Team 22

No. 09-214

IN THE
Supreme Court of the United States

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

NATIONAL COLLEGE 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 RESPONDENTS

_____

Team 22

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

QUESTIONS PRESENTED

I. ARE THE NCAA AMATEURISM AND ELIGIBILITY BYLAWS PROTECTED AS A MATTER OF LAW FROM ATTACK UNDER SECTION 1 OF THE SHERMAN ANTITRUST ACT?

II. ARE THE STATE LAW CLAIMS OF NEGLIGENT HIRING, NEGLIGENT RETENTION, NEGLIGENT MISREPRESENTATION, NEGLIGENT DISTRIBUTION AND ENCOURAGEMENT OF EXCESSIVE PAINKILLER PRESCRIPTION BY LEAGUE DOCTORS BROUGHT BY JON SNOW AND NFL PLAYERS INEXTRICABLY INTERTWINED WITH THE COLLECTIVE BARGAINING AGREEMENT?

STATEMENT OF JURISDICTION

The Court has jurisdiction to review the Fourteenth Circuit's decision pursuant to 28 U.S.C. § 1254(1) (2012) upon granting a petition for a writ of certiorari.

STATUTORY PROVISIONS

The first issue requires the Court to examine Section 1 of the Sherman Antitrust Act. 15 U.S.C. § 1. The preemption issue requires the Court to examine Section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185 (2012), the Controlled Substances Act, 21 U.S.C. § 801 *et seq.*, and the Food, Drugs, and Cosmetics Act, 21 U.S.C. § 301 *et seq.*

STATEMENT OF THE CASE

A. Factual Background

Jon Snow brought suit against the NCAA in the United States District Court for the District of Tulania to overturn is eligibility bylaw 12.5.2.1, that states players will no longer be eligible if they accept any remunerations for or permit the use of his or her name or picture or advertise, recommend, or promote directly the sale or use of a commercial product or service in any way, by way of violation of Section 1 of the Sherman Act. R. at 4.

The National Football League ("NFL") was founded in 1920 with fourteen (14) franchise clubs. Today, the NFL "is an unincorporated association of thirty-two independently owned and operated football 'clubs,' or teams" in twenty-two (22) cities. *Dent v. NFL*, 902 F.3d 1109 (9th Cir. 2018) (quoting *Williams v. NFL*, 582 F.3d 863, 868 (8th Cir. 2009)). On August 4, 2011, the National Football League Management Council ("NFLMC"), the NFL, and the National Football League Players Association ("NFLPA") entered into a collective bargaining agreement ("CBA") pursuant to the provisions of the National Labor Relations Act. *See* Collective Bargaining Agreement, NFL Labor xiv (Aug. 4, 2011), https://nfllabor.files.wordpress.com/2010/01/collective-bargaining-agreement-2011-2020.pdf.

The NFLMC is the sole and exclusive bargaining representative of current and future members clubs of the NFL. *Id.* The NFLPA is recognized as the sole and exclusive bargaining representative of current and future players in the NFL including all professional football players employed by NFL franchise clubs, all professional football players previously employed by an NFL member club currently seeking employment with an NFL franchise club, all rookies selected in the current year's NFL College Draft, and all undrafted rookies after they begin negotiation with an NFL franchise club regarding employment as a professional player. *Id.* Section 5 of Article 70, Governing Law and Principles, states "This Agreement shall be binding upon and shall inure to the benefit of the Parties hereto and their heirs, executors, administrators, representatives, agents, successors and assigns and any corporation into or with which any corporate party hereto may merge or consolidate." *Id.* at 254.

On December 2, 2009, Commissioner Roger Goodell issued new Return-to-Play concussion rules developed by the league's concussion committee, team doctors, outside medical experts, and the NFLPA. *See* Associated Press, "Goodell Issues Memo Changing Return-to-Play Rules for Concussions," NFL.com (July 26, 2012 8:25 PM), http://www.nfl.com/news/story/09000d5d814a9ecd/article/goodell-issues-memo-changing-returntoplay-rules-for-concussions. After mounting concern over Chronic Traumatic Encephalopathy and suicide among former players, the NFL Head, Neck, and Spine Committee developed the NFL Game Day Concussion Diagnosis and Management Protocol in 2011. *See* "Protecting Players: NFL Return-to-Participation Protocol," Play Smart Play Safe (June 2018), https://www.playsmartplaysafe.com/focus-on-safety/protecting-players/nfl-return-to-participation-protocol/. Every year, this protocol is reviewed to ensure players receive care reflecting the most up-to-date medical consensus on concussions. *Id.* In June 2018, the Committee issued protocols regarding returning to a game after a concussion, emphasizing

individualized treatment and timelines and requiring clearance from a team's medical staff and an independent neurological consultant. *Id.*

After entering his name in the NFL draft, Jon Snow was drafted by the New Orleans Saints. R. at 13. Throughout Snow's rookie year, team doctors and trainers prescribed him painkillers to manage his pain caused by small head collisions and minor ankle injuries. R. at 13. During Snow's second contract year, he was diagnosed with an enlarged heart and permanent nerve damage in his ankle and developed an addiction to painkillers. R. at 13. Snow and the other NFL players in this action argue that the NFL failed to fulfill its duty to "'hire and retain educationally well-qualified medically-competent, professionally-objective and specifically trained professionals not subject to any conflicts.'" R. at 9. Moreover, they allege the NFL failed to exercise reasonable care in policing team physicians and addressing medical mistreatment. R. at 9.

B. Proceedings Below

The Fourteenth Circuit held that Section 301 preempts Plaintiffs' negligence-based claims, reversing the District Court for the Southern District of Tulania. R. at 9, 11.

STANDARD OF REVIEW

The Supreme Court reviews all matters of law in this case *de novo*. R. at 2.

SUMMARY OF THE ARGUMENT

Plaintiff's claim that the eligibility bylaw 12.5.2.1 is a violation of Section 1 of the Sherman Act is invalid because the Sherman Act does not apply to NCAA bylaw 12.5.2.1 since a level of collusion is necessary to preserve the reasonable objective of the student-athlete. Furthermore, even if this Court finds that the Sherman Act does apply to NCAA Bylaw 12.5.2.1, this bylaw does not violate the Sherman Act because it is not an unreasonable restraint of trade. Since the Sherman Act only prohibits unreasonable restraints of trade, the Supreme Court has

stated that restraints of trade must be analyzed under the Rule of Reason. Under the Rule of Reason analysis, the most important inquiry is whether the challenged restraint enhances competition. Since NCAA eligibility bylaw 12.5.2.1 is a justifiable means of fostering competition among amateur athletic teams, it is therefore procompetitive and enhances public interest in intercollegiate athletics and not a violation of Section 1 of the Sherman Act.

Plaintiffs' claims of negligent hiring, negligent retention, negligent misrepresentation, negligent distribution and encouragement of excessive painkiller prescriptions by league doctors are preempted by Section 301 of the Labor Management Relations Act ("LMRA") because the claims are inextricably intertwined with the collective bargaining agreement entered into by the NFLMC and NFLPA. Because claims of negligence require plaintiffs to establish (1) the defendant had a duty or obligation to "'conform to a certain standard of conduct for the protection of others against unreasonable risks,' (2) the defendant breached that duty, (3) that breach proximately caused the plaintiff's injuries, and damages," R. at 21, this suit would require interpretation of the terms of the 2011 CBA to what duty, if any, was owed by the NFL and what affirmative steps were taken by the NFL to fulfill its duty, if one existed. Because Articles 39 and 40 of the CBA and the Return-to-Participation Protocol directly address players' medical care and treatment, the claims brought forth in this suit are preempted by Section 301 of the LMRA.

ARGUMENT

I. The Tulania Court of Appeals Correctly Upheld the NCAA Amateurism and Eligibility Bylaw as a Permissible Restraint of Trade Because It Protects the Availability of Student Athletes for the Product of College Football

A. The Sherman Act does not apply to NCAA Bylaw 12.5.2.1 Because a Level of Collusion Is Necessary to Preserve the Reasonable Objective of the Student-Athlete

The purpose of the Sherman Antitrust Act of 1890 is to protect consumers from injury that results from diminished competition. *Agnew v. NCAA* 683 F.3d 328, 334-35 (7th Cir. 2012); see also *Banks v. NCAA*, 977 F.2d 1081, 1087 (7th Cir.1992). Under § 1 of the Sherman Act, "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce ... is declared to be illegal." 15 U.S.C. § 1. The Act was enacted in an era of 'trusts' and of 'combinations' of businesses and of capital organized and directed to control the market by suppression of competition in the marketing of goods and services. *Jones v. NCAA*, 392 F.Supp 295, 303 (D. Mass. 1975). The monopolistic nature of these activities led to public concern. *Id*.

The wording of the Sherman Act is broad in nature, but it has long been settled that not every form of combination or conspiracy alleged in restraint of trade falls within the reach of the Sherman Act. *Jones v. NCAA*, 392 F.Supp 295, 303 (D. Mass. 1975). The *Jones* court stated that proscriptions of the Sherman Act were 'tailored for the business world,' not as a mechanism for the resolution of controversies in the liberal arts or in the learned professions. *Jones v. NCAA*, 392 F.Supp 295, 303(D. Mass. 1975); see also *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961). The Supreme Court has also recognized that antitrust regulation is aimed primarily at combinations with commercial objectives and is applied only to a very limited degree to other types of organizations. *Klors, Inc. v. Broadway-Hale Stores, Inc*., 359 U.S. 207, 213 n. 7, 79 S.Ct. 705, 3 L.Ed.2d 741 (1959).

As in *Jones*, the application of the Sherman Act to this case is inappropriate. In *Jones*, the plaintiff was a student, not a businessman in the traditional sense, and was not a 'competitor' within the contemplation of the antitrust laws. *Jones v. NCAA*, 392 F.Supp 295, 304 (D. Mass. 1975). The 'competition' which the plaintiff sought to protect in the *Jones* case did not originate in the marketplace or as a sector of the economy. *Id.* at 304. This 'competition' originated in the hockey rink as part of the educational program of a major university. *Id.* at 304. In our case, Jon Snow, and others similarly situated, are also students and not businessmen in the traditional sense. Additionally, the 'competition' these students seek to protect does not originate in the marketplace or as a sector of the economy but rather on the football field as a part of the educational programs of major universities.

Additionally, in order to preserve the character and quality of the "student-athlete", a goal sought after by the NCAA, athletes must not be paid, and they must be required to attend class. These requirements further the objective of the NCAA of integrating athletics into the collegiate educational system. *McCormack v. National Collegiate Athletic Association*, 845 F.2d 1338, 1344 (5th Cir. 1988); see also *Board of Regents,* at 102, 104 S.Ct. at 2960–61. The integrity of the "student-athlete" cannot be preserved except by mutual agreement; if an institution adopted such restrictions unilaterally, its effectiveness as a competitor on the playing field might soon be destroyed. *Board of Regents,* at 102, 104 S.Ct. at 2960–61. The necessity of mutual agreements among institutions in the NCAA is clear in order to preserve the student-athlete. Further, this necessary collusion makes the application of the Sherman Act unwarranted in this case.

The Supreme Court recognized that in college football, horizontal restraints on competition are essential if the "student-athlete" is to exist at all. *McCormack v. National Collegiate Athletic Association*, 845 F.2d 1338, 1344 (5th Cir. 1988); see also *Board of Regents,* at 101, 104 S.Ct. at 2960. The Supreme Court further noted that if there were no rules on which the competitors in

the NCAA agreed to create and define the competition to be marketed, the NCAA would be ineffective in marketing competition and producing the "student-athlete." *Board of Regents* at 101, 104 S.Ct. at 2960; see also *Broadcast Music, Inc. v. Columbia Broadcasting System*, 441 U.S. 1, 99 S.Ct. 1551, 60 L.Ed.2d 1 (1979).

The integration of the "student-athlete" differentiates college football from and makes it more popular than professional sports to which it might otherwise be comparable, like minor league baseball. *McCormack v. Nat'l Collegiate Athletic Ass'n*, 845 F.2d 1338, 1344 (5th Cir. 1988). Thus, the NCAA plays a vital role in enabling college football to preserve its character, and as a result, enables the student-athlete to exist when it might otherwise be unavailable. In performing this role, the NCAA's actions widen consumer choice, not only the choices available to sports fans but also those available to athletes, and hence can be viewed as procompetitive. *Bd. of Regents* at 102, 104 S.Ct. at 2960–61.

Furthermore, the NCAA eligibility rules were not designed to coerce students into staying away from intercollegiate athletics, but to implement the NCAA basic principles of amateurism, principles which have been at the heart of the Association since its founding. *Jones v. NCAA,* 392 F.Supp 295, 304 (D. Mass 1975). Any limitation on access to intercollegiate sports is merely the incidental result of the organization's pursuit of its legitimate goals. Its conduct does not, therefore, rise to the level of a violation of section 1 of the Sherman Act. *Id.* at 304.

B. NCAA Eligibility Bylaw 12.5.2.1 Does Not Violate the Sherman Act Because It Is Not an Unreasonable Restraint of Trade

Congress enacted the Sherman Antitrust Act of 1890 to regulate competition and commerce between enterprises within the United States. The Sherman Act was designed as a "consumer welfare prescription" intended to protect consumers by preserving the competitive process. *See Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Oklahoma,* 468 U.S. 85, 107, 104 S. Ct. 2948, 2963, 82 L. Ed. 2d 70 (1984); *see also, Geneva Pharm. Tech. Corp. v.*

Barr Labs. Inc., 386 F.3d 485, 489 (2d Cir. 2004). The Sherman Act encourages competition because it prohibits companies from unlawfully monopolizing, thus forcing the market to produce better quality goods and services and reduced prices. *See Nat'l Soc. of Prof'l Engineers v. United States*, 435 U.S. 679, 695, 98 S. Ct. 1355, 1367, 55 L. Ed. 2d 637 (1978). Preserving competition is so vital to the foundation of the Sherman Act that the "statutory policy precludes inquiry into the question [of] whether competition is good or bad." *Id.*; *see also*, *Bd. of Regents*, 468 U.S. at 117 (finding the Petitioner's invalid assumption that competition *itself* was unreasonable, was inconsistent with the basic policy of the Sherman Act to safeguard competition.)

Although the Sherman Act was designed to preserve free competition among enterprises, it does not per se forbid all restraints of trade as some regulations are *essential* for the very existence of certain products. *See Bd. of Regents*, 468 U.S. at 101. Therefore, the Sherman Act only prohibits unreasonable restraints of trade and competition. *See Bd. of Regents*, 468 U.S. at 99; *see also*, *Nat'l Soc. of Prof'l Engineers*, 435 U.S. at 696 (finding the Sherman Act may preserve competition even if it is not "entirely conducive to ethical behavior"); *see also*, McCormack v. Nat'l Collegiate Athletic Ass'n, 845 F.2d 1338, 1343 (5th Cir. 1988). Therefore, the Tulania Court of Appeals correctly upheld the NCAA's amateurism standards and eligibility bylaw 12.5.2.1 because it is a reasonable restraint of trade to preserve the integrity of amateur collegiate athletics and thus does not violate the Sherman Act.

In the same spirit of preserving competition, the Supreme Court has fostered a procompetitive presumption of NCAA regulations as they protect amateurism and keep the product of college football available. *See Bd. of Regents*, 468 U.S. at 102, 117. ("It is reasonable to assume that most of the regulatory controls of the NCAA are justifiable means of fostering competition among amateur athletic teams and therefore procompetitive because they enhance

public interest in intercollegiate athletics.") The Supreme Court further identified specific categories of regulations that share this procompetitive presumption including "rules defining the conditions of the contest, [and] the eligibility of participants." *Id.* at 117.

These regulations all protect consumer interest as they insure that the competition of student athletes remains distinguished and insulated from illegal and unduly influential activity. *Id.* at 102 ("In order to preserve the character and quality of the product, athletes must not be paid, must be required to attend class, and the like.") Although this presumption is not dispositive as a matter of law on an inquiry into whether or not a regulation is anticompetitive, it does shed light on the rationality of the rule when questioning if it is an unreasonable restraint of trade. *Id.* at 99, 117. The Sherman Act only outlaws unreasonable restraints of trade, and so the courts give deference to petitioners who permissibly justify their regulations as reasonable within the prescribed procompetitive categories. *Id.* at 117 - 119 (finding the Petitioner's television was so extraneous that it was not even arguably tailored to serve any of the enumerated procompetitive interest and thus was an unreasonable restraint of trade).

Since the Sherman Act only outlaws unreasonable restraints of trade, regulations that appear anticompetitive may survive antitrust scrutiny if the petitioner can establish that their rule has a legitimate and compelling purpose. *See Bd. of Regents*, 468 U.S. at 119 (suggesting that if the NCAA had a more compelling reason for its television regulation, and if it actually preserved competition the Court would have ruled in its favor). The Supreme Court has held that although the Sherman Act is a consumer welfare prescription based on promoting competition, it would be inappropriate to apply an illegal per se approach because "horizontal constraints" are necessary for the product to be available. *Id.* at 101.

In *Board of Regents*, the Supreme Court held that courts must analyze restraints of trade under the Rule of Reason. *Id*. at 113. "Under the Rule of Reason, these hallmarks of

anticompetitive behavior place upon petitioner a heavy burden of establishing an affirmative defense which competitively justifies this apparent deviation from the operations of a free market." *Id.* This means that when an entity exhibits anticompetitive behavior, the Rule of Reason will protect and uphold regulations that are necessary and justified restraints. *Id.* at 113 (finding the NCAA's television restriction was anticompetitive as it raised the price and reduced the output, both against the wishes of consumers, and did not have a legitimate purpose and so it failed to satisfy the Rule of Reason). Guidelines that seek to safeguard the product itself and to ensure its availability are reasonable restraints of trade and thus do not violate the Sherman Act. *Id.* at 102. However, regulations that do not promote competition nor protect it do not survive the scrutiny under the Rule of Reason. *See* White v. Nat'l Collegiate Athletic Ass'n, No. CV-06-0999 RGK (C.D. Cal. filed Sept. 8, 2006) (NCAA reached a settlement in case where limits on the amount of scholarships a student athlete could be offered did not have a procompetitive function and did not protect the product).

The NCAA regulation in question here is procompetitive in nature as it is an eligibility rule that preserves the amateurism of college football. NCAA bylaw 12.5.2.1 states "After becoming a student-athlete, an individual shall not be eligible for participation in intercollegiate athletics if the individual: (a) Accepts any remuneration for or permits the use of his or her name or picture to advertise, recommend or promote directly the sale or use of a commercial product or service of any kind; or (b) Receives remuneration for endorsing a commercial product or service through the individual's use of such product or service." *See* NAT'L COLLEGIATE ATHLETIC ASS'N, 2018-2019 NCAA DIVISION I MANUAL, Bylaw 12.5.2.1, at 76. The Tulania Court of Appeals correctly upheld this amateurism and eligibility bylaw as a permissible restraint of trade as it preserves the character and integrity of student athletes and college football. *R*. at 6; *see also*, *Bd. of Regents*, 468 U.S. at 102.

Unlike in *Board of Regents*, where the NCAA asserted that its regulation to restrict the amount of broadcasted college football games was to protect live ticket sales, here, NCAA bylaw 12.5.2.1 has a legitimate purpose that does not violate the Sherman Act. *See Bd. of Regents*, 468 U.S. at 115 - 119. In *Board of Regents*, the Court held that the NCAA's television regulation did not even arguably seek to serve the interest of maintaining a competitive balance among amateur athletic teams. *Id*. at 119. The NCAA restricted broadcasting with no legitimate procompetitive purpose, as they did not inquire into how the schools were running their programs, they only limited the amount of television streams. *Id.* at 119. The NCAA stated that they limited the broadcastings in the efforts to protect and increase live attendance at college football games, as live attendance decreased with more games being broadcasted. *Id*. at 115. The Supreme Court asserted that the Rule of Reason does not protect a defense that is based on the "competition itself is unreasonable". *Id.* at 117.

However, the NCAA by 12.5.2.1 has a purpose that has been recognized by the Supreme Court as legitimate, which is to protect amateurism among college football teams and to preserve the integrity of the sport. *Id.* at 102 ("In order to preserve the character and quality of the product, athletes must not be paid, must be required to attend class, and the like."). Unlike the broadcasting restraints that did not have a procompetitive purpose, here the eligibility regulations that require student athletes not to be paid are procompetitive as they protect the integrity of the product ensuring that the students remain students. If student athletes are allowed to be paid by outside sponsors there is a strong likelihood that they will lose interest in their studies and focus on sports full time, putting their academics on the back burner. This is extremely harmful as over 73,000 college students play collegiate football in the NCAA league, but less than 2% of

those players will play professional football.[1] A contrary eligibility rule would leave 98% of college students unprotected and unduly influenced, as they may be eligible to receive payments from outside sources while they are in school, with a huge possibility of failing out of school due to a lack of accountability.

These eligibility rules keep student athletes, coaches and universities accountable by ensuring that these players prioritize their studies so they can find employment after graduation and support themselves. This rule in return protects the product of college football, as it would not be available without the eligibility restraints as there would be no incentive for the student athletes to remain astute students. *See* McCormack v. Nat'l Collegiate Athletic Ass'n, 845 F.2d 1338, 1344 (5th Cir. 1988) ("[T]he NCAA plays a vital role in enabling college football to preserve its character, and as a result enables a product to be marketed which might otherwise be unavailable. In performing this role, its actions widen consumer choice—not only the choices available to sports fans but also those available to athlete.") The NCAA does not want to encourage students to put all of their focus into playing any sport and be unmarketable upon graduation. This eligibility not only protects the student players but also consumers who rely on the market being protected from undue influence.

Moreover, the Supreme Court declared that the most important inquiry under the Rule of Reason analysis is where the challenged restraint enhances competition. *See Bd. of Regents*, 468 U.S. at 104. Here, the NCAA eligibility bylaw 12.5.2.1 is a justifiable means of fostering competition among amateur athletic teams and thus is procompetitive as it enhances public

[1] *See Estimated Probability of Competing in Professional Athletics*, NCAA, http://www.ncaa.org/about/resources/research/estimated-probability-competing-professional-athletics.

interest in intercollegiate athletics. *Id*. at 117. Therefore, this Court should uphold the decision of the Tulania Court of Appeals.

II. The negligence claims brought by Jon Snow and similarly situated NFL players are preempted by Section 301 of the Labor Management Relations Act because these claims are inextricably intertwined with the 2011 Collective Bargaining Agreement and the 2018 Return-to-Participation Protocol.

Section 301 of Labor Management Relations Act ("LMR") preempts state law claims "founded directly on rights created by collective-bargaining agreements," and "inextricably intertwined" or "'substantially dependent on analysis of a collective-bargaining agreement.'" *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 394 (1987); *Allis-Chalmers v. Lueck*, 471 U.S. 202, 213 (1985).

"Questions of contract interpretation…underlie any finding of tort liability." *International Brotherhood of Electrical Workers v. Hechler*, 481 U.S. 851, 862 (1987). Moreover, the collective bargaining agreement does not need to expressly conflict with the state tort law claim asserted. *Id.* In *Hechler*, Sally Hechler, an electrical apprentice for Florida Power and Light Company, was injured while assigned to a job requiring her to perform tasks "beyond the scope of her training and experience." *Id.* at 853. Hechler brought suit against the International Brotherhood of Electrical Workers and its Local 759, the exclusive bargaining representatives for the unit in which Hechler was employed, alleging "the Union had a duty to ensure that [Hechler] 'was provided safely in her work place and a safe workplace.'" *Id.* In Florida, if a party breaches a contractual duty, the aggrieved party may bring an action for either breach of contract or injuries suffered for the breach of contract. *Id.* at 860 (citing *Banfield v. Addington*, 104 Fla. 661, 669-70 (1932)). There, the Supreme Court held that to evaluate whether the union was liable for negligence, a court would first need to ascertain whether "the collective-bargaining agreement in fact placed an implied duty of care on the Union to ensure that Hechler was provided a safe workplace," and "whether, and to what extent, the Union's duty extended to the particular responsibilities alleged by respondent in her complaint." *Hechler*, 482 U.S. at 862. Because this test analyzed the terms of the collective bargaining agreement, the

Court held Hechler's negligence claims were not sufficiently independent of the collective bargaining agreement and thus, were preempted by Section 301 of the Labor Management Relations Act. *Id.*

To evaluate Plaintiffs' state law tort claims here, the Southern District of Tulania cited Ninth Circuit case law, which requires a plaintiff bringing a negligence claim to prove "(1) the defendant had a duty, or an 'obligation to conform to a certain standard of conduct for the protection of others against unreasonable risks,' (2) the defendant breached that duty, (3) that breach proximately caused the plaintiff's injuries, and (4) damages." R. at 21 (citing *Corales v. Bennett*, 567 F.3d 554, 572 (9th Cir. 2009)). The NFL is not arguing that it is not subject to negligence standards, but that state law suits but that state law negligence claims require interpretation of the rights and responsibilities of defined within the collective bargaining agreement, ultimately preempting such state law claims. Like the collective bargaining agreement in *Hechler*, the 2011 CBA does not expressly conflict with state negligence claims. 2011 NAT'L FOOTBALL LEAGUE COLLECTIVE BARGAINING AGREEMENT. Instead, the 2011 CBA contains provisions detailing the NFL's obligations to its players and affirmative steps it has taken to fulfill its obligations, if any. *Id.* Because this Court found that the collective bargaining agreement in *Hechler* was inextricably intertwined with the plaintiff's tort claims it wished to bring, this Court should also find that Plaintiffs' negligence claims are substantially dependent on the analysis of the 2011 CBA, ultimately preempting their state law claims.

A. Plaintiffs' negligent hiring and retention claims are preempted because the duty of making these personnel decisions are directly governed by Article 39 of the 2011 CBA.

Jon Snow and other similarly situated individuals allege that the NFL had a duty to "'hire and retain educationally well-qualified, medically competent, professionally-objective, and specifically-trained professionals not subject to any conflicts.'" R. at 9. Article 39 of the CBA,

"Players' Rights to Medical Care and Treatment," governs the hiring and retention requires the orthopedic surgeons and other physicians retained by the franchise clubs to be "board-certified in their field of medical expertise." 2011 NAT'L FOOTBALL LEAGUE COLLECTIVE BARGAINING AGREEMENT 171. Section 1(a) of Article 39 further requires that any medical physicians hired by the franchise clubs after August 4, 2011 to also have a Certification of Added Qualification ("CAQ") in Sports Medicine. *Id.* Section 1(b) of Article 39 necessitates a board-certified neurological consultant with "extensive experience in mild and moderate brain trauma;" a board-certified cardiovascular consultant, a licensed athletic nutritionist, and a licensed/certified neuropsychologist with a Ph.D. *Id.*

Section 3 of Article 39, establishes an Accountability and Care Committee, comprised of the NFL Commissioner, the NFLPA Executive Director, and six appointees, to "provide advice and guidance regarding the provision of preventive, medical, surgical, and rehabilitative care for players by all clubs during the term of this Agreement." 2011 NAT'L FOOTBALL LEAGUE COLLECTIVE BARGAINING AGREEMENT 171. Section 3(c)(i) tasks the Committee with encouraging and supporting programs to "ensure outstanding professional training for team medical staffs, including by recommending credentialing standards and continuing education programs for Team medical personnel; sponsoring educational programs from time to time…and supporting other professional development programs." *Id.* at 172. Because the negligent hiring and retention claims require this Court to interpret what the 2011 CBA has required of the NFL, plaintiffs' state law claims for negligent hiring and retention are preempted.

B. Plaintiffs' negligent misrepresentation and negligent distribution/excessive painkiller prescription claims are preempted because it requires evaluation of Sections 1(c) and 7 of Article 39 of the 2011 CBA and the 2018 Return-to-Participation Protocol.

Because Plaintiffs' negligent misrepresentation and negligent distribution/excessive painkiller prescription claims require analysis of Sections 1(c) and 7 of Article 39 of the 2011

CBA and the 2018 Return-to-Participation Protocol to determine the NFL's duties to its players and any affirmative steps it has taken to fulfill its obligations, these claims are also inextricably intertwined with the 2011 Collective Bargaining Agreement and the 2018 Return-to-Participation Protocol and thus preempted by the LMRA.

Article 39, Section 1(c) defines the "Doctor/Patient Relationship" as one in which "each Club physician's primary duty in providing player medical care shall be not to the Club, but instead to the player-patient." 2011 NAT'L FOOTBALL LEAGUE COLLECTIVE BARGAINING AGREEMENT 171. This section further mandates all Club physicians and medical personnel to "comply with all federal, state, and local requirements, including all ethical rules and standard established by any applicable government and/or other authority that regulates or governs the medical profession in the Club's city" and "disclose to a player any and all information about the player's physical condition that the physician may from time to time provide to a coach or other Club representative, whether or not such information affects the player's performance or health." *Id.*

The League's Substance Abuse Policy, Article 39, Section 7, states "The parties agree that substance abuse and the use of anabolic steroids are unacceptable within the NFL, and that it is the responsibility of the 174 parties to deter and detect substance abuse and steroid use and to offer programs of intervention, rehabilitation, and support to players who have substance abuse problems." 2011 NAT'L FOOTBALL LEAGUE COLLECTIVE BARGAINING AGREEMENT 173-74.

The 2017 Return-to-Participation Protocol consists of five (5) steps: (1) Rest and Recovery; (2) Light Aerobic Exercise; (3) Continued Aerobic Exercise & Introduction of Strength Training; (4) Football Specific Activities; and (5) Full Football Activity/Clearance. "Protecting Players: NFL Return-to-Participation Protocol," https://www.playsmartplaysafe.com/focus-on-safety/protecting-players/nfl-return-to-

participation-protocol/. Throughout steps one through four, the player is under direct oversight of the team's medical staff. *Id.* Before participating in club practices and games, the player must be cleared by the team's physician for 'full football activity involving contact" and "examined by the Independent Neurological Consultant assigned to his Club." *Id.*

C. Plaintiffs' negligence per se claims must also be preempted to ensure the preservation of uniformity intended by Congress during its enactment of the Labor Management Relations Act.

Because of the disparity in approach to negligence per se, Plaintiffs' negligence per se claims are preempted to keep ensure the terms of the collective bargaining agreement prevail over the inconsistent state law actions, as Congress initially intended. The players allege that they were "injured by the NFL's provision and administration' of controlled substances without written prescription, proper labeling, or warnings regarding side effects and long-term risks," in violation of the Controlled Substances Act, 21 U.S.C. § 801 *et seq.*; and the Food, Drugs, and Cosmetics Act, 21 U.S.C. § 301 *et seq*. R. at 22. Neither the Controlled Substances Act, nor the Food, Drugs, and Cosmetics Act establish or intends to establish a private right of action. *See* 21 U.S.C. § 801 *et seq.*; 21 U.S.C. § 301 *et seq.*; *Alexander v. Sandoval*, 532 U.S. 275, 289 (2001) ("Statutes that focus on the person regulated rather than the individuals protected create 'no implication of an intent to confer rights on a particular class of persons.'"); *Vanderwerf v. Smithklinebeecham*, 414 F.Supp.2d 1023, 1027 (D. Kansas 2006). Because of this, some states have held that "a violation of a statute that neither establishes no intends a private right of action cannot give right to a negligence per se claim." *Vanderwerf*, 414 F.Supp.2d at 1026-27 (quoting *Cullip v. Domann*, 266 Kan. 550, 555 (1999)). *See also*, *Talley v. Danek Medical*, 179 F.3d 154, 161 (4th Cir. 1999); *Kapps v. Biosense Webster*, 813 F.Supp.2d 1128, 1152 (D. Minn. 2011). Nevertheless, other states have held that defendants may liable for negligence per se if "(1) the plaintiff is among the class of people for whose particular benefit the statute had been enacted;

(2) recognition of a private right of action would promote the legislative purpose behind the statute; and (3) creation of the right would be consistent with the overall legislative scheme." *Prohaska v. Sofamor, S.N.C.*, 138 F.Supp.2d 422, 448 (W.D.N.Y. 2001). *See also*, *Marvin v. Zydus Pharmaceuticals U.S.A.*, 203 F.Supp.3d 985, 989 (W.D. Wiscon. 2016).

If the plaintiffs' negligence per se claim were not ruled preempted, this disparity in negligence per se caselaw would promote forum shopping. Players could also claim cumulative injury to ensure they are covered under state tort law of the most lenient state. Forcing the NFL to be subject to suit under the laws of over twenty U.S. states and some foreign states[2], would undermine confidence in future collective bargaining agreements. Congress enacted Section 301 of the LMRA with the intention that federal labor law doctrines would uniformly prevail over inconsistent local rules. *Hechler*, 481 U.S. 851, 857 (1987) (quoting *Teamsters v. Lucas Flour Co.*, 368 U.S. 95, 104 (1962)).

D. This case is unaffected by the Ninth Circuit's ruling in *Dent v. NFL* because the plaintiffs in *Dent* were parties to the 1993 CBA while the plaintiffs here are parties to the 2011 CBA.

The named players in *Dent v. National Football League*, 902 F.3d 1109 (9th Cir. 2018) are retired NFL players who sustained both their on-the-field and alleged off-the-field injuries before the August 4, 2011 Collective Bargaining Agreement. The 1993 Collective Bargaining Agreement, which was renewed in 2002 and 2006, is vastly different from the 2011 replacement, under which Jon Snow and the other plaintiffs sustained their injuries. *See* Christopher R. Deubert, I. Glenn Cohen & Holly Fernandez Lynch, "Part 3: The NFL, NFLPA, and NFL Clubs," *Protecting and Promoting the Health of NFL Players: Legal and Ethical Analysis and*

[2] Many NFL franchise clubs have played games in London and in 2019, the League plans to have two teams play in Mexico. *See* NFL UK, "Home Teams Announced for the Five 2019 NFL International Games," NFL.com (Dec. 11, 2018 8:10 PM), http://www.nfl.com/news/story/0ap3000000999024/article/home-teams-announced-for-the-five-2019-nfl-international-games.

Recommendations, 212 (2016). Unlike the 1993 CBA in *Dent*, the 2011 CBA implemented numerous policies centered around the health and treatment of its players. For example, Article 39, § 1(a) was added to the 2011 CBA, requiring clubs to employ "an orthopedic surgeon and an internist, family medicine, or emergency medicine physicians" with Certifications of Added Qualifications in Sports Medicine and neurological, cardiovascular, nutritional, and neurological, cardiovascular, nutritional, and neuropsychological consultants." *Id.* Article 39, § 1(c) was added, stating "each Club physician's primary duty in providing medical care shall be not to the Club, but instead to the player-patient." *Id.* Moreover, Article 39, § 1(e) required game-day neutral physicians "be experienced in rapid sequence intubations and be board certified in emergency medicine, anesthesia, pulmonary medicine, or thoracic surgery. *Id.*

Although Dent's claims did not require the interpretation of the terms of the 1993 CBA, the added provisions to the 2011 CBA required interpretation to properly evaluate Jon Snow's claims, ultimately preempting Plaintiffs' negligence claims.

CONCLUSION

The Court should affirm the judgment entered below.

Respectfully submitted.

Team 22

Counsel for Respondents

February 4, 2019