No. 09-214

In the Supreme Court of the United States of America

PETITIONER

JON SNOW, AND OTHER SIMILARLY SITUATED INDIVIDUALS;

v.

RESPONDENT

NAT'L COLLEGIATE ATHLETIC ASS'N; THE NAT'L FOOTBALL LEAGUE

ON WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE FOURTEENTH CIRCUIT

BRIEF FOR THE RESPONDENTS

Questions Presented

I. Whether the National Collegiate Athletic Association amateurism and eligibility bylaws are protected as a matter of law from attack under § 1 of the Sherman Act.

II. Whether the state law claims of negligent hiring, negligent retention, negligent misrepresentation, and negligence per se brought by the National Football League Players are preempted by the Labor Management Relations Act.

Standard of Review

For the purposes of this review, the United States Supreme Court will review all matters *de novo*.

Corporate Disclosure Statement

The National Collegiate Athletic Association ("NCAA") is an unincorporated, nonprofit membership association composed of over 1,200 member schools and conferences. It has no corporate parent, and no publicly held corporation owns 10 percent or more of its stock.

The National Football League ("NFL") is an unincorporated association of 32 member clubs organized under the laws of New York.

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Statement of the Facts

The United States District Court for the Southern District of Tulania has recorded the facts of this case, and they are summarized here.

Jon Snow, star quarterback for Tulania University, has had multiple successful seasons for the Tulania Greenwave football team. After three years, Snow was nominated for multiple awards for his athletic achievements.

Apple Inc., in an effort to appeal to college football fans, has approached Jon Snow (along with other particularly successful and well-known players) to participate in a trial run for the new Apple Emoji Keyboard. This keyboard allows users to type using the image and likeness of these select college athletes. Apple hopes that this new keyboard will promote both college football and new Apple products.

As part of the agreement, Apple agreed to pay Snow and other participating athletes an immediate $1,000 for the use of their image and likeness on the emoji keyboard. Apple also promised the athletes an additional $ 1 royalty fee for each download by apple consumers.

Snow agreed to the trial term agreement with Apple. His likeness generated approximately $3,500 during the first trial period. The head of Tulania compliance, Cersei Lannister, received complaints from other student athletes concerning Jon Snow's receipt of unfair compensation. She notified the NCAA, which suspended Jon Snow indefinitely for violating NCAA Bylaw 12.5.2.1.

Jon Snow was furious he was unable to complete both the season and his collegiate career. He brought the first part of this combined legal action against the NCAA for violating § 1 of the Sherman Act and preventing himself and others from competition.

Snow also decided to enter his name in the NFL draft. The New Orleans Saints drafted Jon Snow within the year. The Saints are a professional football franchise of the NFL. Snow performed exceptionally well during his rookie year and gained even more recognition. During the course of Snow's rookie year, doctors and trainers prescribed him multiple painkillers to manage pain from small head collisions and minor ankle injuries. Jon Snow was never given disclosure on the side effects and risks posed with each medication. Instead, Snow alleges, he and the other players were given rushed cookie-cutter treatment and were dispatched back to the field.

Well into Snow's second contract year, he was diagnosed with an enlarged heart and suffered permanent nerve damage in his ankle. He had also developed an addiction to painkillers. The other players included in this action have all experienced similar stories.

Jon Snow and other plaintiffs situated similarly brought suit and their cases were consolidated in the United States District Court for the Southern District of Tulania.

Procedural History

Plaintiff Jon Snow, on behalf of himself and others similarly situated ("Snow"), brought suit against the NCAA and the NFL in the United States District Court for the Southern District of Tulania. The questions before that court were:

1. Does the NCAA bylaw 12.5.2.1 violate § 1 of the Sherman Antitrust Act?
2. Are state negligence claims against the NFL for negligent distribution and encouragement of excessive painkiller prescription preempted by § 301 of the LMRA?

The District Court found for the plaintiffs on both issues. On issue one, the court held that plaintiffs showed injury and that there was a violation of the Sherman Antitrust Act by the NCAA's prohibition on players receiving compensation for the use of their name, image or likeness. On issue two, the court held that state-law negligence claims were not preempted by § 301 of the LMRA, as the NFL's collective bargaining agreement ("CBA") was not needed to interpret the claims.

The NCAA and NFL defendants filed a timely appeal on both issues to the Fourteenth Circuit Court of Appeals. The Circuit Court heard the appeal and issued a ruling, finding that the NCAA was not in violation § 1 of the Sherman Act, and that § 301 of the LMRA did preempt state negligence claims because the state-law claim requires CBA interpretation. The Court reversed the district court's ruling.

Snow subsequently filed a writ of certiorari to the United States Supreme Court. The Court granted this writ.

Introduction

This case draws on decades of uncontested jurisprudence to illustrate two points. First, the case makes clear that limits on the application of § 1 of the Sherman Act (15 U.S.C.A. § 1) are necessary to preserve both the character of amateur sports in this country, and the competitive marketplace that exists for popular athletics. As held by the Fourteenth Circuit, the challenged NCAA rules limiting student remuneration to those categories already blessed by this court advance these goals. Second, the case solidifies the supremacy of federal law (specifically, the Labor Management Relations Act, 29 U.S.C. § 185) over state law, where appropriate, to maintain uniformity in adjudication of labor disputes where contracts exist, and where federal statutes have occupied the field. Here, too, the Fourteenth Circuit agreed with this position and held preemption to be appropriate.

1. Issue One: The Sherman Act Claim

The NCAA Amateurism and Eligibility Bylaws are Protected as a Matter of Law from Attack under § 1 of the Sherman Act

The holding in *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents* established amateur sports as a distinct product, and the eligibility rules required by the NCAA to preserve the unique nature of that product, as necessary to the product's existence and to the promotion of market competition in the arena. *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents*, 468 U.S. 85, 120 (1984). As a result, the rules challenged in this action are protected as a matter of law from attack under § 1 of the Sherman Act.

The Circuit Court's holding, and rule of reason analysis, correctly finds a procompetitive rationale for these eligibility rules sufficiently strong to overcome the admittedly dominant market power of the NCAA.

Sherman Act § 1 Framework and Analysis

15 U.S.C.A. § 1 provides, "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C.A. § 1.

The purpose of the prohibition on restraints of trade in antitrust law is the protection against injury to the public. *Standard Oil Co. v. United States*, 221 U.S. 1, 78 (1911). "Injury to the public" can come in the form of a restraint, which limits consumer choice, causes higher prices, reduces overall output, or impacts innovation. Injury can also result from well-intentioned, but ultimately harmful application of antitrust laws to actions, which appear to restrain trade, but, on balance, provide a public benefit. To reduce the likelihood that an antitrust inquiry will result in this sort of "false positive" (i.e. a finding of antitrust violation where procompetitive conditions exist), the court has, over the last century, shifted from a strict interpretation of restraint of trade to one which applies a flexible inquiry to the effects of contested horizontal restraints couched in the market power of the accused actor.

The Relevant Market is Concentrated

All restraints of trade are considered through the lens of the market power wielded by the party accused of the restraint. *Fortner Enters. v. United States Steel Corp.*, 394 U.S. 495, 502 (1969). With greater market power, heavier scrutiny is applied to the questioned restraints. *Id.*

Market definition requires analyses of the geographic scope of, and reasonable alternatives to, the product in question. *Bd. of Regents v. Nat'l Collegiate Athletic Ass'n*, 546 F. Supp. 1276, 1297 (W.D. Okla. 1982). In *Board of Regents*, the District Court defined the relevant market as "live college football television," which this court adopted. *Bd. of Regents*, 468 U.S. at 95 n.12. The court surmised that the day of the week on which college football is

played (Saturday) and the target demographic of college football broadcasts, constituted a unique market niche with no reasonable alternatives. *Bd. of Regent*, 546 F. Supp. at 1297.

O'Bannon provided an alternate market definition in which the Ninth Circuit described two relevant markets for the licensing rights of student athletes: the "college education market" and the "group licensing market." *O'Bannon v. NCAA*, 802 F.3d 1049, 1056 (9th Cir. 2015). These market definitions are related to, but not appropriate for, the issue presented here because both definitions, on their own, are too narrow. The question here is one of whether the NCAA's amateurism and eligibility rules (broadly) are protected, as a matter of law, and a more abstract market definition is appropriate.

Board of Regents addressed, and rightly held as unlawful, a restrictive broadcast television rights regime. *Bd. of Regents*, 468 U.S. at 95 n.12, 104. The holding in that seminal case pointed to the clear reduction in output arising from the NCAA's restrictions on television broadcasts. In the same decision, this court identified amateur sports as a distinct product, and distinguished the rules relating to amateurism and eligibility as critical aspects of that product in the broader marketplace of televised sports. *Id.* at 112.

In order to properly define the market, a reasonable assumption is necessary; "Televised" is a proxy for "popular" (i.e. the free market has clearly favored the sports which enjoy television coverage). Following this logic, the market for Name, Image, and Likeness licensing ("NIL") of sporting participants would mirror the market for televised sports. Simply put, but for the popularity of these sports, the NIL licensing market for those sports would not exist. The appropriate market, therefore, should be a combination of the markets defined in *Board of Regents* and *O'Bannon*, specifically "Group Licensing for Televised Sports."

By any definition, Division I college football and basketball comprise the overwhelming majority of the relevant market where college athletics are concerned, *Bd. of Regents*, 546 F. Supp. at 1284, and dominate the overall market for NIL in terms of sheer size. Per recent publications, Division I college football and basketball account for nearly 90 percent of the market (as defined), even when all *three* major professional sports (NFL, NBA, and MLB) are included in the calculation.[1] *Board of Regents* acknowledged this fact and assessed the restraints in light of this market power. *Bd. of Regents*, 468 U.S. at 103 citing to *Nat'l Soc. Of Prof'l Eng'rs v. U.S*, 435 U.S. 679, 684 (1978). Similar analyses were conducted, more recently, by the 5th Circuit, using *Board of Regents* as instructive. *McCormack v. Nat'l Collegiate Athletic Ass'n.*, 845 F.2d 1338, 1344 (5th Cir. 1988). This decision held that, even in the face of significant market power, the NCAA's amateurism and eligibility rules, which restrain certain types of commercial activities, do not fall under the per se antitrust analysis. *Id*. *McCormack* validated and built upon the outcome of *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, in which the court held that, even in the face of an overwhelming monopoly (which BMI certainly enjoyed), the procompetitive effects of product diversity required the court to cast otherwise restrictive behaviors in light of their overall effect. *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 24 (1979).

Rule of Reason Analysis Applies

In *Standard Oil*, this court moved away from the hard-and-fast per se analysis to one "prohibit[ing] all contracts and combination which amount to an *unreasonable or undue* restraint of trade." *Standard Oil Co.*, 221 U.S. at 504 (emphasis added). This court's holding in *U.S. v.*

[1] Dr. Ed Feng, *Nature vs. Nurture: The Odds of Playing College Basketball*, The Power Rank, https://thepowerrank.com/2013/03/29/nature-vs-nurture-the-odds-of-playing-college-basketball/; *Odds of Getting In*, Shmoop.com, https://www.shmoop.com/careers/football-player/odds-of-getting-in.html; *Total Players in the NFL*, Infoplease, https://www.infoplease.com/askeds/total-players-nfl; *Number of players on Major League Baseball rosters on opening day from 2013 to 2017*, Statistica, https://www.statista.com/statistics/639334/major-league-baseball-players-on-opering-day-rosters/; *Where the NBA Players Come From*, RPIRatings.com, http://rpiratings.com/NBA.php (emphasis added).

U.S. Gypsum Co. further clarified that restraints "can in certain circumstances increase economic efficiency and render markets more, rather than less, competitive." *United States v. United States Gypsum Co.*, 438 U.S. 422, 441 n.16, 98 (1978). This refrain, that restraints of trade can sometimes yield a public benefit in the form of enhanced efficiency and/or competitiveness has been upheld in cases since then, notably in *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1 (1979). In that case, this court held that the "sum was truly greater than its parts," and that this cumulative effect disrupted the presumed market analysis to the point that the product created by Broad Music, Inc. was, in fact, distinct from the rest of the market, and, ultimately, increased both efficiency and consumer choice. *Broad. Music, Inc.*, 441 U.S. at 22.

Applying these concepts to the NCAA, in *Board of Regents*, this court stated that NCAA football, and amateur sports in general, were a different product from those offered by professional leagues. The rules, which facilitate amateurism within the NCAA, are a critical component of what distinguishes NCAA athletics from professional sports. Based on this the court held those rules to be procompetitive. Specifically, those rules, which control the "character and quality of the product," and those that, in essence, "create the product" are deemed procompetitive. Without the existence and adoption of such rules by all participating institutions, amateur sports could not exist, leaving both athletes and consumers with less choice in the marketplace. *Bd. of Regents*, 468 U.S. at 102.

A century of Supreme Court jurisprudence dictates that, where there are reasonable procompetitive arguments behind horizontal restraints, per se analysis is forgone in favor of a rule of reason analysis. Three decades of jurisprudence from this court and the circuits have also dictated that rules maintaining "the revered tradition of amateurism in college sports" deserve "ample latitude to play that role." *Id.* at 120. Without such rules, the product of amateur college

athletics could not exist. The District Court's contention that this is "considered dicta" bears little substance on which to grant legality, *Jon Snow v. NCAA & NFL.*, No. XX-XXXX, slip op. *1, *6 (S.D. Tulania 2018), ignores both the preceding cases establishing the standards discussed here, and the cases decided more recently, which interpret and build upon established law.

NCAA Eligibility Bylaws

The Sherman antitrust issue in this case involves a NCAA eligibility bylaw 12.5.2.1 ("Eligibility Bylaw") that states:

> After becoming a student-athlete, an individual shall not be eligible for participation in intercollegiate athletics if the individual: (a) Accepts any remuneration for or permits the use of his or her name or picture to advertise, recommend or promote directly the sale or use of a commercial product or service of any kind; or (b) Receives remuneration for endorsing a commercial product or service through the individual's use of such product or service.

Operating Bylaws 12.5.2.1, NCAA (Aug. 1, 1989). The NCAA eligibility rules support the core of the NCAA's stated principles to preserve an academic environment so that the amateur athlete can obtain a quality education.[2]

The NCAA Eligibility Bylaw challenged here is a restraint on non-educational compensation that directly supports the product of amateur collegiate athletics. The Supreme Court has said that the "NCAA plays a vital role in enabling college football to preserve its character" and to "enable its product to be marketed which might otherwise be unavailable." *Bd. of Regents*, 468 U.S. at 102. Further, the Court stated that, in performing its role of enabling amateur college football, "[the NCAA's] actions widen consumer choice . . . and hence can be viewed as procompetitive." *Id.*

[2] *Who We Are*, NCAA http://www.ncaa.org/about/who-we-are/ (last visited on Jan. 10, 2019).

The NCAA Eligibility Bylaw Subject to the Rule of Reason

The Sherman Act § 1 Rule of Reason analysis, correctly applied in this case, looks to see if the restraint is reasonably necessary to accomplish the legitimate primary purpose of the arrangement and is not unreasonably affecting marketplace competition. *Bd. of Regents*, 546 F. Supp. at 1309. The rule of reason, therefore, reviews any perceived anticompetitive restraint and requires those accused of such a restraint to provide "evidence of the restraint's procompetitive effects." *O'Bannon*, 802 F.3d at 1070 citing to *Tanaka v. Univ. S. Cal.*, 252 F.3d 1059, 1063 (9th Cir. 2001.) The plaintiff may counter this by showing "that any legitimate objective [of the restraint] can be achieved in a *substantially* less restrictive manner." *Id*. (emphasis added).

The Eligibility Bylaw is Procompetitive for the NCAA's Product

With any rule of reason analysis associated with the Eligibility Bylaw, there is a presumption that the rule is procompetive. The Supreme Court has stated "it is reasonable to assume that most of the regulatory controls of the NCAA are justifiable means of fostering competition among amateur athletic teams and therefore procompetitive because they enhance public interest in intercollegiate athletics." *Bd. of Regents*, 468 U.S. at 117.

Limiting the type and amount of remuneration, which student athletes may receive, is a core principle of amateurism. Payments associated with a student's athletic abilities would destroy amateurism and eliminate the unique product that the NCAA offers. "In order to preserve the character and quality of the 'product' athletes must not be paid." *Id.* at 102. Eligibility rules that prohibit payments based on athletic performance are "not designed to coerce students into staying away from intercollegiate athletics, but to implement the NCAA basic principles of amateurism." *Jones v. NCAA*, 392 F. Supp. 295, 304 (Mass. 1975).

The demand for amateur sports in the market creates a demand for the use of student athletes' NIL. Advertisers, producers, and the like approach students to use their NIL because they are identifiable and recognizable in the public sphere because of their athleticism. The NCAA amateur sports product enables this recognition. There is not a market demand outside of athletics, because commercial advertisers do not use a student's NIL based on academics, rather for performance in a sport.

Payment to the student athlete for his performance, or because of that performance, would defeat the nature of the amateur product. This would cause a reduction of market competition, as it would eliminate the unique product of amateur college sports. As previously noted, this unique product "differentiates college football from . . . professional sports to which it might otherwise be comparable." *Bd. of Regents*, 468 U.S. at 102. Maintaining amateur status of the student athlete protects the product and allows the product to compete with other forms of sports entertainment in the marketplace. As stated, "actions that widen consumer choice . . . can be viewed as procompetitive." *Id.*

The existence of a collegiate market for athletics provides greater choice for students that want to participate in an organized and competitive athletic program. There are over 490,000 NCAA student athletes,[3] compared to the approximately 11,800 professional athletes across all professional sports.[4] Maintaining the amateur status of college sports integrated with academics is crucial for the survival of the NCAA's product offering. This association allows both the sports fan and the student athlete to have choices and opportunity. The NCAA amateur product is available across the United States and is procompetitive to student athletes by providing more

[3] Amy Wimmer Schwarb, *Number of NCAA college athletes reaches all-time high,* NCAA (Oct. 22, 2018, 2:00 PM), http://www.ncaa.org/about/resources/media-center/news/number-ncaa-college-athletes-reaches-all-time-high/.
[4]Bureau of Labor Statistics U.S. Department of Labor, *Occupational Outlook Handbook Athletes and Sports Competitors*, Bureau of Labor Statistics https://www.bls.gov/ooh/entertainment-and-sports/athletes-and-sports-competitors.htm#tab-1/ (last modified on Apr. 13, 2018).

opportunities to play sports in a relevant marketplace. This is more than if their opportunities were limited and restricted to the smaller professional market.

The Eligibility Bylaw is Procompetitive for Academic Integration

In addition to supporting the competitive role and the unique product of amateur athletics, the eligibility rules in question are procompetitive because they "integrate academics with athletics." *O'Bannon*, 802 F.3d at 1073. The NCAA's product is associated and identified with an "academic tradition," *Bd. of Regents*, 468 U.S. at 102, and collegiate sports, by their very nature, are associated with the student athlete. While student athletes perform on the field of play, they must also pursue their education and fulfill academic obligations. These obligations include attending a minimum number of classes, taking exams, and maintaining a minimum grade point average.[5]

The vast majority of NCAA athletes will not move on to become professional athletes in their chosen sport. Of the over 490,000 athletes, approximately 2 percent will go on to become professional athletes.[6] The remainder will pursue careers in other non-sports related fields relying more heavily on the educational skills learned in college. The goal of the NCAA is to ensure that their athletes complete their college education and become valuable members of the workforce. The overall student eligibility regulations of the NCAA, including the Eligibility Bylaw in question, support amateurism and represent a legitimate purpose "to keep university athletics from becoming professionalized to the extent that profit making objectives would overshadow educational objectives." *Bd. of Regents*, 468 U.S. at 123 citing to *Kupec v. Atl. Coast Conference*, 399 F. Supp. 1377, 1380 (M.D.N.C. 1975).

[5] *Academics*, NCAA, http://www.ncaa.org/about/what-we-do/academics/ (last visited on Jan. 10, 2019).
[6] *NCAA Recruiting Facts*, NCAA https://www.ncaa.org/sites/default/files/Recruiting%20Fact%20Sheet%20WEB.pdf / (last modified in March 2018).

The NCAA further supports a legitimate educational purpose by allowing colleges and universities to provide scholarships for higher education expenses. This may appear, on the surface, to be a student payment that violates the concept of amateurism. However, college scholarships provide more opportunity to have additional players in the sport, and as such cannot be said to have an "obviously negative impact on amateurism," *Agnew v. NCAA*, 683 F.3d 328, 344 (7th Cir. 2012), as they further the goals of supporting student education. Further, scholarships are not considered to be a payment for sports activity. The Seventh Circuit has held:

> For the purposes of college sports, and in the name of amateurism, we consider players who receive nothing more than educational costs in return for their services to be 'unpaid athletes'. . . for whether or not a player receives four years of educational expenses or one year of educational expenses, he is still an amateur. It is not until payment above and beyond educational costs is received that a player is considered a paid athlete.

Id. at 344. The Ninth Circuit in commenting on NCAA standards has stated, "student athletes remain amateurs as long as any money paid to them goes to cover legitimate educational expenses." *O'Bannon*, 802 F.3d at 1075.

The Eligibility Bylaw in question promotes and integrates athletics and education and therefore has a procompetitive purpose and allows the academic relationship of the amateur sports product to survive. Eligibility rules of the NCAA that prohibit professionalism and commercialization are as the Fifth Circuit has stated, "the goal of the NCAA . . . to integrate athletics with academics." Eligibility rules preserving amateurism "reasonably further this goal." *McCormack*, 845 F.2d at 1344.

The Eligibility Bylaw regarding prohibiting payments to student athletes is procompetitive and directly supports the ability for the various NCAA members to compete in various sports, including college football, with the amateur student athlete product. It is a "self-evident fact that paying students for their NIL rights will vitiate their amateur status." *O'Bannon*,

802 F.3d at 1077. This is a reasonable restraint because it follows Supreme Court jurisprudence holding that eligibility rules such as these "[foster] competition among amateur athletic teams and therefore precompetitive. " *Bd. of Regents*, 468 U.S. at 117.

Least Restrictive Restraint

The NCAA Eligibility Bylaw is procompetitive, and is the least restrictive manner in which the NCAA can maintain the amateur nature of collegiate sports. There is no other manner, let alone a substantial manner, that can accomplish this since, "not paying students is *precisely what makes them amateurs*." *O'Bannon*, 802 F.3d at 1076 (emphasis added). The Ninth Circuit reinforced the distinction between educational scholarships and other compensation associated with NIL stating:

> The difference between offering student-athletes education-related compensation and offering them cash sums untethered to education expense is not minor; it is a quantum leap. Once that line is crossed, we see no defined stopping point . . . until they have captured the full value of their NIL. At that point the NCAA will have surrendered its amateurism principles entirely and transitioned from its 'particular brand of football' to minor league status.

Id. at 1078–79 citing to *Bd. of Regents*, 486 U.S. at 102–03. Allowing even small payments to student athletes would eliminate their amateur status, and with it, the unique product offering of amateur collegiate sports.

The Eligibility Bylaw is a procompetive rule that is the least restrictive method in maintaining amateurism for NCAA athletics. If the rules limiting remuneration to college athletes were held to be illegal, it would cause the harm antitrust laws are intended to avoid.

2. Issue Two: The Preemption Claim

Plaintiffs' State law Negligence Claims are Preempted by § 301

The question presented is whether a state-law tort claim for the negligent hiring and retention, negligent misrepresentation, and negligence per se brought against the NFL is

sufficiently independent of the CBA to withstand the preemptive force of § 301. In this case, the claims are not sufficiently independent of the CBA. The duty alleged by the Players arises from the CBA. However, if this court were to decide that the duties the NFL owes to the Players arise from common-law tort principles, this court should hold that resolution of the Players' claims requires CBA interpretation and consequently, the pre-emptive force of § 301 still applies.

Preemption and § 301

Congress, afraid of "[t]he possibility that individual contract terms might have different meanings under state and federal law would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements," intended that the enactment of § 301 and the doctrines of federal labor law would prevail over inconsistent local rules to promote uniformity. *Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 104 (1962); *Int'l Bhd. of Elec. Workers v. Hechler*, 481 U.S. 851, 857 (1987). Specifically, § 301 of the Labor Management Relations Act states:

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

29 U.S.C.A. § 185(a)(West). While the traditional § 301 case usually involves a contract claim for breach regarding rights within the bargaining agreement, *Allis-Chalmers Corp. v. Lueck,* makes clear that a state-law tort action against an employer under a collective-bargaining agreement is consistent with the interests of § 301, and therefore the agreements under federal common law apply equally in the context of certain state-law tort claims. *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 210–11 (1985).

In order to determine whether § 301 preempts state law, the court must look to see if the state-law claims are "founded directly on rights created by the collective-bargaining agreement" or if the claim is "substantially dependent on analysis of the collective bargaining agreement." *Caterpillar, Inc. v. Williams,* 482 U.S. 386, 394 (1987). This determination requires the court to conduct an "evaluation of the tort claim [and ask] is [the claim] inextricably intertwined with consideration of the terms of the labor contract." *Lueck*, 471 U.S. at 213. Whether a state-law claim is preempted by § 301 requires the court to conduct a two-step inquiry. First, the court must ask if the state-law cause of action involves "rights conferred upon an employee by virtue of state law, not by a CBA." *Burnside v. Kiewit Pacific Corp.*, 492 F.3d 1153, 1059 (9th Cir. 2007). This means that if the rights at issue "exist[] solely as a result of the CBA, then the claim is preempted" and the analysis stops there. *Id.* at 1059. However, if the right at issue does not exist solely as a result of the CBA, the court must move to the second step of the analysis and ask, "whether litigating the state law claim nonetheless requires interpretation of a CBA, such that resolving the entire claim in court threatens the proper role of grievance and arbitration." *Alaska Airlines, Inc. v. Schurke*, 898 F.3d 904, 921 (9th Cir. 2018). Under this analysis, "[t]he plaintiff's claim is the touchstone" of the § 301 preemption analysis. *Burnside*, 492 F.3d at 1059. A defense based on a CBA does not give rise to preemption. *Williams,* 482 U.S. at 398–99. "[A]djudication of the claim must require interpretation of a provision of the CBA." *Cramer v. Consol. Freightways, Inc.*, 225 F.3d 683, 691–92 (2001).

State-Law Claim for Negligence

To state a claim for negligence, a plaintiff must establish the following elements: (1) the defendant had a duty, or an "obligation to conform to a certain standard of conduct for the protection of others against unreasonable risks," (2) the defendant breached that duty, (3) that

breach proximately caused the plaintiff's injuries, and (4) damages. *Corales v. Bennett*, 567 F.3d 554, 572 (9th Cir. 2009) quoting *McCarr v. Sax*, 70 Cal. Rptr. 3d 519, 530 (2008). Additionally, a statute may establish a standard of care under the doctrine of negligence per se if the defendant's violation of that statute gives rise to a presumption that the defendant "violated a statute, ordinance, or regulation of a public entity," and that violation proximately caused an injury, and the injury "resulted from an occurrence of the nature which the statute, ordinance, or regulation was designed to prevent," and the person who suffered the injury "was one of the class of persons for whose protection the statute, ordinance or regulation was adopted." Cal. Evid. Code § 699(a); *see also Elsner v. Uveges*, 34 Cal. 4th 915, 927 (2004).

In assessing tort liability, this court needs to ascertain whether the CBA placed an implied duty of care on the NFL and whether the nature and scope of that duty and the particular responsibilities alleged by respondent are in the complaint. *Hechler*, 481 U.S. at 859. In this case, plaintiffs claim that the individual clubs mistreated their players and the league was negligent in failing to intervene and stop their alleged mistreatment. In determining the extent to which the NFL was allegedly negligent by failing to curb medication abuse by the individual NFL clubs, requires this court to examine how the NFL addressed this issue through the bargaining process.

Negligence Based Claims

In this case, plaintiffs claim that the individual clubs mistreated their players and the NFL was negligent in failing to intervene and stop their alleged mistreatment. Plaintiffs couch this claim in a supposed common law duty based in principles of negligence. However, no decision in any state has held that a professional sports league owed such a duty to intervene and stop mistreatment by the league's independent clubs. While plaintiffs cited to *Rowland v. Christian*,

their reliance is misguided. *Rowland* is not analogous to this case. While *Rowland* recognized the existence of an individual's common law duty of reasonable care based upon foreseeability of harm, the duty of reasonable care and foreseeability was in relation to the liability of a land possessor, not an unincorporated association of independent clubs. *Rowland v. Christian*, 69 Cal.2d 108, 113 (1968). If there is no state-law duty, plaintiffs' state-law negligence claim fails. Any potential duty arising from the CBA and any potential redress would require interpretation of the CBA.

A. § 301 Preempts Plaintiffs' State-law Negligence Claim

If this court were to find the asserted claims for relief would be recognized under the common law, the court should find that the state-law claims are still preempted by § 301 because resolution of the Players' claims requires CBA interpretation.

Determining whether the claim requires interpretation of the CBA requires a "case-by-case analysis of the state-law claim as it relates to the CBA." In Re *Bentz Metal Prods. Co.*, 253 F.3d 283, 289 (7th Cir. 2001).

The NFL has imposed many requirements upon the individual clubs for the protection of players' health and safety. Provisions under the CBA require the clubs to hire doctors and trainers and to provide medical care and information to players. For example, the CBA requires that "[e]ach Club will have a board-certified orthopedic surgeon as one of its Club physicians. . . . If a Club physician advises a coach or other Club representative of a player's physical condition which adversely affects the player's performance or health, the physician will also advise the player." NFL Players Ass'n, Collective Bargaining Agreement (2011) at 186, https://www.scribd.com/document /62123516/The-2011-2020-NFL-CBA. The CBA provides players with the right to examine their medical records two times per year, *id.* at 190, and requires that all trainers

are certified by the National Athletic Trainers Association. *Id.* at 172. The CBA also imposes obligations on the clubs relating to substance abuse stating, "it is the responsibility of the parties to deter and detect substance abuse . . . and to offer programs of intervention, rehabilitation, and support players who have substance abuse problems. *Id.* at 174. Furthermore, in 2011, the CBA emphasized that; "club physicians must comply with all federal, state, and local requirements, including all ethical standards established by any applicable government and/or authority that regulates the medical profession. *Id.* at 186.

As the Fourteenth Circuit correctly noted, analyzing plaintiffs' claims requires an interpretation of the CBA provisions outlined above. They are inextricably intertwined with plaintiffs' claims that the individual clubs mistreated their players and the league was negligent in failing to intervene and stop their alleged mistreatment because those claims strike at a handful of provisions in the CBA, as noted above. Specifically, the CBA provisions do not impose health and safety duties on the League and therefore the CBA must be interpreted in resolving the Players' claims because they define the nature and scope of the League's duties. Here the court must look to the CBA to see if the League delegated a duty to other parties, like the respective Clubs, because delegating those obligations to the Clubs parties could relieve the league from the alleged state-law obligations. Simply put, this court cannot determine the duty of care it owed to the plaintiffs by the NFL without looking to the CBA.

1. Negligent Hiring and Negligent Retention Claim

Plaintiffs claim that the NFL had a duty to "hire and retain educationally well-qualified, medically-competent, professionally-objective and specifically-trained professionals not subject to any conflicts." Second Amd. Compl. ¶ 388. However, as clarified in the CBA, each individual football team hires their respective doctors and trainers, not the NFL. NFL Players Ass'n,

Collective Bargaining Agreement at 171. Therefore, in order for this court to assess whether the NFL was negligent in their hiring and retention of medical staff, it must look to see if the CBA creates a duty on behalf of the NFL. As stated in above, the CBA outlines the requirements for hiring medical personnel. *Id*. Plainly put, this court must look to the CBA to determine which duties the NFL voluntarily assumed, if any, and how the CBA might affect this assumed duty.

2. Negligent Misrepresentation Claim

Plaintiffs claim that the NFL had a "duty to protect the Class Members, and to disclose to them the dangers of Medications." Second Amd. Compl. ¶¶ 355, 370–80, 386. However, the duty to advise players of a condition is that of the club physician, not the NFL. More specifically, the CBA contains multiple obligations on the physicians and medical staff, but not the NFL. *See Generally* NFL Players Ass'n, *Collective Bargaining Agreement* (noting that those related provisions address second medical opinions, medical records, access to medical facilities, and medical evaluations). As the Fourteenth Circuit correctly noted, "[i]t is impossible to determine the scope of the NFL's duties in relation to misrepresentation of medical risks, and whether the NFL breached those duties, without reference to the CBA provisions outlined above." *Snow v. Nat'l Collegiate Athletic Ass'n: The National Football League*, No. 09–2108, USDC No. 09–AC–0213.

3. Negligence Per Se Claim

Plaintiffs claim that the NFL had a duty to follow federal and state laws in the administration of medications and to "act with reasonable care toward the Class Members." Second Amd. Compl. ¶¶ 355, 370–80, 386. While a statute may establish a standard of care under the doctrine of negligence per se, Cal. Evid. Code § 699(a); *see also Elsner*, 34 Cal. 4th at 927, the cases relied on by plaintiffs in making their argument are distinguishable. Both *Burnside*

and *Cramer* involve straightforward claims brought by an employee against their employer. *Burnside*, 491 F.3d at 1074; *Cramer*, 255 F.3d at 688, 695. Both cases were straightforward because there was no question as to what the statute required or obligated the employer to do; therefore, no interpretation of the CBA was necessary. Additional cases where the court found that the statutory claims were not preempted also involved statutes that explicitly defined the duty and clearly described who was responsible for compliance with the relevant statutes. *Humble v. Boeing Co.*, 305 F.3d 1004, 1008 (9th Cir. 2002); *Livadas v*. Bradshaw, 512 U.S. 107, 124 (1994). However, this case does not involve the traditional employee-employer relationship. This case is murkier than that. It is unclear as to whom the statues apply. The CBA creates a duty to the individual club, and this court, in order to determine if the NFL has a duty, must look to the CBA.

B. Case Law Favors Preemption

While there is no case from the Fourteenth Circuit that is completely analogous to the current case, cases from other jurisdictions can be particularly helpful here.

In the Eighth Circuit, football players tested positive for banned substances and subsequently sued the NFL for negligence and negligent misrepresentation. *Williams v. Nat'l Football League*, 582 F.3d 863, 870–81 (8th Cir. 2009). In that case, the players alleged that the NFL owed a "common duty," distinct from the CBAs to provide the players with an "ingredient-specific warning." *Id.* The court, however, disagreed, stating that the "negligence claims are 'inextricably intertwined with consideration of the terms of the [Policy].'" *Id.* at 881 citing to *Lueck*, 471 U.S. at 220.

Similarly, in *Stringer v. Nat'l Football League*, a NFL football player died of heat exhaustion during a summer training camp. 474 F. Supp. 2d 894, 898 (2007). Thereafter, his

estate brought a negligence claim against the NFL for failure to abide by the "Hot Weather Guidelines." *Id.* at 910. Again, the court stated that the claim at issue is "inextricably intertwined with certain key provisions of the CBA." *Id.* Here, it is important to note that the court looked to the pre-existing duties of the CBA in relation to the health and safety of the players. *Id.* In doing so, the court looked to provisions in the CBA that addressed trainers and physicians before holding that the players' claims were preempted by § 301. *Id.*

Duerson v. Nat'l Football League, Inc. provides a similar analysis. In this case a former NFL player suffered brain injuries and committed suicide. His estate sued the NFL for negligence—failing to provide concussion education. *Duerson v. Nat'l Football League, Inc.*, No. 12 C 2513, 2012 WL 1658353, *1, *1 (N.D. Ill. May 11, 2012). In defense, the NFL pointed to a provision in the CBA that required physicians to provide notice to players with "significantly aggravated" injuries. *Id.* at *1 citing to 1993 CBA art. XLIV, § 1. In this case, the district court stated that if a club had a duty to warn, "it would be one factor tending to show that the NFL's alleged failure to take action to protect [the player] from concussive brain trauma was reasonable." *Id.* at *4. Simply put, the court was required to interpret the CBA to determine what standard of care, if any, the NFL owed to the player.

Lastly, *Smith v. Nat'l Football League Players Ass'n*, involves a negligence claim for failure to treat concussions. No. 14 C 10559, 2014 WL 6776306 at *1 (E.D. Mo. Dec. 2, 2014). Here the court acknowledged that the plaintiffs "did not explicitly say the NFLPA has a duty to inform its members on the risks and consequences of head injuries." However, the court still found it necessary to interpret the CBA to determine the duties in relation to plaintiffs' claims. *Id.* at *8.

C. Failure to Follow CBA Grievance Procedures

Plaintiffs' failure to abide by the mandatory grievance procedures set forth in the CBA alone provides for an independent ground of affirmation of the Fourteenth Circuits holding. Article 43 NON-INJURY GRIEVANCE clearly states that, "[a]ny [grievance] arising after the execution of this Agreement and involving the interpretation of, application of, or compliance with, any provision of this Agreement . . . will be resolved exclusively in accordance with the procedure set forth in this Article." NFL Players Ass'n, *Collective Bargaining Agreement* at 187. *Allis-Chalmers*, 471 U.S. at 219–21, illustrated that §301 precludes a party from suit before they initiate and exhaust the grievance procedures set forth in the CBA. The NFL CBA expressly provides that the interpretation, application of, or compliance with the CBA shall be handled by the grievance procedures. NFL Players Ass'n, *Collective Bargaining Agreement* at 187. In this case, even if this court were to hold that an interpretation of the CBA was not necessary to establish the elements of plaintiffs' state-law claim, the claims do involve the application and compliance of the relevant provisions. Therefore, plaintiffs' failure to abide by the grievance procedures in the CBA in it of itself provides a reason for this court to affirm the Fourteenth Circuit's holding.

Conclusion

The Eligibility Bylaws at issue in this case, following this court's precedent, are protected as a matter of law, and therefore not in violation of § 1 of the Sherman Act. The bylaws are reasonable restraints that are procompetitive to the NCAA athletic sports market, and to student's integration of athletics and academics. Additionally, § 301 of the LMRA preempts the California state-law claims. The NFL CBA must be interpreted in order to resolve the claims presented. The decision of the Fourteenth Circuit court should be affirmed.