No. 09-214

In the

SUPREME COURT OF THE

UNITED STATES OF AMERICA

JON SNOW, AND OTHER SIMILARLY SITUATED INDIVIDUALS
Petitioners

V.

NATIONAL COLLEGIATE ATHLETIC ASS'N; THE NATIONAL FOOTBALL LEAGUE
Respondents

On Appeal From
The United States Court of Appeals
For the Fourteenth Circuit

BRIEF FOR PETITIONER
ORAL ARGUMENT REQUESTED

Counsel for Petitioners
Team 3

QUESTIONS PRESENTED

I. WHETHER THE NCAA AMATEURISM AND ELIGIBILITY BYLAWS ARE PROTECTED AS A MATTER OF LAW FROM ATTACK UNDER § 1 OF THE SHERMAN ACT WHEN THE BYLAWS ARE CONTRACTS IN RESTRAINT OF COMMERCIAL ACTIVITY, WHEN THE SUPREME COURT HAS APPLIED A RULE OF REASON ANALYSIS TO OTHER NCAA BYLAWS, AND WHEN BYLAW 12.5.2.1 IS NOT AMONG THE NARROW CLASS OF BYLAWS THAT THIS COURT CONSIDERED PROCOMPETITIVE.

II. WHETHER THE NFL PLAYERS' STATE-LAW CLAIMS ARE PREEMPTED BY § 301 OF THE LABOR MANAGEMENT RELATIONS ACT WHEN THE CLAIMS DO NOT ARISE UNDER THE COLLECTIVE-BARGAINING AGREEMENT NOR REQUIRE ANY REFERENCE TO THE COLLECTIVE-BARGAINING AGREEMENT AS THE AGREEMENT DOES NOT MENTION THE NFL'S DUTIES AND ITS PROVISIONS DO NOT AFFECT THE STATE, FEDERAL, AND COMMON-LAW DUTIES ALLEGED IN THE PLAYERS' COMPLAINT.

PARTIES TO THE PROCEEDING

PETITIONERS,

JON SNOW, AND OTHER SIMILARLY SITUATED INDIVIDUALS,

RESPONDENTS,

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION; NATIONAL FOOTBALL LEAGUE.

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JURISDICTION

Following the decisions of the Fourteenth Circuit and the District Court for the Southern District of Tulania, this Court granted certiorari pursuant to 28 U.S.C. § 1254(1) (2006).

STANDARD OF REVIEW

For the purposes of this case, the Supreme Court of the United States reviews all matters de novo. R. 2.

STATUTORY PROVISIONS INVOLVED

The pertinent statutory provisions and NCAA bylaw are reproduced in the appendix below. *See* App. A.

STATEMENT OF THE CASE

I. Factual Background

Petitioner Jon Snow dedicated his entire life to the game of football. R. 13. His hard work earned him a spot on Tulania University's football team as its star quarterback. *Id*. Because of his talent, Snow was nominated for many athletic awards in only three years. *Id*. His notoriety also caught the attention of Apple, Inc., which—in an effort to appeal to college football fans—sought Snow's participation for the new Apple Emoji Keyboard. *Id*. The keyboard allows users to type images that resemble popular college athletes. *Id*.

Snow accepted Apple's offer, allowing Apple to use his name, image, and likeness ("NIL") on the keyboard in exchange for $1,000 and an additional $1 royalty for each subsequent download of Snow's emoji. *Id*. During the trial period, Snow earned approximately $3,500. *Id*. After hearing about Snow's profitable activity, Tulania University's compliance director notified the National Collegiate Athletic Association ("NCAA"). *Id*. In response, the NCAA suspended Snow during his final season for an alleged violation of NCAA Bylaw 12.5.2.1. *Id*.

After college, Snow was drafted into the National Football League ("NFL") by the New Orleans Saints. *Id*. During his career, Snow sustained multiple head and ankle injuries. *Id*. Each time, to return Snow to the game quickly, doctors and trainers overprescribed strong painkillers without disclosing the risks of each medication. *Id*. Such rash action was not uncommon among other players. *Id*. Because of these careless actions, Snow quickly developed a serious addiction to painkillers and was diagnosed with an enlarged heart and permanent nerve damage in his ankle. *Id*.

II. Background of the NCAA and NFL

The NCAA is a regulatory organization that oversees college and university ("member institutions") intercollegiate athletics. *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 88 (1984). It promulgates bylaws designed to integrate education into athletics and preserve fair competition between member institutions. *Bd. of Regents*, 468 U.S. at 122 (White, J., dissenting). More importantly, these bylaws control eligibility. *Id.* Specifically, the member institutions and student-athletes agree to abide by these bylaws in exchange for eligibility to participate in competition. *Worldwide Basketball & Sports Tours, Inc. v. NCAA*, 388 F.3d 995, 997 (6th Cir. 2004). At issue, NCAA eligibility Bylaw 12.5.2.1 prohibits "student-athletes from being paid for the use of their [NILs]." *O'Bannon v. NCAA*, 802 F.3d 1049, 1052 (9th Cir. 2015).

The NFL is "an unincorporated association of member clubs which own and operate professional football teams." *Williams v. NFL*, 582 F.3d 863, 868 (8th Cir. 2009). It "promotes, organizes, and regulates professional football in the United States." *Id*. The collective-bargaining agreement ("CBA") in dispute is a labor agreement that represents the negotiations between the National Football League Players Association ("NFLPA") and the National Football League Management Council ("NFLMC"). *Atwater v. NFLPA*, 626 F.3d 1170, 1178 (11th Cir. 2010). The NFLPA is "recognized as the sole and exclusive bargaining representative of present and future employee players in the NFL." *Id*. The NFLMC is "recognized as the sole and exclusive bargaining representative of present and future employer member Clubs of the [NFL]." *Id*. To ensure such agreements are interpreted uniformly, § 301 of the Labor Management Relations Act ("LMRA") preempts state-law breach-of-contract claims. *Id*. at 1176; *see* 29 U.S.C. § 185(a) (2012). The relevant provisions of the CBA are as follows:

(1) Each club must retain a "board-certified orthopedic surgeon" and all full-time trainers must be "certified by the National Athletic Trainers Association." R. 9.

(2) If a "condition could be significantly aggravated by continued performance, the physician will advise the player of such fact in writing before the player is again allowed to perform on-field activity." R. 9.

(3) Other CBA provisions provide for "a player's right to a second medical opinion, access to medical records, access to medical facilities, and require that the 'prognosis of the player's recovery time should be as precise as possible.'" R. 9.

III. Procedural Posture

This case represents a consolidation of two actions in the United States District Court for the Southern District of Tulania. R. 13. In the first, Snow sought to invalidate NCAA Bylaw 12.5.2.1 as a violation of § 1 of the Sherman Act. *Id*.; 15 U.S.C. § 1 (2012). In the second action, Snow and other players sued the NFL for its negligence under state, federal, and common law. *Id*. The NCAA and NFL filed motions to dismiss. The District Court denied the motions finding that NCAA Bylaw 12.5.2.1 was subject to scrutiny under section § 1 of the Sherman Act and that the players' claims were not preempted by section § 301. Respondents appealed the decision of the District Court and the Fourteenth Circuit Court of Appeals reversed. This Court granted certiorari.

SUMMARY OF THE ARGUMENT

This Court should reverse the decision of the Fourteenth Circuit on both questions presented for two reasons. First, § 1 of the Sherman Act applies to the NCAA's amateurism and eligibility bylaws. Second, § 301 of the LMRA does not preempt petitioners' state-law claims.

This Court should find that § 1 of the Sherman Act does apply to the NCAA amateurism and eligibility bylaws. Section 1 of the Sherman Act governs: (1) contracts; that (2) restrain commercial activity. First, the bylaws are contracts as they bind the NCAA, its member institutions, and student-athletes to concerted actions. Second, the bylaws restrain commercial activity because they interfere with member institutions' finances and student-athletes' earnings. Thus, the bylaws are subject to antitrust scrutiny. Under antitrust scrutiny, this Court must apply a rule of reason analysis given this Court's reasoning in *Board of Regents*. Moreover, the narrow

class of bylaws considered procompetitive in *Board of Regents* does not include Bylaw 12.5.2.1. Even if Bylaw 12.5.2.1 is considered procompetitive, labeling it as such necessarily means the Court conducted an incomplete rule of reason analysis. Lastly, this Court should consider the drastic growth in the collegiate-athletics market in making its determination.

This Court should also reverse the Fourteenth Circuit's finding that § 301 preempts the players' negligence claims. Congress enacted § 301 to address "disputes arising out of *labor contracts*." *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 209 (1985) (emphasis added). Here, the players are not disputing any provision of the CBA, but instead are anchoring their claims for relief in state, federal, and common law. Thus, these claims arise not from the CBA but from the law. Moreover, the players' claims require no interpretation of the CBA as the CBA is silent on the NFL's duties, but instead only sets the teams' duties. Even if this Court imputes the teams' duties to the NFL, the CBA provisions do not define, narrow, or affect the duties alleged by the players. If this Court preempts the players' claims, states will be unable to protect their residents, and parties to CBAs will unknowingly waive legal rights.

ARGUMENT

I. THE NCAA AMATEURISM AND ELIGIBILITY BYLAWS ARE SUBJECT TO § 1 OF THE SHERMAN ACT BECAUSE THEY ARE AGREEMENTS RESTRAINING COMMERCIAL ACTIVITY AND THEREFORE DEMAND A RULE OF REASON ANALYSIS TO DETERMINE THEIR REASONABLENESS.

The Sherman Act was enacted "to protect consumers from injury that results from diminished competition." *Banks v. NCAA*, 977 F.2d 1081, 1087 (7th Cir. 1992). To accomplish this goal, § 1 of the Sherman Act declares illegal "[e]very contract . . . in restraint of trade or commerce." *Agnew v. NCAA*, 683 F.3d 328, 334 (7th Cir. 2012). Accordingly, "the criterion to be used in judging the validity of a restraint on trade is its impact on competition." *Bd. of Regents*,

468 U.S. at 98. However, "the Sherman Act was "intended to prohibit only unreasonable" impacts on competition. *Id*. at 105.

A violation of § 1 of the Sherman Act occurs when: (1) there is a contract, combination, or conspiracy; (2) the agreement unreasonably restrains trade under either a per se rule of illegality or a rule of reason analysis; and (3) that restraint affects interstate commerce. *Tanaka v. Univ. of S. Cal.*, 252, F.3d 1059, 1062 (9th Cir. 2001). When determining whether a restraint on commercial activity is unreasonable, this Court in *Board of Regents* determined that eligibility bylaws are subject to a rule of reason review. Therefore, this Court should reverse the Fourteenth Circuit's holding that NCAA amateurism and eligibility bylaws are immune from antitrust scrutiny.

A. The NCAA amateurism and eligibility bylaws are agreements covered under the Sherman Act as they create contracts in restraint of commercial activity.

The Sherman Act only reaches agreements that restrain commercial activity. *O'Bannon*, 802 F.3d at 1065. Therefore, before a court can scrutinize the reasonableness of a restraint, a party need only show: (1) an agreement exists; and (2) the agreement retrains commercial activity. *Id*.

i. The NCAA amateurism and eligibility bylaws constitute a contract between the NCAA, member institutions, and student-athletes.

The NCAA requires that its member institutions and student-athletes agree "to abide by the [NCAA] bylaws" in exchange for eligibility. *Agnew*, 683 F.3d at 335. In doing so, the parties clearly form a contract subject to the Sherman Act. *O'Bannon v. NCAA*, C 09-1967-CW, 2010 WL 445190, at *3 (N.D. Cal. Feb. 8, 2010) (finding that contracts distributed to the student-athletes as mandated by the NCAA and the member institutions abidance of NCAA bylaws satisfied the first element of a Sherman Act claim).

ii. The NCAA amateurism and eligibility bylaws restrain commercial activity as they prevent student-athletes from earning money.

Commercial activity is construed broadly and includes almost any activity from which a party expects economic gain. *O'Bannon*, 802 F.3d at 1065. This definition encompasses contracts that regulate transactions in which parties expect economic gain. *Id*. (finding NCAA eligibility bylaws restricting student-athletes from being compensated for the use of their NIL restrained commercial activity) *Worldwide Basketball*, 388 F.3d at 959 ("We think it apparent that the [bylaw] has some commercial impact insofar as it regulates games that constitute sources of revenue for both the member schools . . . .").

Student-athletes clearly expect economic gain from their contractual relationship with the NCAA. *O'Bannon*, 802 F.3d at 1065 ("That definition [of commercial activity] surely encompasses the transaction in which an athletic recruit exchanges his labor and NIL rights for a scholarship at a Division I school because it is undeniable that both parties to that exchange anticipate economic gain from it."). In playing college sports on such as stage as the NCAA, student-athletes anticipate even more economic gain from their notoriety and recognition. Were it not for the NCAA amateurism and eligibility bylaws, they would profit from the sale of their NILs. *O'Bannon*, 802 F.3d at 1065 (holding that video game makers would negotiate with college athletes for the right to use their NILs if not for the bylaws); *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 990 F. Supp. 2d 996, 1004 (N.D. Cal. 2013). Therefore, all NCAA eligibility bylaws govern commercial activity for two reasons as they impede student-athletes' ability to earn money from their NILs.

B. The NCAA amateurism and eligibility bylaws must be subject to a rule of reason analysis under § 1 of the Sherman Act because antitrust law requires that restraints be analyzed for their reasonableness and this Court subjected similar bylaws to such a review.

Because the NCAA amateurism and eligibility bylaws constitute an agreement in restraint of trade, the next question is whether that restraint is unreasonable. *Agnew*, 683 F.3d at 335. Courts employ either a per se rule of invalidity or a rule of reason analysis to determine the reasonableness of a restraint, or in other words, whether "the challenged restraint enhances competition." *Bd. of Regents*, 468 U.S. at 103–04. "Per se rules are invoked when . . . anticompetitive conduct" is so great that a "further examination of the challenged conduct" is unjustified. *Id*. at 104. Generally, per se violations present as price-fixing or restricting output. *Id*. at 109.

Alternatively, a rule of reason determination of whether a restraint is unreasonable focuses on its anticompetitive effects in comparison to its procompetitive purposes. *Agnew*, 683 F.3d at 335. This Court must employ a rule of reason analysis as it subjected similar rules to such a review in *Board of Regents*. Moreover, this Court never considered the specific bylaw at issue—Bylaw 12.5.2.1—in the *Board of Regents* discussion and thus its narrow categorization of certain rules as procompetitive does not apply. Even if this Court disagrees and determines that Bylaw 12.5.2.1 is procompetitive under *Board of Regents*, the lower court would still need to address the remaining rule of reason elements.

i. In *Board of Regents*, this Court applied a rule of reason review to the NCAA bylaws because of the NCAA's unique need for restraints.

Generally, a per se violation of the Sherman Act exists where, because of the restraint on trade, "[p]rice is higher and output lower than they would otherwise be, and both are unresponsive to consumer preference." *Bd. of Regents*, 468 U.S. at 107. This type of price-fixing and output restricting arrangement makes anticompetitive consequences apparent on the face of the

agreement. *Id.* Even with such per se violations, courts still employ a rule of reason analysis when cooperation is necessary for the type of competition that respondent seeks to market. *Id*. at 118.

This Court in *Board of Regents* determined that "by fixing a price for television rights to [NCAA] games, the NCAA create[d] a price structure that is unresponsive to viewer demand and unrelated to the prices that would prevail in a competitive market." *Id*. at 106. Identically here, Bylaw 12.5.2.1 is facially a per se violation of the Sherman Act because it—like the regulation in *Board of Regents*—restricts the output of student-athletes' NILs and fixes the price for NILs at zero. R. 13. Specifically, the complete ban on compensation fails to respond to consumer demand for student-athletes' NILs just as Snow was unable to respond to the high demand for his emoji. *Id*.

Although NCAA bylaws should ordinarily be "condemned as a matter of law under an 'illegal per se' approach," this Court nonetheless subjected the bylaws to a rule of reason analysis because the NCAA must promulgate bylaws that allow its product to exist—that is, amateur collegiate athletics. *Id*. at 120. The product would not exist "if there were no rules on which the competitors agreed to create and define the competition." *Id*. at 101. Following *Board of Regents*, courts have consistently subjected these restrictive bylaws to a rule of reason review.[1] *See O'Bannon*, 802 F.3d at 1053 (subjecting NCAA Bylaw 12.5.2.1 to rule of reason analysis); *see also Law v. NCAA*, 134 F.3d 1010, 1020 (10th Cir. 1998) (subjecting an NCAA bylaw to rule of reason); *Smith v. NCAA*, 139 F.3d 180, 184 n.4 (3d Cir. 1998), *vacated on other grounds by NCAA v. Smith*, 119 S. Ct. 924 (1999) (finding that the NCAA bylaw restricting players from competing

[1] Other sport leagues' bylaws are similarly subject to antitrust scrutiny under the rule of reason analysis. *See, e.g., M&H Tire Co. v. Hoosier Racing Tire Corp.*, 733 F.2d 973, 980 (1st Cir. 1984).

while in graduate programs, although restrictive on commerce, was justified under the rule of reason as procompetitive). *Banks*, 977 F.2d at 1088–94 (analyzing the NCAA's no-agent and no-draft eligibility bylaws under the rule of reason analysis and justifying the bylaws as necessary to preserve amateurism of student-athletes); *McCormack v. NCAA,* 845 F.2d 1338, 1343 (5th Cir.1988) (assuming that the NCAA's eligibility bylaws were subject to antitrust scrutiny using a rule of reason review); *In re NCAA Grant-in-aid Cap Antitrust Litig.*, No. 14-md-02541-CW, 2017 WL 1524005 (N.D. Cal. Mar. 28, 2018) (scrutinizing Bylaw 12.5.2.1 under rule of reason analysis); *Gaines v. NCAA,* 746 F. Supp. 738, 744–46 (M.D. Tenn. 1990) (justifying NCAA's "no-agent" and "no-draft" eligibility bylaws using their procompetitive effects).

As shown by the numerous aforementioned cases, the NCAA amateurism and eligibility bylaws must be analyzed under a rule of reason review to determine whether they are reasonable restraints on student-athletes. Just as in *McCormack*, *Banks*, and *Gaines*, where the court subjected eligibility bylaws to a rule of reason analysis, Bylaw 12.5.2.1 is classified as an eligibility bylaw. R. 13. Therefore, Snow must be given the opportunity to apply the rule of reason analysis and show that the bylaw's anticompetitive effects on student-athletes outweighs the procompetitive purposes of the NCAA, or "that the restraint in question is not reasonably necessary to achieve the procompetitive objective." *Agnew*, 683 F.3d at 336.

ii. This Court's endorsement of a narrow class of NCAA bylaws in *Board of Regents* did not pertain to a student-athlete's compensation for use of his NIL.

In *Board of Regents*, this Court also stated in dicta that it could find procompetitive justification for "rules defining . . . the eligibility of participants" such as "athletes must not be paid, must be required to attend class, and the like." *Bd. of Regents*, 468 U.S. at 102, 117. Specifically, this Court noted that only bylaws that are necessary to "preserve a tradition [of

amateurism]" serve a procompetitive purpose. *Id*. at 120; *Banks*, 977 F.2d at 1090 (stating that the "no-draft" and "no-agent" bylaws represent the NCAA's line of demarcation to keep athletics from "becoming professionalized"); *Jones v. NCAA,* 392 F. Supp. 295, 303 (D. Mass. 1975) (holding that antitrust law does not apply to NCAA eligibility bylaws prohibiting compensation from professional leagues); *but see Justice v. NCAA*, 577 F. Supp. 356, 379 (D. Ariz. 1983) (finding that even an NCAA bylaws prohibiting compensation to student-athletes from member institutions and pertaining "solely to the NCAA's stated goal of preserving amateurism" is subject to antitrust scrutiny using the rule of reason).

First, NCAA Bylaw 12.5.2.1 does not fit into this narrow class of amateurism bylaws considered procompetitive in *Board of Regents*. *O'Bannon*, 802 F.3d at 1053. This Court justified as procompetitive only those NCAA bylaws that are absolutely necessary for the preservation of amateurism. *Bd. of Regents*, 468 U.S. at 120. Such bylaws—specifically the bylaw restricting the member institution from compensating student-athletes—are different than the one currently in dispute. Here, Snow is not challenging that he cannot be paid by the member institution; rather, he is challenging the restriction on student-athletes that blunts their ability to respond to consumer demand for NILs. *See O'Bannon*, 802 F.3d at 1053 (holding that NCAA eligibility Bylaw 12.5.2.1 when reviewed under a rule of reason analysis was an unreasonable restraint on trade because it stifled student-athletes' ability to benefit off their own NIL); *In re NCAA Student-Athlete Name*, 990 F. Supp. 2d at 1004 (finding that student-athletes stated a valid antitrust claim where they challenged the validity of NCAA eligibility Bylaw 12.5.2.1).

Even if this Court considers NCAA Bylaw 12.5.2.1 analogous to those discussed in *Board of Regents*, it still must be scrutinized under rule of reason. The rule of reason analysis is a three-step inquiry: (1) a plaintiff must show that the restraint has anticompetitive effects; (2) the

defendant then articulates the procompetitive purposes of the restraint; and (3) finally the plaintiff rebuts by showing that the restraint is reasonably necessary to achieve the procompetitive objective. *Agnew*, 683 F.3d at 336. By considering a narrow class of NCAA bylaws "procompetitive," this Court necessarily engaged in a rule of reason analysis. *Id*. at 339. This Court did not give the NCAA broad power to impose anticompetitive restrictions, but instead subjected even its most necessary bylaws to a rule of reason analysis. *Law,* 134 F.3d at 1024; *see also Agnew*, 683 F.3d at 339. Therefore, the NCAA's amateurism and eligibility bylaws cannot be immune from antitrust scrutiny, but rather must be analyzed under rule of reason.

iii. This Court in *Board of Regents* did not subject the narrow class of the NCAA amateurism and eligibility bylaws to a complete rule of reason analysis given the lack of consideration for less restrictive alternatives to the restrictions.

Even if this Court considers Bylaw 12.5.2.1 to be among the narrow class of eligibility bylaws already considered procompetitive, the rule of reason analysis does not stop there. *Agnew*, 683 F.3d at 336. The rule of reason review requires a third step—that is, establishing that the bylaw is absolutely necessary to achieve the procompetitive objective. *Agnew*, 683 F.3d at 336. This Court in *Board of Regents* only considered two of the three steps in a rule of reason review and thus did not make NCAA eligibility bylaws immune from antitrust scrutiny. *See Bd. of Regents*, 468 U.S. at 102, 117. Consequently, *Board of Regents* cannot be interpreted as establishing some fictitious per se rule of validity for NCAA amateurism and eligibility bylaws.

iv. *Board of Regents*' outdated progeny does not account for the collegiate athletic market's drastic growth.

Moreover, regardless of whether *Board of Regents* justified a few of the NCAA bylaws, the market for student-athletes' NILs has drastically changed since 1984. *In re NCAA Student-Athlete Name*, 990 F. Supp. 2d at 1002 n. 6. Antitrust law is limited "to punish and prevent

harm to consumers in particular markets, with a focus on *relatively specific time periods*." *Data Gen. Corp. v. Grumman Sys. Support Corp.*, 36 F.3d 1147, 1184 (1st Cir. 1994) (emphasis added). Therefore, *Board of Regents* offers minimal guidance as to the procompetitive effects of a ban on compensation to student-athletes in today's college sports market because today—unlike in 1984—the NCAA produces "a business venture of far greater magnitude than the vast majority of 'profit-making' enterprises." *Worldwide Basketball*, 388 F.3d at 959; *see also Banks*, 977 F.2d at 1099 (Flaum, J., concurring in part and dissenting in part) ("The NCAA continues to purvey, even in this case, an outmoded image of intercollegiate sports that no longer jibes with reality. The times have changed."). Because the NCAA amateurism and eligibility bylaws constitute agreements in restraint of trade, and this Court requires such agreements to be subject to a rule of reason review, this Court should reverse the holding of the Court of Appeals for the Fourteenth Circuit. NCAA Bylaw 12.5.2.1 is subject to antitrust scrutiny under § 1 of the Sherman Act.

II. PETITIONERS' NEGLIGENCE CLAIMS ARE NOT PREEMPTED BY § 301 AS THEY DO NOT ARISE FROM THE CBA NOR IS INTERPRETATION OF THE CBA NECESSARY FOR THE CLAIMS' ADJUDICATION.

Section 301 of the LMRA vests federal courts with jurisdiction to hear suits "for violation of contracts between an employer and a labor organization." 29 U.S.C. § 185(a). This Court has interpreted § 301 as authorizing "federal courts to fashion a body of federal common law to be used to address disputes arising out of labor contracts." *Lueck*, 471 U.S. at 209. Section 301 can preempt state-law claims but only when the claims are "substantially dependent upon analysis of the . . . agreement." *Id.* at 220. Accordingly, the "ordinary § 301 claim is a contract claim in which a party to the [CBA] expressly asserts that a provision of the agreement has been violated." *Int'l Bhd. of Elec. Workers, AFL-CIO, v. Hechler*, 481 U.S. 851, 857 (1987). Although this Court has extended § 301 preemption to tort claims, it has only done so in narrow circumstances. *Lueck,* 471

U.S. at 211. Specifically, this Court only preempts tort claims that are rooted in contract, but disguised as torts. *Id*. at 202. Any other result would "allow parties to evade the requirements of § 301 by relabeling their contract claims as [torts]." *Id.* at 211.

However, this Court cautioned that not every state-law dispute should be preempted by § 301 as "[s]uch a rule would delegate to unions and unionized employers the power to exempt themselves from whatever state [laws] they disfavored." *Lueck*, 471 U.S. at 212. To ensure that § 301 preemption "extends only as far as necessary" for the protection of federal labor law, this Court adopted a two-step inquiry, that only preempts state-law claims when they: (1) "arise[] entirely from" a CBA; or (2) "require[] [interpretation] of a CBA." *Alaska Airlines Inc. v. Schurke*, 898 F.3d 904, 913–14 (9th Cir. 2018); *see Livadas v. Bradshaw*, 512 U.S. 107, 123 (1994). Because respondents cannot establish preemption through either approach, and because policy narrows the situations in which preemption is appropriate, this Court should reverse the Fourteenth Circuit's finding of preemption.

A. The rights at issue arise from state, federal, and common law, not the CBA.

To determine whether a complaint asserts claims that arise from the CBA, courts evaluate whether "the legal character of [the] claim[s]" are rooted in the CBA. *McCray v. Marriott Hotel Servs., Inc.*, 902 F.3d 1005, 1010 (9th Cir. 2018). Claims are rooted in the CBA when they allege a "violation of [a] labor agreement, whether sounding in contract or in tort." *Schurke*, 898 F.3d at 921. In effect, these claims are "CBA dispute[s] in state law garb" and are thus preempted. *Id*. The CBA must be "the only source of the right the plaintiff seeks to vindicate." *Id.* Thus, the players' claims cannot be preempted on this basis because they anchor their claims not in the CBA, but in state, federal, and "common law theories." R. 9.

i. The NFL's duty to follow the law exists independently of the CBA.

First, the players brought a negligence per se claim alleging that the NFL illegally distributed controlled substances without proper labeling or warnings in violation of the Controlled Substances Act ("CSA"), the Food, Drugs, and Cosmetics Act ("FDCA"), and local Pharmacy Laws. R. 22. Thus, the players are not arguing that the NFL breached the CBA, just that it violated the law. Such claims "would exist with or without the CBA" as the NFL's duty to follow federal and state law exists regardless of its contractual obligations. *McCray*, 902 F.3d at 1010. Accordingly, this claim is wholly independent from the CBA.

ii. The NFL's duties to hire and retain employees with due care and to avoid misrepresentation arise from common law, not the CBA.

Next, the players assert several common-law negligence claims against the NFL. R. 9. Specifically, they allege that the NFL engaged in negligent misrepresentation and negligent hiring and retention. R. 9. When plaintiffs base their claims "on common law tort principles" rather than a CBA, it is the common law—not the CBA—that "defines the sources of the duty at issue." *Stringer v. NFL*, 474 F. Supp. 2d 894, 905, 908 (S.D. Ohio 2007) (finding that a wrongful death claim arose from common law, not the CBA, and refusing to preempt on this ground). For their misrepresentation claim, the players allege that the NFL had a "duty to protect the Class Members, and to disclose to them the dangers of Medications." R. 9. They base their negligent hiring and retention claims on the NFL's duty to "hire and retain educationally well-qualified, medically-competent, professionally objective and specifically-trained professionals not subject to any conflicts." R. 9. At no point do the players allege that the NFL violated the CBA. R. 9. Like the common-law claim in *Stringer*, the players' claims are merely alleging that the NFL breached its duties under Tulania common law. R. 9. Thus, their negligence claims cannot be preempted on this ground. In fact, the NFL even conceded that such negligence claims cannot be preempted on

the arise under inquiry in *Dent v. NFL*. *See* Brief for Petitioner, Dent v. NFL, 902 F.3d 1109 (2018) (No. 15-15143) ("The NFL concedes the inapplicability of the first alternative in the accepted preemption test - that the plaintiff's claim[s] is based on a right created by the CBA.").

B. Petitioners' claims do not require interpretation of the CBA as the CBA is silent on the NFL's duties and none of its provisions affect the claims as pled by the players.

Because the rights at issue exist independently of the CBA, the next question is whether the players' negligence claims nonetheless "require interpretation of the CBA such that they are 'dependent upon an analysis' of the agreement." *Williams*, 582 F.3d at 881 (*quoting Lueck*, 471 U.S. at 220). This imposes on respondents a heavy burden to show interpretation of a CBA is absolutely necessary. *See Avalos v. Foster Poultry Farms,* 798 F. Supp. 2d 1156, 1162 (E.D. Cal. 2011) (finding defendant "failed to carry its heavy burden to establish" that resolution of claims "requires interpretation of the CBA"). Interpretation is construed narrowly, and "means something more than consider, refer to, or apply." *Schurke*, 898 F.3d at 921 (internal quotation marks omitted). A hypothetical connection between a claim and the terms of the CBA is insufficient. *Id*. Merely consulting a CBA is likewise not enough. *Livadas*, 512 U.S. at 125. Rather, claims are only preempted to the extent they "*necessarily* require[] the court to interpret an existing provision of a CBA." *Cramer v. Consol. Freightways*, 255 F.3d 638, 693 (9th Cir. 2001) (emphasis added).

i. Adjudication of the players' negligence per se claim does not require interpreting the CBA as violation of the law is a purely factual question.

Petitioners first allege that the NFL negligently distributed controlled substances in violation of several laws. R. 22. Under the negligence per se doctrine, a defendant's violation of a statute can create a presumption of negligence if four elements are established:

> (1) the defendant violated a statute, ordinance, or regulation of a public entity; (2) the violation proximately caused death or injury to person or property; (3) the death or injury resulted from an occurrence the nature of which the statute . . . was designed to prevent;

> and (4) the person . . . [injured]. . . was one of the class of persons for whose protection the statute . . . was adopted.

Quiroz v. Seventh Ave. Ctr., 45 Cal. Rptr. 3d 222, 244 (2006); *see also* CAL. EVID. CODE § 699(a) (2018). Under the negligence per se doctrine, courts have "no need to consult [CBAs]" for two reasons. *Williams*, 582 F.3d at 876. First, a violation of the law can be determined solely by comparing the NFL's conduct to the elements of the statutes at issue. In *Williams*, plaintiffs sued the NFL alleging that it violated Minnesota's Drug and Alcohol Testing in the Workplace Act ("DATWA"). The court found that rather than consult the CBA, it only needed to "compare the facts and the procedure that the NFL actually followed with respect to its drug testing of the Players with DATWA's requirements." *Williams*, 582 F.3d at 876; *see also Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 261 (1994) ("[P]urely factual questions about an employer's conduct . . . do not 'requir[e] a court to interpret any term of a [CBA].'"); *Karnes v. Boeing Co.*, 335 F.3d 1189, 1194 (10th Cir. 2003) (finding statutory claim "clearly independent of the CBA and . . . not subject to § 301 preemption" where plaintiff could establish violation by merely satisfying the elements of the statute in question).

In their negligence per se claim, the players allege that the NFL violated the CSA, the FDCA, and local Pharmacy Laws. R. 22. Just as the statute in *Williams* imposed "minimum standards and requirements for employee protection," these laws impose standards regarding the distribution of controlled substances. *Williams*, 582 F.3d at 874. Thus, this Court can determine whether the NFL complied with the CSA, the FDCA, and local Pharmacy Laws by simply looking to their elements. As the CBA need not be consulted—let alone interpreted—to find a violation, the players' claim that the NFL negligently and illegally distributed controlled substances is not preempted by § 301.

Moreover, this Court and circuit courts' precedents have explicitly held that § 301 "does not grant the parties to a [CBA] the ability to contract for what is illegal." *Lueck*, 471 U.S. at 212; *see also Cramer*, 255 F.3d at 688 (noting "when an employer's surreptitious surveillance constitutes a *per se* violation of established state privacy laws, the employees affected thereby may bring an action for invasion of privacy regardless of the terms of the CBA"). Thus, even if a CBA term permitted this violation, such a provision authorizing the violation of the law would be invalid and cannot justify preemption.

ii. Adjudication of the players' common-law negligence claims does not require interpreting the CBA as its provisions are silent on the NFL's duties.

The players' remaining claims allege that the NFL engaged in negligent misrepresentation and negligent hiring and retention. R. 9. In such claims, interpretation of a CBA is unnecessary when the CBA only addresses the obligations of third parties. *Dent v. NFL*, 902 F.3d 1109, 1122 (9th Cir. 2018). In *Dent*, a CBA provision required teams to retain a "board-certified orthopedic surgeon" and that all full-time trainers be "certified by the National Athletic Trainers Association." *Id*. at 1122. The court refused to interpret the CBA as the provisions "relate[d] to the *teams*' obligations, not the NFL's." *Id*. at 1122. Identically here, the CBA provisions only address team and physician responsibilities. R. 9. In fact, "NFL" is notably absent from all of the provisions in dispute. R. 9. For example, the only provision of the CBA marginally related to the players' negligent misrepresentation claim states that if a "condition could be significantly aggravated by continued performance, the *physician* will advise the player of such fact in writing before the player is again allowed to perform on-field activity." R. 9 (emphasis added). Similarly, the only provisions related to the negligent hiring and retention claims require each team to retain a "board-certified orthopedic surgeon" and that all full-time trainers be "certified by the National Athletic Trainers Association." R. 9. Identical to the provisions in *Dent*, those here only address the teams'

duties and are silent on the NFL's. As the players sued the NFL and not the teams, physicians, or trainers, the CBA provisions are wholly irrelevant to resolving the players' negligence claims against the NFL. On this basis alone, respondent's motion to dismiss should be denied.

iii. Adjudication of the players' negligence claims does not require interpreting the CBA as none of its provisions affect the NFL's duties under common law.

Even if the teams' duties defined by the CBA could somehow be imputed to the NFL, the players' claims still cannot be preempted as those contractual duties are irrelevant to those pled by the players. In a negligence action, a plaintiff must allege that the defendant had a duty to protect the plaintiff from injury, the defendant breached that duty, and the defendant's failure proximately caused injury to the plaintiff. *Corales v. Bennett*, 567 F.3d 554, 572 (9th Cir. 2009). Whether the defendant's negligence caused the plaintiff's injuries is a "purely factual question[]" that does not "require[] a court to interpret any term of a [CBA]." *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 407 (1988).

Courts consider several factors when deciding whether a common-law duty exists, including:

> [F]oreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved.

Rowland v. Christian, 443 P.2d 561, 564 (Cal. 1968). The players allege that the NFL owes them a duty under Tulania common law to "hire and retain educationally well-qualified, medically competent, professionally-objective and specifically-trained professionals not subject to any conflicts." R. 9. They additionally allege that the NFL owes them a duty to disclose "the dangers of [m]edications." Applying the *Rowland* factors, the NFL clearly owes players these duties of

care. A lack of reasonable care in the handling of controlled substances and in the hiring of the physicians who distribute them will certainly harm the individuals who take them. Substances are "controlled" for a reason—overuse or misuse can cause addictions and long-term health issues. *See, e.g.*, 21 U.S.C. §§ 801(2), 812.

More importantly, however, the § 301 preemption inquiry "is not an inquiry into the merits of a claim; it is an inquiry into the claim's 'legal character'—whatever its merits—to ensure it is decided in the proper form." *Schurke*, 898 F.3d at 924 (*quoting Livadas*, 512 U.S. at 123). Here, respondents have not argued that the players failed to state a claim; rather, they argued solely that the players' claims are preempted by § 301. Thus, any disagreement over the merits of the players' allegations is irrelevant, leaving respondents with one option: arguing that the CBA in some way affects the scope of duty pled by the players. As no provision affects the players' claims, the claims cannot be preempted by § 301.

a. The players' negligent hiring and retention claims are unaffected by the CBA provisions setting hiring quotas.

First, the only CBA provisions slightly related to the players' negligent hiring and retention claims require each team to retain a "board-certified orthopedic surgeon" and that all full-time trainers be "certified by the National Athletic Trainers Association." R. 9. These provisions are essentially hiring quotas and have no effect on the players' negligent hiring and retention claims. First, the players do not allege that the NFL breached the CBA by failing to hire certified surgeons or trainers. *Green v. Az. Cardinals Football Club LLC*, 21 F. Supp. 3d 1020, 1027–28 (E.D. Mo. 2014) (refusing to interpret CBA provisions guaranteeing medical care where players did not allege that they were not treated when "contractually entitled"). To the contrary, nothing indicates that the NFL failed to meet its hiring quota. Rather, the players are simply alleging an absence of due care in the hiring process. The fact that teams need doctors says nothing about the research

and diligence the teams must use in hiring and retaining these doctors. Thus, the CBA provisions setting hiring quotas do not affect the NFL's duty to hire individuals in a reasonable manner.

b. The players' negligent misrepresentation claims are unaffected by the CBA provision requiring physicians to disclose when conditions may be aggravated by playing time.

Second, the only CBA provision related to the players' negligent misrepresentation claim requires physicians to advise players when a "condition could be significantly aggravated by continued performance." R. 9. However, a duty to inform players when continued on-field activity may exacerbate, say, a torn ligament or fracture or fracture is irrelevant to a duty to disclose the risks of prescription drugs. The players did not allege that the NFL violated the CBA by failing to warn them that playing time may make their condition—an addiction to painkillers—worse. R. 13. To the contrary, it was the physicians' continued overprescription of painkillers, not continued performance, that aggravated their addictions. R. 13. Rather, they alleged that the NFL failed to warn them that addiction was a possibility. R. 9. Thus, the CBA provision requiring disclosure when a condition could be aggravated is irrelevant to the NFL's duty to warn of medication risks.

iv. Adjudication of the players' negligent misrepresentation claim does not require interpretation of the CBA as it contains no disclaimer language.

In addition to a legal duty, negligent misrepresentation requires: (1) misrepresentation of a past or existing material fact; (2) knowledge of falsity; (3) intent to induce another's reliance on the fact misrepresented; (4) justifiable reliance on the misrepresentation by the party to whom it was directed; and (5) damage. *Dent*, 902 F.3d at 1123. The first three elements "do[] not require interpretation of the [CBA]" as they "turn[] on [the defendant's] state of mind." *Milne Emps. Ass'n v. Sun Carriers*, 960 F.2d 1401, 1408 (9th Cir. 1991). Nor does the fifth element as damages are completely fact-oriented. *Id*. Thus, the only remaining element of the negligent misrepresentation claim at issue is whether the players' reliance was justifiable.

Reliance is justifiable when the "circumstances were such to make it reasonable for [the plaintiffs] to accept [the defendants'] statements without an independent inquiry or investigation." *Id*. Plaintiffs are denied recovery for lack of justifiable reliance "only if [their] conduct is manifestly unreasonable in light of [their] own intelligence or information." *OCM Principal Opportunities Fund, L.P. v. CIBC World Mkts. Corp.*, 68 Cal. Rptr. 3d 828, 865 (2007). Courts only interpret CBAs for justifiable reliance if they contain a provision rendering reliance manifestly unreasonable. *See Atwater*, 626 F.3d at 1183; *Williams*, 582 F.3d at 881. In *Atwater*, players sued the NFL for its negligence in conducting background checks on financial advisers. *Atwater*, 626 F.3d at 1174–75. However, the CBA contained a disclaimer expressly warning players that they alone were "responsible for their personal finances." *Atwater*, 626 F.3d at 1183. In *Williams*, players argued that the NFL owed them a duty to disclose that certain supplements contained a banned substance. *Williams*, 582 F.3d at 881. However, the CBA warned players that consuming supplements would be "AT [THEIR] OWN RISK." *Williams*, 582 F.3d at 869. In both cases, the courts found interpretation of the disclaimers necessary to determine whether the players' reliance on the NFL's representations was justifiable. *Id.*; *Atwater*, 626 F.3d at 1183. Unlike the CBAs in *Atwater* and *Williams*, however, no provision of the players' CBA even arguably renders their reliance on the NFL's misrepresentations unreasonable. In other words, there is no language shifting responsibility to the players. Given the notable absence of any disclaimer, the players can demonstrate justifiable reliance without interpreting the CBA. Thus, none of the players' negligence claims can be preempted by § 301.

C. The policy arguments in *Lueck* disfavor preemption.

This Court in *Lueck* based its decision to narrowly extend § 301 preemption to tort claims on two policy rationales: (1) that plaintiffs could "evade the requirements of § 301 by relabeling

their contract claims as [torts]"; and (2) that "parties would be uncertain as to what they were binding themselves to" if state law could determine the meaning of a particular contract provision. *Lueck,* 471 U.S. at 211; *see also Hechler*, 481 U.S. at 857 (preempting claim where plaintiff referenced safety provisions in a CBA to argue that defendant owed her an implied duty of care as plaintiff could not evade § 301 preemption by "casting her [contract] claim as a state-law tort action"). Neither policy rationale justifies preempting the players' claims in this case.

First, unlike the plaintiffs in *Lueck* and *Hechler*, the players are not presenting questions related to the parties' contractual obligations. They are merely arguing that under Tulania common law, "a professional sports league owe[s] [players] a duty" of care. R. 8. Put simply, the players are not attempting to evade preemption with sneaky pleading; they are just trying to assert their state-given rights.

Second, extending § 301 preemption to negligence claims like the players' would exacerbate the very concern this Court expressed in *Lueck*: that plaintiffs would not know what they were binding themselves to. Here, the players could not have possibly known that provisions setting hiring quotas and scant physician responsibilities could displace their state-law tort claims. If this Court preempts the players' claims, all future parties to a CBA would likewise never be certain as to which provisions may waive their state-law tort claims.

Lastly, preempting the players' claims would remove states' abilities to regulate the safety of their resident-employees. This Court so cautioned in *Lueck* that not every state-law dispute should be preempted by § 301 as "[s]uch a rule would delegate to unions and unionized employers the power to exempt themselves from whatever state [laws] they disfavored." *Lueck*, 471 U.S. at 212. As the players' do not claim an implied breach of contract but simply common-law

negligence, the state—not a labor contract—is best equipped to determine relief. Thus, this Court should reverse the Fourteenth Circuit's preemption of the players' negligence claims.

CONCLUSION

For the aforementioned reasons, this Court should reverse the Court of Appeals for the Fourteenth Circuit's finding that the NCAA amateurism and eligibility bylaws are categorically exempted from scrutiny under § 1 of the Sherman Act. Moreover, this Court should also reverse the Fourteenth Circuit's preemption of Jon Snow and his fellow players' negligence claims.

Dated: February 4, 2019

Respectfully submitted,

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Team 3
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Appendix A

I. 15 U.S.C. § 1 provides:

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

II. 29 U.S.C. § 185 provides:

> (a) Suits for violations 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.

III. NCAA Bylaw 12.5.2.1 provides:

> 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 permit[ting] 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 services.