No. 09-214

In the

SUPREME COURT OF THE
UNITED STATES OF AMERICA

JON SNOW, individually and on behalf of all others similarly situated;

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 THE PETITIONER

Team 1

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QUESTIONS PRESENTED

I. Whether the NCAA Amateurism and eligibility bylaws are protected as a matter of law from attack under Section 1 of the Sherman Act.

II. Whether the variety of state law claims brought by the NFL Players are preempted by the Labor Management Relations Act.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourteenth Circuit is unreported and set forth int eh Record on Appeal. R. at 3-11. The opinion of the United States District Court for the District of Tulania is also unreported and set forth in the Record on Appeal. R at 12-26.

JURISDICTION

This Court granted certiorari pursuant to 28 U.S.C. § 1254 following the decisions of the Fourteenth Circuit and the District Court. This Court has jurisdiction under 28 U.S.C. § 1331.

STANDARD OF REVIEW

For the purposes of this review, the United States Supreme Court will review all matters de novo. R. at 2.

STATEMENT OF THE CASE

A. Statement of the Facts.

Jon Snow was an incredibly successful college and professional football player. R. at 13. He won multiple awards over several successful seasons with Tulania University and had an exceptional rookie year with the National Football League (NFL). R. at 13. He became so well-known for his athletic ability that Apple, Inc. (Apple) approached him to become an emoji. R. at 13. Apple provided nominal compensation for the use of his name, image, and likeness (NIL) on the New Emoji Keyboard. R. at 13. Despite his success and popularity, Jon's season ended

abruptly when the National Collegiate Athletic Association (NCAA) suspended him due to his contract with Apple. R. at 13.

The NCAA suspended Jon indefinitely under NCAA bylaw 12.5.2.1 (hereinafter compensation bylaw). The bylaw restricts the advertising and promotion rights of student-athletes. R. at 4. It states that a student-athlete is no longer eligible to participate in intercollege sports if he or she "[a]ccepts 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." NCAA MANUAL bylaw 12.5.2.1. The NCAA completely controls all student-athletes' NIL rights. R. at 19.

Despite this setback, Jon's athletic talents continued to gain him recognition. Jon was quickly drafted into the NFL by the New Orleans Saints. R. at 13. Unfortunately, his NFL career also ended abruptly due to mistreatment by NFL doctors and trainers. R. at 13. To keep players on the field, the NFL medical team pushed, and the NFL dispensed, multiple painkillers on Jon for small head collisions and minor ankle injuries. R. at 22. The over prescription of these drugs led Jon to suffer an enlarged heart, permanent nerve damage in his ankle, and an addiction to painkillers. R. at 13. Jon was never informed of these risks and side effects of the medication. R. at 13.

B. Procedural History.

Jon Snow first brought a claim against the NCAA for violating antitrust laws under Section 1 of the Sherman Act. R. at 13. After his potentially career-ending diagnoses, Jon Snow brought claims against the NFL due to the NFL's provision and administration of controlled substances without written prescriptions, proper labeling, or warning of side effects. R. at 22. The District Court consolidated the two actions in the interest of judicial efficiency. R. at 13. The

District Court found the NCAA bylaw could be brought to suit under the Sherman Act, Jon Snow suffered an antitrust injury, and the claim against the NFL was not preempted by Section 301 of the Labor Management Relations Act (LMRA). R. at 19, 26.

The Respondents appealed to the Fourteenth Circuit. R. at 3. The Fourteenth Circuit reversed the decision of the District Court and held that Jon Snow could not even bring the claims against the NCAA or NFL. R. at 11. Stating the NCAA bylaw was valid as a matter of law and the negligence claims against the NFL were preempted by the LMRA. R. at 4, 6, 11.

Jon Snow then petitioned for a writ of certiorari to the Supreme Court of the United States. R. at 1. This Court granted that writ. R. at 2.

SUMMARY OF THE ARGUMENT

Respondent violated Section 1 of the Sherman Act because the compensation bylaw regulates commercial activity, unreasonably restricts the market, and caused Jon Snow to suffer an antitrust injury. Section 1 of the Sherman Act only applies to commercial transactions. NCAA bylaw 12.5.2.1 (compensation bylaw) is commercial because it sets the price of student labor and its primary purpose is not to ensure a level playing field in recruiting.

Next, the Court must analyze whether there is an unreasonable restraint on the market using either a per se, quick-look, or rule of reason analysis. A per se analysis is inappropriate because the unique nature of college football requires some horizontal and vertical cooperation among competitors. Quick-look analysis is used where per se analysis is inappropriate, but no in-depth market analysis is required to demonstrate the anticompetitive character of the agreement. Therefore, a quick-look analysis applies. Under a quick-look analysis the bylaw is invalid because there are no legitimate procompetitive effects. If the Court finds a procompetitive effect and applies rule of reason analysis, the bylaw still fails because there are less restrictive

alternatives. Therefore, the compensation bylaw fails under all three analyses and is an unreasonable restraint on the market.

Finally, there must be an injury-in-fact that stems from the antitrust violation. Jon Snow suffered an injury-in-fact because he was foreclosed from using his name, image, or likeness.

The negligence claims brought forth by Jon Snow against the National Football League (NFL) are not preempted by Section 301 of the Labor Management Relations Act (LMRA) because the claims do not rely on a right conferred by the Collective Bargaining Agreement (CBA) or on an interpretation of the CBA. There are no provisions in the CBA that specifically address a right to medical care provided by the NFL, meaning this is not a right conferred by the CBA. Additionally, the negligence claims do not rely on an interpretation of the CBA because Jon Snow can establish the prima facie case for negligence without relying on the CBA.

Jon Snow can establish that the NFL had a duty to players because of the general character of the NFL's actions and the violation of the Controlled Substance Act. The standard of care set forth in the Controlled Substance Act can also be used to determine whether there was a breach. Causation is a factual inquiry that does not require an interpretation of the CBA and referring to the CBA for damages purposes is not an interpretation of the CBA. Jon Snow can establish his negligence claims without relying on the CBA, making it so that they are not preempted by Section 301 of the LMRA. For these reasons, this Court should reverse the decision of the Fourteenth Circuit.

ARGUMENT

I. RESPONDENT VIOLATED SECTION 1 OF THE SHERMAN ACT BECAUSE THE COMPENSATION BYLAW REGULATES COMMERCIAL ACTIVITY, UNREASONABLY RESTRICTS THE MARKET, AND CAUSED JON SNOW TO SUFFER AN ANTITRUST INJURY.

This Court should reverse the decision of the Fourteenth Circuit and find that Respondent violated Section 1 of the Sherman Act because the compensation bylaw regulates commercial activity, unreasonably restricts the market, and caused Jon Snow to suffer an antitrust injury. Section 1 of the Sherman Act states that "[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 purpose of the Act is to protect consumers by promoting competition in the marketplace John B. Kirkwood & Robert H. Lande, The Fundamental Goal of Antitrust: Protecting Consumers, Not Increasing Efficiency, 84 Notre Dam L. Rev. 191, 192 (2008).

Section 1 of the Sherman Act only applies to commercial transactions. Apex Hosiery Co. v. Leader, 310 U.S. 469, 493 (1940). Thus, a plaintiff must first prove the Sherman Act governs by showing that the transaction being regulated is commercial. Next, the Court must analyze whether there is an unreasonable restraint on the market using either a per se, quick-look, or rule of reason analysis. Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 692 (1978); Agnew v. NCAA, 683 F.3d 328, 335-36 (7th Cir. 2012). Finally, there must be an injury-in-fact that is "of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful." Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977).

A. The Compensation Bylaw Regulates Commercial Activity.

Section 1 of the Sherman Act only applies to commercial transactions. Apex Hosiery Co., 310 U.S. at 493. This Court has implied that all NCAA regulations are subject to the Sherman Act. Agnew, 683 F.3d at 339; See NCAA v. Bd. Of Regents of Univ. of Okla., 468 U.S. 85, 117 (1984). However, This Court has also suggested in dicta that bylaws promoting amateurism are noncommercial. Bd. Of Regents, 468 U.S. at 117. The legal definition of commerce is broad "including almost every activity from which the actor anticipates economic gain." Agnew, 683 F.3d at 338 (citing Phillip Areeda & Herbert Hovenkamp, Antitrust Law: An Analysis of Antitrust Principles and Their Application, 260b (4th ed. 2013)). The NCAA regularly licenses student-athletes' NIL rights for profit and anticipates significant economic gain from successful recruiting programs. Id. at 340. Beyond the definition, an NCAA bylaw regulates commercial transactions when it sets the price of student-athlete labor and does not create an unfair advantage in recruiting. O'Bannon v. NCAA, 802 F.3d 1049, 1065 (9th Cir. 2015); Smith v. NCAA, 139 F.3d 180, 185 (3d Cir. 1998), vacated and remanded on other grounds, 525 U.S. 459 (1999).

NCAA bylaws regulate commercial transactions if they set the price of student-athlete labor. O'Bannon, 802 F.3d at1065. In O'Bannon v. NCAA, a student-athlete's image was used in a video game without his consent or compensation. Id. at 1055. The student-athlete sued the video game creator for compensation and the NCAA for violation of Section 1 of the Sherman Act. Id. at 1055, 1066. The suit against the NCAA was based on a bylaw which prohibited compensation to student-athletes for the use of their NIL. Id. at 1052. Reasoning that the student-athlete's athletic performance is labor that is "sold" to the university and NCAA, the court held

the bylaw was commercial because setting the price of student-athlete labor is within the commercial business of the NCAA. Id. at 1065-66.

In comparison, NCAA bylaws are noncommercial when they prevent an unfair advantage in recruiting. Smith, 139 F.3d at 185. In Smith v. NCAA, a student-athlete was prohibited from participating in intercollegiate sports by the postbaccalaureate bylaw which prohibits student-athletes from participating in athletics in any postgraduate school that was not where they obtained their undergraduate degree. Id. at 183. The court held the Sherman Act did not apply because the postbaccalaureate bylaw was noncommercial. Id. at 185-86. The court stated the bylaw furthered the goal of fair competition by providing an even playing field for recruiting; by discouraging student-athletes from forgoing participation in athletics at undergraduate schools in order to preserve eligibility to participate at a different postgraduate school. Id. at 187.

The compensation bylaw regulates commercial transactions because, like the bylaw in O'Bannon, it sets the price of student-athlete labor. The bylaw in O'Bannon is essentially identical to compensation bylaw in that they both prohibit student-athletes from receiving compensation for the use of their NIL rights. Therefore, the compensation bylaw sets the price of Jon Snow's labor and "goes to the heart of the NCAA's business." O'Bannon, 802 F.3d at 1066.

Unlike the postbaccalaureate bylaw in Smith, the compensation bylaw is not primarily to prevent an unfair advantage in recruiting. Jon Snow was not approached by Apple because of his enrollment at Tulania University, but because of his success and popularity as an individual. Third party compensation based on student-athlete skill does not discourage student-athletes from participating in specific schools' intercollegiate sports teams the same way postgraduate school recruiting does. Therefore, the compensation bylaw does not ensure an even playing field in recruiting.

In addition, the mere fact that a bylaw can be characterized as an eligibility rule does not automatically mean it is noncommercial. O'Bannon, 802 F.3d at 1065. Otherwise, antitrust laws could be avoided through "clever manipulation of words." Id. at 1065 (citing Simpson v. Union Oil Co., of Cal., 377 U.S. 13, 21-22 (1964)). Therefore, the compensation bylaw is commercial, and the Sherman Act governs.

B. The Compensation Bylaw is an Unreasonable Restraint on the Market.

The Sherman Act was enacted to "guard against conduct that unfairly restricts competition in the market place and thereby harms consumers." Benjamin J. Larson, Antitrust for All: A Primer for the Non-Antitrust Practitioner, 43 Colo. Law. 19, 19 (2014). The Act ensures a level playing field for consumers and businesses by restricting agreements which create unreasonable restraints of trade in the market. Denny's Marina v. Renfro Prods., 8 F.3d 1217, 1220 (7th Cir. 1993). Violation of the Act requires "(1) a contract, combination, or conspiracy; (2) a resultant unreasonable restraint of trade in [a] relevant market; and (3) an accompanying antitrust injury." Agnew, 683 F.3d at 335. Restraints in the market are analyzed under the per se unlawful, quick-look, or rule of reason analysis. Id.; Nat'l Soc'y of Prof'l Eng'rs, 435 U.S. at 692.[1]

The compensation bylaw is unreasonably restrictive under any analysis because it creates a monopsony. O'Bannon, 802 F.3d at 1058. A Monopsony occurs when the market has only one buyer. Id. In O'Bannon, the court held there was a monopsony for the NIL rights of student-athletes because the student-athletes were not allowed to sell that right to anyone other than the NCAA. Id. Essentially, the NCAA price-fixed the student-athletes' use of their NIL to zero,

[1] This Court has never recognized a valid per se analysis. See generally, Bd. Of Regents, 468 U.S. 85 (1984) (applying rule of reason analysis despite the NCAA amateurism bylaws appearing invalid per se).

which is anticompetitive. Id. at 1057-58. Exactly the same as the bylaw in O'Bannon, the compensation bylaw creates a monopsony on student-athletes use of their NIL. The NCAA, "like a cartel", has colluded to fix the price of the student-athletes' product. Id. at 1058.

1. The Compensation Bylaw Fails Per Se Analysis.

Per se analysis is used when a "practice facially appears to be one that would always or almost always tend to restrict competition and decrease output." Bd. Of Regents, 468 U.S. at 100 (quoting Broad. Music, Inc. v. Columbia Broad. Sys., 441 U.S. 1, 19-20 (1979)). Ordinarily, it is per se unlawful for competitors to enter agreements to price-fix through a monopsony. Id. at 100. However, This Court has previously stated that the college football industry receives special consideration because some restraints—such as limiting the number of players and games—are necessary for the survival of the intercollegiate athletics industry. Id. at 117. Therefore, even though the bylaw would be per se unlawful, a per se analysis is improper for NCAA regulations.

2. The Compensation Bylaw Fails Quick-Look Analysis.

Quick-look analysis is used where per se analysis is inappropriate, but no in-depth market analysis is required to demonstrate the anticompetitive character of the agreement. Agnew, 683 F.3d at 336. Quick-look analysis is appropriate in situations where a restraint would normally be illegal per se but some cooperation is necessary for the industry to be preserved. Id. Quick-look analysis applies here because the compensation bylaw appears illegal per se but cooperation among teams is necessary to maintain intercollegiate sports. Under this analysis, if there are no legitimate procompetitive justification for the anticompetitive behavior then it is an unreasonable restraint on the market. Id. If there is a legitimate justification, then the court applies a full rule of reason analysis. Chicago Prof'l Sports Ltd. P'ship v. NBA, 95 F.3d 593, 600 (7th Cir. 1996). An

NCAA bylaw is procompetitive if it enhances amateurism or strengthens the connection to academics. O'Bannon v. NCAA, 802 F.3d 1049, 1076 (9th Cir. 2015).

There are no legitimate justifications for the price-fixing of student-athletes' NIL rights. Although amateurism can be a valid procompetitive effect it is not a valid justification for the compensation bylaw. Id. at 1059; Bd. Of Regents, 468 U.S. at 117. Amateurism has several meanings, such as engaging in a sport with little experience or as a pastime rather than as a profession. MERRIAM WEBSTER, https://www.merriam-webster.com/dictionary/amateur. alternatively, this Court has recognized that college football is amateur because of its association with academics. Bd. Of Regents, 468 U.S. at 101-02. Even the NCAA's definition of amateurism is flexible and has changed over time in "significant and contradictory ways." O'Bannon, 802 F.3d at 1058. In addition, amateurism is not the driving force of consumer demand for college sports. Id. at 1059. Consumers are primarily attracted to college sports based on loyalty to their alma mater or the region of the country in which the school is located. O'Bannon v. NCAA, 7 F. Supp. 3d 955, 977-78 (N.D. Cal. 2014) aff'd in part, vacated in part, 802 F.3d 1049 (9th Cir. 2015). Therefore, this Court should focus on the connection to academics.

The compensation bylaw does not strengthen the connection between intercollegiate sports and academics. Typically, to integrate academics and sports the bylaw must encourage academics such as requiring class attendance Bd. Of Regents, 468 U.S. at 102. Not only does the compensation bylaw not encourage academics, but Apple is a third party unrelated to the NCAA or the member schools. Apple chose to compensate Jon Snow, as an individual, for his excellence as an athlete not because of his association with the university. Barring compensation from Apple does not affect Jon Snow's academics.

Socioeconomic status and hunger have both been linked to poor academic performance and reduced chance of completing school. Virginia H. Burney & Jayne R. Beilke, The Constraints of Poverty on High Achievement, 31 J. For Educ. Of the Gifted 171, 173 (2008); Alfred Tigerino, Satiating Food Insecure College Students: Restocking Shelves by Expanding Policies in California's Legislation, 25 J. L. Bus. & Ethics 105, 115 (2018). Many student-athletes live below the poverty line even when they receive scholarships. Jamie Nicole Johnson, Removing the Cloak of Amateurism: Employing College Athletes and Creating Optional Education, 2015 U. Ill. L. Rev. 959, 972 (2015). Some student-athletes have admitted to going hungry because they can't afford to eat. Sara Ganim, UConn Guard on Unions: I Go to Bed 'Starving', CNN (April 8, 2014), https://www-m.cnn.com/2014/04/07/us/ncaa-basketball-finals-shabazz-napier-hungry/index.html?r=https%3A%2F%2Fwww.google.com%2F. As the compensation bylaw contributes to poor academic performance by keeping student-athletes in poverty it does not strengthen the connection between intercollegiate sports and academics.

Therefore, amateurism nor academics creates a procompetitive effect to weight against the anticompetitive effect of price fixing. Since there is no legitimate procompetitive justification, the compensation bylaw fails under quick-look analysis.

3. The Compensation Bylaw Fails Rule of Reason Analysis.

Rule of reason analysis is used when there is a legitimate procompetitive justification for the bylaw. Chicago Prof'l Sports Ltd. P'ship, 95 F.3d at 600. Under this analysis, the court weighs the procompetitive and anticompetitive effects of the challenged activity in the relevant market. Larson, supra at 9. If the procompetitive objective outweighs the anticompetitive effect the bylaw is invalid unless it can be achieved in a substantially less restrictive manner. Tanaka v. Univ. of S. Cal., 252 F.3d 1059, 1063 (9th Cir. 2001).

As discussed in quick-look analysis, amateurism and the academic connection are not legitimate procompetitive justifications for the compensation bylaw. However, if this Court does find a sufficient procompetitive effect there are still less restrictive alternatives. Just as the definition of amateurism has changed, the Court's antitrust analysis must also evolve over time. Data Gen. Corp. v. Grumman Sys. Support Corp., 36 F.3d 1147, 1184 (1st Cir. 1994), abrogated on other grounds, Reed Elsevier, Inc. v. Muchnick, 559 U.S. 154 (2010). ("Antitrust law generally seeks to punish and prevent harm to consumers in particular markets, with a focus on relatively specific time periods.").

The markets surrounding intercollegiate athletics have changed significantly since 1984 when Board of Regents was decided. College football has since become a billion-dollar industry. Alex Kirshner, Here's how the NCAA generated a billion dollars in 2017, SBNATION, (March 8, 2018), https://www.sbnation.com/2018/3/8/17092300/ncaa-revenues-financial-statement-2017. The NCAA's image of intercollegiate sports "no longer jibes with reality." Banks v. NCAA, 977 F.2d 1081, 1099 (7th Cir. 1992) (Flaum, J., concurring in part and dissenting in part). The amateurism that fans care about is the connection to academics and intercollegiate sports has evolved into a billion-dollar industry significantly effecting the surrounding markets, therefore, an absolute ban on compensation is unreasonably restrictive.

Moreover, student-athletes may be more likely to attend college and stay through graduation if they could earn income from third parties. A possible alternative would be to hold funds in trust for student-athletes. Not allowing them to access the funds until they graduation would strengthen the relationship between academics and intercollegiate sports, therefore strengthening amateurism. Another alternative would be capping the amount student-athletes

could receive in one year. A reasonable cap would help student-athletes support themselves while maintaining an even playing field in recruiting.

Therefore, the compensation bylaw fails under rule of reason analysis. As it fails under per se, quick-look, and rule of reason analysis it necessarily creates an unreasonable restraint on the market and violates Section 1 of the Sherman Act.

C. Jon Snow Suffered an Injury.

Jon Snow suffered an antitrust injury. To show an antitrust injury, a plaintiff must show an "injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful." Brunswick Corp., 429 U.S. at 489. The types of injuries antitrust is intended to prevent include restricting production, raising prices, or otherwise controlling the market to the detriment of consumers. Apex Hosiery Co., 310 U.S. at 492-93. However, the standing challenged by the NCAA is not antitrust injury but injury-in-fact. R. at 19. An NCAA bylaw results in injury-in-fact if it forecloses the market to student-athletes who would otherwise receive compensation. O'Bannon, 802 F.3d at 1067.

In O'Bannon, the court held that prohibiting student-athletes from receiving compensation for the use of their NIL rights in a video game resulted in an injury-in-fact. Id. at 1067. Reasoning that absent the bylaw, student-athletes would negotiate for compensation for the use of their NIL in an unrestricted market. Id. As proof the student-athletes could negotiate for compensation, the court focused on contracts between the video game creator and the NFL, NBA, and NCAA. Id. The contracts showed the student-athletes had potential for profit in the market. Id. Thus, the bylaw "foreclosed the market" for the use of student-athletes' images in video games. Id.

Jon Snow's injury is a mirror image of the student-athlete's in O'Bannon. Just as in O'Bannon there has been an injury because absent the bylaw Jon Snow could negotiate compensation for the use of his image. Granted, the NCAA has never allowed college sports emojis to be made unlike the NCAA's licensing of sports teams for video games in O'Bannon. But the potential for profit from the licensing is still present in college sports emojis. Just as the O'Bannon court looked at contracts between the video game company and the NBA and NFL, the NBA and NFL have already contracted with third parties to create professional sports emojis. John Breech, Look: Every NFL Team Now Has its Own Fancy Twitter Emoji, CBS (Sep. 8, 2016) https://www.cbssports.com/nfl/news/look-every-nfl-team-now-has-its-own-fancy-twitter-emoji/; NBA, NBA Unveils Emoji App for the Finals: Available Now for Free, NBA COMMUNICATIONS (June 10, 2016) http://pr.nba.com/nba-unveils-emoji-app-finals-available-now-free/. Just as the contract in O'Bannon, these contracts show there is a potential for profit in the market. Therefore, the NIL market for Jon Snow is foreclosed by the compensation bylaw.

Therefore, this Court should reverse the decision of the Fourteenth Circuit because the compensation bylaw regulates commercial transactions, unreasonably restricts the market, and caused Jon Snow to suffer an antitrust injury.

II. JON SNOW'S CLAIMS ARE NOT PREEMPTED BY SECTION 301 OF THE LABOR MANAGEMENT RELATIONS ACT BECAUSE THE CLAIMS DO NOT DEPEND ON A RIGHT CONFERED BY THE COLLECTIVE BARGAINING AGREEMENT OR AN INTERPRETATION OF THE COLLECTIVE BARGAINING AGREEMENT.

Jon Snow's claim does not refer to the Collective Bargaining Agreement (CBA) and exclusively relies on federal and state law. Any potential defenses the NFL might bring to these independent claims that rely on the CBA should not be evaluated by this Court. Caterpillar, Inc. v. Williams, 482 U.S. 386, 398-99 (1987). This Court should only determine whether Section

301 of the Labor Management Relations Act (LMRA) applies in this case either through the reliance of a right conferred by the CBA or an interpretation if the CBA.

Jon Snow's claims against the National Football League (NFL) do not qualify as a CBA dispute and are therefore not preempted by Section 301. Section 301 of the LMRA governs "[s]uits for violation of contracts between an employer and a labor organization," essentially, suits alleging breach of a CBA. 29 U.S.C. §185(a) (2019). Congress intended for Section 301 of the LMRA to protect arbitration as the premier forum to resolve CBA disputes. Alaska Airlines Inc. v. Schurke, 898 F.3d 904, 920 (9th Cir. 2018) (en banc). Courts have interpreted Section 301 as a mandate to create federal common law to address labor contract disputes. Kobold v. Good Samaritan Reg'l Med. Ctr., 832 F.3d 1024, 1032 (9th Cir. 2016). Consequently, Section 301 preempts state claims that arise from rights created by the CBA or that require a substantial interpretation of the CBA. Williams, 482 U.S. at 394. Claims that arise from rights independent from CBAs are not preempted by Section 301. Burnside v. Kiewit Pac. Corp., 491 F.3d 1053, 1058 (9th Cir. 2007).

In applying the preemption doctrine under Section 301, the court must analyze the claim itself. The court first determines if the claim involves "rights conferred upon an employee by virtue of state law, not the CBA." Id. at 1059. If the right is derived from the CBA, then the claim is preempted and the analysis ends. Id. If the right is independent from the CBA, then the court must determine if the claim "nonetheless requires interpretation of the CBA, such that resolving the entire claim in court threatens the proper role of grievance and arbitration." Schurke, 898 F.3d at 921. If litigating the state law claim would require an interpretation of the CBA, then it is preempted. However, if litigation does not require any interpretation of the CBA it is not preempted.

Interpretation is constructed narrowly to require something more than to merely consider, refer to, or apply the CBA. Id. It is important to note that "the plaintiff's claim is the touchstone" for a Section 301 preemption analysis, meaning that the plaintiff's claim must require an interpretation of the CBA for there to be preemption. Cramer v. Consolidated Freightways, Inc., 255 F.3d 683, 691 (9th Cir. 2001) (en banc). A potential defense based on the CBA should not be considered for preemption purposes. Williams, 482 U.S. at 398-99. There needs to be more than a potential or hypothetical reliance on the CBA for preemption to occur. Cramer, 255 F.3d at 691–92. A determination of whether the Section 301 preempts state claims is not an evaluation of the merits of the claim, but rather the legal character of the claim, to ensure it is litigated in the proper forum. Schurke, 898 F.3d at 924.

A. Jon Snow's Claims are Based on a Right Independent of the CBA.

The first inquiry is whether Jon Snow's negligence claim is based on a right that is conferred by the CBA. The gravamen of the players' complaint is the right to receive medical care. The CBA does not require the NFL provide medical care, meaning that this right is not conferred by the CBA. R. at 22. The only CBA provisions that discuss medical treatment apply only to the clubs, such as the Saints, and their individual physicians, not the NFL itself. R. at 9. Additionally, the players do not allege that the NFL violated the CBA, but instead that it violated state common law and federal law. Thus, the right that is at issue is not conferred by the CBA.

B. Jon Snow's Claims Do Not Require an Interpretation of the CBA.

Jon Snow's negligence claim does not require an interpretation of the CBA because the prima facie case for negligence can be made without interpreting the CBA. To establish negligence, a plaintiff must show (1) the defendant had a duty (2) the defendant breached that

duty (3) that breach caused plaintiff's injuries and (4) damages. Corales v. Bennett, 567 F.3d 554, 572 (9th Cir. 2009).

Jon Snow's claim uses the negligence per se doctrine which establishes duty and breach through the violation of a statute. Das v. Bank of Am., N.A., 186 Cal. App. 4th 727, 737–38 (2010). "The violation of a statute gives to any person within the statute's protection a right of action to recover damages caused by its violation." Jacobellis v. State Farm Fire & Cas. Co., 120 F.3d 171, 175 (9th Cir. 1997). In Cramer, the Ninth Circuit determined that claims were not preempted by Section 301 when claims were based on the violation of law. It concluded that "freedom from … illegality is a 'nonnegotiable state-law right,' a court reviewing plaintiffs' claims … need not interpret the CBA," meaning there was no preemption. Cramer, 255 F.3d at 696. Jon Snow argues he was injured by the NFL's "provision and administration" of controlled substances without written prescriptions, proper labeling, or warnings regarding side effects and long-term effects. R. at 22. This conduct violates the Controlled Substances Act, 21 U.S.C. § 801 and Food, Drugs and Cosmetics Act, 21 U.S.C. § 301. The NFL had a duty to follow the law, and the NFL players could assume the NFL would meet this duty.

Additionally, a duty can be established through the general character of the activity which the defendant was engaged." J'Aire Corp. v. Gregory, 589 P.2d 60, 61 (Cal. 1979). Many factors can be considered to determine whether there is a duty including foreseeability of harm, closeness in connection between defendant's actions a plaintiff's injury, moral blame, extent of the burden on the defendant, and the degree of certainty of injury. Rowland v. Christian, 443 P.2d 561, 564 (Cal. 1968). These factors weigh in Jon Snow's favor. Lack of care when administering controlled substances is a morally blameworthy activity given the high risk of injury. It is foreseeable that the negligent distribution of painkillers would injure NFL players

and requiring the NFL to comply with federal law when dispersing painkillers is not a burden. Thus, the NFL—the organization in the best position to prevent these harms—has a duty to NFL players when it administers controlled substances. Dent v. NFL, 902 F.3d 1109, 1119 (9th Circuit 2018). In Dent, the Ninth Circuit found, under identical circumstances, that the NFL had a duty to NFL players when administering controlled substances. Id.

The standard of care used to determine breach is also independent of the CBA. The standard of care cannot be established by the CBA, as the NFL might suggest, but rather through the Controlled Substance Act and the Food Drug, and Cosmetics Act. Both statutes provide minimum standards on the handling and distribution of potentially dangerous substances such as the painkillers that were prescribed to the NFL players. 21 U.S.C §§ 331, 352, 353(b)(1), 825, 829 (2019). The complaint applies the doctrine of negligence per se, requiring only a comparison of the NFL's action with what is required by federal law. Williams, 482 U.S. at 398-99.

Causation is a factual inquiry that would not require an interpretation of the CBA. Lingle v. Norge Div. of Magic Chef Inc., 486 U.S. 399, 407 (1988). Therefore, the NFL's breach caused the player's injuries does not rely on the CBA. Jon Snow must only show that the NFL's illegal dispensing of controlled substances caused his enlarged heart, permanent nerve damage, and other injuries. R. at 13.

As to the final element of negligence, there is no need to look to the CBA to determine damages. Jon Snow's damages can be determined by looking at costs he has sustained and estimating his loss of income. Even if this Court found that using the CBA to determine damages is appropriate, this use would not be considered an interpretation of the CBA. If the CBA were consulted to determine damages this would not cause preemption because it would not be an

interpretation of the CBA. See Livadas v. Bradshaw, 512 U.S. 107, 125 (1994). Thus, Jon Snow can establish a prima facie case for negligence without relying on an interpretation of the CBA. Jon Snow's negligence claims are not preempted by Section 301 of the LMRA because (1) the claims do not arise from a right provided by the CBA and (2) do not require an interpretation of the CBA. Because both steps are satisfied, the CBA does not preempt the claims that he is bringing against the NFL. For these reasons, the court should reverse and find that Jon Snow's claim is not preempted by Section 301 of the LMRA.

CONCLUSION

This Court should reverse the decision of the Fourteenth Circuit. The compensation bylaw regulates commercial transactions, unreasonably restricts the market under any analysis, and caused Jon Snow to suffer an antitrust injury. Therefore, Respondent violated Section 1 of the Sherman Act by price-fixing the cost of student-athlete labor.

Additionally, Jon Snow's state claims are not preempted by Section 301 of the LMRA because the claims do not arise from a right provided by the CBA and do not require an interpretation of the CBA. Each element of Jon Snow's negligence claims are supported by both state and federal law. For these reasons, this Court should reverse the decision of the Fourteenth Circuit.

Respectfully submitted,
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