No. 09-214

IN THE

SUPREME COURT OF THE

UNITED STATES OF AMERICA

SPRING TERM, 2019

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 Supreme Court of the United States

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Brief for the Respondent

Team No. 20

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QUESTIONS PRESENTED

I. Under the Sherman and Clayton Acts, does a National Collegiate Athletic Association eligibility bylaw unreasonably restrain trade when it prohibits student-athletes from receiving compensation for their names, images, and likeness, but does so to benefit amateurism and competition?

II. Under the Labor Management Relations Act, is a plaintiff able to avoid the resolution procedures to which he agreed under a collective bargaining agreement when he alleges a state law negligence claim but the duty that he alleges was breached arises under the collective bargaining agreement?

STATEMENT OF JURISDICTION

The Fourteenth Circuit Court of Appeals entered its judgment on this case, and now, Petitioners filed for a Writ of Certiorari to the Supreme Court of the United States. This Court granted the petition, and this Court's jurisdiction rests on 28 U.S.C. § 1254 (West 2018).

SUMMARY OF THE ARGUMENT

I. NCAA Bylaw 12.2.5.1. Permissibility Under Antitrust Law

This Court should find National Collegiate Athletic Association ("NCAA") Bylaw 12.5.2.1 permissible under antitrust law for three reasons: (1) the NCAA eligibility bylaws do not fall under the Sherman Act definition of "commerce"; (2) Petitioners do not meet the heightened antitrust standing requirements; and (3) even if Petitioners do have standing, it is permissible under the rules of reason because it is pro-competitive.

First, this Court should find that the NCAA eligibility bylaws do not regulate "commerce" and should not fall to scrutiny through the Sherman Act. Specifically, NCAA Bylaw 12.5.2.1 is aimed at keeping student-athletes from becoming professional athletes, and maintaining amateurism in the sport. Because the purpose behind the NCAA eligibility bylaws are amateurism and noncommercial, this Court should find the Petitioners do not have a claim to challenge the bylaws with the Sherman Act.

Additionally, this Court should find Petitioners do not have standing to pursue this claim. Petitioners did not suffer antitrust injury from NCAA Bylaw 12.5.2.1 because it is pro-competitive and maintains competition and amateurism in collegiate athletics. Also, Petitioners are not the proper plaintiffs to pursue this claim because other NCAA bylaws prohibit their participation in commercial applications like the emoji keyboard. Even if Bylaw 12.5.2.1 did not exist, other NCAA bylaws prohibit Petitioners from engaging in commercial behavior. Therefore, this Court should find Petitioners do not have antitrust standing because they did not suffer antitrust injury, and any injury they did suffer from Bylaw 12.5.2.1's effects was indirect.

Even if Petitioners have antitrust standing, this Court should find NCAA Bylaw 12.5.2.1 is a reasonable restraint on trade because it is pro-competitive. Under the rules of reason, a

horizontal restraint on trade is impermissible only if it is unreasonable. NCAA Bylaw 12.5.2.1 is reasonable because it serves the important aims of maintaining amateurism and fair competition in college athletics. Eligibility restraints are necessary to balance and enable competition. Without mutual agreements between member universities, the product of college athletics could not exist. Because commercial influences would swallow the product of college sports without regulation, this Court should find NCAA Bylaw 12.5.2.1 is a reasonable restraint on trade.

II. LMRA Preemption

This Court should find that the LMRA preempts Snow's negligence claims for three reasons. First, Snow's claim involves a duty that the NFL adopted through its CBA—not a state-law duty. Next, even if Snow's claim did not involve rights conferred by the CBA, the Court must interpret the CBA because the claim only exits by virtue of the CBA and the relationship it establishes between the NFL and the team doctors. Finally, this Court should find that the LMRA preempts Snow's claim because, by doing so, it will reaffirm the uniformity that Congress intended and that the circuit courts have cultivated.

This Court has identified two circumstances in which the LMRA will preempt a state-law claim: (1) if the claim is based on a duty adopted through a CBA and; (2) if the defendant did not adopt the duty through the CBA but the claim still requires the court to interpret the CBA. Snow's claim is preempted by the LMRA because the duty to provide and supervise team doctors is one that the NFL voluntarily adopted through its CBA—rather than one imposed upon it by state law. Snow should not be able to benefit from asserting a claim that stems from the CBA while also skipping out on the CBA's resolution process.

Even if the duty to provide and supervise team doctors is a state-law duty, the claim would still require the Court to interpret the CBA because the CBA establishes the relationship—

and thus the liability—between the NFL and the team doctors. The existence of the claim depends on the CBA. Without the CBA, Snow would only have a claim against the team doctors, not the NFL.

Finally, the circuit courts have found uniformity on the subject of negligence claims against sports leagues. This type of uniformity is rare in LMRA cases. By finding that Snow's claim is preempted, this Court reaffirms the uniformity that Congress intended and that the circuit courts have cultivated.

STATUTORY PROVISIONS INVOLVED

The basic purpose of the NCAA is to "maintain intercollegiate athletics as an integral part of the educational program . . . and retain a clear line of demarcation between intercollegiate athletics and professional sports." NCAA Bylaw 1.3.1. Similarly, the NCAA's eligibility requirements are designed "to encourage its members to adopt eligibility rules to comply with satisfactory standards of scholarship, sportsmanship[,] and amateurism." NCAA Bylaw 1.2(c). The "Principle Governing Eligibility" is that "eligibility requirements shall be designed to assure proper emphasis on educational objectives, to promote competitive equity among institutions[,] and to prevent exploitation of student-athletes." NCAA Bylaw 2.12.

To be eligible to compete within the NCAA, the Association states that, "only an amateur student-athlete is eligible for intercollegiate athletics participation." NCAA Bylaw 12.01.1. To be a student-athlete within the NCAA, a student cannot be labeled as a professional. The NCAA defines a professional athlete as "one who receives any kind of payment, directly or indirectly, for athletics participation." NCAA Bylaw 12.02.11. And pay is defined as the "receipt of funds, awards[,] or benefits not permitted by the governing legislation of the Association for participation in athletics." NCAA Bylaw 12.02.10.

To ensure these student-athletes do not become professionals, the NCAA has also decided that student-athletes cannot participate in for-pay advertisements and promotions. NCAA Bylaw 12.5.2.1 specifies the following:

> After becoming a student-athlete, and 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.

NCAA Bylaw 12.5.2.1.

Petitioner is challenging NCAA Bylaw 12.5.2.1 with the Sherman Act. The Sherman Act 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 hereby declared to be illegal." 15 U.S.C. § 1.

Additionally, Petitioners second claim is preempted by § 301 of the LMRA. It states:

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

29 U.S.C.S. § 185(a).

STATEMENT OF FACTS

This is a case about whether an athlete can violate the NCAA eligibility bylaws, then sue the NCAA years later for disagreeing with their purpose. *See Snow v. Nat'l Collegiate Athletic Ass'n; Nat'l Football League*, 09-AC-0213, 1 So. Tul. 2 (La. 2019).

Apple Paid Snow for Endorsing its New Product

A few years ago, Snow was the star quarterback of the Tulania University Greenwave football team. *Id.* After three successful seasons for the Greenwave, Snow was one of the most well-known and successful college football players at the time. *See id*. Right before his senior year and final football season at Tulania, Apple Inc. (hereinafter "Apple") started their new product, the Apple Emoji Keyboard. *Id*.

In an effort to promote both college football and their new product, Apple offered Snow money to participate in the Keyboard's trial period. *Id*. Snow agreed, and Apple immediately paid him $1,000. *Id.* Additionally, Apple would pay Snow a $1 royalty fee every time a consumer downloaded the Keyboard. *Id*. During his trial period, Apple paid Snow a total of $3,500 for using the Keyboard and allowing his image to be used on the Keyboard. *Id*. Because of this, the NCAA did not allow Snow to play in his final season of college football for Tulania, and suspended him indefinitely. *Id*.

Snow's Injuries Playing Football in the National Football League

Once Snow could no longer play football for Tulania, he decided to enter his name into the NFL draft. *Id*. The New Orleans Saints drafted him quickly. *Id*. During his rookie year, Snow played exceptionally well, and became even more well-known by football fans across the country. *Id*. Also during this year, Snow suffered some injuries from playing football, such as small head collisions and minor ankle injuries. *Id*. The Saints' team doctors and trainers

prescribed him some painkillers to manage the pain from these injuries. *Id*. Snow alleges the doctors and trainers never disclosed the side effects and risks of these painkillers. *Id*. After his rookie year, doctors diagnosed Snow with an enlarged heart and permanent nerve damage in his ankle. *Id*. Snow also alleges he now has developed an addiction to the painkillers prescribed to him by the Saints' doctors. *Id*.

Snow Sues the NCAA and the NFL

Now, in this uniquely combined action, Snow is suing both the NCAA and the NFL. *Id*. Snow and other Plaintiffs are seeking to judicially invalidate NCAA Bylaw 12.5.2.1, and hold the NFL liable for the NFL doctors prescribing painkillers. *Id.*

ARGUMENT

I. NCAA Bylaw 12.5.2.1 is a valid restraint on trade under the Sherman Act because standard eligibility requirements are necessary to create and maintain the market for amateur, collegiate sports.

This Court should find NCAA Bylaw 12.5.2.1 valid for three reasons. First, the Sherman Act does not apply to NCAA eligibility bylaws because they do not regulate "commerce." Second, Petitioners do not have antitrust standing to pursue this claim because they cannot show they suffered the type of injury the antitrust laws were designed to prevent and that they are the most appropriate party to assert the claim. And finally, even if Petitioners have antitrust standing, NCAA Bylaw 12.5.2.1 is pro-competitive and has a reasonable restraint on trade.

A. The Sherman Act does not apply to NCAA eligibility bylaws because the eligibility bylaws do not regulate "commerce" as it is defined under the Act.

The purposes of the NCAA's eligibility bylaws are strictly noncommercial. In theory, they are almost anti-commercial, because they specifically restrict pay for student-athletes to ensure they do not become professionals. *See* NCAA Bylaw 12.02.10; NCAA Bylaw 12.02.11. Instead of having commercial goals, the goals of the NCAA eligibility bylaws are to "comply with satisfactory standards of scholarship, sportsmanship and amateurism." NCAA Bylaw 1.2(c). In fact, the NCAA's "Principle Governing Eligibility" is to maintain that eligibility requirements "shall be designed to assure proper emphasis on educational objectives, to promote competitive equity among institutions[,] and to prevent exploitation of student-athletes." NCAA Bylaw 2.12.

This Court has already addressed the applicability of the Sherman Act to the NCAA regarding its plan to restrict television coverage of intercollegiate football games. *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Oklahoma*, 468 U.S. 85, 104 (1984). This Court held that when the NCAA controls the market regarding television channels airing its

collegiate football games, then these types of bylaws are commercial in nature. *Id*. This is especially because these bylaws regulated televised sporting events, and ultimately, had a significant anticompetitive effect among the television broadcasters in that market. *Id*. at 120. However, it is important to note this Court distinguished the procompetitive nature of the NCAA's eligibility requirements from the anticompetitive nature of television regulation. *Id*. at 117.

While this Court made their decision regarding the specific commercial bylaws in *Bd. of Regents*, this Court has never determined whether the Sherman Act applies to the noncommercial nature of the eligibility requirements. But when deciding this issue, it is important for this Court to remember that the Sherman Act is "aimed primarily at combinations having commercial objectives and is applied only to a very limited extent to organizations . . . which normally have other objectives." *Klor's Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 213, n. 7 (1959). However, because this Court has never considered the topic, it should consider the many Circuit and District Courts that have ruled on this issue below.

For example, the Third Circuit held that the Sherman Act does not apply to the NCAA eligibility bylaws because they are not related to the NCAA's commercial or business activities. *Smith v. NCAA*, 139 F.3d 180, 185-86 (3d. Cir. 1998). In *Smith*, a student-athlete challenged the NCAA's post-graduate eligibility requirements with the Sherman Act when she was unable to continue playing volleyball at her graduate college after playing for two and a half years at her undergraduate college. *Id*. at 183. However, the Third Circuit held that the NCAA bylaws do not apply to the Sherman Act because the eligibility rules "primarily seek to ensure fair competition in intercollegiate athletics." *Id*. at 185. The court based its analysis on this Court's recognition in *Apex Hosiery Co. v. Leader*, that the goal of the Sherman Act is to prevent restraints to

competition in "business and commercial transactions," and should not extend to other non-commercial activities. *Id*. at 185-86; 310 U.S. 469, 493 (1940). Thus, the Sherman Act does not apply to the NCAA eligibility bylaws because the Act only has limited applicability to organizations with "principally noncommercial activities." *Id*. at 186; *Klor's Inc*., 359 U.S. at 214 n.7.

Similarly, the Sixth Circuit also held that the appropriate inquiry when determining if the Sherman Act applies is "whether the rule itself is commercial, not whether the entity promulgating the rule is commercial." *Bassett v. NCAA*, 528 F.3d 426, 433 (6th Cir. 2008) quoting *Worldwide Basketball & Sport Tours Inc. v. NCAA*, 388 F.3d 955, 959 (6th Cir. 2004). In *Bassett*, a football coach resigned for violating NCAA rules and infractions, and NCAA regulations permitted him from coaching at any other NCAA schools. *Id*. at 429. He alleged this NCAA bylaw violated the Sherman Act, because it had an effect on commercial activity. *Id*. However, the court held that while the coach's Complaint contained "considerable information" regarding the size and scope of college football revenue, the NCAA's *enforcement* of the regulations is still not commercial in nature. *Id*. at 433 (emphasis added). And ultimately, the court dismissed his claim because he could not demonstrate the "critical commercial activity component required to permit application of the Sherman Act." *Id*.

Following the Third and Sixth Circuits, numerous District Courts have also continuously held that the NCAA's eligibility bylaws do not regulate commercial activity. *Pocono Invitational Sports Camp, Inc. v. NCAA*, 317 F. Supp 2d 569, 584 (D. Pa. 2004) (holding that recruiting rules, like eligibility rules, are aimed at preserving amateurism and education and are exempt from antitrust scrutiny); *Gaines v. NCAA*, 746 F. Supp. 738, 743 (M.D. Tenn. 1990) (holding that NCAA bylaws are not subject to antitrust analysis because they are not designed to generate

profits in a commercial activity, because instead, they are actually designed to preserve amateurism by ensuring regulating student athletes does not become commercial); *Jones v. NCAA*, 392 F. Supp. 295, 303-04 (D. Mass. 1975) (holding that antitrust law does not apply to eligibility rules because eligibility rules were designed to implement the NCAA's goal of amateurism); *College Athletic Placement Servs., Inc. v. National Collegiate Athletic Ass'n*, 1974 U.S. Dist. LEXIS 7050, 1975 Trade Cas. (CCH) P60, 117 (D.N.J. 1974) (holding that the NCAA adopting a rule furthering its noncommercial objectives, like preserving the educational standards of its members, is not subject to antitrust law scrutiny). Even the D.C. Circuit Court of Appeals similarly held in *Marjorie Webster Jr. Coll., Inc. v. Middle States Ass'n of Colls. & Secondary Sch.*, that the Sherman Act does not apply to a different collegiate organization's eligibility restrictions. 432 F.2d 650, 654-55 (D.C. Cir. 1970).

Here, NCAA Bylaw 12.5.2.1 is simply an eligibility requirement that is noncommercial in nature and should not be scrutinized by the Sherman Act. Petitioner contends that *Bd. of Regents* holds that NCAA regulations do effect commercial activity, and requires the antitrust scrutiny of the Sherman Act. But, Petitioner misconstrues *Bd. of Regents*, and overlooks the fact that *Bd. of Regents* dealt with NCAA regulations for televised sporting events which had a significant anticompetitive effect on the television market. *Bd. of Regents* never dealt with NCAA eligibility requirements. And this distinction is essential, because unlike regulations for televised sporting events, eligibility regulations do not have a commercial effect on the market. Instead, the primary goal of these eligibility requirements is to maintain amateurism and prevent exploitation of student-athletes. Therefore, *Bd. of Regents* answers the question that NCAA eligibility bylaws should be treated differently by this Court than NCAA regulations effecting an entire market.

This Court should follow the Circuits below in *Smith* and *Bassett*, that have both held that eligibility bylaws are noncommercial. The NCAA eligibility bylaws are more like the bylaws in *Smith*, which prohibited the student-athlete from using her remaining eligibility at a graduate program, than they are the television regulations in *Bd. of Regents*. Like the bylaws in *Smith*, which had no commercial effect and simply ensured fair competition and eligibility, NCAA Bylaw 12.5.2.1 has no commercial effect and is aimed at promoting amateurism in the NCAA. Moreover, NCAA Bylaw 12.5.2.1 is also more like the bylaws in *Bassett*. Like in *Bassett*, where the NCAA bylaws only regulated the actions of college football coaches and permitted the coach from coaching at another school, here, NCAA Bylaw 12.5.2.1 is only an eligibility requirement designed to promote amateurism and competition. Neither NCAA Bylaw 12.5.2.1 nor the bylaws in *Bassett* had any effect on regulating commerce.

The NCAA bylaws that other Circuits have held do not regulate commerce are so similar to the eligibility requirements the Petitioners are questioning today. While there is no question that the NCAA as its own entity is subject to antitrust law, its eligibility requirements the student-athletes must follow are not. Ensuring a student athlete is not paid for any type of promotional work is a simple requirement by the NCAA to ensure amateurism and a focus on the educational motives in the organization. Just because Petitioner cannot follow a simple rule, that he must remain a student-athlete and not become a professional, does not mean that the NCAA's own eligibility bylaws should be subject to antitrust scrutiny. Therefore, the Petitioner does not have a claim, because the NCAA eligibility bylaws do not regulate "commerce," and should not be subject to scrutiny of the Sherman Act.

B. This Court should find Petitioners do not have antitrust standing to challenge NCAA Bylaw 12.5.2.1 because they did not suffer injury from the anti-competitive effects of 12.5.2.1, and they are not the proper Plaintiffs to pursue this claim.

Antitrust standing is a heightened standard above and beyond the requirements of constitutional standing. *Associated Gen. Contractors v. California State Council of Carpenters*, 459 U.S. 519, 535 n. 31 (1983); *In re Aluminum Warehousing Antitrust Litigation*, 833 F.3d 151, 157 (2d Cir. 2016); *Gatt Communications, Inc. v. PMC Associates, L.L.C.*, 711 F.3d 68, 75 (2d Cir. 2013). To establish antitrust standing, a plaintiff must show both 1) antitrust injury; and 2) that he is the proper plaintiff to sue. *E.g. Brunswick Corp. v. Pueblo Bowl–O–Mat, Inc.*, 429 U.S. 477 (1977); *Gulfstream III Assocs., Inc. v. Gulfstream Aerospace Corp.*, 995 F.2d 425, 429 (3d Cir. 1993); *Hairston v. Pac. 10 Conference*, 101 F.3d 1315, 1321 (9th Cir. 1996), *as amended* (Dec. 19, 1996) (J. Trott, Concurring). These two factors must be weighed, and no single factor is dispositive. *Ad Mgmt., Inc. v. Gen. Tel. Co. of California*, 190 F.3d 1051, 1055 (9th Cir. 1999). But antitrust injury carries the greatest weight in determining whether a plaintiff has antitrust standing. *Id.*

Courts impose a heightened standing requirement in antitrust cases to serve the purposes of the Sherman and Clayton Acts. *JetAway Aviation, LLC v. Board of County Com'rs of County of Montrose, Colo.*, 754 F.3d 824, 841-842 (10th Cir. 2014); *Hairston*, 101 F.3d at 1321. Read broadly, the Sherman and Clayton Acts could offer relief to any person causally connected to any antitrust violation. *Am. Ad Mgmt., Inc.*, 190 F.3d at 1054. But not every financial loss resulting from an antitrust violation will survive standing scrutiny because harm that is "merely incidental" to the defendant's antitrust violation is not enough to grant a plaintiff antitrust standing. *E.g. Hairston*, 101 F.3d at 1318; *Productive Inventions Inc. v. Trico Products Corp.* 224 F.2d 678, 679 (2d Cir.1955); *Loeb v. Eastman Kodak Co*, 183 F. 704, 707 (3d Cir. 1910).

Courts narrow recovery under antitrust law with a specific injury. *See Brunswick,* 429 U.S. 477 (1977).

Antitrust injury is the type of harm the antitrust laws were designed to prevent. *Brunswick Corp., 429 U.S. at 477*; *Gulfstream III Assocs., Inc.*, 995 F.2d at 429. This type of injury occurs when the defendant's anti-competitive behavior directly causes the plaintiff's harm. *Brunswick Corp.,* 429 U.S. at 489. Antitrust injury does not occur when the defendant's alleged violation does, or could, increase competition. *See id.* at 485-86; *Glen Holly Entm't, Inc. v. Tektronix Inc.,* 343 F.3d 1000, 1007 (9th Cir.). Even if the defendant's violation is an illegal "per se" horizontal restraint on trade, the plaintiff does not suffer antitrust injury if his injury stems from a defendant's actions that are beneficial or neutral to competition. *Glen Holly Entm't, Inc.,* 343 F.3d at 1007. The NCAA bylaws are an example of horizontal restraints on trade that benefit competition. *See Bd. of Regents*, 468 U.S. at 117.

The NCAA bylaws are presumptively pro-competitive because they enable and enhance competition among member universities. *E.g. Am. Needle, Inc. v. Nat'l Football League*, 560 U.S. 183, 203 (2010); *Bd. of Regents*, 468 U.S. at 117; *McCormack v. Nat'l Collegiate Athletic Ass'n*, 845 F.2d 1338, 1344 (5th Cir. 1988); *Justice v. Nat'l Collegiate Athletic Ass'n*, 577 F. Supp. 356, 379 (D. Ariz. 1983); *Jones v. Nat'l Collegiate Athletic Ass'n*, 392 F. Supp. 295, 304 (D. Mass. 1975). In *Bd. of Regents*, this Court held it is reasonable to assume most of the NCAA bylaws are permissible means of fostering competition amongst member schools and maintaining the amateur nature of collegiate sports. 468 U.S. at 117. This Court held the NCAA bylaws are pro-competitive because they widen consumer and athlete choice. *Id.* at 102. But antitrust injury is not the only requirement for antitrust standing. *See McCormack*, 845 F.2d at 1341.

Even if a plaintiff suffered antitrust injury, he may be an improper party to pursue an antitrust claim. *McCormack,* 845 F.2d at 1341. Courts look to several factors to determine whether a party is the proper plaintiff to pursue an antitrust claim including: (1) whether the plaintiff's injuries or their causal link to the defendant's unlawful actions are speculative; (2) whether other parties have been more directly harmed; and (3) whether allowing this plaintiff to sue would risk multiple lawsuits, duplicative recoveries, or complex damage apportionment. *McCormack,* F.2d at 1341. *See also Hairston*, 101 F.3d at 1321–22 (J. Trott, concurring).

Applying these factors, a plaintiff may still be improper even when he is the target of the antitrust violation. *See Hairston,* 101 F.3d at 1322. In *Hairston Pac. 10 Conference*, the NCAA barred the University of Washington from participating in a bowl game when it found its football team committed several recruiting violations, and its star quarterback received 50,000 dollars in compensation from an Idaho businessman. 101 F.3d at 1317. In his concurrence, Justice Trott stressed the players were not the proper plaintiffs to pursue the claim because the sanctions more directly impacted the university with millions of dollars in fines. *Id.* at 1322 (J. Trott, concurring). Similarly, in *McCormack*, the NCAA suspended the Southern Methodist University (SMU) football team from competition for an entire season when it found the university over-compensated its football players. 845 F.2d at 1340. The court stared that if the players had shown they would have received more lucrative scholarships at other universities without the NCAA's cap on player compensation they would have been more proper plaintiffs to allege an antitrust violation. *Id.* at 1343.

Here, Petitioners did not suffer antitrust injury because the NCAA's alleged violation does not constitute anti-competitive behavior. NCAA Bylaw 12.5.2.1 is an eligibility requirement that directly serves the NCAA's historic aim to preserve the quality of collegiate

athletics and maintain the amateur status of student-athletes. In *Bd. of Regents*, this Court asserted restraints on trade that are designed to preserve these important interests are presumably pro-competitive. Here, Bylaw 12.5.2.1 strictly serves to maintain amateurism by barring athletes from receiving compensation related to their student-athlete status. The Petitioners did not suffer the type of injury the antitrust laws were designed to prevent because the NCAA bylaw is not anti-competitive.

Even if this Court holds the Petitioners did suffer antitrust injury, they are not the proper plaintiffs to assert this claim. Like in *McCormack* where SMU compensated players above and beyond the NCAA bylaw's eligibility standards, here the players received compensation beyond the permissions of Bylaw 12.5.2.1 for their participation in a commercial application: the emoji keyboard. In *McCormack*, the court reasoned that if the football players showed they would have received more lucrative scholarships or compensation at other universities without NCAA restraints, they would have been more suitable plaintiffs. Similarly, if Petitioners could show they would be able to monetarily benefit from the emoji keyboard application without Bylaw 12.5.2.1's restraints, they might serve as proper plaintiffs.

However, other NCAA bylaws bar the players from participating in the emoji application independent from NCAA Bylaw 12.5.2.1. NCAA Bylaw 12.01.1 states, "Only an amateur student-athlete is eligible for intercollegiate athletics participation in a particular sport." NCAA Bylaw 12.02.11 explains a professional athlete, "is one who receives any kind of payment, directly or indirectly, for athletics participation except as permitted by the governing legislation of the Association." So, the players cannot show they would have benefited from the emoji application without 12.5.2.1's bar on player compensation because even if they could benefit from use of their name, image, or likeness, they cannot be paid for being an athlete and maintain

their amateur statuses. Lastly, this suit would spur countless lawsuits from nearly every student-athlete in the NCAA. With thousands of student-athletes, spanning various sports and timeframes, these lawsuits would invite duplicative recoveries and complex damage apportionment.

Petitioners did not suffer antitrust injury because the NCAA bylaws are not anti-competitive. Also, Petitioners are not the proper plaintiffs to pursue this claim because they cannot show that without NCAA Bylaw 12.5.2.1, they could receive compensation in this context. Therefore, Petitioners do not satisfy the heightened antitrust standing requirements and this Court should grant Respondent's Motion to Dismiss.[1]

C. This Court should find NCAA Bylaw 12.5.2.1 is permissible under the rules of reason because it enables and benefits competition among member institutions through standard rules and mutual agreements that maintain amateurism and insulate collegiate athletics from commercial pressure.

To state a claim under Section One of the Sherman Act, Petitioners must show: (1) that a contract, combination, or conspiracy existed; (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. *Hairston,* 101 F.3d at 1318. Where horizontal restraints on trade are necessary to make the product available in the market, the presumption that such restraints are "per se" illegal does not apply. *Bd. of Regents,* 468 U.S. at 100-101. Instead, courts apply a rule of reason analysis to determine if the horizontal restraint on trade is reasonable. *Id.* at 103; *Bd. of Trade of Chicago v. United States*, 246 U.S. 231, 238 (1918) (establishing rule of reason analysis in antitrust cases). To determine if a restraint is reasonable, courts balance whether a

[1] It is unclear from the record where this case stands procedurally. Based on the issues presented, this case is ripe for a motion to dismiss.

restraint's pro-competitive effects outweigh its harm to competition. *Bd. of Regents,* 468 U.S. at 103-104; *Hairston,* 101 F.3d at 1319.

Horizontal restraints on trade are presumptively reasonable in industries where they are necessary to make the product available. *Am. Needle, Inc.*, 560 U.S. at 203; *Bd. of Regents,* 468 U.S. at 101. In *Am. Needle,* this Court held the presumption of reasonability applied to horizontal restraints on NFL licensing rights because the mutual agreements were necessary to make the product available. 560 U.S. at 203-204. Similarly, in *Bd. of Regents,* this Court held the NCAA eligibility bylaws were the type of horizontal restraints necessary to make the product of college football available and are presumptively reasonable. 468 U.S. at 117. This Court explained the NCAA markets "competition itself" by forming mutual agreements regarding the rules and standards of college athletics. *Id.* at 101. If institutions adopted the safety, eligibility, and other beneficial NCAA protocols independently, they would quickly perish in the face of commercial pressure. *Id.* But this presumption of reasonability may be overcome. *See Hairston,* 101 F.3d at 1318.

The presumption of reasonability regarding horizontal restraints essential to trade may be rebutted with evidence showing the restraint's total impact is anti-competitive. *See Hairston,* 101 F.3d at 1318. Under the rule of reason analysis, the plaintiff bears the initial burden of showing the restraint on trade is anticompetitive. *Id.* If plaintiff meets this burden, the defendant must show evidence of the restraint's pro-competitive effects. *Id.* Then, the plaintiff must show the restraint's legitimate objectives can be achieved through less restrictive means. *Id.* When student-athletes have challenged the NCAA Bylaws, they have not met their burden of showing amateurism in collegiate sports can be achieved through less restrictive means. *See Bd. of Regents*, 468 U.S. at 117.

Under the rules of reason, the NCAA eligibility bylaws are permissible because they are pro-competitive. *See Bd. of Regents,* 468 U.S. at 117. In *Bd. of Regents,* this Court held the NCAA's core interest in maintaining a competitive balance among amateur athletic teams is an important one. *Id.* This Court reasoned that NCAA bylaws barring athlete compensation and requiring athletes to attend class are necessary restraints to preserve the "character and quality" of collegiate sports. *Id.* at 102. Further, this Court held that most NCAA regulations directly serve the important interest of maintaining collegiate amateurism and survive antitrust scrutiny. *Id. See also Bd. of Regents of Univ. of Oklahoma v. Nat'l Collegiate Athletic Ass'n,* 546 F. Supp. 1276, 1309 (W.D. Okla. 1982), *aff'd in part, remanded in part,* 707 F.2d 1147 (10th Cir. 1983), *aff'd,* 468 U.S. 85 (1984) (district court holding NCAA eligibility standards are reasonable restraints on trade).

Also, in *Hairston,* University of Washington football players successfully showed a NCAA eligibility bylaw was facially anti-competitive because it barred their participation in a bowl game. But the defendant successfully showed its bylaw's effects were pro-competitive, and the players failed to rebut this effect with less restrictive alternatives. 101 F.3d at 1319. The court held the bylaws were indeed pro-competitive because punishing schools who violate the eligibility bylaws maintains fair competition among member schools and preserves the amateur status of student-athletes. *See id.* Similarly, in *McCormack,* the court explained the NCAA eligibility bylaws create the product of a student-athlete and allow collegiate athletics to exist free from commercial pressures. 845 F.2d at 1344-45. There, the court held the NCAA eligibility restraints enable competition through uniform standards and ensure large organizations do not take advantage of smaller ones. *Id.* at 1344.

Lastly, courts have held that the NCAA eligibility bylaws are reasonable restraints on trade because they serve pro-competitive interests. *Justice*, 577 F. Supp. at 379; *Jones,* 392 F. Supp. at 304. In *Justice*, the court held NCAA Bylaw 12.5.2.1 barring compensation to student-athletes was pro-competitive because it served the important goal of maintaining amateurism in collegiate sports. 577 F. Supp. at 379. There, the NCAA sanctioned the University of Arizona after it gifted its athletes with cash and bank loans to finance cars, rent, and airline tickets. *Id.* at 362. The court held the NCAA sanctions imposed under the eligibility bylaws served no anti-competitive purpose and reasonably related to the important interest of maintaining amateurism and fair competition in collegiate sports. *Id. at* 379. Additionally, in *Jones*, the court held the NCAA eligibility bylaws were not designed to be anti-competitive or coerce students not to participate in college sports. 392 F. Supp. at 304. There, a hockey player who played professional hockey could not participate in NCAA hockey. *Id.* at 300-302. The court held the restraint was permissible because it stopped professional athletes from invading college athletics. *Id.* at 304.

Here, the presumption of reasonability applies, and NCAA Bylaw 12.5.2.1 is permissible as a restraint on trade that is necessary to create the market for collegiate athletics. Even if this Court holds Petitioners have shown the anti-competitive nature of 12.5.2.1 and rebutted the presumption of reasonability, overwhelming precedent demonstrates 12.5.2.1's pro-competitive effects greatly outweigh its detriment to competition. Just as in *Bd. of Regents,* where this Court held NCAA bylaws barring compensation to student-athletes preserve the amateur nature of collegiate athletics, 12.5.2.1 makes ineligible any student-athlete who receives improper compensation based on his or her athlete status. Like in *Hairston* where disqualifying the University of Washington football team from a bowl game was reasonable because it served the

NCAA's core policies of fair competition and amateurism, disqualifying Petitioners from competition serves fairness because it prevents student-athletes at some institutions from receiving compensation while others do not.

But for the existence of Bylaw 12.5.2.1, the amateur market for college athletics and the existence of the student-athlete would not exist. As the *McCormack* court explained, the NCAA eligibility requirements balance competition among member schools and ensure larger institutions do not swallow smaller ones. Without this regulatory balance, the wealthy, large universities would harvest the most attractive athletic talent and rapidly grow while the poorer, smaller institutions suffered. Eventually, the unrestrained market would extinguish the less lucrative programs leaving less options for student-athletes and consumers alike. Removing 12.5.2.1 reduces the market for college athletics and robs thousands of student-athletes of an education athletics would otherwise afford them. So, NCAA Bylaw 12.5.2.1 is a reasonable restraint on trade and should survive antitrust scrutiny under the rules of reason because its pro-competitive effects outweigh its anti-competitive effects. Therefore, this Court should grant Defendant-Respondent's Motion to Dismiss because Petitioners failed to state a claim upon which relief may be granted.[2]

II. This Court should find that Snow's claim is preempted by the LMRA because it involves a duty the NFL adopted through the CBA, the Court must interpret the CBA, and, by finding the claim preempted, this Court will cultivate the uniformity Congress intended.

In creating the LMRA, Congress envisioned a uniform landscape for preempting state-law claims so that employees, employers, and unions alike could rely on consistent laws to govern labor disputes. *See United Steelworkers of America v. Rawson*, 495 U.S. 362, 368–369

[2] It is unclear from the record where this case stands procedurally. Based on the issues presented, this case is ripe for a motion to dismiss.

(1990). When a claim is preempted by the LMRA, the plaintiff simply has to follow the CBA's resolution process, rather than pursing the claim through the court system. *See Lividas v. Bradshaw*, 512 U.S. 107, 123 (1994). Thus, a plaintiff who's claim is preempted is not without a remedy, they are just in the wrong place. This Court should find that the LMRA preempts Snow's claim for three reasons: (1) Snow's claim is based on a duty that the NFL adopted through its CBA; (2) even if the NFL did not adopt the duty through its CBA, the claim still requires the Court to interpret the CBA; and (3) by finding this claim preempted, this Court helps ensure the uniformity that Congress intended and that the circuit courts have cultivated.

A. Because Snows claims that the NFL violated a duty that it adopted through its CBA, this Court should find that the claim is preempted by the LMRA.

This Court has found that if a plaintiff claims that a defendant violated a duty it assumed under a CBA, then that claim is preempted. *See Rawson*, 495 U.S. at 371–72. These voluntarily assumed duties exist under the CBA, not under state law, and must be adjudicated according to the CBA's resolution process. *See id.* A plaintiff who claims that a defendant owes them some additional duty cannot skip out on the appropriate resolution process by relabeling their claim as a state-law tort. *See id.* at 373–75; *see Lividas*, 512 U.S. at 123.

This Court's opinion in *United Steelworkers of America v. Rawson* illustrates that when a CBA outlines additional duties of care—above and beyond state-law duties—a claim alleging that a party negligently performed those duties is preempted by the LMRA. 495 U.S. at 371–72. In it, this Court considered a claim brought by the families of miners killed in an underground fire. *See id.* at 364–66. The families claimed that the safety committee, which the union had established in the CBA, had been negligent in inspecting the mine. *See id.* Yet state law did not create the duty to inspect the mine. *See id.* at 371–72. Rather, the union had adopted the duty

through its CBA and its duty was to the miners and not the public at large. *See id.* In holding that the LMRA preempted the claim, the Court reasoned that, because the union had not breached a state law duty, but a duty adopted through its CBA, the LMRA preempted the claim. *See id.*

Here, the NFL has adopted additional duties of care by providing for team doctors in the CBA. This duty is similar to the union's duty to inspect the mine in *Rawson* because it was voluntarily assumed and owed only to the players, not to the public at large. The NFL could have decided to allow each player to find their own doctor. But instead, it adopted the additional duty to provide these doctors through the CBA, making it a contractual duty, not a state-law duty. Had Snow sued the doctors directly for their negligence, he may have alleged a successful state-law claim because state law, not a CBA, governs the duty of care which doctors owe to anyone they treat. But Snow has reached for the deeper pockets of the NFL and is suing the league for the doctors' negligence while ignoring the very CBA that gives him the power to do so.

This Court should not allow Snow to skip out on the CBA's resolution process to which he agreed. This would subvert the uniformity the LMRA promises. This Court should thus find that, because Snow is claiming a duty that the NFL adopted under the CBA, his claim is preempted by the LMRA.

B. Even if the NFL did not adopt the duty to provide and supervise team doctors through the CBA, because this Court must interpret the CBA in adjudicating the claim, it should find that the claim is preempted by the LMRA.

A state-law claim requires a court to interpret a CBA when the existence or the contours of the claim depend on the terms of the CBA. *See Lingle v. Norge Div. of Magic Chef*, 486 U.S. 399, 413 (1988). The Court's opinion in *Lividas v. Bradshaw* illustrates when a claim is *not* preempted because it merely requires the Court to consult a CBA, rather than interpret it. *See*

Lividas, 512 U.S. at 124–25. In *Lividas*, an employee sued her employer for failing to pay her immediately upon severance as required by state law. *Id.* at 112–14. The CBA did not address the employer's duty to pay immediately upon an employee's severance—it only addressed how to calculate payment. *Id.* at 124–35. In holding that the claim was not preempted, the Court reasoned that it only needed to consult the CBA to determine damages, not to determine the contours of the state-law claim or the outcome of the case. *Id.* at 124–26.

Unlike the claim in *Lividas*, Snow's claim requires this Court to interpret—not simply consult—the NFL's CBA. This is because Snow's claim exists only by virtue of the CBA. The NFL's CBA outlines the relationship between the NFL and the team doctors. Unlike the CBA in *Lividas*, which did not address the employer's duty to pay an employee, the NFL's CBA *creates* the relationship between the NFL and the team doctors. This difference matters because that relationship, as outlined by the CBA, determines whether or not the NFL can even be held liable for the doctors' actions. This Court should thus find that, because Snow's claim requires it to interpret the CBA, his claim is preempted by the LMRA.

C. By determining that Snow's claim is preempted by the LMRA, this Court can reaffirm the uniformity that Congress intended and that the circuit courts have already established.

Congress's purpose in enacting the LMRA was to create uniformity upon which employees, employers, and unions alike could rely. *See Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 209–11 (1985). Yet circuit authority on the matter remains unkempt and snarled. This Court has granted cert on multiple LMRA cases to guide the circuits through the confusing landscape. *See Galvez v. Kuhn*, 933 F.3d 773, 774 (9th Cir. 1991); *see Lingle*, 486 U.S at 403. As the Ninth Circuit observed: "[t]here is no sure route through the thicket and, as we face this problem anew,

we must once again hack our way through the tangled and confusing interplay between federal and state law." *Galvaz*, 933 F.3d at 774.

It is surprising then that, when it comes to negligence claims against sports leagues, the circuit courts have found common ground. Three of the four circuit courts which have addressed the issue have come out the same way, finding that the LMRA preempts negligence claims against sports leagues. *See Boogaard v. NHL*, 891 F.3d 289, 291-92 (7th Cir. 2018); *see Atwater v. NFL Players Ass'n*, 626 F.3d 1170, 1174 (11th Cir. 2010); *see Williams v. NFL*, 582 F.3d 863, 881 (8th Cir. 2009). It thus bears explanation why a single circuit has found differently from the rest and why this Court should preserve the rare and precious uniformity that the other three circuits have found.

In the single outlier circuit case—*Dent*—the court stumbled over a technicality which reached across the path like a weed missed by a gardener. *See Dent v. NFL*, 902 F.3d 1109, 1121–22 (9th Cir. 2018). In it, NFL players alleged that the NFL *itself* negligently administered medications and hired doctors. *See id.* at 1115. Crucially, the court was determining the case on a motion to dismiss and had to take these allegations as true—despite the fact that the NFL does neither. *See id.* at 1121–22. Because the CBA did not address the *NFL's* duty to administer medicine and hire doctors, the *Dent* court was ensnared by this technicality. *See id.* at 1118. Making a point to note that the plaintiffs seemed to have conflated the NFL with the teams and doctors, and that it was unlikely that the NFL actually performed the actions alleged, the court reversed dismissal and remanded the case. *See id*. 1121–22.

Dent is the weed that escaped the shears. This same weed appears to have also choked and immobilized the district court below; to such an extent that the court has resorted to plagiarizing *Dent*, rather than conducting its own analysis. The path through the landscape of

negligence claims against sports leagues should be easy to walk, as demonstrated by the decisions of the *Williams*, *Atwater*, and *Boogaard* opinions—each of which found that such claims are preempted. Today, this Court has the opportunity to preserve this rare circumstance where the uniformity that Congress intended in enacting the LMRA comes naturally and easily to the circuits. By holding that Snow's claim is preempted by the LMRA, this Court can help clear the uniform path that Congress intended, and that the circuit courts have diligently maintained.

CONCLUSION

NCAA Bylaw 12.5.2.1 is an eligibility requirement and does not regulate "commerce." Additionally, Petitioners do not have standing to pursue this claim because they have not suffered antitrust injury because NCAA Bylaw 12.5.2.1 is pro-competitive. But even if Petitioners have standing, NCAA Bylaw 12.5.2.1 is a reasonable restraint on trade because it is pro-competitive under the rules of reason. Additionally, the LMRA preempts Snow's negligence claims because it involves a duty the NFL adopted, and the Court must interpret the CBA to determine the relationship. For these reasons, this Court should affirm the lower court.