionally, over the last ten years, the NBA has evolved into a players' league, where the modern NBA star's earning power and decision-making ability are at all-time highs.<sup>57</sup> These differences afford NBA players the opportunity to take significant strides towards racial equality in the cities in which they live and play.

*B. NBA Collective Bargaining and the Competing Interests at Play*

The CBA, between the NBPA and team governors, presents the biggest risk to players who want to take a political stance through protesting while maintaining their job security. CBAs are binding legal documents negotiated between employers and labor unions.<sup>58</sup> The NBA's current CBA has a no-strike clause that expressly prohibits players from participating in any strike or stoppage of work.<sup>59</sup> Additionally, under the agreement, the NBPA must attempt to prevent players from refusing to play in games.<sup>60</sup> When the players refused to play in the August 2020 playoff games, they did so despite the no-strike provisions in their CBA.<sup>61</sup> An otherwise legally protected strike under the NLRA does not cover employees who are bound by a no-strike clause.<sup>62</sup> Thus, the players could have faced penalties such as fines and termination for their participation in the strike.<sup>63</sup> Although team governors may find it difficult to retaliate against or replace NBA players, the safest time for players to strike without fear of retaliation is during collective bargaining negotiations, which take place after the

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56. See, e.g., Rosenblatt, *supra* note 40.

57. NBA players and commentators have referred to the league as a "players' league" over the past several years due to players' increased decision-making power. See Mike Wise, *Phil Jackson's Departure Tells Us NBA Is a Players' League*, THE UNDEFEATED (June 29, 2017), <https://theundefeated.com/features/phil-jackson-departure-tells-us-nba-is-a-players-league/> [<https://perma.cc/TU8E-P7TZ>]. Superstars like James Harden and Kevin Durant have the ability to influence team governors to sign players and hire staff of their choosing. Joe Rivera, *Why Did the Nets Hire Steve Nash as Coach? Relationship with Kevin Durant Could Be a Big Reason*, SPORTING NEWS (Sept. 3, 2020), <https://www.sportingnews.com/us/nba/news/steve-nash-kevin-durant-nets-coach/125wimanth4qs1d80k760g7dcz> [<https://perma.cc/ZL2P-LG8N>]; Richard Langford, *NBA Rumors: James Harden's Recruitment of Dwight Howard a Great Sign for Rockets*, BLEACHER REP. (May 22, 2013), <https://bleacherreport.com/articles/1648901-nba-rumors-james-hardens-recruitment-of-dwight-howard-a-great-sign-for-rockets> [<https://perma.cc/B3F5-7Rj2>].

58. See Blake Yagman, *Weekly Legal Brief: Collective Bargaining, Lockouts, and Strikes*, FRONT OFF. SPORTS (Apr. 27, 2018), <https://frontofficesports.com/weekly-legal-brief-collective-bargaining-lockouts-and-strikes/> [<https://perma.cc/LY5X-VQR2>].

59. See Ongweso, *supra* note 8; see also *Collective Bargaining Agreement*, *supra* note 5, at 390.

60. See *Collective Bargaining Agreement*, *supra* note 5, at 390–91.

61. See Ongweso, *supra* note 8.

62. See *The Right to Strike*, *supra* note 7.

63. See *id.*

expiration of the current CBA. When the no-strike provisions are no longer operational, potential NBA strikes would be governed by the NLRA.<sup>64</sup> The current CBA is a seven-year agreement set to expire after the 2023–2024 season.<sup>65</sup>

During NBA CBA negotiations, the NBPA and team governors discuss salaries, health and safety rules, and various disciplinary actions for breach of contract.<sup>66</sup> When the CBA expires, each party proposes and releases its ideas and positions that pertain to league issues during a negotiating window.<sup>67</sup> The parties make concessions and ultimately agree to the terms of the next CBA.<sup>68</sup> If the parties cannot reach an agreement on certain terms, a strike or lockout ensues.<sup>69</sup> A strike, led by the NBPA, occurs when players refuse to play because they disagree on their contractual obligations.<sup>70</sup> A lockout, on the other hand, is led by the team governors who, dissatisfied with the NBPA's proposed terms, choose to lock players out of their facilities.<sup>71</sup> All of the work stoppages in the NBA up until the 2020 strike were lockouts involving revenue-sharing disputes.<sup>72</sup> These lockouts resulted in missed games, disinterested fans, and losses of over \$1 billion in revenue.<sup>73</sup>

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64. See *id.* See generally National Labor Relations Act (NLRA), 29 U.S.C. §§ 151–169.

65. The current CBA is set to expire after the 2023–2024 season unless mutual opt-outs are exercised after the 2022–2023 season. See Wojnarowski, *supra* note 9.

66. See, e.g., *id.*

67. See Shehan Jeyarajah, *NBA Collective Bargaining for Dummies: Are the Players or Owners Right?*, BLEACHER REP. (June 29, 2011), <https://bleacherreport.com/articles/706467-nba-collective-bargaining-sifting-through-the-confusing-nba-cba-negotiations> [<https://perma.cc/7JAY-KXX3>]; Sam Quinn, *NBA Players Interested in Negotiating for Ownership Stakes in Teams in Next CBA, Says Michele Roberts*, CBS SPORTS (Jan. 22, 2021, 11:12 PM), <https://www.cbssports.com/nba/news/nba-players-interested-in-negotiating-for-ownership-stakes-in-teams-in-next-cba-says-michele-roberts/> [<https://perma.cc/ZRU4-F5L3>].

68. See Jeyarajah, *supra* note 67; Quinn, *supra* note 67.

69. See *Pro Sports Lockouts and Strikes Fast Facts*, CNN, <https://www.cnn.com/2013/09/03/us/pro-sports-lockouts-and-strikes-fast-facts/index.html> [<https://perma.cc/3EJY-P28H>] (Dec. 4, 2021, 8:27 AM).

70. See, e.g., *id.*

71. See, e.g., *id.*

72. The NBA has had a total of four lockouts, which occurred in 1995, 1996, 1998, and 2011. See *id.*

73. See Thomas Golianopoulos, “*It Was All About Money*”: *An Oral History of the 1998-99 NBA Lockout*, THE RINGER (Feb. 14, 2019, 6:40 AM), <https://www.theringer.com/nba/2019/2/14/18222040/lockout-1998-99-season-david-stern-david-falk-billy-hunter-patrick-ewing-michael-jordan-oral-history> [<https://perma.cc/9XJE-VZS3>]; Patrick Rishe, *NBA Lockout Costs League \$800 Million. . . and Counting; Players Justified to Fight in Courts*, FORBES (Nov. 16, 2011, 7:40 AM), <https://www.forbes.com/sites/prishe/2011/11/16/nba-lockout-costs-league-800-million-and-counting-players-justified-to-fight-in-courts/#2f59fc8f4be5> [<https://perma.cc/33KT-VE5L>].

There are, of course, non-NLRA concerns for NBA players and team governors when confronted with a potential player strike. The NBA makes and generates billions of dollars mainly through television broadcasts, sponsorships, and tickets.<sup>74</sup> During the 2018–2019 NBA season, the league made nearly \$9 billion in revenue, of which approximately 50 percent went to the players.<sup>75</sup> Work stoppages certainly cut into this revenue.<sup>76</sup> The 1998 and 2011 lockouts cost the league at least \$1 billion and \$800 million, respectively, and the NBA would have lost over \$1.5 billion during the 2019–2020 season had it not resumed play in the isolated Orlando community bubble after the season was postponed because of the COVID-19 pandemic.<sup>77</sup> The league and team governors, who are incentivized by the financial well-being of the league and its teams, want as little work stoppage as possible to prevent the loss of revenue and fans.

Teams' host cities also want to minimize work stoppage. NBA teams can economically benefit their host cities by boosting the local economy and spurring local business growth, especially if the team is winning.<sup>78</sup> Teams allow different streams of revenue to flow into the city because they generate new jobs for arena workers and attract visitors.<sup>79</sup> NBA teams also benefit the local public by bringing the community together in support of a single cause.<sup>80</sup>

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74. Greg McFarlane, *How the NBA Makes Money*, INVESTOPEDIA, <https://www.investopedia.com/articles/personal-finance/071415/how-nba-makes-money.asp> [<https://perma.cc/7EUY-CQUC>] (Oct. 18, 2021).

75. See *id.*; *Collective Bargaining Agreement*, *supra* note 5, at 247–49.

76. See, e.g., Rische, *supra* note 73.

77. See *id.*; Golianopoulos, *supra* note 73; Rob Schaefer, *Report: NBA Revenues Down 10% in 2019-20, Disney Bubble Saved \$1.5 Billion*, NBC CHI. (Oct. 28, 2020), <https://www.nbccicago.com/news/sports/nbcsports/report-nba-revenues-down-10-in-2019-20-disney-bubble-saved-1-5-billion/2360729/> [<https://perma.cc/PC7P-7PTV>].

78. See A.J. Kuznitz, *Professional Sports Teams and Their Local Economic Impact* (Dec. 15, 2011) (B.S. honors thesis, Coastal Carolina University), <https://digitalcommons.coastal.edu/cgi/viewcontent.cgi?article=1103&context=honors-theses> [<https://perma.cc/Q7D4-2DPJ>]; Jeremy Evans, *The Economic Impact of Professional Sports Franchises on Cities*, DODGERS NATION (May 9, 2017, 12:35 PM), <https://www.dodgersnation.com/economic-impact-professional-sports-franchises-cities-je1083/2017/05/09/> [<https://perma.cc/AJ4M-MRLD>]. *But see* Andrew Zimbalist & Roger G. Noll, *Sports, Jobs, & Taxes: Are New Stadiums Worth the Cost?*, BROOKINGS (June 1, 1997), <https://www.brookings.edu/articles/sports-jobs-taxes-are-new-stadiums-worth-the-cost/> [<https://perma.cc/VW5F-JSLC>] (arguing that the typical reasons in favor of having sports teams, including the creation of new jobs, generating new spending in the community, attracting tourists and companies to the host city, and increasing spending, are not always sound economic arguments, especially when construction of a new stadium is involved).

79. See Kuznitz, *supra* note 78.

80. See ESPN, *It's 'Phenomenal' that Lakers and Dodgers Honored Kobe by Winning Titles*, YOUTUBE (Oct. 28, 2020), <https://www.youtube.com/watch?v=pDJRO5yB0qA> [<https://perma.cc/YJJ5-X9GR>] (“[The Los Angeles Lakers and Dodgers stadiums] are places where

League events like All-Star Weekend and Draft Night create even more wealth for host cities.<sup>81</sup> The MLB recently used its All-Star Game as an economic bargaining chip when it moved the 2021 game from Atlanta to Denver after Georgia enacted a law that had the “potential to restrict voting access for people of color.”<sup>82</sup> The league relocated the game to demonstrate the values of baseball as a sport.<sup>83</sup> Similarly, the NBA revoked Charlotte’s privilege to host All-Star Weekend in 2017 after North Carolina passed a law that required transgender individuals to use public restrooms that correspond to the sex they were assigned at birth.<sup>84</sup> In 2019, the league awarded the All-Star Weekend back to Charlotte after North Carolina partially repealed the law.<sup>85</sup>

In addition to financial incentives, many members of the NBA community aim to resolve societal issues off the court.<sup>86</sup> Several players, including players on the title-contending Los Angeles Lakers and Los Angeles Clippers, felt that the season should have ended after the August 2020 strike to call more attention to racial inequality in the United States.<sup>87</sup> Players also spoke out against racial injustice after the January 2021 riots on Capitol Hill, stating that the riots highlighted the disparate treatment of Black and white people by law

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everyone from all over town gets together, in the same physical space, with a common interest, and are rooting for the same thing. So, sports [make] LA a city more than anything else.”).

81. See, e.g., *Study Estimates NBA All-Star Game Generated \$44.9 Million in Spending to Louisiana*, NOLA.COM (July 24, 2017, 6:11 PM), [https://www.nola.com/news/business/article\\_be8e2237-b58d-5aaa-bc07-1c8bb38b6c86.html](https://www.nola.com/news/business/article_be8e2237-b58d-5aaa-bc07-1c8bb38b6c86.html) [https://perma.cc/N9VR-9MFT].

82. See Alden Gonzalez, *MLB Moving 2021 All-Star Game from Atlanta over Georgia Voting Law*, ESPN (Apr. 2, 2021), [https://www.espn.com/mlb/story/\\_/id/31183822/mlb-moving-all-star-game-atlanta-georgia-voting-law](https://www.espn.com/mlb/story/_/id/31183822/mlb-moving-all-star-game-atlanta-georgia-voting-law) [https://perma.cc/5NKD-DLWQ]; Jabari Young, *MLB Confirms It’s Moving All-Star Game to Denver After It Pulled Out of Atlanta over Voting Law*, CNBC, <https://www.cnbc.com/2021/04/06/mlb-will-move-all-star-game-to-denver-after-pulling-out-of-atlanta-over-voting-law.html> [https://perma.cc/5CPQ-2A4Y] (Apr. 6, 2021, 2:38 PM).

83. See Gonzalez, *supra* note 82.

84. See *NBA Moves 2017 All-Star Game from Charlotte over HB2 Bill*, ESPN (July 21, 2016), [https://www.espn.com/nba/story/\\_/id/17120170/nba-moving-all-star-game-charlotte-north-carolina-bill](https://www.espn.com/nba/story/_/id/17120170/nba-moving-all-star-game-charlotte-north-carolina-bill) [https://perma.cc/4RAV-MW6J].

85. See Matt Bonesteel, *Charlotte Gets 2019 NBA All-Star Game After Change in North Carolina Law*, WASH. POST (May 24, 2017), <https://www.washingtonpost.com/news/early-lead/wp/2017/05/24/charlotte-gets-2019-nba-all-star-game-after-change-in-north-carolina-law/> [https://perma.cc/F4X4-92XJ].

86. See, e.g., Helin *supra* note 41.

87. See Brittany Martin, *NBA Playoff Games Expected to Resume Following Player Protest*, L.A. MAG. (Aug. 27, 2020), <https://www.lamag.com/citythinkblog/lakers-dodgers-sparks-protest-blm/> [https://perma.cc/4XFR-ZYR6].

enforcement.<sup>88</sup> Players appear to be increasingly willing to disrupt the league in order to address racial injustice.

Players and coaches continued to express their frustration with racial inequality in the United States in April 2021 after the police shooting of 20-year-old Black man Daunte Wright in Brooklyn Center, Minnesota.<sup>89</sup> The NBA actively took steps to postpone the Minnesota Timberwolves game against the Brooklyn Nets that night and rescheduled it for the following day.<sup>90</sup> Nets head coach Steve Nash supported postponing the games further if doing so involved a broader comprehensive approach for fighting against underlying racial injustice issues.<sup>91</sup>

### C. The NLRB's Protection of Political Protests

Although the no-strike provision in the current NBA CBA is an obstacle to a player-led strike during the term of the CBA, the provision will not be in effect when the agreement expires after the 2023–2024 season.<sup>92</sup> Upon expiration of the CBA, the NLRB, as the federal agency that oversees union and employee activity, would typically resolve any disputes under the provisions of the NLRA.<sup>93</sup> While the NLRB has protected player associations in various matters that involve league commissioners and team governors, it has never ruled on a player-led political strike.<sup>94</sup> However, the NLRB has issued guidance on the protection of employees who have engaged in political strikes in other

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88. See, e.g., Jack Dougherty, *Draymond Green Sends a Passionate Message About 'Shameful' Washington, D.C. Protests*, SPORTSCASTING (Jan. 7, 2021), <https://www.sportscasting.com/draymond-green-sends-a-passionate-message-about-shameful-washington-d-c-protests/> [<https://perma.cc/G4TL-8RRC>]. Clippers' stars Paul George and Marcus Morris expressed their desire to end the basketball season early to call attention to racial injustice after the January 2021 riots. See Garrett Chorpenning, *Paul George, Marcus Morris Preferred Not to Play in Wake of Capitol Violence*, SPORTS ILLUSTRATED (Jan. 7, 2021), <https://www.si.com/nba/clippers/news/la-clippers-paul-george-marcus-morris-capitol> [<https://perma.cc/9KGS-T9SR>].

89. See, e.g., *NBA Players Hold Moment of Silence for Daunte Wright Ahead of Rescheduled Game*, NBC NEWS, <https://www.nbcnews.com/news/nbcblk/nba-players-hold-moment-silence-daunte-wright-ahead-rescheduled-game-rcna676> [<https://perma.cc/YM9Q-CCZH>] (Apr. 14, 2021, 11:41 AM).

90. See *id.*

91. See *id.*

92. See *supra* notes 7–9, 65 and accompanying text.

93. See *What We Do*, NAT'L LAB. RELS. BD., <https://www.nlr.gov/about-nlr/what-we-do> [<https://perma.cc/FTE2-X2SU>] (last visited Oct. 25, 2021).

94. See, e.g., *Nat'l Football League Players Ass'n v. NLRB*, 503 F.2d 12, 12–13, 17 (8th Cir. 1974); *Impact of the NLRB on Professional Sports*, NAT'L LAB. RELS. BD., <https://www.nlr.gov/about-nlr/who-we-are/our-history/impact-of-the-nlr-on-professional-sports> [<https://perma.cc/FXK7-G7UC>] (last visited Oct. 25, 2021).

industries.<sup>95</sup> Recent political protests and NLRB advice memoranda shed light on the agency's protection of employees who take part in political activity.<sup>96</sup>

### 1. Concerted Activity and Unfair Labor Practices

The NLRA governs relationships between private employers and union employees.<sup>97</sup> This includes the relationship between NBA players and team governors.<sup>98</sup> Section 7 of the NLRA protects employees if they participate in “concerted activities for the purposes of collective bargaining or other mutual aid or protection.”<sup>99</sup> If concerted activity is protected under section 7, an employer cannot retaliate against its employees under section 8 of the NLRA, which states that retaliation against protected concerted activity is an “unfair labor practice.”<sup>100</sup> Generally, employees engage in concerted activity when they work together to achieve a common objective, such as improved working conditions.<sup>101</sup> Concerted activity, however, is not always protected.<sup>102</sup>

The Supreme Court's interpretation of protected concerted activity requires a necessary link between the objective behind the employees' concerted activity and their workplace conditions.<sup>103</sup> Several courts of appeals, including the US Court of Appeals for the Sixth Circuit and D.C. Circuit, protect concerted employee activity as long as one can reasonably see the activity as affecting the workplace.<sup>104</sup> There must be an identifiable relationship between the activity and employees' concerns about work-related matters.<sup>105</sup> The NLRB thus, in tandem with the courts, acknowledges that a strike's purpose must have a “direct nexus” to legitimate employee concerns related to workplace terms or conditions.<sup>106</sup>

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95. See, e.g., Gurrieri, *supra* note 12; Foley et al., *supra* note 16.

96. See Gurrieri, *supra* note 12; Foley et al., *supra* note 16.

97. See ROBERT J. NOBILE, GUIDE TO EMPLOYEE HANDBOOKS § B:7 (2021).

98. See Lance Pugmire, *NBA Players Association Alleges Unfair Labor Practices*, L.A. TIMES (May 24, 2011, 12:00 AM), <https://www.latimes.com/sports/la-xpm-2011-may-24-la-sp-nba-labor-20110525-story.html> [<https://perma.cc/KWW4-T223>].

99. National Labor Relations Act (NLRA), 29 U.S.C. § 157.

100. *Id.* § 158(a)(1).

101. 51A C.J.S. *Labor Relations* § 436 (2021).

102. See *id.*

103. See, e.g., *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565–68 (1978).

104. See, e.g., *NLRB v. Main St. Terrace Care Ctr.*, 218 F.3d 531, 540 (6th Cir. 2000); *Cadbury Beverages, Inc. v. NLRB*, 160 F.3d 24, 28 (D.C. Cir. 1998) (explaining that employee discussions about topics that affect the workplace are considered protected concerted activities).

105. See, e.g., *Tradesmen Int'l, Inc. v. NLRB*, 275 F.3d 1137, 1143 (D.C. Cir. 2002).

106. See *Can-Am Plumbing, Inc. v. NLRB*, 321 F.3d 145, 148 (D.C. Cir. 2003); Advice Memorandum from Jayme Saphir, Assoc. Gen. Couns., Div. of Advice, NLRB, to Terry

Section 8(a)(1) of the NLRA, which discusses unfair labor practices, acts as a complement to the section 7 concerted activity clause because it prohibits an employer from interfering, restraining, or coercing employees as they engage in any section 7 rights.<sup>107</sup> To be considered an unfair labor practice, the employer's statements or actions must reasonably deter employees from exercising their right to engage in protected concerted activity.<sup>108</sup>

## 2. NLRB Guidance

The NLRB focuses on the purpose of the strike to determine whether employees should be protected.<sup>109</sup> Usually, the strike must involve objectionable working conditions or economic disputes.<sup>110</sup> Sometimes, however, employees strike to protest issues outside of the workplace, such as political injustice.<sup>111</sup> In 1978, the Supreme Court addressed whether political activity could be protected concerted activity under section 7 of the NLRA in *Eastex, Inc. v. NLRB*.<sup>112</sup> The employer in *Eastex* stopped the distribution of a union newsletter across its plant during nonworking hours.<sup>113</sup> The newsletter urged employees to support the union and write to their legislators about minimum wage and a right-to-work order.<sup>114</sup> The Court determined that the NLRA's "broader purpose" includes employee appeals to legislators to protect their work-related interests.<sup>115</sup> However, the Court qualified its holding by acknowledging that the relationship between some concerted activity and employee working conditions is "so attenuated" that it falls outside the section 7 protections.<sup>116</sup> The Court deferred to the NLRB to make this fact-based distinction.<sup>117</sup> Thus, the NLRA covers political

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Morgan, Reg'l Dir., Region 7, NLRB 8–9 (Aug. 30, 2017), <https://apps.nlr.gov/link/document.aspx/09031d458270d0e8> [<https://perma.cc/USL4-X9K7>] [hereinafter NLRB Advice Memo from Aug. 30, 2017]; *see also* Gurrieri, *supra* note 12.

107. National Labor Relations Act (NLRA), 29 U.S.C. § 158(a)(1).

108. *See* Greater Omaha Packing Co. v. NLRB, 790 F.3d 816, 822 (8th Cir. 2015).

109. *See The Right to Strike, supra* note 7.

110. *See id.*

111. *See, e.g.,* Bogage, *supra* note 15.

112. *Eastex, Inc. v. NLRB*, 437 U.S. 556, 564 (1978).

113. *See id.* at 556.

114. *See id.* A right-to-work order allows workers to choose if they want to join a labor union in the workplace. *See* Will Kenton, *Right-to-Work Law*, INVESTOPEDIA, <https://www.investopedia.com/terms/r/righttowork-law.asp> [<https://perma.cc/54N7-QF54>] (Aug. 23, 2021).

115. *See Eastex*, 437 U.S. at 565–66.

116. *See id.* at 567–68.

117. *See id.*

protests under section 7 when there is an identifiable link between the purpose of the protest and the protestors' "interests as employees."<sup>118</sup>

The power to distinguish between lawful and unlawful strikes belongs to the NLRB.<sup>119</sup> Over the past four years, the NLRB has echoed its longstanding view that political strikes are to be protected under the appropriate circumstances.<sup>120</sup> The NLRA protects political strikes if: (1) the motivations behind the strike are directly linked to employee working conditions, and (2) the employer has some degree of control over the subject matter of the employees' strike.<sup>121</sup> The NLRB's guidance regarding the 2017 Day Without Immigrants protest reinforces this two-step test.<sup>122</sup>

In 2017, workers throughout the United States protested to show their support for immigrants' contributions to US society in the Day Without Immigrants strike.<sup>123</sup> Among the participants were Mexican-American employees who were fired when they missed work on the day of the protest.<sup>124</sup> On March 13, 2018, the NLRB released an advice memorandum, dated August 30, 2017, which stated that the employees participated in the strike for their own "mutual aid or protection" and thus were protected under section 7 of the NLRA.<sup>125</sup> The NLRB guidance explained that the political activity was protected under section 7 because there was a direct nexus between the concerted activity and the employees' work-related interests.<sup>126</sup> The Day Without Immigrants strike was a response to vigorous immigration enforcement and increased workplace raids—the NLRB concluded that this could

118. See *id.* at 564, 566.

119. See, e.g., *What We Do*, *supra* note 93.

120. See, e.g., Gurrieri, *supra* note 12; NLRB Advice Memo from Aug. 30, 2017, *supra* note 106; Tim Ryan, *NLRB GC Says Labor Law Should Protect Political Advocacy*, LAW360 (Oct. 6, 2021, 5:00 PM), <https://www.law360.com/employment-authority/articles/1428643/nlr-gc-says-labor-law-should-protect-political-advocacy> [<https://perma.cc/DPA5-G2F2>]; NLRB, GC 21-03, EFFECTUATION OF THE NATIONAL LABOR RELATIONS ACT THROUGH VIGOROUS ENFORCEMENT OF THE MUTUAL AID OR PROTECTION AND INHERENTLY CONCERTED DOCTRINES 2–3 (2021) [hereinafter NLRB GC 21-03].

121. See Foley et al., *supra* note 16; NLRB Advice Memo from Aug. 30, 2017, *supra* note 106, at 8–15.

122. See Foley et al., *supra* note 16; NLRB Advice Memo from Aug. 30, 2017, *supra* note 106, at 8–15.

123. See Holly Yan & David Williams, *Nationwide 'Day Without Immigrants' Shuts Down Businesses*, CNN, <https://www.cnn.com/2017/02/16/us/day-without-immigrants-vignettes/index.html> [<https://perma.cc/T38H-FXPF>] (Feb. 16, 2017, 7:59 PM).

124. Philip B. Rosen, Howard M. Bloom, Ian B. Bogaty & Kathryn J. Barry, *NLRB GC: Participating in Nationwide 'Day Without Immigrants' Is Protected Concerted Activity*, JACKSON LEWIS (Apr. 10, 2018), <https://www.jacksonlewis.com/publication/nlr-gc-participating-nationwide-day-without-immigrants-protected-concerted-activity> [<https://perma.cc/A45M-4M8R>].

125. See *id.*

126. See *id.*

likely diminish working conditions for all employees.<sup>127</sup> Additionally, the NLRB emphasized the employer's ability to wield control over the ultimate purpose of the strike.<sup>128</sup> In other words, the NLRB found that, collectively, the employers were in a position to influence legislators to address the employees' immigration concerns.<sup>129</sup>

In July 2020, US employees participated in the Strike for Black Lives.<sup>130</sup> Based on the NLRB's 2017 advice memorandum, several employment law specialists recommended that employers should not "engage in conduct designed to discourage or frustrate employee participation" in the strike.<sup>131</sup> More recently, in October 2021, Jennifer Abruzzo, NLRB general counsel and top prosecutor, issued a statement expounding on the NLRB's previous guidance and proclaimed that federal labor law should protect employees who engage in certain political and social strikes, including strikes in support of racial equality.<sup>132</sup> Throughout 2021, the NLRB general counsel has issued advice memoranda that signal the agency's intention to forcefully pursue retaliation claims involving protected concerted activity.<sup>133</sup>

The NLRB's recent advice memoranda and Abruzzo's 2021 statements show that NLRA protections extend beyond wage disputes and also highlight the agency's willingness to protect employees' rights to politically protest.<sup>134</sup> Unless a political strike is a "wildcat" strike—a strike explicitly disapproved by the employees' union—and unless

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127. See *id.*

128. See Foley et al., *supra* note 16; NLRB Advice Memo from Aug. 30, 2017, *supra* note 106, at 17–18.

129. See Foley et al., *supra* note 16; NLRB Advice Memo from Aug. 30, 2017, *supra* note 106, at 17–18.

130. See Bogage, *supra* note 15.

131. See Foley et al., *supra* note 16. While experts recognize that political protests fall under a gray area, they generally caution employers to carefully consider how they would handle employees striking for political purposes based on the current social climate and the NLRB's recent protected concerted activity trends. See *id.*; Jonathan J. Spitz, Howard M. Bloom, Patrick L. Egan & Edward V. Jeffrey, *National Walkout Called for July 20*, JACKSON LEWIS (July 17, 2020), <https://www.jacksonlewis.com/publication/national-walkout-called-july-20> [<https://perma.cc/S8TD-9RAL>]; *NLRB Prosecutor Signals an Aggressive and Expansive View of Protected Employee Activities*, KAMER ZUCKER ABBOTT (Apr. 13, 2021), <https://kzalaw.com/knowledge-center/employer-reports/nlr-prosecutor-signals-an-aggressive-and-expansive-view-of-protected-employee-activities/> [<https://perma.cc/EEW4-QJG6>]; Lisa Burden, *Employee Participation in 'Day Without Immigrants' Was Protected Activity, Agency Says*, HR DIVE (Mar. 19, 2018), <https://www.hrdiver.com/news/employee-participation-in-day-without-immigrants-was-protected-activity/519336/> [<https://perma.cc/6WNG-C26K>].

132. See Ryan, *supra* note 120.

133. See NLRB GC 21-03, *supra* note 120, at 4; *NLRB Prosecutor Signals an Aggressive and Expansive View of Protected Employee Activities*, *supra* note 131.

134. See Ryan, *supra* note 120.

employees are bound by a no-strike clause, there is a possibility that the strike would be protected under the NLRA.<sup>135</sup>

## II. SAVED BY THE BALL: ABATING THE UNCERTAINTIES SURROUNDING AN NBA STRIKE

This Note analyzes the potential responses to an NBA political strike against racial inequality upon the current CBA's expiration. An NBA strike can be resolved either by the NLRB—through guidance or adjudication—or by the league and its players.<sup>136</sup> The status quo is suboptimal due to the uncertainties surrounding the repercussions of a player strike and the competing interests between team governors and players.<sup>137</sup> The NLRB and the league both have the ability to minimize these uncertainties and strike a balance between the parties' interests.

### A. A NLRB Resolution

The NLRB decides whether employee conduct is protected concerted activity, and it decides whether employer retaliation constitutes unfair labor practices, provided that employees are not bound by a no-strike clause.<sup>138</sup> If future protests against racial inequality qualify as section 7 protected concerted activity, then retaliation against the players by team governors would be an unfair labor practice under section 8.<sup>139</sup> Team governors would not be able to threaten to fire, bench, or discipline any players for their attempts to participate in the protests.<sup>140</sup> Benching, fining, or replacing players

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135. See Amanda J. Fray, Howard M. Bloom & Philip B. Rosen, *NLRB: Wildcat Strike Loses NLRA Protection Following Employee Knowledge of Union Disavowal, Disapproval*, NAT'L L. REV. (Oct. 15, 2019), <https://www.natlawreview.com/article/nlr-wildcat-strike-loses-nlra-protection-following-employee-knowledge-union> [<https://perma.cc/5F6S-J3ZG>].

136. See *The NLRB Process*, NAT'L LAB. RELS. BD., <https://www.nlr.gov/resources/nlr-process> [<https://perma.cc/P9Y3-7NES>] (last visited Oct. 25, 2020).

137. See Ryan, *supra* note 120. Most team governors view the league and their teams as revenue-generating businesses, while many players view the NBA as a platform to both earn a living playing basketball and push for societal change and racial equality. Martenzie Johnson, *NBA Governors Will Have to Use Their Political Capital to Enact Social Change*, THE UNDEFEATED (Sept. 30, 2020), <https://theundefeated.com/features/nba-governors-will-have-to-use-their-political-capital-to-enact-social-change/> [<https://perma.cc/BSP7-SXNU>]; Malika Andrews & Marc J. Spears, *How the NBA Bubble Has Become a Platform for Social Justice*, ESPN (July 29, 2020), [https://www.espn.com/nba/story/\\_/id/29555143/nba-restart-how-nba-bubble-become-platform-social-justice](https://www.espn.com/nba/story/_/id/29555143/nba-restart-how-nba-bubble-become-platform-social-justice) [<https://perma.cc/DW54-J8FF>].

138. See National Labor Relations Act (NLRA), 29 U.S.C. §§ 157, 158(a)(1); see also *The Right to Strike, supra* note 7; *What We Do, supra* note 93.

139. See 29 U.S.C. §§ 157, 158(a)(1); *Eastex, Inc. v. NLRB*, 437 U.S. 556, 561 n.7, 563–64 (1978).

140. See 29 U.S.C. §§ 157, 158(a)(1); *Eastex*, 437 U.S. at 561 n.7.

would plainly fall under section 8 of the NLRA's prohibition of disciplinary retaliation.<sup>141</sup> However, it is less clear whether a potential player protest would be considered protected concerted activity under section 7.<sup>142</sup> Political protests, such as those against racial inequality or social injustice, are considered protected concerted activity only if the objective behind the protest has a direct nexus to employee working conditions.<sup>143</sup> Thus, the main question is whether an NBA player strike against racial injustice in the United States has a direct nexus to NBA working conditions.

The NLRB can either wait for a case in point or issue guidance as it did for the Day Without Immigrants strike.<sup>144</sup> Waiting for a court to speak on the issue is an inefficient approach—especially with no professional athlete strike precedent to follow—as it would entail lengthy NLRB adjudication followed by potential appeals to a circuit court and the Supreme Court.<sup>145</sup> Issuing guidance, on the other hand, would eliminate some of the uncertainty and reduce the chances of drawn-out litigation. Regardless of its course of action, the NLRB would have to make a conclusion about an NBA strike and section 7 protected concerted activity. The agency could decide that the purpose of the players' political protests is too far removed from NBA workplace conditions and thus not protected under the NLRA.<sup>146</sup> Alternatively, the NLRB could draw a nexus between the purpose of the strike and the players' working conditions, as it did in its 2017 guidance in regard to the Day Without Immigrants strike.<sup>147</sup>

### 1. No Direct Nexus: An NLRB Decision for the Team Governors

If the NLRB fails to find a direct nexus between an NBA strike and workplace conditions, it would likely conclude that societal racism does not ultimately diminish employment conditions for NBA players. In *Eastex*, the employees' political concerted activity was protected

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141. See *Eastex*, 437 U.S. at 561 n.7.

142. See *id.* at 564.

143. See Foley et al., *supra* note 16; NLRB Advice Memo from Aug. 30, 2017, *supra* note 106, at 8.

144. See Gurrieri, *supra* note 12.

145. See *The NLRB Process*, *supra* note 136; *Appeals from Administrative Proceedings*, JUSTIA, <https://www.justia.com/administrative-law/appeals-from-administrative-proceedings/> [<https://perma.cc/D653-SM86>] (last visited Oct. 25, 2020); *Court Role and Structure*, U.S. CTS., <https://www.uscourts.gov/about-federal-courts/court-role-and-structure> [<https://perma.cc/XRK2-GXR3>] (last visited Oct. 25, 2020).

146. See, e.g., *Eastex*, 437 U.S. at 567–68 (acknowledging that some concerted activities are too attenuated from employee working conditions to be protected).

147. See Gurrieri, *supra* note 12.

because it involved the distribution of a newsletter about a right-to-work order and minimum wage legislation, which would ultimately affect the employees' workplace conditions.<sup>148</sup> Here, players are not protesting racial injustice in the NBA, nor are they protesting any potential legislation that would affect their workplace conditions.<sup>149</sup> Rather, they are protesting racial inequality in general.<sup>150</sup> The 2020 NBA strike was specifically a response to the unjust treatment of Black and African-American people throughout the United States.<sup>151</sup>

In a legal Comment that focuses on the 2016–2017 NFL national anthem protests, M'Kenzie Galloway concludes that the NLRB would likely fail to draw a nexus between NFL players' protests against societal racism and their working conditions.<sup>152</sup> The objective behind both the NFL and NBA protests is the same: to raise awareness and take a stand against racial inequality.<sup>153</sup> Although Galloway believes that disciplining players for protesting is ultimately not the best solution, she argues that the protests are not related to the NFL players' interests as employees.<sup>154</sup>

Galloway's NLRA argument has similar merit in the NBA context because NBA players are not specifically protesting racial inequality in the NBA workplace.<sup>155</sup> In fact, the NBA and team governors have undertaken numerous efforts to make sure players feel comfortable at work.<sup>156</sup> The league stood with players to raise awareness and fight injustice throughout the 2020 season.<sup>157</sup> Examples include creating promotional campaigns in an effort to promote civic engagement ahead of the November 2020 elections and postponing the Minnesota Timberwolves game in April 2021 after the police shooting of Daunte Wright in Brooklyn Center, Minnesota.<sup>158</sup> Like Galloway's

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148. See *Eastex*, 437 U.S. at 569–70.

149. See Scott, *supra* note 20.

150. See *id.*

151. See *id.*

152. See M'Kenzie Galloway, *NFL National Anthem Protests: An Impending Labor Law Violation?*, 29 MARQ. SPORTS L. REV. 527, 544 (2019).

153. See *id.* at 541; Scott, *supra* note 20.

154. See Galloway, *supra* note 152, at 543.

155. See *id.*

156. See Chase Hughes, *NBA Unveils New Social Justice Efforts as Postseason Gets Set to Resume*, NBC SPORTS (Aug. 28, 2020), <https://www.nbcsports.com/washington/wizards/nba-unveils-new-social-justice-efforts-postseason-gets-set-resume> [<https://perma.cc/EEJ2-KYT4>].

157. See *id.*

158. See, e.g., *id.*; Joseph Salvador, *Timberwolves–Nets Game Postponed After Police Shooting of Daunte Wright*, SPORTS ILLUSTRATED (Apr. 12, 2021), <https://www.si.com/nba/2021/04/12/minnesota-timberwolves-nets-postponed-daunte-wright-shooting-police-officer> [<https://perma.cc/7LQT-AQW7>]. The league also had Black Lives Matter painted on its courts and allowed players to replace the names on their jerseys with phrases like

NLRA argument concerning NFL players, the relationship between NBA players' protests against nationwide racism and workplace conditions could be "too attenuated" to support the finding of a direct nexus.<sup>159</sup>

*a. Implications of a Team Governor Decision*

Although the failure to find a nexus between NBA players' strike objectives and their workplace conditions is possible, such an outcome is at odds with the public direction that the NLRB and much of US society are heading.<sup>160</sup> The 2017 Day Without Immigrants protest and the 2020 Strike for Black Lives highlight a growing movement in the United States that seeks to address societal injustice. For this reason, employers, including NBA team governors, could encounter public backlash if they discipline employees who participate in such a strike, especially since most Americans overwhelmingly supported the 2020 NBA strike.<sup>161</sup> The recent NLRB advice memoranda, the 2020 employment attorney recommendations, and the 2021 public statement by Abruzzo suggest that the law is following a similar trend.<sup>162</sup>

An NLRB decision that fails to find a direct nexus between a player strike against racial injustice and the NBA workplace would also downplay the racism experienced by NBA players, both off and on the court. It is well established that racism affects Black and

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"Enough" and "How Many More." See Malika Andrews, *NBA Unveils Black Lives Matter on Orlando Court*, ESPN (July 21, 2020), [https://www.espn.com/nba/story/\\_/id/29510169/nba-unveils-black-lives-matter-orlando-court](https://www.espn.com/nba/story/_/id/29510169/nba-unveils-black-lives-matter-orlando-court) [<https://perma.cc/HPK2-LC5G>]; *Social Justice Messages Each NBA Player Is Wearing on His Jersey*, THE UNDEFEATED (July 31, 2020), <https://theundefeated.com/features/social-justice-messages-each-nba-player-is-wearing-on-his-jersey/> [<https://perma.cc/HW5W-HAMR>]. Further, team governors collectively pledged to donate \$300 million by the year 2031 to a foundation aimed at supporting and empowering Black and African-American communities. Alexandra Kelley, *NBA Team Owners to Donate \$300 Million to Black Empowerment*, CHANGING AM. (Aug. 6, 2020), <https://thehill.com/changing-america/respect/diversity-inclusion/510894-nba-team-owners-to-donate-300-million-to-black> [<https://perma.cc/3NPL-ZHXN>].

159. See Galloway, *supra* note 152, at 543.

160. See Rosenblatt, *supra* note 40; Ryan, *supra* note 120.

161. See Alex Hampl, *Milwaukee Bucks Fans React to Players' Decision to Protest Playoff Game Against Orlando Magic*, SPORTS ILLUSTRATED (Aug. 26, 2020), <https://www.si.com/nba/2020/08/27/milwaukee-bucks-fans-react-canceled-playoff-game-jacob-blake-protest> [<https://perma.cc/8SR3-5Y66>]; Katherine Fung, *More than Half of Americans Support NBA Strike, Poll Shows*, NEWSWEEK (Aug. 28, 2020, 12:34 PM), <https://www.newsweek.com/more-half-americans-support-nba-strike-poll-shows-1528390> [<https://perma.cc/82V6-2Q7E>].

162. See *supra* Section I.C.1.a.

African-American NBA players off the court.<sup>163</sup> In January 2018, Sterling Brown, the same Milwaukee Bucks shooting guard who refused to leave his team's locker room before the 2020 NBA strike, was confronted by a police officer over a parking violation.<sup>164</sup> Multiple police vehicles were called to the scene, and officers tased him because he did not take his hands out of his pockets when asked to do so.<sup>165</sup> Brown and the City of Milwaukee agreed to a \$750,000 settlement in 2020.<sup>166</sup> A similar settlement was reached in New York in 2017 after officers broke former Atlanta Hawk Thabo Sefolosa's right leg during an altercation.<sup>167</sup>

NBA players have also encountered racial discrimination in their workplace. In 2020, Boston Celtics point guard Marcus Smart detailed an incident where he tried to tell a white woman outside the team's arena to move out of the street so she would not get hit by a car; she responded with a racial slur.<sup>168</sup> In March 2019, former MVP Russell Westbrook was involved in a confrontation with fans who directed disrespectful and racial comments towards him.<sup>169</sup> All-Star player Kyrie Irving also expressed concerns about racist comments shouted by fans ahead of his team's 2021 playoff series.<sup>170</sup> Further, in May 2021, three fans were banned from attending the Utah Jazz arena after they yelled racist and sexually explicit comments at the parents of 2020 Rookie of the Year Ja Morant.<sup>171</sup> Although racism in the arenas is not what

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163. See, e.g., Ohm Youngmisuk, *Jimmy Butler, Other Heat Players Open Up on Racism in Online Town Hall*, ESPN (June 19, 2020), [https://www.espn.com/nba/story/\\_id/29336532/jimmy-butler-other-heat-players-open-racism-online-town-hall](https://www.espn.com/nba/story/_id/29336532/jimmy-butler-other-heat-players-open-racism-online-town-hall) [https://perma.cc/LGA7-TXZE].

164. See Concepción de León, *Sterling Brown Agrees to \$750,000 Settlement in Lawsuit Against Milwaukee*, N.Y. TIMES (Nov. 9, 2020), <https://www.nytimes.com/2020/11/09/us/sterling-brown-nba-settlement.html> [https://perma.cc/LS9E-QG5R].

165. See *id.*

166. See *id.*

167. See *Thabo Sefolosa Settles Lawsuit vs. 5 NYPD Officers for \$4 Million*, ESPN (Apr. 5, 2017), [https://www.espn.com/nba/story/\\_id/19087188/thabo-sefolosa-atlanta-hawks-settles-lawsuit-vs-new-york-police-department-officers](https://www.espn.com/nba/story/_id/19087188/thabo-sefolosa-atlanta-hawks-settles-lawsuit-vs-new-york-police-department-officers) [https://perma.cc/8T2K-UUYA].

168. See Hayden Bird, *Celtics' Marcus Smart Details Racist Incident Outside TD Garden in Players' Tribune Column*, BOS. GLOBE, <https://www.bostonglobe.com/2020/10/19/sports/celtics-marcus-smart-details-racist-incident-outside-td-garden-players-tribune-column/> [https://perma.cc/V6JA-WLES] (Oct. 19, 2020, 4:33 PM).

169. See Matt Stevens & Kevin Draper, *Russell Westbrook Says Utah Jazz Fan Made 'Racial' Taunt that Led to Confrontation*, N.Y. TIMES (Mar. 12, 2019), <https://www.nytimes.com/2019/03/12/sports/russell-westbrook-utah-fan.html> [https://perma.cc/4BH5-PP8N].

170. See Chris Mannix, *Kyrie Irving's Return to Boston Reignites Racism Issue*, SPORTS ILLUSTRATED (May 28, 2021), <https://www.si.com/nba/2021/05/28/kyrie-irving-boston-celtics-racism-comments> [https://perma.cc/YSSV-S3AF].

171. See Tim MacMahon, *Ja Morant's Dad Says 3 Banned Jazz Fans Made Lewd, Racist Remarks During Game 2 in Utah*, ESPN (May 27, 2021),

sparked the 2020 NBA strike, it is part of the overall problem that players are trying to fight against—racial discrimination in the United States. While the NBA prohibits this type of fan behavior and bans anyone who engages in it, many members of the NBA community believe that more can be done.<sup>172</sup>

## 2. Direct Nexus: An NLRB Decision for the Players

If, on the other hand, the NLRB does find a direct nexus between NBA players' strike motivations and their workplace conditions, it would likely conclude that societal racism affects employment conditions for NBA players and that team governors have some ability to address racial injustice in their communities. In its guidance regarding the Day Without Immigrants strike, the NLRB stated that the existing immigration enforcement policies threatened workers' job security and, in turn, could worsen workplace conditions.<sup>173</sup> The guidance also highlighted the employers' ability to influence legislators to address immigration issues.<sup>174</sup> Abruzzo echoed this position in October 2021 when she announced that advocacy for political and social causes should be protected under the NLRA whenever the subject matter has a direct nexus to employees' interests in the workplace.<sup>175</sup>

Benjamin Sachs, a Harvard Law School professor of labor and industry, argues that a protest against racial inequality in the NFL national anthem context should be considered protected concerted activity under section 7 of the NLRA.<sup>176</sup> He contends that the racial discrimination protested against by NFL players in 2016–2017 negatively impacted their personal lives as well as their interests as

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[https://www.espn.com/nba/story/\\_/id/31523231/utah-jazz-ban-three-fans-verbal-altercation-game-2-vs-grizzlies](https://www.espn.com/nba/story/_/id/31523231/utah-jazz-ban-three-fans-verbal-altercation-game-2-vs-grizzlies) [<https://perma.cc/L6SB-H48T>].

172. Former NBA stars Matt Barnes and Stephen Jackson have stated that NBA team governors can do more to fight against racism inside and outside of the workplace. See Dan Loumena, *Matt Barnes Says NBA Teams Can Do More to Combat Racism*, L.A. TIMES (June 30, 2020, 3:06 PM), <https://www.latimes.com/sports/story/2020-06-30/matt-barnes-says-nba-teams-can-do-more-to-combat-racism> [<https://perma.cc/4C3J-W8Z3>]; All the Smoke, *David Fizdale, J.B. Bickerstaff, Ray Paultre*, SHOWTIME BASKETBALL (May 20, 2021), [https://www.youtube.com/watch?v=TFz\\_ICohzJo](https://www.youtube.com/watch?v=TFz_ICohzJo) [<https://perma.cc/97NJ-W9AU>].

173. See Foley et al., *supra* note 16; NLRB Advice Memo from Aug. 30, 2017, *supra* note 106, at 10.

174. See Foley et al., *supra* note 16; NLRB Advice Memo from Aug. 30, 2017, *supra* note 106, at 17–18.

175. See Ryan, *supra* note 120.

176. See Benjamin Sachs, *Benching NFL Players for Protesting During the Anthem Would Be Illegal*, VOX, <https://www.vox.com/the-big-idea/2017/10/14/16473534/benching-nfl-players-taking-knee-illegal-labor-law> [<https://perma.cc/T2DP-U8YC>] (Oct. 15, 2017, 8:36 AM).

employees.<sup>177</sup> This argument can be applied to the NBA context. As previously detailed, Black and African-American NBA players observe and experience racial injustice throughout their lives, and this experience can, directly and indirectly, impact their ability to work.<sup>178</sup> For example, if a player fears for his safety when the police question him over a parking dispute shortly before a game, his performance in the arena will likely be impacted. Such a connection leaves room for the NLRB to draw a direct nexus between players' protest objectives and their workplace conditions. The connection becomes even stronger when racial discrimination occurs in the workplace. When fans shout racial slurs at players during games, workplace conditions undeniably decline and, thus, the nexus strengthens.

The NLRB guidance and the attorney recommendations about the aforementioned 2017 and 2020 political protests bolster the argument that a nexus exists between NBA workplace conditions and the players' protest motivations.<sup>179</sup> When the NLRB issued guidance in regard to its direct nexus requirement for the Day Without Immigrants protest—in addition to its acknowledgment that the immigration enforcement threatened workplace conditions—the agency also emphasized the employers' ability to influence legislators to “change course” in order to address employees' immigration concerns.<sup>180</sup> As such, this guidance supports the conclusion that the NLRB would draw a nexus to protect a potential NBA strike because the racial injustice threatens player workplace conditions, and team governors have sufficient economic resources and connections to change the course of racial inequality and address player concerns.<sup>181</sup> The potential to protect an NBA political protest also increases due to the recent Strike for Black Lives, of which participants had similar objectives to NBA players.<sup>182</sup> Both the NBA players and the employees who participated in the Strike for Black Lives aimed to fight against racial inequality

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177. See *id.* But see Galloway, *supra* note 152, at 542 (arguing that the relationship between societal racism and one's workplace conditions is too attenuated to warrant NLRA section 7 protection).

178. See discussion *supra* Section II.A.1.a.

179. See *supra* Section I.C.

180. See Foley et al., *supra* note 16; NLRB Advice Memo from Aug. 30, 2017, *supra* note 106, at 18.

181. See Foley et al., *supra* note 16; NLRB Advice Memo from Aug. 30, 2017, *supra* note 106, at 12. The Milwaukee Bucks team governors proved that they are capable of addressing player concerns over racial inequality when they contacted the lieutenant governor and state attorney general of Wisconsin during the 2020 NBA strike. See Shelburne & Bontemps, *supra* note 50.

182. See Bogage, *supra* note 15; Scott, *supra* note 20.

inside and outside of the workplace.<sup>183</sup> Further, the NLRB's 2021 advice memoranda and Abruzzo's 2021 statements signal the agency's willingness to protect political concerted activities such as the Strike for Black Lives.<sup>184</sup> If this trend in federal labor law continues, then the NLRB would likely draw a direct nexus between the NBA players' protest objectives and their workplace conditions.

If the NLRB decides to protect an NBA strike, employers would not be able to take any actions that might deter players from participating in the protest.<sup>185</sup> This means the NLRA would prevent team governors from fining, benching, or similarly disciplining players for refusing to play.<sup>186</sup> The players must only ensure that the NBPA approves of the protest, lest it be deemed an unprotected wildcat strike.<sup>187</sup>

### *a. Implications of a Player Decision*

It is certainly possible that the NLRB would protect an NBA political strike. However, there is a notable difference between the events that led to the Day Without Immigrants strike and that of a potential NBA strike against racial injustice, which may lead the NLRB to reach a different outcome when asked to determine whether the protest would be protected under section 7. Part of the NLRB's rationale behind its 2017 guidance involved not only concerns of unjust immigration treatment, but also that workplaces were raided.<sup>188</sup> The guidance addresses tangible workplace changes—increased workplace raids—which partially prompted the strike.<sup>189</sup> This distinction contributed to the NLRB decision that protected the concerted activity as it pertained to employees' workplace interests.<sup>190</sup> The objectives behind the 2020 NBA strike differed because the protests did not address specific workplace changes that resulted from racial injustice.<sup>191</sup>

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183. See Bogage, *supra* note 15; Scott, *supra* note 20.

184. See *supra* text accompanying note 131.

185. See National Labor Relations Act (NLRA), 29 U.S.C. §§ 157, 158(a)(1); Eastex, Inc. v. NLRB, 437 U.S. 556, 561 n.7 (1978).

186. 29 U.S.C. § 158(a)(1).

187. Fray et al., *supra* note 135.

188. See Gurrieri, *supra* note 12; NLRB Advice Memo from Aug. 30, 2017, *supra* note 106, at 6, 11.

189. See Gurrieri, *supra* note 12; NLRB Advice Memo from Aug. 30, 2017, *supra* note 106, at 11.

190. See Gurrieri, *supra* note 12; NLRB Advice Memo from Aug. 30, 2017, *supra* note 106, at 11.

191. See Scott, *supra* note 20.

Additionally, while an NLRB finding that protects protests against racial inequality under the NLRA would surely be considered a win by most players, there are concerns about the potential impact of such a determination. Protecting protests against racism under the NLRA may open a Pandora's box, in that all types of out-of-work experiences which may affect workplace conditions could be protected.<sup>192</sup> Professor Sachs addresses this point by arguing that a line should be drawn between racial discrimination and other types of nonworking conditions because “[t]he law must draw lines of this sort all the time.”<sup>193</sup>

Further, ruling against team governors may devalue the actions that the NBA and teams undertook to combat racial inequality inside and outside of the workplace. As discussed, the NBA has taken steps to call attention to racial inequality outside of the workplace and to prevent it within the workplace.<sup>194</sup> However, many individuals maintain that the actions taken by the league and team officials are more performative than impactful and that more can and should be done.<sup>195</sup> Another potential drawback to a ruling in favor of the players is the concern that it may force players to become activists, a role they may not have anticipated or desired. Although many players have shown their willingness to fight against racial injustice,<sup>196</sup> others may not want the added pressures and responsibilities that come with social activism.

### *B. A Collaborative Resolution*

While the NLRB can resolve the uncertainty surrounding an NBA strike, such a resolution would likely involve stoppage of play, revenue loss, fan loss, and potential drawn-out litigation. These outcomes would work against the interests of players, team governors, and the league. The NBPA and team governors can instead address a potential NBA strike against racial inequality by reaching an agreement during collective bargaining negotiations. Waiting for the NLRB is not necessary, and players and team governors have proven to be collaborative in the past.<sup>197</sup> Due to the parties' cooperative

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192. See Galloway, *supra* note 152, at 540–44 (considering a court's ability to distinguish off-the-job racial discrimination from other off-the-job circumstances).

193. Sachs, *supra* note 176.

194. See *supra* text accompanying note 158.

195. See *supra* text accompanying note 172.

196. See Scott, *supra* note 20.

197. See *Joint NBA and NBPA Statement*, NAT'L BASKETBALL PLAYERS ASS'N (Aug. 28, 2020), <https://nbpa.com/news/joint-nba-and-nbpa-statement> [<https://perma.cc/U4VC-YYSW>].

relationship, a mutually beneficial resolution is more likely to occur than one that involves conflict and NLRB adjudication.

Team governors and the league itself were supportive throughout the players' strike against racial injustice in 2020.<sup>198</sup> The Bucks' ownership issued a statement that backed the players and agreed to stand with them.<sup>199</sup> League Commissioner Adam Silver also gave his support.<sup>200</sup> Upon resuming play, forty-eight hours after the 2020 strike, the NBA and NBPA released a joint statement that outlined some of the measures they would take to combat racial inequality, which included establishing a social justice coalition, converting team arenas into voting locations for the 2020 general elections, and dedicating game-time advertising spots to promote civic engagement in national and local elections.<sup>201</sup> This past cooperation could prove to be a useful jumping-off point for the parties if they negotiate provisions related to racial inequality activism in the upcoming CBA. The best resolution will address societal racism inside and outside the NBA workplace and reach a compromise between the competing interests of the players and team governors.

### III. SMELLS LIKE TEAM SPIRIT: RACIAL EQUALITY AND THE NBA CBA

Whether the NLRB decides to consider the protection of a potential NBA player strike against racial inequality under section 7 of the NLRA is yet to be seen, and it is unlikely that the judicial and regulatory processes will offer much clarity in the near future. This Note, therefore, proposes that the issues surrounding a potential NBA strike be resolved proactively by the league, team governors, and players through collective bargaining negotiations as a follow-up to their collaborative efforts during and after the 2020 NBA strike. It also posits that the NBPA would likely have superior bargaining power in the negotiations due to the current social and political climate, the NLRB's recent guidance and statements about political protests, and the NBA's trend of becoming a player-driven league. However, because this Note assumes more impactful changes take place when opposing parties work together, compromises should be made to consider all parties' interests and ensure effective collaboration.

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198. *Id.*

199. *See* Fung, *supra* note 161.

200. *See* Jasmyrn Wimbish, *Adam Silver Pens Letter to Employees Deciding to Strike in Solidarity with NBA and WNBA Players*, CBS SPORTS (Aug. 28, 2020, 11:26 AM), <https://www.cbssports.com/nba/news/adam-silver-pens-letter-to-employees-deciding-to-strike-in-solidarity-with-nba-and-wnba-players/> [<https://perma.cc/3BU5-Z9KZ>].

201. *See* *Joint NBA and NBPA Statement*, *supra* note 197.

### A. CBA Negotiations

As it stands, a potential player strike may result in the following undesirable scenario: (1) the players refuse to take part in games, (2) the league loses revenue and fan interest, (3) team governors reprimand the players, and (4) players potentially file a labor lawsuit against team governors. Instead, the NBPA could and should negotiate with the league and team governors to proactively address player concerns and prevent litigation or work stoppage altogether. The parties successfully collaborated in the aforementioned August 2020 joint statement and April 2021 postponement of the Minnesota Timberwolves game.<sup>202</sup> Although these actions address racial injustice and prevent potential stoppage of play and conflict and thus are steps in the right direction, collaboration between the league and its players should include a broader approach that fights against underlying racial issues at the collective bargaining level.

Players and team governors should agree to add racial equality provisions into their CBA, just as they would agree to amend revenue sharing and salary provisions. Players should enter into these negotiations with certain racial justice reforms in mind, such as: (1) bans on pretextual traffic stops, (2) voting rights protections, (3) equal access to education, and (4) challenges to legislation that disproportionately impacts the Black and African-American populations.<sup>203</sup> The NBPA can work with racial justice reform experts to better its understanding of the issues that should be raised during CBA negotiations.<sup>204</sup> It can also address pressing issues in players' respective cities, such as the police shootings of Jacob Blake and Daunte Wright, and advocate for resolutions similar to the Daunte Wright and Kobe Dimock-Heisler Community Safety & Violence Prevention Act.<sup>205</sup>

The racial equality reforms can be included in a separate section within the CBA. The provisions should be league-wide and apply to each team governor, and they should encourage team governors to take active steps within their respective communities in regard to each issue. The parties can use the language from the August 2020 joint statement

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202. See *supra* Section II.B.

203. See, e.g., Arnovitz, *supra* note 4.

204. See *id.*

205. See *supra* Sections I.A.2, I.B. The Kobe Dimock-Heisler Community Safety & Violence Prevention Act creates new divisions of trained, unarmed civilian employees who respond to non-moving traffic violations. See Marlene Lenthang & Meredith Deliso, *After Daunte Wright Shooting, City Council Approves Resolution on Police Changes*, ABC NEWS (May 15, 2021, 7:06 PM) <https://abcnews.go.com/US/daunte-wright-shooting-city-council-vote-police/story?id=77708866> [<https://perma.cc/VM8V-UM8R>].

issued in response to the 2020 strike as a template for language to include in the CBA. For example, one commitment in the joint statement reads, “team governors will continue to work with local elections officials to convert [the team arena] into a voting location for the 2020 general election.”<sup>206</sup> A similar provision can be inserted into the new NBA CBA that encourages team governors to work with local officials and focus on non-discriminatory legislation. As businesspeople and media personalities, NBA team governors have important connections to the cities in which they live and work.<sup>207</sup> As evidenced by the events in Milwaukee in August 2020, team governors can get the attention of local authorities and politicians.<sup>208</sup> Players should encourage team governors to contact their connections with specific goals to improve the quality of life for Black and African-American residents in their respective cities. The CBA can also require that players and team governors meet with experts in racial justice reform on a regular basis to discuss any ongoing issues within their communities.<sup>209</sup> Under this provision, team governors would agree to hear players’ concerns and continue to work alongside them and experts in a joint effort to fight racial injustice.

The league itself should also be involved in these negotiations. New provisions can be included, such as one that details how to decide which cities will host the NBA All-Star Weekends and Draft Nights. Players should encourage the league to follow its 2017 All-Star Weekend and the 2021 MLB All-Star Game approaches, and should establish a course of action that forbids the league from awarding important events to cities or states with potentially discriminatory policies.<sup>210</sup> Such provisions might also suggest that the NBA and team governors seriously consider relocating teams if the parties feel like the current location is unsafe for Black and African-American players.<sup>211</sup> This should further incentivize local legislators to work with teams and players and address their concerns due to the significant benefits that professional sports teams bestow upon their home cities and

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206. See *Joint NBA and NBPA Statement*, *supra* note 197.

207. See, e.g., Kurt Badenhausen, *The NBA’s Billionaire Owners 2020: Navigating Shutdowns and Outcries as the Coronavirus Spreads*, FORBES (Mar. 25, 2020, 7:30 AM), <https://www.forbes.com/sites/kurtbadenhausen/2020/03/25/the-nbas-billionaire-owners-2020-navigating-shutdowns-and-outcries-as-the-coronavirus-spreads/?sh=e93d22c51abb> [<https://perma.cc/A3B8-77CU>].

208. See, e.g., Shelburne & Bontemps, *supra* note 50.

209. See Arnovitz, *supra* note 4.

210. See *supra* Section I.B.

211. See *supra* Section I.B.

residents.<sup>212</sup> A redesigned CBA would give team governors and NBA players the opportunity to use their prominent positions to influence positive societal change without the disruption of a strike.

### *B. Potential Collective Bargaining Conflicts*

Although collective bargaining is an effective way to resolve disputes between players and team governors, a lingering uncertainty would remain during negotiations—conflicts may arise as to which party has superior bargaining power since the NLRB has not issued any decisions that speak to political strikes against racial inequality by professional athletes. Consequently, reaching an agreement on the racial injustice provisions may be difficult due to the previously discussed competing interests of team governors and players.<sup>213</sup> Even if an agreement can be reached, the speed at which these provisions can be agreed upon raises further concerns. However, players can maintain significant leverage in NBA negotiations if they remain united on the underlying reasons for protest. The NBA has become a player-driven league; superstar players like Kawhi Leonard are so integral to the league's success that the players would likely have the upper hand in most negotiation sticking points.<sup>214</sup> Team governors cannot avoid a stoppage of play by benching the entire team, and fans have supported players in their racial equality efforts. As such, it is in the best interests of team governors to address these issues at the CBA negotiation stage.

Another drawback is the difficulty of enforcing and measuring team governors' responses to the racial justice provisions in the CBA. Further, some of the more extreme suggestions, such as relocating teams, would likely be caught up in legal and contractual arguments. However, the NBPA can work with the aforementioned racial justice reform experts to gauge how each team governor responds to the provisions in periodic reviews, and the league may utilize these reviews to measure the effectiveness of the provisions and how better to enforce them.

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212. See *supra* Section I.B.

213. See *supra* Section I.B.

214. See Mark Medina, *Kawhi Leonard: It Doesn't Matter if You Put Statement on Jersey. It's About Doing the Work.*, USA TODAY (July 13, 2020, 7:55 PM), <https://www.usatoday.com/story/sports/nba/clippers/2020/07/13/kawhi-leonard-nba-player-social-justice-actions/5432180002/> [https://perma.cc/DKV5-WCT9].

Despite these difficulties, the soundest route to take is one that involves early CBA negotiations that address both parties' concerns. Avoiding a costly and time-consuming legal battle over the NLRA is convenient for all sides. Moreover, a revised CBA with the provisions discussed above would allow players and governors to work together to influence local legislation and make community changes within their cities without resorting to protest. In the negotiation process, the parties can work together to reach favorable terms that benefit their teams and communities. NBA team governors are in an excellent position, both financially and socially, to advocate for political change, and a CBA would direct this social and financial capital in the most efficient way for the league. Additionally, players and team governors who stand together to address issues of racial inequality would communicate an impactful image that could inspire other leagues and workplaces to follow suit.

#### IV. CONCLUSION

Athlete activism has a long history in the United States.<sup>215</sup> Although previous instances of athlete activism were met with hostility and ostracization,<sup>216</sup> the 2020 NBA protest reflected a different social climate. The players were unified, society was more aware of racial inequality, and the NLRB has indicated a broad view on the protection of concerted activity under section 7 of the NLRA.<sup>217</sup>

The NLRB's current public standpoint and the current social climate in the United States make it possible that an NBA player strike against racial injustice would be deemed protected concerted activity upon the expiration of the current CBA.<sup>218</sup> However, rather than striking and pursuing a labor law claim against team governors for any retaliation, players, team governors, and the league should choose to collaborate. Players should negotiate with team governors to add racial equality provisions to the upcoming CBA. These provisions should encourage team governors to take active steps to fight against racial inequality in their respective communities. Racial justice reform experts can assist in this process and measure the employers' efforts.

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215. *See supra* Section I.A.

216. *See supra* Section I.A.

217. *See supra* Part I.

218. *See supra* Section I.C.1.a.

The league and team governors have shown a willingness to cooperate with players in the fight for racial equality on multiple occasions.<sup>219</sup> The parties should continue these collaborative efforts for years to come. This proposed collaboration would not only make lives easier for NBA players but could also lead to impactful social change.

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219. See *supra* Section II.B.

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