No. 09-214

In The Supreme Court of the United States

JON SNOW,
AND OTHER SIMILARLY SITUATED INDIVIDUALS,
Petitioner,
v.

NATIONAL COLLEGIATE ATHLETIC ASS'N;
THE NATIONAL FOOTBALL LEAGUE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourteenth Circuit

BRIEF FOR PETITIONER

TEAM 19
Counsel for Petitioner

QUESTIONS PRESENTED

1. Should NCAA bylaw 12.5.2.1 be immune from scrutiny under Section 1 of the Sherman Act, even though it precludes student-athletes from being compensated for licensing their own name, image, and likeness for the duration of their athletic career at member institutions?
2. Does LMRA § 301 preempt state law claims regarding painkiller distribution when those claims allege that the defendant's conduct was illegal and no provision of the Collective Bargaining Agreement directly addresses the issues being litigated?

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STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

The United States District Court for the Southern District of Tulania granted petitioner's motion for summary judgment. The United States Court of Appeals for the Fourteenth Circuit reversed. Petitioners subsequently applied for certiorari, which this Honorable Court granted.

B. STATEMENT OF FACTS

Petitioners seek relief from the Fourteenth Circuit's improper rulings on two issues. First, the petitioners seek a reversal of the Fourteenth Circuit's denial to overturn the National Collegiate Athletics Association ("NCAA") bylaw 12.5.2.1. Second, petitioners seek reversal of the Fourteenth Circuit's decision that LMRA 301 preempts their negligent hiring, retention, misrepresentation, and fraud claims against the National Football League ("NFL").

The facts of this case are all too familiar. Athletes, pushed to their physical limits by the NCAA, are penalized for accepting compensation for their hard work. Then, upon entering the NFL, athletes are fed painkillers for minor injuries and left with lifelong medical problems, including opioid addiction. R. at 13.

Jon Snow is an example of this all too common story. As the star quarterback for the Tulania Greenwaves, Mr. Snow was nominated for several awards for his athletic achievements. *Id*. This recognition brought him attention by sponsors. In particular, Apple, Inc. approached him for permission to use his name, image, and likeness ("NIL") for a new emoji keyboard.[1] Mr. Snow agreed and Apple, Inc. offered to give him $1,000 to use his NIL, plus a $1 royalty for each keyboard sold. *Id.* Because Mr. Snow had allowed Apple to use his NIL, the NCAA

[1] An emoji is a small digital icon that captures the likeness of celebrities, smiley faces, and athletes expressing a range of emotions.

suspended him indefinitely and he was precluded from playing in his senior season at Tulania University.

After being barred from his senior season, Mr. Snow was drafted into the NFL by the New Orleans Saints. He excelled in his rookie season, but his success came at a cost. NFL Doctors and trainers routinely prescribed Mr. Snow multiple painkillers for minor injuries without disclosing the side effects of the medications. *Id.* By his second season in the NFL, Mr. Snow was left with an enlarged heart, nerve damage, a pain killer addiction, and a broken dream. One would hope that this story is anecdotal, but it is shared by all the petitioners in this action. *Id.*

As a result of his hardships, Mr. Snow brought two actions. First, Mr. Snow brought an action to overturn NCAA bylaw 12.5.2.1. Second, Mr. Snow brought actions against the NFL for negligent hiring, retention, misrepresentation, and fraud. The United States District Court for the Southern District of Tulania properly held that Mr. Snow suffered as a result of the NCAA's rules barring athletes from using their own NIL. R. at 19. The Court also concluded that LMRA 301 did not preempt Mr. Snow's claims for negligent hiring, retention, misrepresentation, and fraud. Subsequently, the Fourteenth Circuit reversed. R. at 6,11. After the Fourteenth Circuit's decision, this Court granted Certiorari.

SUMMARY OF THE ARGUMENT

Petitioner's argument is twofold: (1) respondents are subject to regulation under Section 1 of the Sherman Act, and (2) LMRA § 301 does not preempt Mr. Snow's claims for negligence, negligent hiring, negligent retention, negligent misrepresentation, or fraud.

With regards to the first claim on certiorari, the Court should reverse the Fourteenth Circuit's holding and dismiss respondent's claims. Respondents are subject to regulation under

Section 1 of the Sherman Act because NCAA bylaw 12.5.2.1 regulates commercial activity. Petitioner has established that the rules prohibiting compensation represent a conspiracy that has caused Mr. Snow to suffer a cognizable antitrust injury. Further, the bylaws are subject to a rule of reason analysis as they produce significant anticompetitive effects within a specified market, affecting interstate commerce.

With regards to the second claim on certiorari, this Court should reverse the Fourteenth Circuit's holding and find that LMRA § 301 does not preempt Mr. Snow's negligence, negligent hiring, negligent retention, negligent misrepresentation, or fraud claims for four reasons. First, Mr. Snow's claims allege that the NFL engaged in illegal conduct by violating state and federal drug laws. Second, the rights involved in this claim arise out of state law and the claims can be resolved without interpreting the CBA. Third, the Fourteenth Circuit's assertion that "prevailing case law favors preemption", is an oversimplified and inaccurate interpretation of preemption jurisprudence. Finally, Mr. Snow's claims are not preempted because the federal government cannot occupy the arena of labor law to the exclusion of the states.

ARGUMENT

I. NCAA BYLAW 12.5.2.1 IS SUBJECT TO SECTION 1 OF THE SHERMAN ACT BECAUSE IT IMPROPERLY REGULATES AND RESTRICTS COMMERCIAL ACTIVITY.

Congress enacted the Sherman Act in 1890 as a means of prohibiting activities that act as a restraint on trade. The act was intended to be a "comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade." FED. TRADE COMM'N, the Antitrust Laws, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws. Section 1, the relevant provision to Mr. Snow's claims, states that "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." 15 U.S.C § 1. The purpose of the Sherman Act, is to encourage fair and open markets, and "protect consumers from injury that results from diminished competition." *Agnew v. NCAA*, 682 F.3d 328, 334-335 (7th Cir. 2012) (citing *Banks v. NCAA*, 977 F.2d 1081, 1087 (7th Cir. 1992)). The National Collegiate Athletics Association ("NCAA")has become a monopoly in the world of college sports. It is a billion-dollar industry that dictates player's scholarships, the manner in which games are televised, and most relevant to this case, precludes players from receiving any monetary compensation for the use of their name, image, and likeness ("NIL").

In enacting its bylaws, the NCAA sought to propel and maintain amateurism in its athletes and competitions. The NCAA has long "contended that amateurism [has] been one of the NCAA's core principles since its founding and that amateurism is a key driver of college sports' popularity with consumers and fans." *O'Bannon v. NCAA*, 802 F.3d 1049, 1058 (9th Cir. 2015) (citing *O'Bannon v. NCAA*, 7 F.Supp.3d 955, 999-1000 (9th Cir. 2014)). One core component of the amateurism rules is demonstrated in bylaw 12.5.2.1, which states that:

> 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.

2009-10 NCAA Division Manual 74 (2009), http://www.ncaapublications.com/productdownloads/D110.pdf. The NCAA explains that the rules barring compensation serve to distinguish "amateur college athletics from professional sports, allowing the former to exist as a distinct form of athletic rivalry and as an essential component of a comprehensive college education." *In Re: NCAA Grant-In-Aid Cap Antitrust Litigation*, Nos. 14-md-02541-CW, 14-cv-02758-CW, 2018 WL 1524005, at *10 (N.D.C.A. Mar., 28, 2018). While these rules may *seek* to preserve the "innocence" of amateur sports, they simultaneously place an impermissible restriction on trade in two specific markets, ultimately affecting interstate commerce.

The threshold question is whether the NCAA, and its member schools, may be subjected to the regulations of the Sherman Act. Although this court has never directly ruled on this issue, both the Seventh and Ninth Circuits have made clear "that *all* regulations passed by the NCAA are subject to the Sherman Act." *In re NCAA Student-Athlete Name & Likeness Licensing Litigation*, 990 F.Supp.2d 996, 1004 (9th Cir. 2013) (quoting *Agnew*, 683 F.3d at 338-39). Respondent contends that its compensation rules are not subject to scrutiny under the Sherman Act because they do not regulate commercial activity. However, as astutely noted by the district court, "'no knowledgeable observer could earnestly assert that big-time college football programs competing for highly sought after high school football players do not anticipate economic gain from a successful recruiting program.'" R. at 17. (quoting *Agnew*, 683 F.3d at 340). The NCAA knows that strong athletic programs will bring in billions of dollars of revenue.

To make a successful claim under Section 1 of the Sherman Act, a plaintiff must show "(1) that there was a contract, combination, or conspiracy; (2) that the agreement unreasonably restrained trade under either a per se rule of illegality or a rule of reason analysis; and (3) that the restraint affected interstate commerce." *In re NCAA Student-Athlete Name & Likeness Licensing Litigation*, 990 F.Supp.2d at 1001 (citing *Tanaka v. Univ. of S. Cali.*, 252 F.3d 1059, 1062 (9th Cir. 2001)).

A. The NCAA rules against player compensation represent a conspiracy that caused Mr. Snow to suffer a cognizable antitrust injury under the Sherman Act.

To prove the first element, Mr. Snow must present evidence that the NCAA "'had a conscious commitment to a common scheme designed to achieve an unlawful objective.'" *Bhan v. NME Hospitals, Inc.*, 669 F.Supp. 998, 1015 (9th Cir. 1987) (quoting *Wilcox v. First Interstate Bank*, 815 F.2d 522, 525 (9th Cir. 1987)). The Ninth Circuit also notes that a "'contract, combination or conspiracy under the antitrust laws may be defined as concerted action intended to achieve a common goal.'" *Id.*

Here, much like in other cases involving the NCAA, the respondent argues that no conspiracy exists, but rather that they are acting to preserve amateurism. However, the simple fact remains that the respondent and its member schools are the only ones profiting from the efforts of the players. During the 2016-2017 academic year, the NCAA made $1.06 billion in revenue, $761 million of which was from the NCAA basketball tournament. Darren Rovell, *NCAA tops $1 billion in revenue during 2016-17 school year*, ESPN (Mar. 7, 2018), http://www.espn.com/college-sports/story/_/id/22678988/ncaa-tops-1-billion-revenue-first. In 2015, the University of Alabama athletic department brought in over $95 million in revenue, the football program alone bringing in $46 million in profit. Jason Belzer, *The Univ. of Ala. made almost $100 million from football in 2015*, Forbes (Feb. 24, 2016),

https://www.forbes.com/sites/jasonbelzer/2016/02/24/the-university-of-alabama-made-almost-100-million-from-football-in-2015/#5958973243ca. While the NCAA and member schools take in billions of dollars, not a penny goes to student-athletes like Mr. Snow. Without the student-athletes, the individual programs and the NCAA simply would not exist. The NCAA wholly relies on the efforts of student-athletes to generate revenue, yet their rules against compensation ensure that the athletes see absolutely zero return on those efforts. In any other setting, an employer's non-payment of an employee would be considered a violation of the Fair Labor Standards Act, yet the NCAA seems to believe that, because their business involves amateur sports, they should be held to a different standard. Their regulations represent a clear conspiracy to direct money into hands of specific and limited people, at the express exclusion of the athletes who generate that money.

The *Bassett* court and the NCAA are concerned that compensation *may* quash the amateur spirit of college sports. This argument is unfounded. The *schools* already provide athletes with scholarships, housing, and meal plans. Further, even if these expenses are viewed as compensation – that compensation is coming from the schools – not the NCAA. Simply stated, the NCAA is making millions of dollars through player appearances, the sale of apparel, advertising, and tickets sales, while expending zero dollars compensating the athletes.

In addition to the existence of a conspiracy, plaintiff must also show that the conspiracy caused him to suffer a cognizable injury. *See Bhan*, 669 F.Supp. at 1005. The Sherman Act only protects "against injury sustained as a result of anticompetitive activities." *Id*. at 1012. In establishing injury, the plaintiff must show that he or she participates in the same market as the alleged wrongdoers, either as a participant or a consumer, and that the plaintiff suffered injury to his business or property. *See id*. (citing *Lucas v. Bechtel Corp.* 800 F.2d 839, 844 (9th Cir.

1986)). Here, Mr. Snow is clearly a participant in the same market, collegiate athletics, as the NCAA. Mr. Snow's athletic ability is the product that the market relies on to exist. The NCAA's rules barring compensation are the only barrier prohibiting Mr. Snow from fully participating in the market by way of monetary gain for sale of the product. In terms of injury, the Ninth Circuit describes business as "'that which occupies the time, attention and labor of [persons] for the purpose of…pecuniary reward.'" *Bhan*, 669 F. Supp. at 1013 (citing *Fine v. Barry and Enright Productions*, 731 F.2d 1394, 1397 (9th Cir. 1984)).

NCAA football is a business for both the respondent and Mr. Snow. Collegiate athletes spend the majority of their college career in practices, meetings, and games for the purpose of maintaining academic and athletic eligibility. These athletes are hopeful that they will become professionals and gain a large pecuniary reward. College sports are undoubtedly a business to the respondents. The NCAA regulates nearly every component of amateur collegiate sports, for the pecuniary benefit of itself and its member schools.

Next, Mr. Snow was actually injured by the illegal actions of the respondent. To establish that an antitrust injury has occurred, a plaintiff must show an "'injury of the type the antitrust laws were intended to prevent and that flows from that which makes Respondents' acts unlawful.'" R. at 19. (citing *Glen Holly Entm't, Inc. v. Tektronix, Inc.*, 343 F.3d 1000, 1007-08 (9th Cir. 2003)) (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977)).

Here, Mr. Snow is properly claiming that his injury is a direct result of respondent's illegal conduct. But for bylaw 12.5.2.1, Mr. Snow would have the ability to freely license his NIL and to be compensated for doing so. As in *O'Bannon* and *Board of Regents*, video game providers and television networks "'often seek the right to acquire the rights to use' the players'

NILs," which leads to a strong presumption that these rights are not only sought after, but valuable. *O'Bannon*, 802 F.3d at 1057 (quoting *O'Bannon*, 7 F.Supp.3d at 968-69). Where networks, gaming companies, or Apple, seek to use the NIL of a college player, the player should be left to negotiate that right on their own behalf. The NCAA's failure to allow such negotiations, or even to compensate players for the use of their images based on contracts entered into by the NCAA on behalf of players, result in injury to the player's business. As the district court concluded, the NCAA's rules have "foreclosed the market" for athletes to profit from the use of their NIL. R. at 19.

B. A rule of reason analysis should be applied in this case because the NCAA rule against compensation produces significant anticompetitive effects within a specified market.

Generally, horizontal agreements - those that fix the price of a good or restrict their output - are considered to be per se illegal. *Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 100 (1984); *see Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 19-20 (1979). However, the court in *Board of Regents* strayed from the general rule and held that NCAA rules are not per se unlawful although they are "restraints on the ability of member institutions to compare in terms of price and output." *Bd. of Regents of Univ. of Okla.*, 468 U.S. at 101. To compensate for this departure from the general rule, the court noted that the NCAA rules should not to be invalidated without a rule of reason analysis. R. at 16; *see Bd. of Regents of Univ. of Okla.*, 468 U.S. 85 (1984).

Under a rule of reason analysis, the plaintiff bears the burden of showing that "the challenged restraints produce significant anticompetitive effects within a relevant market." *In Re: NCAA Grant-In-Aid Cap Antitrust Litigation*, Nos. 14-md-02541-CW, 14-cv-02758-CW, 2018 WL 1524005, at *8 (N.D.C.A. Mar., 28, 2018). The first step in the analysis is to define the relevant market in which respondent's actions have produced anti-competitive effects. The

second step is to show that the restraints on the market produced significant anticompetitive effects within that market. *See In Re: NCAA Grant-In-Aid Cap Antitrust Litigation*, Nos. 14-md-02541-CW, 14-cv-02758-CW, 2018 WL 1524005, at *18 (N.D.C.A. Mar., 28, 2018). If anticompetitive effects are present, the defendant "must come forward with evidence of the restraints' precompetitive effects." *Id*. at *7. The burden then shifts back to the plaintiff to "show that any legitimate objective can be achieved in a substantially less restrictive manner." *Id*. (citing *Tanaka v. Univ. of S. Cali.*, 252 F.3d 1059, 1062 (9th Cir. 2001). Should a court find that respondents have in fact met their burden of establishing procompetitive effects, the facts reveal "that any legitimate objectives can be achieved in a substantially less restrictive manner." *In Re: NCAA Grant-In-Aid Cap Antitrust Litigation*, Nos. 14-md-02541-CW, 14-cv-02758-CW, 2018 WL 1524005, at *7 (N.D.C.A. Mar., 28, 2018).

In *O'Bannon v. NCAA*, the plaintiffs, a group of twenty current and former student-athletes, sued the NCAA for claims comparable to those of Mr. Snow. The plaintiffs alleged that the rules barring students from receiving shares "of the revenue that the NCAA and its member schools earn from the sale of licenses to use the student-athletes' names, images and likenesses in videogames, live game telecasts, and other footage" violated the Sherman Antitrust Act. *O'Bannon*, 7 F.Supp.3d at 963. In *O'Bannon*, the plaintiff's established two markets in which the NCAA impermissibly restrained trade through their compensation restrictions, the "college education market" and the "group licensing market." *Id*. at 965. Mr. Snow's allegations involve the latter of these markets – the group licensing market. The *O'Bannon* court correctly explained that notwithstanding the NCAA's rules on compensation, collegiate athletes would be able to sell "group licenses for the use of their names, images, and likenesses…to their respective schools, third-party licensing companies, or media companies seeking to use student-athletes' names,

images and likenesses." *Id*. at 968. The court identified three submarkets within the licensing market, including a submarket for the use of NIL in videogames. *Id*. Although the use of NIL in a videogame is not directly analogous to the use of NIL in an emoji keyboard, they are similar due to their nature of "animation" and purpose for entertainment.

The restraints in NCAA bylaws also produced significant anticompetitive effects within the market. The Federal Trade Commission describes anticompetitive practices as those that are "likely to reduce competition," examples of which include "price fixing…and exclusionary exclusive dealing contracts or trade association rules…" FED. TRADE COMM'N, Anticompetitive Practices, https://www.ftc.gov/enforcement/anticompetitive-practices. Here, the NCAA rules against compensating student-athletes for the use of their NIL creates a monopoly in the group licensing market, which by its very nature, not only reduces competition, but entirely wipes it out. Bylaw 12.5.2.1 ensures that nobody but the NCAA will be able to profit from the players' NIL, an anticompetitive effect that is clearly significant and detrimental. Absent this bylaw, the student-athletes would retain the ability to license the rights to their NIL and to profit from such licensing deals.

Respondents have not produced adequate evidence of procompetitive effects to bar Mr. Snow's claims and thus the third prong should not be assessed. As detailed above, respondents rely heavily on the assertion that the compensation rules are a key component to their dedication to preserving amateurism in college sports. The court in *O'Bannon* held that allowing for compensation would increase competition, rather than hinder it as respondents contend. 7 F.Supp.3d at 1004. Moreover, the district court in *O'Bannon* held that it was "primarily 'the opportunity to earn a higher education' that attracts athletes to college sports." 802 F.3d at 1073 (citing *O'Bannon*, 7 F.Supp.3d at 986). The Ninth Circuit explains that this opportunity will still

be available if student-athletes are paid beyond the value of their athletic scholarships. *O'Bannon*, 802 F.3d at 1073 (quoting *O'Bannon*, F.Supp.3d at 986). Additionally, the Ninth Circuit notes that players might be more likely to go to and finish college "if they knew that they were earning some amount of NIL income while they were in school." *O'Bannon*, 802 F.3d at 1073. Respondent's contention that bylaw 12.5.2.1 serves to preserve amateurism is not a sufficient procompetitive effect as to outweigh its anticompetitive effects. The court in *Board of Regents* notes that although amateurism is certainly a noble cause, "good motives will not validate an otherwise anticompetitive practice." *Board of Regents*, 468 U.S. at 101.

Even if this Court were to find that the respondents met their burden, there is a less restrictive alternative. Guidance can be drawn from the less restrictive alternatives suggested in *O'Bannon*. In *O'Bannon,* the plaintiffs suggested that the "NCAA could permit its schools to hold in trust limited and equal shares of its licensing revenue to be distributed to its student-athletes after they leave college or their eligibility expires." *O'Bannon*, 802 F.3d at 1005. The court found that "permitting schools to award these stipends and deferred payments would increase price competition among FBS football and Division I basketball schools in the college education market…without undermining the NCAA's stated procompetitive objectives." *Id.* at 1005-06. The court in *O'Bannon* affirmed that this proposition constituted a less restrictive means of achieving the NCAA's procompetitive goals, and the same should be found here. Mr. Snow should be permitted to obtain compensation for the use of his NIL in the emoji keyboard, which shall be held in trust until Mr. Snow departs from Tulania University. Such a system would allow players to benefit from the use of their talents and their image, while maintaining the integrity of the amateur sport.

Finally, the respondents misunderstand the scope of this Court's holding in *Board of Regents*. In *Board of Regents*, this court held that the NCAA bylaws against compensating players were necessary to preserve the "character and quality of college football." *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 117 (1984). However, the Tulania District Court, properly noted that they are "not bound by *Board of Regents* to conclude that every NCAA rule that somehow relates to amateurism is automatically valid." R. at 16. Furthermore, the Ninth Circuit held that *Board of Regents* "does not stand for the sweeping proposition that student-athletes must be barred, both during their college years, and forever after, from receiving any monetary compensation for the commercial use of their names, images and likenesses." *O'Bannon v. NCAA*, 7 F.Supp.3d at 999.

C. The NCAA rule against compensation affects interstate commerce because it limits any individual or corporation, other than the NCAA, from trading based on NIL rights.

The final step in establishing a Section 1 claim is proof that the conspiracy acted "in restraint of trade or commerce among the several states." 15 U.S.C. § 1; *Bhan*, 669 F.Supp. at 1010. "The jurisdictional reach of the Sherman Act is broad, and generally coextensive with Congressional authority under the Commerce Clause." *Bhan*, 669 F.Supp. at 1010. "Accordingly, a plaintiff may establish federal jurisdiction under the Act upon a showing that 'defendant's activity is itself in interstate commerce…" *Id*. (quoting *McClain v. Real Estate Bd.*, 444 U.S. 232, 241 (1980)). Here, Mr. Snow need only establish that the NCAA's business activities affect interstate commerce. The NCAA engages in various activities that involve commerce across state lines. For example, "the NCAA conducts and sponsors, numerous athletic events which incidentally and directly use…interstate transportation." *NCAA's Certification Requirement: A Section 1 Violation of The Sherman Antitrust Act*, 9 Val. U. L. Rev. 193 (1974). Furthermore, the NCAA spans across "all fifty states, with at least thirty-one interstate collegiate

athletic conferences that compete on a regularly scheduled basis." *Id*. These activities, along with the television and radio contracts that reach consumers across the nation, place the business activities of the NCAA clearly within the realm of interstate commerce. In having interstate competitions and licensing deals, the NCAA uses the talents, efforts, and appearances of the student-athletes to monopolize the nation's amateur sports market. "The labor of-student athletes is an integral and essential component of the NCAA's 'product,' and a rule setting the price of that labor goes to the heart of the NCAA's business." MATTHEW J. MITTEN ET AL., SPORTS LAW AND REG.: CASES, MATERIALS AND PROBS. (Wolters Kluwer Law & Business et al. eds., 4th ed. 2016).

Here, respondents will attempt to rely on *Bassett v. NCAA*, where the Sixth Circuit held that the rules against compensation were "explicitly noncommercial," and that the failure to follow said rules "violates the spirit of amateur athletics by providing remuneration to athletes in exchange for their commitments to play…" R. at 18 (quoting *Bassett v. NCAA*, 528 F.3d 426, 433 (6th Cir. 2008). As the District Court noted, the *Bassett* court plainly got it wrong. As noted above, the definition of commerce is one that is broad, encompassing "almost every activity from which the actor anticipates economic gain." R. at 17 (quoting Philip Areeda & Herbert Hovenkamp, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION, ¶260b (4th Ed. 2013)). The NCAA and its member schools are without question anticipating and receiving significant financial gain from the efforts of the players. There is simply no way in which the business of the NCAA, no matter their lofty goals of amateurism, can possibly be construed as anti-commercial.

The NCAA's rules barring compensation are not just eligibility rules; they are anticompetitive restraints. The rules constitute a conspiracy that led to an antitrust injury. A rule

of reason analysis unveils the existence of a less restrictive alternative to achieving procompetitive purposes. The restraint also has an adverse effect on interstate commerce. Therefore, bylaw 12.5.2.1 is in violation of Section 1 of the Sherman Act and cannot stand.

II. MR. SNOW'S CLAIMS ARE NOT PREEMPTED FOR FOUR REASONS. FIRST, PARTIES TO A CBA CANNOT BARGAIN FOR WHAT IS ILLEGAL UNDER STATE LAW. SECOND, MR. SNOW'S CLAIMS ARISE OUT OF RIGHTS CONFERRED BY STATE LAW AND DO NOT REQUIRE THE INTERPRETATION OF THE CBA. THIRD, THE FOURTEENTH CIRCUIT TOOK AN OVERSIMPLIFIED AND DISTORTED VIEW OF PREEMPTION LAW WHEN FINDING IN FAVOR OF THE NFL. FINALLY, IT WOULD BE CONTRARY TO THE PLAIN TEXT OF THE CONSTITUTION TO ALLOW FEDERAL COURTS TO OCCUPY THE ARENA OF LABOR LAW TO THE EXCLUSION OF THE STATES.

In the interest of public policy, this Court has stated that parties to a Collective Bargaining Agreement ("CBA") cannot contract for what is illegal under state law. *Allis–Chalmers Corp. v. Lueck* , 471 U.S. 202, 212 (1985). Mr. Snow alleges that the NFL engaged in illegal conduct by violating state and federal drug laws. Thus, in accordance with *Allis-Chalmers*, Mr. Snow's claims are not preempted.

Moreover, Mr. Snow's claims are not preempted under this Court's preemption jurisprudence. Courts have developed a two-prong inquiry to determine whether § 301 preempts a plaintiff's claim. First, courts ask whether the rights arise from the Collective Bargaining Agreement. Second, courts ask whether litigating the state law claim requires interpretation of the CBA. *See Caterpillar, Inc. v. Williams*, 482 U.S. 386 , 395 (1997) (citing *Electrical Workers v. Hechler*, 481 U.S. 851, 859, n. 3 (1987)); *Burnside v. Kiewit Pac. Corp.*, 491 F.3d 1053, 1058 (9th Cir. 2007). The rights in question arise out of state law, not out of the CBA, and each of Mr. Snow's claims can be resolved without interpreting the CBA.

Additionally, the Fourteenth Circuit's assertion that "prevailing case law favors preemption" is an oversimplified and inaccurate interpretation of preemption jurisprudence. R. at 10.

Finally, Mr. Snow's claims are not preempted because the federal government cannot occupy the arena of labor law to the exclusion of the states. *Allis-Chalmers Corp.*, 471 U.S. at 209. Thus, a holding that Mr. Snow's claims are preempted would run afoul of the Tenth Amendment.

A. LMRA § 301 does not preempt Mr. Snow's claims because the claims allege that the NFL engaged in illegal conduct.

In *Allis–Chalmers Corp. v. Lueck*, this court stated, "Clearly, LMRA § 301 does not grant the parties to a collective-bargaining agreement the ability to contract for what is illegal under state law." 471 U.S. at 212. The Ninth Circuit has also recognized that a plaintiff's claim is not preempted when the purported conduct is illegal under state law. *See*, e.g., *Cramer v. Consol. Freightways, Inc.*, 255 F. 3d 683, 685 (9th Cir. 2001); *Dent v. NFL*, 902 F.3d 1109, 1121 (9th Cir. 2018). All persons and entities are subject to the law regarding the distribution of controlled substances – including solo practitioners and "multi-billion dollar machines" like the NFL. Brief for Plaintiffs-Appellants, *Dent v. NFL*, 902 F.3d 1109 (9th Cir. 2018) (No. 15-15143), 2016 WL 614228 (C.A. 9) at *8.

Mr. Snow's claims allege that the NFL, through its negligence, engaged in illegal conduct. In particular, Mr. Snow alleges that the NFL violated (1) the Controlled Substances Act, 21 U.S.C. § 801, (2) the Food, Drugs, and Cosmetics Act, 21 U.S.C. § 301 and (3) the California Pharmacy Laws, Cal. Bus. & Prof. Code § 4000. R. at 22. Thus, Mr. Snow's claims cannot be preempted by LMRA 301.

B. LMRA 301 does not preempt Mr. Snow's claims because the claims arise out of rights conferred by state law and do not require interpretation of the CBA.

Only state law claims that are "inextricably intertwined" with the interpretation of the CBA will be preempted under § 301. *Allis-Chalmers*, 471 U.S. at 213, 220. Interpretation should be construed narrowly and the interpretation must require more than a mere reference to or consideration of the CBA. *Alaska Airlines Inc. v. Schurke*, 898 F.3d 904, 939 (9th Cir. 2018). Courts ask two questions to determine whether a plaintiff's claim is preempted: (1) whether the rights in question are conferred by virtue of state law, outside of the CBA; and (2) whether litigating the state law claim required interpretation of the CBA**.** *See* Caterpillar, Inc., 482 U.S. at 395 (citing *Electrical Workers*, 481 U.S. at 859, n. 3); *Burnside*, 491 F.3d at 1058.

Merely five months ago, the Ninth Circuit decided a case almost identical to the one at bar – yet the Fourteenth Circuit neglected to mention it. In *Dent v. NFL*, a former NFL player brought a claim against the NFL for negligence per se, negligent hiring and retention, negligent misrepresentation, fraudulent concealment, fraud, and loss of consortium in relation to the NFL's distribution and administration of painkillers. 902 F.3d at 1115. The Ninth Circuit applied the two-prong test to each claim and found that the claims were not preempted because no rights arose from the CBA nor was interpretation of the CBA required to litigate the claims. *Id.* As Mr. Snow alleges a nearly identical complaint to the one in *Dent,*[2] each of Mr. Snow's claims are compared to the reasoning in *Dent* below.

i. LMRA 301 does not preempt Mr. Snow's negligence claims because the plaintiff's rights to reasonable medical care do not arise out of the CBA and the CBA does not need to be interpreted to assess a negligence claim.

[2] In *Dent v. NFL* the court also assessed a fraudulent concealment and loss of consortium claim. 902 F.3d 1109 at 1115. Mr. Snow does not allege such claims; thus they will not be assessed in this brief. R. at 36.

In order to state a claim for negligence, a plaintiff must show that (1) the defendant had a duty to protect others against unreasonable risks, (2) the defendant breached that duty, (3) that breach proximately caused the plaintiff's injuries, and (4) damages. *Dent*, 902 F.3d at 117 (quoting *Corales v. Bennett*, 567 F.3d 554, 572 (2009)); *see McGarry v. Sax*, 70 Cal. Rptr. 3d 519 (Cal. Ct. App. 2008).[3]

A duty may exist solely based on the inherent dangerousness of an activity undertaken by the defendant. *J'Aire Corp v. Gregory*, 598 P.2d 60 (Cal. 1979). Breach of that duty can be resolved by comparing the statutory requirements to the defendant's conduct. *Dent*, 902 F.3d at 1119. Finally, causation of damages is a purely factual inquiry. *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 261 (1994) (quoting *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399 (1988)).

In *Dent v. NFL*, the Ninth Circuit found that the right to receive medical care without unreasonable risk of harm does not arise out of the CBA. *Dent*, 902 F.3d at 1119. The court reasoned that the plaintiff's negligence claim alleged that the NFL negligently violated state and federal laws governing prescription drugs – not that the NFL violated the CBA. *Id.*

Next, the court determined that the plaintiff's negligence claim did not require interpretation of the CBA for three reasons. *Id.* First, the NFL owed the plaintiffs a duty of care because the distribution of controlled substances is inherently dangerous and a duty arises out of the "general character of the activity." *Id.* Therefore, there was no need to look to the CBA to determine whether a duty exists because that duty is clear when looking at the nature of the activity. *See id.* Second, the court held that there was no need to look to the CBA to determine whether the NFL breached their duty because the court merely needs to compare the statutory

[3] In some jurisdictions "negligence per se" is not an independent cause of action and is construed as a traditional negligence claim. *See Quiroz v. Seventh Ave. Ctr.*, 45 Cal. Rptr. 3d 222 (Cal. Ct. App. 2006).

requirements to the NFL's conduct. *Id.* Finally, the court noted that causation of the plaintiff's damages is a purely factual question. *Id.* at 1120.

Here, the facts are nearly identical to those found in *Dent*. Mr. Snow also brings a claim for negligent distribution of painkillers. R. at 4. Just like *Dent*, the right to reasonable medical care arises from state law. Moreover, the elements of negligence do not require the interpretation of the CBA because: (1) the distribution of pain killers automatically gives rise to a duty out of the nature of the activity; (2) breach can be determined by comparing the NFL's conduct to the statute; and (3) damages are a purely factual question. Therefore, Mr. Snow's negligence claim is not preempted.

ii. LMRA 301 does not preempt Mr. Snow's negligent hiring or retention claims because the rights at issue arise from common-law. Moreover, the elements of a negligent hiring and retention claim are purely factual questions that do not require the interpretation of the CBA.

In order to establish a prima facie case for negligent hiring and retention, the plaintiff must show the existence of an employment relationship and the foreseeability of injury. *Dent*, 902 F.3d at 1122 (quoting *Phillips v. TLC Plumbing, Inc.*, 91 Cal. Rptr. 3d 864 (Cal. Ct. App. 2009)). The duty to hire and retain employees is a duty that arises out of common-law. *Id.* Moreover, injury arising from incompetence in the NFL's drug prescription regime is foreseeable. *Id.* Finally, where the NFL has not identified a CBA provision whose interpretation would be required in order to adjudicate a claim, the claim will not be preempted. *Id.* at 1123.

Just like the negligence claim, the facts surrounding Mr. Snow's negligent hiring and retention claim are nearly identical to those in *Dent*. Mr. Snow brings a claim against the NFL for negligent hiring and retention. R. at 26. Just like Dent, the duty to hire and retain employees arises from state law. The questions of whether an employment relationship exists and whether

injuries are foreseeable are questions of fact. Therefore, Mr. Snow's negligent hiring and retention claims are not preempted.

iii. LMRA 301 does not preempt Mr. Snow's negligent misrepresentation claim because the NFL had a duty to act with reasonable care under state law. Moreover, the elements of negligent misrepresentation are a question of fact that does not require the interpretation of the CBA.

When a CBA does not address the duties regarding the distribution of prescription drugs, the rights arise out of state law. *Dent*, 902 F.3d at 1123. Moreover, the elements of a negligent misrepresentation claim[4] do not require the interpretation of a CBA because they are a purely factual matter. *Id.* (citing *Galvez v. Kuhn*, 9333 F.2d 773, 778 (9th Cir. 1991)).

As the Ninth Circuit noted, the CBA does not contain any provision regarding the responsibilities of the NFL in distributing painkillers. *Dent*, 902 F.3d at 1123. Moreover, the court stated that whether the NFL made false assertions that they knew or should have known were false with the intent to induce the player's justifiable reliance was a question of fact that can be resolved without consulting the CBA. *Id.*

The terms of the CBA have not been altered since *Dent* was decided.[5] Thus, just like the rights in *Dent*, there is no provision of the CBA that speaks directly to the subject of litigation. R. at 26. Therefore, Mr. Snow's rights arise out of state law. Moreover, even if such a provision existed, the NFL cannot perform an end run around the law. The law applies to all entities and does not carve out a special exemption for multi-billion-dollar machines. Finally, the elements of

[4] In order to succeed on a claim for negligent misrepresentation, a plaintiff must show (1) the misrepresentation of a material fact with the intent to induce another's reliance, (2) the reliance on that misrepresentation, and (3) damages. Shamisan v. Atlantic Richfield Co., 132 Cal. Rptr. 2d 635 (Cal. Ct. App. 2003).

[5] The current CBA was ratified in 2011 and does not expire until the end of the 2020 season. NFL PLAYER'S ASS'N, COLLECTIVE BARGAINING AGREEMENT at 253, https://nfllabor.files.wordpress.com/2010/01/collective-bargaining-agreement-2011-2020.pdf.

negligent misrepresentation are a question of fact that can be resolved without consulting the CBA. Therefore, Mr. Snow's negligent misrepresentation claim is not preempted.

iv. Mr. Snow's fraud claim is not preempted because fraud claims arise under state law and the claim alleges that the NFL's personnel were responsible for the fraud.

Mr. Snow also brings a claim alleging that the NFL engaged in fraud. R. at 26. In order to state a claim for fraud, a plaintiff must show that the defendant (1) knowingly made a false statement (2) with the intent to induce reliance, and (3) the plaintiff incurred damages while justifiably relying on that promise. *Engalla v. Permanente Med. Grp.*, Inc., 938 P.2d 903, 917 (Cal. 1997).

Protection against fraud is a claim that arises under state law. *McCord v. Brooks, McComb & Fields, LLP*, No. 17-6459, 2018 U.S.App. LEXIS 35046, at *6 (6th Cir. Dec. 12, 2018). Additionally, the Court in *Dent* held that the plaintiff's claims were not preempted because the CBA does not need to be interpreted to prove the elements of fraud. *Dent*, 902 F.3d at 1125. The Court focused on the fact that the plaintiff's claims required an assessment of the *NFL's* conduct, not the *team's* conduct. *Id.* The Court stated that because the CBA only speaks to the duties of *team doctors*, and not the *NFL doctors*, the CBA does not need to be interpreted.

As noted above, fraud claims arise out of state law. Moreover, as in *Dent,* interpreting the CBA for Mr. Snow's claim is unnecessary because the CBA only speaks to the duties of *team* doctors. Finally, plaintiffs are asserting that the NFL's doctors and trainers gave the players medications. R. at 22.

Because plaintiff's fraud claim arises out of state law and allege misconduct by the NFL, it should not be preempted.

C. The Fourteenth Circuit Court of Appeals reached an incorrect holding by taking an oversimplified and distorted view of this Court's preemption jurisprudence while relying on factually distinguishable cases.

The Fourteenth Circuit applied an oversimplified and distorted view of preemption law by stating that the law weighs heavily in favor of preemption. R. at 10. As one legal commentator noted, preemption is an area of judge-made law that is filled with "confounding precedent" and "the lack of a uniform standard." Dana A. Gittleman, Note, *Home Field Advantage: Determining the Appropriate "Turf" for Williams v. NFL and Clarifying Preemption Precedent*, 19 Vill. Sports & Ent. L.J. 203, 206 (2012). Despite the unclear legal backdrop of preemption law, the Fourteenth Circuit boldly ignored the Ninth Circuit's recent decision in *Dent* and declared that prevailing case law favors preemption. While the precedent is confounding, the cases have one thing in common – their application does not preempt Mr. Snow's claims specifically.

The Fourteenth Circuit's distortion of preemption law is demonstrated through their reliance on the factually distinguishable cases of *Stringer v. NFL*, *Duerson v. NFL*, and *Williams v. NFL*. 474 F.Supp. 2d 894 (S.D. Ohio 2007); No. 12-C-2513, 2012 WL 1658353 (N.D. Ill. May 11, 2012); 582 F.3d 863 (8th Cir. 2009).

Stringer and *Duerson* are not instructive because in each case the court's analysis turned on the reasonableness of the care the NFL provided *under the CBA*. *See Stringer*, 474 F.Supp 2d at 910; *see also Duerson*, at *9. However, a reasonableness analysis is moot to the case at bar for Mr. Snow is not claiming that the NFL violated the CBA at all. Rather, Mr. Snow contends that the NFL violated both state and federal law. R. at 22. Thus, *Stringer* and *Duerson* lack any bearing on the facts at bar.

Additionally, the Fourteenth Circuit Court of Appeals placed an unwarranted emphasis on the Eighth Circuit's decision in *Williams v. NFL* because the Eighth Circuit admitted that

claims for a violation of statute can be resolved by comparing the statutory requirements to the NFL's conduct. *Williams*, 582 F.3d at 876. Utilizing the Eighth Circuit's reasoning in *Williams*, there would be no need to look to the CBA as the court could just compare the statutory requirements to the NFL's conduct.

Therefore, *Stringer*, *Duerson*, and *Williams* are not persuasive.

D. Holding that Mr. Snow's claims are preempted would run afoul of the Tenth Amendment to the Constitution because the Federal Government cannot occupy the arena of labor law to the exclusion of the states.

Under the Tenth Amendment, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X. This cornerstone of our democracy has repeatedly been recognized in this Court's preemption jurisprudence. In *Allis-Chalmers*, this court stated that Congress cannot occupy the area of labor legislation to the exclusion of the states. 471 U.S. at 209 (citing *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978)). Additionally, in *Livadas v. Bradshaw*, this Court stated that "§ 301 cannot be read broadly to pre-empt nonnegotiable rights conferred on individual employees as a matter of state law." 512 U.S. 107, 123 (1994). States continue to retain their "broad police powers" to protect the health and safety of workers within their state. *DeCanas v. Bica*, 424 U.S. 351, 356 (1976) (citing *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756 (1985)).

Here, the NFL seeks to frustrate the text of the Constitution by encouraging this Court to ignore State's rights and this Court's prior precedent. A state court should not be denied the ability to protect its citizens from the dangers of mishandling of controlled substances – yet this is the NFL's desired result. States routinely pass laws to protect the health and safety of its citizens in relation to the prescription and distribution of painkillers. *See, e.g.,* California

Pharmacy Laws: Bus. & Prof. Code § 4000 (2018). It would be contrary to the Constitution and this Court's preemption law if state courts could not enforce these nonnegotiable rights.

Therefore, as a matter of constitutional law and this Court's prior jurisprudence, Mr. Snow's claims should not be preempted.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the Fourteenth Circuit and hold that (1) NCAA bylaws precluding player compensation from their NIL are not immune from regulation under the Sherman Act, and (2) Mr. Snow's state law claims are not preempted by LMRA 301.