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 23
ATTORNEYS FOR PETITIONER

QUESTIONS PRESENTED

I. Unreasonable restraints of trade violate the Sherman Act, and plaintiffs may challenge restraints under this Act if they have antitrust standing, the restraint deals with commercial activity, and no exception exists for that type of restraint. The NCAA penalized star quarterback Jon Snow for violating an amateurism bylaw that prevent players from receiving compensation for their name, image, and likeness, this Court has recognized such rules as commercial, and it dictated how they should be analyzed. Is Snow's challenge proper?

II. State law claims are preempted by § 301 of the LMRA if they assert rights established by a collective-bargaining agreement or require interpretation and analysis of a collective-bargaining agreement to resolve them. Snow's claims under the California Pharmacy Laws and other state law do not assert rights under the CBA and do not require interpretation of the CBA between the NFL and Snow because they are wholly independent of the CBA. Are Snow's state law claims preempted by § 301?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourteenth Circuit (Docket No. 09-2108) is unreported. The opinion of the United States District Court for the Southern District of Tulania (Docket No. 09-AC-0213) is unreported.

BASIS FOR JURISDICTION

The District Court for the Southern District of Tulania had jurisdiction over this matter pursuant to 28 U.S.C. § 1331, 15 U.S.C. § 1, and 29 U.S.C. § 185. The Defendants, National Collegiate Athletics Association ("NCAA") and the National Football League ("NFL") (collectively, "the Leagues") appealed to the Fourteenth Circuit. The Fourteenth Circuit had appellate jurisdiction over this matter under 28 U.S.C. § 1292(a) and 28 U.S.C.II § 3701. Jon Snow, along with other NFL players, filed a writ of certiorari, which was granted by this Court. (ROA 1). This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

1. NCAA Bylaws 12.5.2.1. Set forth in Appendix A.

2. 15 U.S. § 1. Set forth in Appendix B.

3. 29 U.S.C. § 185. Set forth in Appendix C.

4. 21 U.S.C. § 801(2). Set forth in Appendix D.

5. CAL. BUS. & PROF. CODE § 4001.1. Set forth in Appendix E.

STATEMENT OF THE CASE

I. Jon Snow's NCAA Career

Jon Snow ("Snow") led the Tulania University ("Tulania") football team in several successful seasons during his career as the university's star football quarterback. (ROA 16). He earned multiple award nominations for his athletic process and team leadership. (Id.). His success also led Apple, Inc. ("Apple"), to reach out to Snow, along with a number of other particularly successful and popular players, for permission to use their image and likeness on the new Apple Emoji Keyboard. (Id.). Apple believe the agreement could help promote both college football and Apple's new products. (Id.). The company offered to pay Snow and other participating athletes $1,000 up front for use of their likeness and an additional $1 for each download of the keyboard by consumers. (Id.). Snow agreed to the terms, earning approximately $3,500 during the trial period. (Id.).

However, other student athletes complained about his involvement with Apple to the athletics compliance officer at Tulania. (Id.). The officer notified the National Collegiate Athletics Association ("NCAA"), which summarily suspended Snow for violating NCAA Bylaw 12.5.2.1.[1] (ROA 16–17). The suspension stripped Snow of his opportunity to finish the season with his team and abruptly cut short his successful collegiate career. (ROA 16). Snow brought an action against the NCAA under the theory that Rule 12.5.2.1 violated § 1 of the Sherman Act by preventing him and other collegiate athletes from competition.[2] (ROA 5).

II. Snow's Medical Treatment in the NFL

Meanwhile, since his college career had been taken away from him, Snow entered his name into the National Football League ("NFL") draft and was picked up by the New Orleans

[1] For the full text of Bylaw 12.5.2.1, see Appendix A.
[2] For the full text of § 1 of the Sherman Act, see Appendix B.

Saints, a professional NFL football franchise. (ROA 16). As an NFL rookie, Snow continued to demonstrate his athletic ability, performing exceptionally and gaining even broader recognition. (Id.). He also suffered a number of injuries, including minor head collisions and ankle injuries. (ROA 17). Focused on keeping Snow and his teammates functioning and on the field, team doctors and trainers treated these injuries by prescribing "cookie-cutter" treatments, repeatedly dispensing numerous painkillers without disclosing the side effects or potential risks associated with them. (Id.). Snow developed an addiction to pain killers as a result. (Id.). Then, during his second contract year, Snow was diagnosed with an enlarged heart and permanent ankle nerve damage. (Id.). He, together with other NFL players, (collectively, "the Players") brought an action against the NFL for "negligent distribution and encouragement of excessive painkiller prescription." (ROA 5).

III. Proceedings Below

Snow brought both his action against the NCAA and his action against the NFL in the District Court for the Central District of Tulania. (ROA 5). In addition to challenging the merits of Snow's claim against them, the NCAA argued that their "eligibility and amateurism bylaws are protected as a matter of law." (ROA 5, 17). Similarly, the NFL argued that the Players' state law negligence claims and Snow's cause of action under the California Pharmacy Laws were preempted by section 301 of the Labor Management Relation Act ("LMRA") because of the collective-bargaining agreement ("CBA") between the NFL and players. (ROA 5, 8). Specifically, the NFL claimed that determining the scope of the NFL's duties would require the court to interpret the CBA provisions providing for players' rights to second medical opinions, medical records, medical facilities and other guidelines regarding the players' relationships with the club doctors. (ROA 12). In the interest of judicial efficiency, the district court consolidated the two matters, and Judge Lannin issued the consolidated opinion, finding the claims against

both the NCAA and NFL ("the Leagues") were properly brought. (ROA 25–26, 36–37). The Leagues appealed the decision. The Fourteenth Circuit reversed the lower court on both issues, holding that the NCAA did not violate § 1 of the Sherman Act and that the claims against the NFL were preempted by the LMRA. (ROA 14). Snow and the other Players sought to appeal the Fourteenth Circuit's decision. This Court granted certiorari. (ROA 1).

SUMMARY OF THE ARGUMENT

I. This Court should reverse the Fourteenth Circuit's decision that the amateurism and eligibility bylaws followed by the NCAA are subject to challenges under the Sherman Act §1. The Sherman Antitrust Act was designed to promote economic liberty in America by preserving free and unfettered competition as the rule of trade. Section 1 provides in pertinent part: "Every contract, combination . . . , or conspiracy, in restraint of trade or commerce among the several States . . . [is] illegal." NCAA Bylaw 12.5.2.1 is an amateurism rule that inherently violates this law because it prohibits college-athletes from receiving pay for their names, images and likenesses ("NILs"). That is, it constitutes horizontal price-fixing, which is generally a per se violation of § 1, because it sets college-athlete's pay for their NILs at zero. Snow's § 1 challenge to this bylaw is proper for three reasons. First, it is procedurally proper, because, as the district court correctly found and the fourteenth circuit impliedly affirmed, he had standing. Second, Bylaw 12.5.2.1 is subject to Sherman Act challenges, because as this court has implicitly recognized, amateurism and eligibility rules regulate commercial activity. Finally, this Court's jurisprudence states that NCAA bylaws which do not pass a rule of reason analysis violate antitrust law. The courts that have held that all amateurism bylaws are protected as a matter of law were misguided because they inappropriately applied this

Court's dicta as law. Rather, the Court merely observed that amateurism laws are necessary to differentiate college athletics as a product from professional sports, but held that NCAA bylaws should be subjected to a Rule of Reason analysis instead of calling them per se illegal. This case presents an opportunity for this Court to reiterate the country's antitrust jurisprudence.

II. This Court should also reverse the Fourteenth Circuit's decision that the NFL Players' state law claims against the NFL are preempted by § 301 of the LMRA because the Players' claims do not seek to assert rights established in the CBA and proving their causes of action do not require interpretation of the CBA. Section 301 of the LMRA governs "[s]uits for violation of contracts between an employer and a labor organization" and preempts state law claims if the claims are founded directly on rights created by CBA or if the resolution of the claim depends upon the interpretation of a CBA. To determine whether a state-law claim is preempted by § 301, courts use a two-prong test. First, courts determine whether the right asserted is conferred by the CBA. If it is, then it is preempted. However, if it is not, courts will then determine if proving all of the elements of the claim require interpretation of the CBA. To the first prong, the Players' claims are not § 301 preempted because they are enforcing state rights that are conferred by statute and common law, independent of the CBA. As to the second prong, the Players' claims do not require interpretation of the CBA because the duty to exercise reasonable care in regard to banned substances arises independently of the CBA and this Court does not need to analyze or interpret the provisions of the CBA in determining the elements of negligence. Thus, this Court can and should find that the Players' claims are not preempted by § 301 of the LMRA.

ARGUMENT

I. SNOW'S SHERMAN ACT CHALLENGE TO THE NCAA AMATEURISM BYLAW IS PROPER, BECAUSE HE HAS STANDING, THE BYLAW RELATES TO COMMERCIAL ACTIVITY, AND THIS COURT HAS DICTATED THAT NCAA BYLAWS VIOLATE ANTITRUST LAW UNLESS THEY PASS A RULE OF REASON ANALYSIS.

The Sherman Antitrust Act was designed to promote economic liberty in America by "preserving free and unfettered competition as the rule of trade." N. Pac. Ry. Co. v. United States, 356 U.S. 1, 4 (1958). Section 1 provides, in pertinent part, that "[e]very contract, combination . . . , or conspiracy, in restraint of trade or commerce among the several States . . . [is] illegal." 15 U.S.C. § 1 (2012). The NCAA is making billions of dollars on the backs of student-athletes, and there must be a procedural mechanism to challenge its bylaws and ensure that they comport with this fundamental principle of fair competition.

A. Snow's Challenge To Bylaw 12.5.2.1 Is Procedurally Proper, Because, As The District Court Correctly Found And The Fourteenth Circuit Impliedly Affirmed, He Has Antitrust Standing.

Although the record shows that the NCAA failed to appeal Snow's standing, as a preliminary matter, it is prudent to mention the abundance of law supporting the district court's findings that Snow has standing to challenge Bylaw 12.5.2.1

To invoke the subject matter jurisdiction of a federal court, a plaintiff must, at a minimum, demonstrate that he suffered a concrete and particularized "injury in fact," that the injury is fairly traceable to the defendant's conduct, and that that the relief sought will redress the harm. Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992). Courts must raise standing *sua sponte* if these requirements are not satisfied, as standing is required by the Constitution and is for subject matter jurisdiction. See FED. R. CIV. P. 12(b)(1); Warth v. Seldin, 422 U.S. 490 (1975). Where private plaintiffs, as opposed to government enforcers, are alleging antitrust violations, they additionally must prove antitrust injury—"injury of the type the antitrust laws

were intended to prevent." Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 486, 489 (1977).

For example, in Sullivan v. NFL, the First Circuit considered an antitrust challenge to an NFL rule barring public ownership of football teams. 34 F.3d 1091 (1st Cir. 1994). There, the owner of the New England Patriots (Sullivan) claimed that this rule violated § 1 because it prevented him from selling his team to the highest bidder. Id. at 1103. The court found that Sullivan could have sold the team for substantially more if the NFL rule had not been in effect. Id. at 1106. Thus, apart from whether the rule had a general anti-competitive effect, Sullivan had antitrust standing because the rule caused him to suffer the type of injury § 1 was designed to prevent. Id.

By contrast, in Brunswick a small business that owned several bowling centers sued a larger company that acquired hundreds of failing bowling centers over a short period of time. 429 U.S. at 479–80. The plaintiff alleged that this created a monopoly and sued for the loss of profits it would have received if the competing bowling centers had gone out of business instead. Id. at 480, 487. This Court found the plaintiff lacked antitrust standing, because it "would have suffered the identical 'loss' but no compensable injury had the acquired centers instead obtained refinancing" or been purchased by smaller companies. Id. at 487. Thus, the injury was not the type that § 1 was intended to prevent. Id. at 487–88.

As in Sullivan where the NFL rule caused Sullivan to receive less for the sale of his team, there is ample evidence that Snow, the star quarterback at Tulania University with multiple successful seasons and award nominations, would have continued his successful collegiate football career without Bylaw 12.5.2.1. (See ROA 13). Moreover, the fact that a well-regarded and successful company like Apple created an emoji in the likeness of Snow, and demonstrates his world-renown skill as a college football player. (Id.). Thus, Snow was not merely arguing

that Bylaw 12.5.2.1 hurts competition in a vacuum, but that its enforcement caused him actual injury by preventing him from completing his football season and collegiate career. (Id.). This is quite unlike Brunswick, because an identical rule enforced by Tulania University, for example, would not have had the career ending effect that the NCAA Bylaw did. It would have simply forced Snow to switch universities or teams. Thus, this is the precise type of injury that § 1 was intended to prevent and Snow has antitrust standing because it was the NCAA's overwhelming control over all college athletics that caused this Bylaw to end his college football career.

B. Additionally, Bylaw 12.5.2.1 Is Subject To Sherman Act Challenges, Because Amateurism And Eligibility Rules Regulate Commercial Activity.

It is undisputed that § 1 applies only to "restraint[s] of trade or commerce." 15 U.S.C. § 1. As the district court observed, courts within the First, Third, and Sixth Circuits have held that the NCAA's "eligibility" rules are exempt because they fail to affect "trade or commerce." (ROA 18). However, the NCAA's argument that this reasoning should bar Snow's claim is incorrect, because those decisions were misguided.

As the Seventh Circuit explained, by choosing to review Board of Regents this Court "presume[d] the applicability of the Sherman Act to NCAA bylaws, since no procompetitive justifications would be necessary for noncommercial activity to which the Sherman Act does not apply." Agnew v. NCAA, 683 F.3d 328, 339 (7th Cir. 2012) (referring to this Court's seminal case on Sherman Act challenges to NCAA regulations). Courts in the circuits above have distinguished the particular bylaw challenged in Board of Regents (limiting the televising of games) from challenges to amateurism and eligibility bylaws. See Gaines v. NCAA, 746 F. Supp. 738 (M.D. Tenn. 1990); Smith v. NCAA, 139 F.3d 180, 185 (3d Cir. 1998), vacated and remanded on different grounds, 525 U.S. 459 (1999); Bassett v. NCAA, 528 F.3d 426 (6th Cir. 2008). They incorrectly reasoned that "eligibility rules are not related to the NCAA's commercial or business activities," because they are designed to preserve the amateur nature of

the sports. See, e.g., Smith, 139 F.3d at 185. However, this Court has long recognized, "Neither the fact that [a] conspiracy may be intended to promote the public welfare, or that of the industry . . . is sufficient to avoid the penalties of the Sherman Act." Am. Med. Ass'n v. United States, 130 F.2d 233, 249 (D.C. Cir. 1942), aff'd, 317 U.S. 519 (1943). Moreover, as the Ninth and Fourteenth Circuits have reasoned, commerce "surely encompasses the transaction in which an athletic recruit exchanges his labor and NIL rights for a scholarship at a Division I school because it is undeniable that both parties to that exchange anticipate economic gain from it." (ROA 17); O'Bannon v. NCAA, 802 F.3d 1049, 1065 (9th Cir. 2015); see also Agnew, 683 F.3d at 340 ("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.").

Thus, the mere fact that the Bylaw relates to amateurism rather than more evidently commercial aspects of college athletics does not protect is from antitrust scrutiny, particularly when what the NCAA controls is such a major industry.[3] Therefore, a Sherman Act challenge to Bylaw 12.5.2.1 is appropriate, because this Court's precedent demonstrated that NCAA Bylaws deal with "trade or commerce." If this Court were to create a categorical exemption for all amateurism and eligibility bylaws by calling them non-commercial, "the NCAA could insulate its member schools' relationships with student-athletes from antitrust scrutiny by renaming every rule governing student-athletes an 'eligibility rule.' The antitrust laws are not to be avoided by such 'clever manipulation of words.'" (ROA 18); O'Bannon, 802 F.3d at 1065 (quoting Simpson v. Union Oil Co. of Cal., 377 U.S. 13, 21–22 (1964).

[3] Marc Edelman, *The Future of College Athlete Players Unions: Lessons Learned from* Northwestern University *and Potential Next Steps in the College Athletes' Rights Movement*, 38 CARDOZO L. REV. 1627, 1630–31 (2017) (stating that major college athletics has become an $11 billion-a-year industry and growing).

Moreover, the fact that NCAA did not raise either of these arguments on appeal further demonstrates the strength of the district court's conclusion. (See ROA 4–6). Although the district court misstated the standing requirement, (ROA 19); the conclusion that Snow suffered both injury-in-fact and the heightened antitrust injury is so strong that the Fourteenth Circuit did not even address the matter, (see ROA 4–6). Further, ruling only on Snow's amateurism challenge, the Fourteenth Circuit impliedly affirmed that Snow has antitrust standing and that the amateurism rules deal with "trade or commerce." (See id.).

C. Snow Can Challenge Bylaw 12.5.2.1 Under Section 1, Because This Court's Jurisprudence States That NCAA Bylaws Which Do Not Pass A Rule Of Reason Analysis Violate Antitrust Law.

It is well-settled that horizontal price-fixing is generally a per se violation of § 1 of the Sherman Act. See Arizona v. Maricopa County Medical Society, 457 U.S. 332 (1982). However, because NCAA amateurism rules are necessary for the industry to exist, courts must apply a Rule of Reason analysis to these rules to determine if they constitute an "unreasonable restraint[] of trade." NCAA v. Bd. of Regents, 468 U.S. 85, 98 (1984); see also Agnew, 683 F.3d at 343 (applying Rule of Reason); McCormack v. NCAA, 845 F.2d 1338, 1344 (5th Cir. 1988) (same).

The Rule of Reason analysis involves a burden-shifting test where the plaintiff must first show "that an agreement had a substantially adverse effect on competition." Law v. NCAA, 134 F.3d 1010, 1019 (10th Cir. 1998). If met, then the defendant must demonstrate that the restraint creating the anticompetitive effect has a legitimate procompetitive justification. Bd. of Regents, 468 U.S. at 113. Only if the defendant satisfies that burden, the plaintiff must then prove "that those objectives can be achieved in a substantially less restrictive manner." Law, 134 F.3d at 1019. If all three burdens are satisfied, the court will weigh the harms and benefits to determine the reasonableness. Id.

For example, in Law, the Tenth Circuit applied the Rule of Reason and held that an NCAA cap on coaches' salaries constituted illegal wage-fixing, because it depressed coaches' compensation without promoting any legitimate antitrust goals. 134 F.3d at 1022 (failing the second Rule of Reason prong). Despite the fact that the restraint created more coaching opportunities for younger, less-experienced coaches, the court found that irrelevant because it was merely a social preference that ran contrary to an open, competitive marketplace. Id. at 1021–22. The court also stated that "cost-cutting by itself is not a valid procompetitive justification. If it were, any group of competing buyers could agree on maximum prices," undercutting the very heart of the Sherman Act. Id. at 1022.

Similarly, Bylaw 12.5.2.1 constitutes illegal wage fixing, andshould be subject to the Rule of Reason. Just as in Law, instead of requiring member-schools or commercial companies to negotiate and compensate athletes like Snow for their NILs, the Bylaw price-fixes the amount at zero. Although student athletes have not traditionally been defined as employees, unlike the coaches in Law, their daily activities show that they are similar to traditional employees. For example, according to the NCAA, Division I athletes devote between 32 to 43.3 hours per week to their sport,[4] the equivalent of a full-time job in most U.S. jurisdictions. Student-athletes have also been recognized as employees in other areas of the law. See, e.g., Univ. of Denver v. Nemeth, 257 P.2d 423 (Colo. 1953) (affirming worker's compensation benefits for a student-athlete who sustained back injuries in football practice); Will v. Nw. Univ., 881 N.E.2d 481, 487–88 (Ill. App. Ct. 2007) (approving a $16 million wrongful death settlement after a student-

[4] NCAA, Examining the Student-Athlete Experience through the NCAA GOALS and SCORE Studies 17-18, (Jan, 11, 2011), https://www.ncaa.org/sites/default/files/Goals10_score96_final_convention2011_public_version_01_13_11.pdf.

athlete died during a football team workout implying that the workout was employment under the IRS's employment test).

Despite these striking similarities, the Fourteenth Circuit erroneously held that no Rule of Reason analysis is necessary here, because NCAA eligibility and amateurism laws are protected as a matter of law. (ROA 6). It explained that "*stare decisis* demands that this Court cannot simply ignore thirty years of unchallenged precedent striking down challenges to NCAA amateurism and eligibility bylaws." (ROA 6). There are crucial errors in this conclusion.

First, the only binding precedent mentioned by the Fourteenth Circuit was Board of Regents, which found the challenged NCAA regulations to be illegal. See 468 U.S. at 120. The other opinions it cited in support of the opposite conclusion were decided in different circuits or by district courts, which, according to basic U.S. legal principles, are in no way binding on the Fourteenth Circuit. See, e.g., Camreta v. Greene, 563 U.S. 692, 709 n.7 (2011) (explaining that federal district decisions are not binding precedent).

In Board of Regents, the two universities challenged the NCAA's restrictions regarding televising college football games. 468 U.S. at 88–95. These included a limit on the number of games that could be televised, which networks could do so, prices for those telecasts, and more. Id. at 91–94. This Court found NCAA rules should not be per se illegal because they are necessary for the existence of the industry. Id. at 100–02. For example, amateurism rules are necessary, because if college athletes are paid, then they are *de facto* no longer amateurs, which will negatively alter the sports. See id. Thus, instead of being ruled per se illegal, its rules should be analyzed under a Rule of Reason analysis. Id. at 98. Under that analysis, the Court found that the NCAA's rules on television violated antitrust law, because they were anticompetitive and did not have any procompetitive justifications. Id. at 120. It explained, "It is well settled that good motives will not validate an otherwise anticompetitive practice." Id. at

101 n.23. Likewise, although Bylaw 12.5.2.1 protects the nature of college athletics, such good motives cannot validate this anticompetitive rule. It must be subjected to the same analysis used to test all challenged NCAA bylaws.

Moreover, the reasoning in the non-binding cases on which the Fourteenth Circuit relied is not persuasive here because cases were wrongly decided. See Banks v. NCAA, 977 F.2d 1081, 1089 (7th Cir. 1992) (finding NCAA restrictions on student-athlete compensation did not constitute illegal price-fixing because amateurism rules are necessary to the sport); McCormack v. NCAA, 845 F.2d 1338, 1344–45 (5th Cir. 1988) (same); Justice v. NCAA, 577 F. Supp. 356 (D. Ariz. 1983) (upholding as necessary to amateurism an NCAA bylaw that disqualified a football team after its players accepted free transportation and lodging). These courts erred by relying too heavily on the Board of Regents dicta that "**most** of the regulatory controls of the NCAA [are] a justifiable means of fostering competition among the amateur athletic teams and therefore are procompetitive because they enhance public interest in intercollegiate athletics." See, e.g., Banks, 977 F.2d at 1089 (quoting Bd. of Regents, 468 U.S. at 117) (emphasis added). Doing so, however, conflates social benefits with procompetitive effect, and, more critically, improperly applies mere dicta as law. See id. at 1095 (Flaum, J., dissenting).

While such dicta should be accorded "appropriate deference," United States v. Augustine, 712 F.3d 1290, 1295 (9th Cir. 2013), it is inappropriate to interpret it to mean that every NCAA amateurism rule is automatically valid. See Bd. of Regents, 468 U.S. at 120 (limiting its holding to "only" the facts in the record of that case). Such a decision would directly contradict basic U.S. antitrust principles and go against the ultimate holding of Board of Regents.

The second crucial error in the Fourteenth Circuit's reasoning is that the circuit and district cases on which it relied are far from "unchallenged," so the purported justification or *stare decisis* is improper. (See ROA 6). For example, in the recent O'Bannon v. NCAA

decision, the Ninth Circuit recognized the necessity of applying the Rule of Reason to amateurism and eligibility bylaws. 802 F.3d 1049, 1070 (9th Cir. 2015). There, several college-athletes sought damages from the NCAA based on the licensing of their NILs in videogames, game footage, and more. Id. at 1052. The court acknowledged that Board of Regents "certainly discussed the NCAA's amateurism rules at great length" but explained that it did so for a "particular purpose: to explain why NCAA rules should be analyzed under the Rule of Reason, rather than held to be illegal per se." Id. at 1063. After a complete Rule of Reason analysis, the court reiterated this once again. See id. at 1079. "[T]he NCAA is not above the antitrust laws, and courts cannot and must not shy away from requiring the NCAA to play by the Sherman Act's rules." Id.

It is the height of irony that the NCAA is using antitrust jurisprudence to quiet student-athletes and prevent them from even having their day in court. As stated by the O'Bannon Court, this Court's jurisprudence demands that NCAA amateurism and eligibility bylaws be subjected to a Rule of Reason analysis. Thus, Bylaw 12.5.2.1 is not protected as a matter of law from the requirements of § 1.

II. THE NFL PLAYERS' STATE CLAIMS ARE NOT PREEMPTED BY § 301 OF THE LABOR MANAGEMENT RELATIONS ACT BECAUSE THEY ASSERT RIGHTS THAT ARISE INDEPENDENT OF THE COLLECTIVE-BARGAINING AGREEMENT AND THIS COURT DOES NOT NEED TO INTERPRET THE COLLECTIVE-BARGAINING AGREEMENT TO PROVE ANY ELEMENT OF THE PLAYERS' CLAIMS.

Section 301 of the Labor Management Relations Act governs "[s]uits for violation of contracts between an employer and a labor organization," 29 U.S.C. § 185(a), and "fashion[s] a body of federal common law to be used to address disputes arising out of labor contracts," Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 209 (1985). Essentially, § 301 preempts state-law claims "if the resolution of a state law claim depends upon the meaning of a collective-

bargaining agreement," because "the application of state law . . . might lead to inconsistent results." Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399, 406–07 (1988).

Section 301 only preempts state-law claims that are "founded directly on rights created by collective-bargaining agreements," and claims that are "**substantially dependent** on analysis of a collective-bargaining agreement." Caterpillar Inc. v. Williams, 482 U.S. 386, 394 (1987) (emphasis added). Thus, "not every dispute . . . tangentially involving a provision of a collective-bargaining agreement[] is pre-empted by § 301." Lueck, 471 U.S. at 211; see also Livadas v. Bradshaw, 512 U.S. 107, 124 (1994) ("The bare fact that a collective bargaining agreement will be consulted in the course of state-law litigation plainly does not require the claim to be extinguished."); Humble v. Boeing Co., 305 F.3d 1004, 1010 (9th Cir. 2002) ("[A] CBA provision does not trigger preemption when it is only potentially relevant to the state law claims.").

To determine whether a state-law claim is preempted by § 301, courts first inquire whether the asserted cause of action involves a right conferred upon by a CBA. Burnside v. Kiewit Pac. Corp., 491 F.3d 1053, 1059 (9th Cir. 2007). "If the right exists **solely** because of the CBA, then the claim is preempted and the analysis ends there." Id. (emphasis added). However, if the right was not conferred solely on the CBA, it will be preempted only if proving all elements of the claim are "substantially dependent on analysis of a collective-bargaining agreement." Id. (quoting Caterpillar, 482 U.S. at 394).

A. The NFL Players' Claims Are Not Preempted Because He Is Enforcing Rights That Do Not Arise From The Collective-Bargaining Agreement.

In Caterpillar, 482 U.S. at 389–90, employees sued Caterpillar, their employer, alleging that Caterpillar breached various individual employment agreements with its employees. Id. at 390. This Court determined that § 301 only "governs claims founded directly on rights created by collective-bargaining agreements." Id. at 394. It concluded that the employee's state law

claim was not preempted by § 301 because the claim "[was] not substantially dependent upon interpretation of the collective-bargaining agreement . . . [did] not rely upon the collective agreement indirectly, nor [did] it address the relationship between the individual contracts and the collective agreement." Id. at 395.

In Cramer v. Consolidated Freightways, Inc., 255 F.3d 683 (9th Cir. 2001), a truck driver sued his employer, Consolidated Freightways, claiming that Consolidated Freightways violated California privacy laws by concealing video cameras and audio listening devices behind two-way mirrors in the restrooms of its terminal. Id. at 688. Though the CBA contained some provisions concerning the use of camera surveillance, the Ninth Circuit found that "[t]he plaintiffs based their claims on the protections afforded them by California state law, without any reference to expectations or duties created by the CBA." Id. at 693–94. In holding that the employee's claim was not preempted, the court reiterated this Court's decision that § 301 "preempts **only** 'claims founded **directly** on rights created by collective bargaining agreements.'" Id. at 689 (emphasis added) (quoting Caterpillar, 482 U.S. at 394); see also Humble, 305 F.3d at 1009 (holding that although an employee could have brought a claim under the CBA, her claim under [Washington law] was not preempted, because the state law created an independent and separately enforceable "statutory duty of reasonable accommodation").

Here, like the employees in Caterpillar, Cramer and Humble, the Players are not bringing a claim based on the CBA. In fact, the Players are not claiming that the NFL violated the CBAs at all, but that it violated state laws governing prescription drugs when coordinated the illegal distribution of painkillers without informing them of the possible side effects, and failed to include written prescriptions, proper labels or warnings on the prescription medication they administered to the players. (ROA 24). Thus, just like the claims in Caterpillar, Cramer, and Humble, which were not preempted by § 301 because they were independent of the CBA, the

Players' claims are not based on the CBA, as they assert rights established in the California Pharmacy Laws and other state law establishing the requisite duty of care when handling controlled substances. (ROA 24). See CAL. BUS. & PROF. CODE § 4001.1 ("Protection of the public shall be the highest priority for the California State Board of Pharmacy in exercising its licensing, regulatory, and disciplinary functions."); see also Lingle, 486 U.S. at 407 (holding employee's claim for retaliatory discharge was not preempted by § 301 because it was based on The Illinois Workers' Compensation Act, not the CBA).

B. The NFL Players' Claims Are Not Preempted Because Proving The Elements Of The Players' Claims Do Not Require Interpretation Of The Collective-Bargaining Agreement.

When determining whether claims are preempted by § 301, the "inquiry is not an inquiry into the merits of a claim; it is an inquiry into the claim's 'legal character'—whatever its merits—so as to ensure it is decided in the proper forum." Alaska Airlines, Inc. v. Schurke, 898 F.3d 904, 924 (2018). Thus, this Court's "only job is to decide whether, as pleaded, the claim . . . is 'independent' of the [CBA, in that the] . . . resolution of the state-law claim does not require construing the collective-bargaining agreement." Id. at 947.

1. The NFL Players' Claim That The NFL Violated the California Pharmacy Laws Is Not Preempted, Because The Collective-Bargaining Agreements Are Irrelevant in Determining the NFL's Violation of a State Statute.

In Lingle, petitioner sued her employer under the Illinois Workers' Compensation Act. 486 U.S. at 401–03. This Court recognized that "if the resolution of a state-law claim depends upon the meaning of a [CBA], the application of state law . . . is pre-empted." Id. at 405–06. At the lower level, the Seventh Circuit held that the claim was preempted because "the state tort of retaliatory discharge is inextricably intertwined with the collective-bargaining agreements here, because it implicates the same analysis of the facts as would an inquiry under the . . . agreements." Lingle v. Norge Div. of Magic Chef, 823 F.2d 1031, 1046 (7th Cir. 1987).

However, on appeal, this Court reversed, holding that the claim was independent of the CBA, because it was brought under an independent state law and "[n]either of the elements requires a court to interpret any term of a collective-bargaining agreement." 486 U.S. at 407; see also Williams v. National Football League, 582 F.3d 863, 877 (8th Cir. 2009) ("Here, a court would have no need to consult the Policy in order to resolve the Players' [state law] claim. Rather, it would compare the facts and the procedure that the NFL actually followed with respect to [drug testing the players] with [the statute's] requirements for determining if the Players are entitled to prevail.").

Similar to the employee in Lingle and the NFL players in Williams, the Players brought a claim under state law. (ROA 24). As the District Court correctly observed, the Players' claim is not based on the CBA. (ROA 24). Thus, like the rights at issue in Lingle and Williams, the rights observed in this case are not established through contract and are wholly independent of the CBA.

Furthermore, to prove that the NFL breached its duty to distribute controlled substances with reasonable care, the Players must only "compar[e] the conduct of the NFL to the requirements of the statute." (ROA 25); see also Karnes v. Boeing Co., 335 F.3d 1189, 1194 (10th Cir. 2003) (ruling that a claim under Oklahoma state statute was "clearly independent of the CBA and . . . not subject to § 301 preemption" because the plaintiff needed to only establish a violation of the statute to prevail on his claim, and did not need to interpret or even refer to the terms of the CBA). Thus, because determining whether the NFL violated the California Pharmacy Laws does not require an analysis of the CBA, it should not be preempted.

2. The NFL Players' Negligence Claims Are Not Preempted Because The NFL Has A Duty To Exercise Reasonable Care In Regards To Banned Substances Independent Of The Collective-Bargaining Agreement.

The Players' negligence claims are not preempted because the NFL's duty to exercise reasonable care does not arise from the CBA, but instead from the California Pharmacy Laws and the general character of distributing controlled substances. (ROA 25) ("[T]o the extent the NFL is involved in the distribution of controlled substances, it has a duty to conduct such activities with reasonable care"); see CAL. BUS. & PROF. CODE § 4001.1 ("Protection of the public shall be the highest priority for the California State Board of Pharmacy in exercising its licensing, regulatory, and disciplinary functions."); see also J'Aire Corp. v. Gregory, 24 Cal.3d 799, 803 (1979) ("[A] duty may be premised upon the general character of the activity in which the defendant engaged.").

The District Court considered several factors when deciding whether the NFL had a duty of care exists, including: (1) foreseeability of harm to the plaintiff, (2) degree of certainty that the plaintiff suffered injury, (3) moral blame attached to the defendant's conduct, and (4) the connection between the defendant's conduct and injury suffered. (ROA 25); see also Rowland v. Christian, 443 P.2d 561, 564 (1968). These factors heavily weigh in favor of requiring the NFL to use reasonable care when distributing controlled substances.

First, the NFL's improper distribution of controlled substances foreseeably causes harm to NFL players. "That's why they're 'controlled' in the first place." (ROA 25); see 21 U.S.C. § 801(2) ("The illegal importation, manufacture, distribution, and possession and improper use of controlled substances have a substantial and detrimental effect on the health and general welfare of the American people."). Second, the mishandling of the drugs are closely connected to the players' injuries. In fact, Snow was diagnosed with an enlarged heart and developed an addiction to painkillers due to his substance use, and other players experienced similar effects.

(ROA 15). Third, carelessness in the distribution of controlled substances is illegal and morally blameworthy. (ROA 25); see 21 U.S.C. § 801 (2) ("The illegal . . . distribution . . . of controlled substances have a . . . detrimental effect on the health and general welfare of the American people." These factors weigh heavily in requiring the NFL to distribute painkillers with reasonable care. Furthermore, the NFL's duty of care does not arise under the CBA.

In Lueck, 471 U.S. at 205, an employee sued his employer under Wisconsin state law, alleging that they intentionally failed to make disability payments after he suffered a non-occupational back injury. The court noted that because the employee's duty of care arose exclusively under the CBA, the claim was "intrinsically relate[d] to the nature and existence of the [CBA]. Id. at 216–17. Thus, "[b]ecause the right asserted . . . derive[d] from the contract . . . any attempt to assess liability . . . inevitably [would] involve contract interpretation." Id. at 218; see also Int'l Bhd. of Elec. Workers v. Hechler, 481 U.S. 851, 862 (1987) (holding that an employee's claim was inextricably intertwined with consideration of the CBA, because "a court would have to ascertain . . . whether the [CBA] . . . placed an implied duty of care on the Union to ensure that [the employee] was provided a safe workplace, and second, the nature and scope of that duty.").

Lueck and International Brotherhood differ from this case, because the duties at issue in those cases were established solely under the CBA. Here, however, the rights and duties in question are independent of the CBA, as they arise from drug statutes and state law. Thus, the claims are not preempted because the NFL's duty to distribute controlled substances with reasonable care is wholly independent of the CBA. See Anderson v. Ford Motor Co., 803 F.2d 953, 958–59 (8th Cir. 1986) (concluding plaintiffs claims were not preempted because "the torts of fraud and negligent misrepresentation . . . arise in state common law and are measured by

standards of conduct and responsibility completely separate from and independent of a collective bargaining agreement.").

3. Determining Breach And Causation Under The Players' Negligence Claims Do Not Substantially Depend Upon Analysis Or Interpretation Of The Collective-Bargaining Agreement.

In Livadas v. Bradshaw, a discharged grocery store clerk sued her former employer, claiming that delayed payment of wages owed to her violated her rights under the California Labor Code. 512 U.S. at 110–11. When determining whether the clerk's claim was preempted by a CBA, the Court noted that "it is the legal character of a claim, as 'independent' of rights under the collective-bargaining agreement . . . that decides whether a state cause of action may go forward." Id. at 123–24. The Court recognized that the clerk's rights at issue were conferred upon by state statue and were thus "entirely independent of . . . the collective-bargaining agreement between the union and the employer." Id. at 124–25.

Despite needing to look to the CBA to compute the amount wages owed, the Court held that the claim was not preempted, because "the mere need to "look to" the collective-bargaining agreement . . . is no reason to hold the state-law claim [preempted]." Id. at 125; see also Alaska Airlines Inc., 898 F.3d at 921 ("[C]laims are only preempted to the extent there is an **active dispute** over the meaning of contract terms") (emphasis added).

In Hawaiian Airlines, Inc. v. Norris, 512 U.S. 246, 250 (1994), respondent Grant Norris sued his employers, Hawaiian Airlines Inc. ("HAL"), alleging that HAL breached the CBA and that he was wrongfully discharged in violation of Hawaii state law. This Court recognized that "'purely factual questions' about an employee's conduct or an employer's conduct and motives do not 'require a court to interpret any term of a collective-bargaining agreement.'" Id. at 262. Thus, the claims were not preempted because "the state-law claim [could] be resolved without interpreting the agreement itself, [making] the claim . . . 'independent' of the agreement." Id.

(quoting Lingle, 486 U.S. at 408–10); see also Stellar v. Allied Signal, Inc., 98 F. Supp. 3d 790, 805 (E.D. Penn. 2015) ("[T]he pertinent question is not whether the Plaintiff's claim relates to a subject contemplated by the CBAs [but] whether the Plaintiffs' claim requires the Court to 'interpret' a provision of the CBA.").

Here, the Fourteenth Circuit held that they would have to interpret the CBA to analyze the players' negligent hiring and retention claims because the CBA requires the NFL to "hire and retain educationally well-qualified, medically competent, professionally-objective and specifically-trained professionals not subject to any conflicts." (ROA 10). This finding is misguided. The Players did not bring a claim under the CBA, and the NFL cannot bring the CBA into issue by using it as a defense. See Cramer, 255 F.3d at 691 ("[T]he need to interpret the CBA must inhere in the nature of the **plaintiff's** claim.") (emphasis added). Additionally, like in Livadas and Hawaiian Airlines, where the courts ruled against preemption despite the fact that the CBAs contained provisions related to facts underlying the state law claims because the claims brought were independent of the CBA, the Players' claims are wholly independent of the CBA and should not be preempted.

While some provisions in the CBA discuss the duty that independent team doctors have towards the players, they do not refer to the NFL and are irrelevant in determining the Players' claims against the NFL. For example, the NFL argued that determining the scope of the NFL's duties would require the court to interpret the CBA provisions providing for players' rights to second medical opinions, medical records, medical facilities and other guidelines regarding the players' relationships with independent club doctors. (ROA 10). However, the Players allege the NFL, not team doctors, implemented a league-wide policy regarding Toradol, and that the NFL, not team doctors, coordinated the illegal distribution of painkillers and anti-inflammatories for decades. (ROA 24). Thus, while certain provisions in the CBA relate to the independent

teams' duties to the player, they are irrelevant in determining the Players' claims that the NFL itself improperly distributed painkillers. See Jurevicius v. Cleveland Browns Football Co., 2010 WL 846120, at *12–*13 (N.D. Ohio Mar. 31, 2010) (ruling that player's negligence claim after contracting a staph infection at the team's training facility was not preempted by CBA provisions regarding player health and safety, because the provisions only related to a player's physical condition, not to the management of the facility.)

Additionally, the NFL incorrectly claims that the court must consult CBA provisions related to team doctors' disclosure obligations to determine whether the plaintiffs reasonably relied on the NFL's representations. (ROA 27). Under California law, reliance is justified when the "circumstances were such to make it reasonable for [the] plaintiff to accept [the] defendant's statements without an independent inquiry or investigation," which would not require interpretation of the CBA. Goonewardene v. ADP, LLC, 5 Cal. App. 5th 154, 178 (2016). For example, in Williams v. National Football League, 582 F.3d at 881, the court held that the players could not establish the requisite reasonable reliance to prevail on their claims without resorting to the CBA because the CBA warned that, "if you take these products, you do so AT YOUR OWN RISK!" Similarly, in Atwater v. Nat'l Football Players Ass'n, 626 F.3d 1170, 1181 (11th Cir. 2010), the court held that the claim was preempted because determining if reliance was reasonable would require interpreting the CBA, because the CBA expressly provided guidelines for what reasonable reliance was when it stated that players are "solely responsible for their personal finances."

Here, unlike Williams and Atwater, the CBA is silent on the reasonableness of the player's reliance. (ROA 28). Thus, the claim should not be preempted.

CONCLUSION

For the foregoing reasons, this Court should reverse the holding of the Fourteenth Circuit and hold that the NCAA amateurism and eligibility bylaws are subject to Sherman Act §1 challenges and the NFL Players' common law claims are not preempted by § 301 of the Labor Management Relations Act.

APPENDIX A—NCAA Bylaws 12.5.2.1

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.

APPENDIX B—15 U.S.C. § 1

Section 1:

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

APPENDIX C – 29 U.S.C. § 185

Section 185(a):

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

APPENDIX D – 21 U.S.C. § 801(2)

Section 801(2):

> The illegal importation, manufacture, distribution, and possession and improper use of controlled substances have a substantial and detrimental effect on the health and general welfare of the American people.

APPENDIX E – CAL. BUS. & PROF. CODE § 4001.1

Section 4001.1:

> Protection of the public shall be the highest priority for the California State Board of Pharmacy in exercising its licensing, regulatory, and disciplinary functions. Whenever the protection of the public is inconsistent with other interests sought to be promoted, the protection of the public shall be paramount.