NO. 09-214

IN THE

SUPREME COURT OF THE

UNITED STATES OF AMERICA

JON SNOW, and others similarly situated;

Petitioners,

v.

NATIONAL COLLEGIATE ATHLETIC ASS'N; THE NATIONAL FOOTBALL LEAGUE

Respondents.

ON WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS FOR THE FOURTEENTH CIRCUIT

BRIEF FOR THE RESPONDENTS

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No. 09-214

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 STATE LAW CLAIMS BROUGHT BY THE PETITIONERS ARE PREEMPTED BY SECTION 301 OF THE LABOR MANAGEMENT RELATIONS ACT.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Fourteenth Circuit entered final judgment for Respondents. The Petition for a Writ of Certiorari was granted. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

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The District Court for the Southern District of Tulania found in favor of the Petitioners, holding that NCAA Bylaw 12.5.2.1 violated Section 1 of the Sherman Act, and that Petitioners' state law claims were not preempted by Section 301 of the Labor Management Relations Act. R. 26. The Fourteenth Circuit reversed the District Court's holdings by finding for Respondents, the Leagues. R. 11. The Fourteenth Circuit held there to be no violation of the Sherman Act and that Petitioners' claims were preempted under Section 301 of the Labor Management Relations Act. R. 11. Petitioners sought a writ of certiorari, which this Court granted.

STATEMENT OF THE CASE

Petitioner, Jon Snow, was a three-year student-athlete of the Tulania University football team, the "Greenwave," which is a member of the National Collegiate Athletic Association ("NCAA"). R. 13. Being an NCAA student-athlete, which can involve scholarships up to the full cost-attendance, requires the athletes to abide by NCAA bylaws, and in turn, they are allowed to participate in intercollegiate sports against opposing member institutions. R. 13. Certain NCAA bylaws, including NCAA Bylaw 12.5.2.1 ("Bylaw 12.5.2.1"), protect the NCAA's product of amateurism athletics and enhance competition. R. 13. Bylaw 12.5.2.1 Advertisements and Promotions Following Enrollment 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.

R. 14.

Petitioner Snow, after three seasons with the Greenwave, willfully accepted compensation totaling $3,500 from Apple Inc. for his image and likeness, in clear violation of

Bylaw 12.5.2.1. R. 13. Following complaints from other student-athletes that Petitioner Snow was receiving compensation untethered to educational expenses (i.e. scholarship), the head of Tulania compliance, Cersei Lannister, notified the NCAA of Petitioner Snow's violation. R. 13. Subsequently, the NCAA suspended Petitioner Snow indefinitely for accepting compensation for his image and likeness in violation of Bylaw 12.5.2.1. R. 13. Due to his violation, Petitioner was unable to compete in his senior season, and brought this claim alleging that Bylaw 12.5.2.1 violates Section 1 of the Sherman Antitrust Act. R. 13.

Following the NCAA's finding of ineligibility, Petitioner Snow entered his name into National Football League ("NFL") draft. R. 13. The NFL is an unincorporated association of member clubs where the member clubs own and operate the professional football teams. *See Williams v. NFL*, 582 F.3d 863, 865 (8th Cir. 2009). The NFL does not directly employ the players; instead the players are employed and supervised by the individual member clubs. *See* John Vrooman, *The Economics of the National Football League*, 14 (2012). Furthermore, as a professional football player on an NFL member-team, Petitioner Snow is a union employee subject to the Collective Bargaining Agreement ("CBA") between the NFL and the players. R. 13. Relevant portions of the CBA govern the player's access to medical treatment from board certified doctors provided by the clubs. R. 9. Petitioners allege in their complaint that the "individual clubs mistreated players" by failing to disclose the side effects of certain medications they distributed to players. R. 13, 22. Petitioners also allege, without support, that the NFL had a duty to intervene to stop the supposedly improper medical care provided by club doctors. R. 8. The record indicates that Petitioners all received medical treatment in the form of painkillers for small head collisions and minor ankle injuries. R. 13. Petitioners commenced this action against

the NFL asserting the common law negligence claims of negligent misrepresentation, negligent hiring, failure to intervene, and failure to warn. R. 22-23.

SUMMARY OF THE ARGUMENT

This Court should remain consistent with decades of precedent, and affirm the Fourteenth Circuit's finding that the NCAA's amateurism and eligibility bylaws are protected as a matter of law from attack under Section 1 of the Sherman Antitrust Act. The NCAA's restrictions protecting amateurism do not restrict competition, but rather enhance competition and thus are procompetitive restraints, and not subject to antitrust scrutiny under the Sherman Antitrust Act. *Nat'l Collegiate Athletic Ass'n v. Bd. Of Regents of Univ. of Oklahoma*, 468 U.S. 85, 101 (1984). Furthermore, the NCAA's amateurism and eligibility bylaws fall outside the scope of the Sherman Antitrust Act because they do not regulate commerce. Therefore, this Court should uphold the NCAA's amateurism and eligibility bylaws because they are protected as a matter of law from attack under the Sherman Antitrust Act.

Similarly, the Fourteenth Circuit correctly held that Petitioners' state law tort claims are preempted under Section 301 of the Labor Management Relations Act ("LMRA"). Petitioners' claims are preempted because the right they assert is conferred solely by the CBA, and the resolution of the litigation requires the interpretation of relevant CBA provisions. As pled by Petitioners, the right to receive medical care from the NFL that does not create an unreasonable risk of harm is derived directly from the CBA. R. 30. Additionally, defining the alleged duty and relevant standard of care the NFL's owes the players can only be determined by interpreting the relevant CBA provisions. Because of the need to ensure uniform federal labor law prevails over inconsistent local rules, Petitioners' claims must be preempted under Section 301 of the LMRA.

ARGUMENT

I. The NCAA'S Amateurism And Eligibility Bylaws Are Protected As A Matter Of Law From Attack Under Section 1 Of The Sherman Antitrust Act.

Under the Sherman Antitrust Act, "[e]very 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 [...] illegal." 15 U.S.C.S. § 1. Accordingly, on its face, § 1 of the Sherman Act essentially bars all contracts, combinations and conspiracies if they restrain trade. *See United States v. Topco Assocs., Inc.*, 405 U.S. 596, 606 (1972). However, the correct way to test the validity of a restraint is whether or not the restraint promotes competition or whether it suppresses or destroys competition. *See Bd. of Trade of City of Chicago v. United States,* 246 U.S. 231, 238 (1918). The NCAA's amateurism and eligibility bylaws do not restrain trade or commerce because they, in fact, promote competition, and are therefore valid as a matter of law under the Sherman Act. *See Bd. Of Regents*, 468 U.S. at 101. Furthermore, the NCAA's amateurism and eligibility bylaws do not regulate commercial activity, and are therefore protected from attack under the Sherman Act. *WorldWide Basketball & Sports Tours, Inc. v. NCAA*, 388 F.3d 955, 959 (6th Cir. 2004); *Virginia Vermiculite, Ltd. v. W.R. Grace 7 Co.*, 156 F.3d 535, 540 (4th Cir. 1998). As such, the NCAA's amateurism and eligibility bylaws, including Bylaw 12.5.2.1, are protected as a matter of law from attack under the Sherman Antitrust Act.

A. All NCAA amateurism and eligibility bylaws are procompetitive, and thus valid as a matter of law.

NCAA bylaws that regulate amateurism and player's eligibility are procompetitive because they are the only way competitive collegiate athletics can exist, thus enhancing competition. *See Bd. Of Regents*, 468 U.S. at 101 ("What the NCAA and its member institutions

market in this case is competition itself -- contests between competing institutions. Of course, this would be completely ineffective if there were no rules on which the competitors agreed to create and define the competition to be marketed."). In *Board of Regents*, this Court established that amateurism and eligibility bylaws are essential to the NCAA's product and are therefore procompetitive. *Id.* at 117-20. Federal courts around the country for the past 30 years have all relied on the *Board of Regents* opinion upholding the NCAA's amateurism and eligibility bylaws as a matter of law because they are procompetitive rather than anticompetitive. *See Agnew v. NCAA*, 683 F.3d 328, 343-44 (7th Cir. 2012).

1. *Board of Regents* summarily decided that NCAA amateurism and eligibility bylaws are procompetitive.

In 1984, this Court considered the Sherman Act's application to the NCAA's amateurism and eligibility bylaws in *Board of Regents*. 468 U.S. at 101. There, the Board of Regents of the University of Oklahoma argued that the NCAA's imposition of output restrictions on the number of football games universities could broadcast violated Section 1 of the Sherman Antitrust Act. *See Id.* In striking down the NCAA's output restrictions, the majority compared the NCAA's valid amateurism and eligibility bylaws to the NCAA's anticompetitive output restriction bylaws to illustrate the difference between permissible and impermissible NCAA bylaws. *See Id.* at 117. To determine if the NCAA's restraints enhanced competition, this Court subjected all NCAA bylaws to the appropriate antitrust scrutiny, the rule of reason analysis, and held that amateurism and eligibility bylaws are valid as a matter of law.

As recognized by *Board of Regents*, for collegiate sports to exist, some "horizontal restraints on competition are essential if the product is to be available at all." *Id.* at 101. Although typical horizontal price fixing and output limitations are "illegal per se," the NCAA's bylaws were subjected to the rule of reason analysis because they help regulate "an industry in

which horizontal restraints on competition are essential if the product is to be available at all." *Id.* at 101. Correctly, this Court recognized the importance of amateurism and how eligibility bylaws as necessary restraints that allow collegiate sports to exist. *Id.* Thus, there needs to be some agreed-to limitations between competing schools, such as size of the field, number of players, and eligibility requirements. *Id.*

Utilizing a burden-shifting approach, a rule of reason analysis requires (1) the plaintiff to meet the initial burden of showing the at-issue limitation restrains a relevant market; (2) if their burden is met, the defendant must produce some evidence demonstrating the restraint's procompetitive effect; and (3) if the defendant meets their shifted-burden, the plaintiff then must demonstrate there is some less restrictive way to accomplish the stated objective to successfully invalidate the alleged restraint on competition. *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2284 (2018). *Board of Regents* made clear that in either the rule of reason and per se analysis, the essential inquiry "remains the same – whether or not the challenged restraint enhances competition." 468 U.S. 85 at 104.

By illustrating the difference between permissible and impermissible bylaws applying the rule of reason, this Court established the strong procompetitive features of amateurism and eligibility bylaws. What the NCAA markets is a product distinct from professional sports because the athletes are students, and not paid; this difference enhances competition by increasing consumer choice for athletes and viewers alike. *Id.* at 101-102; *see also Jones v. NCAA*, 392 F. Supp. 295, 304 (D. Mass. 1975) ("[T]he NCAA eligibility rules were not designed to coerce students into staying away from intercollegiate athletics but to implement the NCAA's basic principles of *amateurism*[.]"); *Justice v. NCAA*, 577 F. Supp. 356, 382 (D. Ariz. 1983) (Imposing sanctions on NCAA players for receiving impermissible payments lack an

anticompetitive purpose "because they are directly related to the NCAA's objectives of preserving amateurism and promoting fair competition."). While discussing the NCAA's anticompetitive restraint on output restrictions, this Court stressed the inherent procompetitive nature of amateurism and eligibility bylaws, which create the NCAA's distinction from professional sports, stating that broadcast restrictions "do not [...]it into the same mold." *Id.* at 117. Therefore, amateurism and eligibility bylaws were deemed procompetitive and the benchmark of the NCAA's product, thus separating them from other NCAA bylaws. *Id* at 101-102. Without such restraints, student-athletes in higher education would cease to exist; therefore, these bylaws are completely consistent with the Sherman Act. *Id* at 120.

Bylaw 12.5.2.1, titled "Advertisements and Promotions Following Enrollment" fits squarely into the NCAA's amateurism and eligibility bylaws that promote the legitimate goal of preserving amateurism in collegiate sports. R. 4. Jon Snow violated Bylaw 12.5.2.1 by accepting $3,500 from Apple Inc. for their use of his image and likeness. R. 13. Following the reasoning from this Court, Bylaw 12.5.2.1's prohibition on compensation is procompetitive as a matter of law because it not only promotes the NCAA's legitimate goals of amateurism, but also because the crux of amateur college athletics is that the athletes are students and "must not be paid." *Bd. of Regents*, 468 U.S. at 101-102. Therefore, this Court should follow its *Board of Regents* precedent and uphold the NCAA's amateurism and eligibility bylaws as procompetitive, and thus protected as a matter of law from attack under the Sherman Act.

2. Federal courts across the Country have followed *Board of Regents*, upholding amateurism and eligibility bylaws as procompetitive.

Following the landmark decision in *Board of Regents*, the NCAA's preservation of amateurism has only been strengthened through numerous courts upholding amateurism and eligibility bylaws as procompetitive. Similar challenges to amateurism and eligibility bylaws in

many circuit courts have consistently relied on the *Board of Regent's* proposition that amateurism and eligibility bylaws are procompetitive, and thus protected as a matter of law from attack under the Sherman Act. Therefore, Bylaw 12.5.2.1, which specifically protects amateurism, should also be protected as a matter law from attack under the Sherman Act, and no additional rule of reason analysis is required.

The first case to address a similar antitrust issue was *McCormack v. NCAA*, 845 F.2d 1338, (5th Cir. 1988). The Fifth Circuit held that NCAA eligibility rules that prohibit student-athletes from competition if they have signed with an agent and declared for the draft ("no-draft and no-agent") are procompetitive. Using the *Board of Regent's* analysis regarding the procompetitive nature of amateurism and eligibility bylaws, the Fifth Circuit determined that the challenged eligibility restrictions were "reasonable" and enhanced competition. *Id* at 1333-34. Likewise, Bylaw 12.5.2.1 is fundamental to the preservation of amateurism in the NCAA; therefore, this Court should continue to follow the reasoning in *Board of Regents*, or risk destroying the fundamental procompetitive components which create the NCAA's unique product of amateur athletics.

Subsequently, *Gaines v. NCAA*, 746 F. Supp. 738 (M.D. Tenn. 1990), held that no-draft and no-agent rules, similar to the Fifth Circuit in *McCormack*, are protected from federal antitrust law as a matter of law because they are procompetitive. *Gaines* interpreted the *Board of Regents* opinion and reasoned that "there is a clear difference between the NCAA's efforts to restrict the televising of college football games and the NCAA's efforts to maintain a discernible line between amateurism and professionalism and protect the amateur objectives of the NCAA […] by enforcing the eligibility Rules." *Id.* at 743. The majority further noted that assuming

antitrust laws apply to NCAA eligibility rules, the rules help preserve the unique product of college football, thus enhancing competition. *Id.*

The Seventh Circuit has also held that NCAA amateurism rules substantially similar to Bylaw 12.5.2.1 do not violate antitrust laws. *See Banks v. NCAA*, 977 F.2d 1081, 1089-94 (7th Cir. 1992). The court in *Banks* reasoned that college football is a league that consists of amateur student-athletes, and there needs to be a clear line of demarcation between college and professional sports, which is accomplished by the implementation of procompetitive no-draft and no-agent eligibility laws. *Id*. Recently, the Seventh Circuit revisited an antitrust challenge to the NCAA's amateurism and eligibility bylaws in *Agnew*, 628 F.3d at 328. The majority found during their analysis that NCAA's bylaws can be commercial, have an anti-competitive effect, and take place in a relevant market, thus exposing the bylaws to antitrust scrutiny. *Id.* However, the opinion further explained that *Board of Regents* created a presumption in favor of certain NCAA rules, specifically eligibility and amateurism bylaws. *Id.* at 341. They stated that "when an NCAA bylaw is clearly meant to help maintain the 'revered tradition of *amateurism* in college sports' or the 'preservation of the student-athlete in higher education,' the bylaw will be presumed procompetitive since, we must give the NCAA 'ample latitude to play the role.'" *Id.* at 342-43 (*quoting Bd. of Regents*, 468 U.S. at 120) (emphasis in original).

The Third Circuit is also in agreement with the Fifth and Seventh Circuits as they hold that in general, the NCAA's eligibility rules are procompetitive because they allow for the survival of the NCAA's product – amateur sports – and allow for an even playing field between competing schools. *See Smith v. NCAA*, 139 F.3d 180 (3d Cir. 1998) (Upholding the NCAA bylaw preventing graduate students from participating on teams other than their undergraduate institutions as procompetitive and not regulating commercial activity.), *vacated on other*

grounds, 525 U.S. 459 (1999). Eligibility bylaws are procompetitive because they promote "fair competition" and allow the survival of the NCAA's product. *Id.* at 187. Therefore, just as the Third Circuit, summarily concluded, amateurism and eligibility requirements are procompetitive because such rules would "clearly survive a rule of reason analysis[.]" *Id.* at 187.

Since Bylaw 12.5.2.1 is plainly procompetitive**,** it does not need to undergo a detailed rule of reason analysis. This Court has recognized that in certain situations there is no need for a detailed rule of reason analysis, because certain restraints can easily survive rule of reason analysis in the "twinkling of an eye." *Am. Needle, Inc. v. Nat'l Football League*, 560 U.S. 183, 203 (2010). The NCAA's product is sustained by amateurism, indicating that amateurism and eligibility restraints are necessary, "thus no detailed analysis would be necessary to deem such rules procompetitive." *Agnew*, 628 F.3d at 345.

By attempting to do an unnecessarily detailed rule of reason analysis, the Ninth Circuit in 2015 strayed from this Court's definitive presumption in *Board of Regents* that all NCAA amateurism and eligibility bylaws are procompetitive. *O'Bannon v. NCAA*, 802 F.3d 1049 (9th Cir. 2015). Even though *O'Bannon* erroneously deviated from the long line of cases holding amateurism and eligibility bylaws procompetitive as a matter of law, the Ninth Circuit still ultimately agreed that amateurism is crucial to the NCAA's product and not compensating student-athletes is what makes them amateurs. *Id*. Through their analysis, the Ninth Circuit eventually came to the same conclusion as *Board of Regents*, that said bylaws are indeed procompetitive, demonstrating that yet another in-depth analysis on amateurism is unnecessary. As this Court plainly stated, and as circuit courts across the Country have reiterated, the preservation of amateurism is the epitome of a procompetitive rationale. *Bd. of Regents*, 468 U.S. at 120.

B. NCAA Amateurism and Eligibility Bylaws, Such As Bylaw 12.5.2.1, Do Not Regulate "Commercial Activity" And Thus Cannot Be Attacked Under The Sherman Act.

To litigate an antitrust issue, "commercial activity" is necessary to implicate the Sherman Act since the Sherman Act only regulates interstate commerce. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 577, (1986); *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 492-93 (1940). Numerous court decisions have found the NCAA's amateurism and eligibility bylaws to be non-commercial, and thus protected from attack under the Sherman Act. *See Bassett v. NCAA*, 528 F.3d 426, 433 (6th Cir. 2008); *Smith v. NCAA*, 139 F.3d 180; *Gaines v. NCAA*, 746 F. Supp. at 746; *Justice v. NCAA*, 577 F. Supp. at 379; *Jones v. NCAA*, 392 F. Supp. at 304.

First, the District Court of Massachusetts in *Jones* explicitly stated that eligibility and amateurism bylaws have no "nexus to commercial or business activities." *Jones v. NCAA*, 392 F. Supp. at 303. The District Court of Arizona in *Justice* similarly stated that the NCAA engages in two distinct forms of rulemaking: (1) the concern for the protection of amateurism (which is non-commercial), and (2) rules with obvious economic purpose; the Court swiftly identified the at-issue eligibility bylaw as the former type of rule. *Justice v. NCAA*, 577 F. Supp. at 383. Additionally, the Third Circuit unequivocally stated that "eligibility rules are not related to the NCAA's *commercial* or business activities … the eligibility [rules] primarily seek to ensure fair competition." *Smith v. NCAA*, 139 F.3d at 185-186. The Sixth Circuit also noted that the "character" of a bylaw preventing coaches from paying recruits were similar to the eligibility rule in *Smith*, and were therefore "explicitly non-commercial." *Bassett*, 528 F. 3d at 433. Finally, the Seventh Circuit weighed in on this issue stating that a relevant "commercial market" was lacking, and therefore the applicability of the Sherman Act to certain NCAA bylaws was not apparent. *Agnew*, 628 F.3d at 345.

Bylaw 12.5.2.1 directly corresponds with the non-commercial eligibility and amateurism bylaws that have been upheld by courts across the Country. As such, Bylaw 12.5.2.1 should be summarily deemed non-commercial in nature, and thus protected from scrutiny under the Sherman Act. Not only did this Court find in *Board of Regents* that amateurism is procompetitive in order to differentiate it from output restrictions on broadcasts, but also it referenced *Jones* and *Justice* which both explicitly recognized eligibility and amateurism bylaws as non-commercial. *See Bd. Of* Regents, 468 U.S. at 102 n.24. The Third and Sixth Circuits referenced this same proposition in *Smith* and *Bassett*, further signifying that amateurism and eligibility laws have been established as non-commercial.

Therefore, Bylaw 12.5.2.1, along with every other NCAA amateurism and eligibility bylaws, is protected as a matter of law from attack under the Sherman Act because: (1) they are procompetitive; and (2) because they do not regulate "commercial activity."

II. Petitioners' State Law Claims Are Preempted Under Section 301 Of The Labor Management Relations Act.

Petitioners brought suit alleging the NFL was negligent in their hiring of club doctors, in failing to warn of the potential side effects of administered medications, and in failing to intervene in the allegedly tortious conduct of the club doctors.[1] R. 9, 13, 22. These allegations stem from medical care provided to Petitioners by doctors hired and supervised by the clubs – not the NFL. *Id.* 9. The present appeal does not concern the merits of Petitioners' claims; rather this Court must only determine if the right asserted by Petitioners stems from some source other than the CBA or if resolution of Petitioners' state law claims will require interpretation of the

[1] Petitioners' also allege a negligent misrepresentation claim, but that claim is duplicative of their failure to warn claim because the misrepresentation is the failure to disclose, or in other words warn, of the dangers associated with the medications. R. 9. Petitioners' also plead a negligent retention claim, however this is the substantive equivalent of a failure to intervene claim.

CBA. *See Int'l Bhd. Of Electrical Workers v. Hechler*, 481 U.S. 851, 859 (1987). In order to determine the NFL's legal obligations to Petitioners in this matter, the Court must interpret the collective bargaining agreement between the players and the NFL. *Id.* at 858. Therefore, Petitioners' claims are preempted by Section 301 of the Labor Management Relations Act.

Section 301 of the LMRA governs "[s]uits for violation of contracts between an employer and a labor organization." 29. U.S.C. 185(a). It is well established that CBAs have powerful preemptive force over state law claims. *See Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 104 (1962). This Court articulated in *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, that "the preemptive force of Section 301 is so powerful as to displace entirely any state cause of action for violation of contracts between an employer and a labor union. 463 U.S. 1, 33 (1983). *See also Metropolitan Life Ins. Co., v. Taylor*, 481 U.S. 58, 65 (1987) ("On occasion, the Court has concluded that the pre-emptive force of a statute is so "extraordinary" that it "converts an ordinary state common law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule."). It is undisputed that when the resolution of a state law claim is "inextricably intertwined with the terms in a labor contract" the claim is preempted. *See Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 210-11 (1985). Section 301 of the LMRA preempts state law claims "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) (*quoting Int's Bhd. Of Elec. Workers v. Hechler*, 481 U.S. 851, 859 (1987)).

A plaintiff's claim is the touchstone of the preemption analysis, but a plaintiff's decision not to reference a CBA in their pleadings does not prohibit preemption based on the need to interpret the CBA. *See Cramer v. Consolidated Freightways, Inc.*, 255 F.3d 683, 689-93 (9th Cr.

2001) (en banc); *Hyles v. Mensing*, 849 F.2d 1213, 1214 (9th Cir. 1988). In the case at bar, the resolution of Petitioners' claims requires the interpretation of the CBA regardless of its mention in the complaint, and thus falls squarely into the preemption outlined in Section 301 of the LMRA. *See Cramer*, 255 F.3d, at 93.

A. Appellant's claims require interpretation of the CBA and thus are preempted under the *Burnside* test.

First, this Court must conduct an analysis to determine if the right at issue is either conferred by the CBA, or "inextricably intertwined" with the terms of the CBA. *See Lueck*, 471 U.S. at 210; *see also Caterpillar, Inc.*, 482 U.S. at 394. The Ninth Circuit in *Burnside v. Kiewit Pac. Corp*, in deciding plaintiff employees' state law claims were preempted under Section 301 of the LMRA, consolidated these principles into a two-step test this Court should apply to determine preemption. 491 F.3d 1053 (9th Cir. 2007). Under the first prong of the *Burnside* analysis, if the right exists "solely as a result of the CBA, then the claim is preempted." *Id.* 1059. Under the second prong, if the litigation cannot be resolved without the interpretation of the CBA, then the claim is similarly preempted. *Burnside* is the proper analysis to apply because it is the most recent and comprehensive test to determine if state law claim is preempted under the LMRA.[2] *See Dent v. NFL*, 902 F.3d 1109, 1118 (9th Cir. 2018).

1. The right at issue is conferred solely by the CBA.

The right at issue here is the player's right to receive medical care from the NFL that does not create an unreasonable risk of harm. R. 30. When a right exists "solely as a result of the CBA, then the claim is preempted, and our analysis ends there." *Burnside*, 902 F.3d at 1059. This Court held in its 1994 decision, *Livadas v. Bradshaw*, that to determine if a right is conferred solely by the CBA a court should look to the "legal character of a claim, as

[2] The Sixth Circuit adopted a similar two step approach to determining preemption in *DeCoe v. General Motors Corp.*, 32 F.3d 212, 216 (6th Cir. 1994).

independent of rights under the collective-bargaining agreement [and] not whether a grievance arising from precisely the same set of facts could be pursued. 512 U.S. 107, 112 (1994). Furthermore, this Court in affirming the Sixth Circuit's holding in *Avo Corp. v. Aero Lodge no. 735, Int'l Asso. of Machinists & Aerospace Workers*, stated "when 'the heart of the [state-law] complaint [is] a . . . clause in the collective bargaining agreement,' that complaint arises under federal law." 376 F.2d 336 (6th Cir. 1967), *aff'd*, 390 U.S. 557 (1968).

In this case, the right conferred to Petitioners is not independent of the CBA. *United Steelworks of America v. Rawson* made clear that a tort claim raised in conjunction with a CBA can only overcome preemption when the duty allegedly violated is one owed to the public at large as opposed to a duty owed only to employees covered by the CBA. 495 U.S. 362, 362 (1990). Here, the duty alleged is one only owed to the players. R. 22. Petitioners cannot reasonably claim that the NFL owes a duty of care to the players for medical treatment provided by doctors who are hired by the independent clubs. *See* R. 24 ("the CBAs place medical disclosure obligations 'squarely on Club physicians, not on the NFL.'"). The only feasible link between Petitioners' alleged injury and the NFL is through the relevant CBA provisions. *Id.* Because this alleged tort only concerns a breach of a duty owed to members of the NFL it is preempted under the principle articulated in *Rawson* and under LMRA Section 301.

Additionally, Petitioners' ground their claim for relief in a supposed common law duty for the National Football League to oversee the clubs. R. 8. But as the Fourteenth Circuit aptly noted, "[t]here is simply no case law that has imposed upon a sports league a common law duty to police the health-and-safety treatment of players by the clubs." *Id.* 8. Without a state or common law duty to ground Petitioners' claims for relief, this Court must look to the CBA in order to determine if the CBA conferred this right on Petitioners. *Lueck*, 471 U.S. at 213.

Because of the forceful preemptive power of Section 301 of the LMRA, Petitioners' failure to ground their claim in something other than the CBA necessitates preemption under the first step of the *Burnside* analysis.

2. The present litigation cannot be resolved without interpretation of the CBA.

Even assuming that Petitioners' claims are derived separately from the CBA, which they are not, their claims are still preempted under the second prong of the *Burnside* test because the litigation cannot be resolved without the interpretation of the CBA. *Burnside*, 491 F.3d. at 1059-60. In order for Petitioners to sustain a negligence claim against the NFL, they must establish the following four elements: (1) the NFL had a "duty or obligation to conform to a certain standard of conduct for the protection of others against unreasonable risks", (2) the NFL breached that duty, (3) the breach proximately caused the plaintiff's injuries, and (4) damages. R. 21. *See Dillion v. Legg*, 441 P.2d 912, 914 (Cal. 1968); *Corales v. Bennett*, 567 F.3d 554, 572 (9th Cir. 2009) (*quoting McGarry v. Sax*, 70 Cal. Rptr. 3d 519, 522 (Cal. Dist. Ct. App. 4th 2008)). Petitioners simply cannot establish these elements without CBA interpretation. At this stage of the litigation, only duty and standard of care are at issue. This is because causation and damages go to the merits of Petitioners' claims, which are not relevant to the question of preemption.

i. Duty

"The threshold inquiry for determining if a cause of action exists is an examination of the contract to ascertain what duties were accepted by each of the parties and the scope of those duties." *See Hechler,* 481 U.S. at 860. Petitioners must establish that the NFL owed the players a duty stemming from something other than the CBA in order avoid preemption. *See Hechler,* 481 U.S. at 862; *Brown v. Brotman Med. Ctr., Inc.*, 581 F. App'x 572, 576 (9th Cr. 2014). In the case at bar, the CBA imposed an express duty on the NFL to "hire and retain educationally well-

qualified, medically-competent, professional-objective and specifically-trained professionals not subject to any conflicts." R. 9. The NFL fulfilled this duty by "requiring each club to retain a board certified orthopedic surgeon" and certified trainers. *Id.* This duty does not expressly require the NFL to be the ones to make disclosures regarding the possible side effects of medication distributed by the club doctors, nor does it necessarily impose a duty to intervene on the club doctors' actions.

It is incontrovertible that the NFL owes no duty to the players to warn or intervene on the care provided by club doctors, absent a special relationship. *See DeJesus v. VA*, 479 F.3d 271, 279-80 (3d Cir. 2007) (adopting the California Supreme Court's reasoning from their landmark decision in *Tarasoff v. Regents of University of California*, 17 Cal. 3d 423, 551 (Cal. 1978)). The only source of this special relationship between the NFL and the players is the CBA. This is because, as the District Court noted, "the CBAs place medical disclosure obligations 'squarely on Club physicians, not on the NFL.'" R. 24. Additionally, the special relationship does not stem from any employment between the NFL and the players because no such agreement exists. *See General Bld. Contractors Ass'n v. Pa.*, 458 U.S. 375, 392 (1982) ("Even if the doctrine of *respondeat superior* were broadly applicable…it would not support the imposition of liability on a defendant based on the acts of a party with whom it had no agency or employment relationship."). Therefore, imposition of the duties on the NFL requires interpretation of the CBA.

Federal courts across the county have all found NFL players' claims to be preempted in similar tort cases because duty could not be established without interpretation of the CBA. In *Williams*, the Eighth Circuit analyzed the players' negligent misrepresentation and failure to warn claims stemming from an alleged duty to disclose that supplement contained a banned

substance. The Court preempted the claims because whether the NFL owed the players a duty to warn or intervene could not be determined without examining "the parties' legal relationship and expectations as established by the CBA[.]" 582 F.3d at 870. The same was true in *Atwater v. NFL Players Ass'n*, where the Eleventh Circuit found the players' negligent misrepresentation claims to be preempted because "in determining any duty the NFL owed Plaintiffs…we would, again, still have to consult the CBA." 626 F.3d 1170, 1182 (11th Cir. 2010). Furthermore, the NFL successfully argued in *Stringer v. National Football League*, that "the only logical source of the duties allegedly breached" is the CBA in a suit about the NFL's duty in regards to the general health and safety of players. 474 F. Supp 2d 894, 901 (S.D. Ohio 2007) (Judge John David Holschuh). The same is true in the present case – the duty owed to the players by the NFL can only be determined by interpreting the CBA.

ii. Scope of Duty

Even if the Petitioners assert a duty owed by the NFL to the players independent of the CBA, interpretation of the CBA is still required to define the scope of that duty. *See Hechler* 481, U.S. at 862 (When assessing tort liability, the CBA must be interpreted to determine the "nature and scope of the duty."). Recently, in *Smith v. National Football League Players Association* the Eastern District Court of Missouri found it necessary to interpret the CBA to determine the scope of the duty the NFL Players Association owed the injured players. 2014 WL 6776306 at 6-8 (E.D. Mo. Dec. 2, 2014) (Judge Ernest Webber). Just as in *Smith v. NFLPA*, the relevant CBA provisions here, discussing a player's right to medical records, access to medical facilities, and the physician's duty to advise the players of their prognosis, all require CBA interpretation to determine the scope of the duty Respondents allegedly owed Petitioners. R. 9. Because the CBA speaks directly to the NFL's duties to the Petitioners, and the steps the

NFL took to fulfill those duties, interpretation of the CBA is required to determine the scope of the NFL's duty.

iii. Standard of Care

Just as Petitioners' must establish that the NFL owes them a duty, they must also establish the relevant standard of care the NFL allegedly owed them to fulfill the breach element of their claim. *See Baltimore & O.R. Co. v.* Griffith, 159 U.S. 603 (1895). Determining the relevant standard of care similarly entails interpretation of the CBA, which alone requires preemption of Petitioners' claims under the LMRA. *See Lueck*, 472 U.S. at 862; *Burnside* 491 F.3d at 1059.

In order for the Petitioners to hold the NFL responsible, the Court must look to the CBA to determine the standard of care the NFL owed the players, which is separate from the standard of care the club doctors owed to the players. In *Duerson v. National Football League Inc.*, the Northern District Court of Illinois addressed this exact issue concerning the same CBA provisions that are at issue in this case. 2012 WL 165835 (N.D. Ill. May 11, 2012) (Judge James F. Holderman). In determining the relevant standard of care that the NFL had to satisfy on Duerson's failure to warn claim, Judge Holderman stated that CBA interpretation was necessary because "'[t]he NFL could…reasonably exercise a lower standard of care' if a court could interpret [the CBAs] to impose a duty on the NFL's clubs to monitor a player's health." *Id.* at 6-7. The circumstances are the same here, because it was the club doctors who distributed medication to the players, not the NFL directly. R. 22, 24. Therefore, this Court could safely find the NFL reasonably had a lower standard of care that they must exercise due to the CBA's imposition of a higher duty on the clubs themselves to monitor players' health and safety. While it is true that the Controlled Substances Act, 21 U.S.C. 801, might establish the standard of care

the doctors must abide by when distributing medication, it is not clear that this standard of care applies to the NFL because the NFL had no direct role in providing the medical care. R. 13. Because establishing the standard of care the NFL owed the players requires interpretation of the relevant CBA provisions, Petitioner's claims are preempted under Section 301 of the LMRA under the second prong of the *Burnside* test.

B. The Interests of Uniformity and Predictability Require Preemption.

For more than 50 years, this Court has repeatedly recognized the need for CBAs to preempt inconsistent local rules in order to maintain a consistent and predictable body of federal labor law. *See Teamsters*, 369 U.S. at 104; *Lueck*, 472 U.S. at 210; *Caterpillar*, 482 U.S. at 395; *Norfolk & W.R. Co. v. Am. Train Dispatchers' Ass'n*, 499 U.S. 117, 127 (1991). Without this predictability, the incentive to bargain for CBAs would severely diminish because the parties could not be confident that their negotiated for provisions would be interpreted consistently. *See Textile Workers v. Lincoln Mills*, 353 U.S. 448, 497 (1957). Inconsistent interpretation of CBA provisions would also disrupt the Congressional intent behind Section 301 of the LMRA, which is to create a body of federal law that protects the "rights and obligations" created through CBAs." *Lueck*, 471 U.S. at 217.

Because Petitioners' claims are rooted in rights conferred by the CBA, and the present litigation cannot be resolved without CBA interpretation, this Court should find that all of Petitioners' claims are preempted. Holding otherwise would fly in the face of "[t]he interests in interpretive uniformity and predictability [, which] require that labor-contract disputes be resolved by reference to federal law, [and] also require that the meaning given to a contract phrase or term be subject to uniform federal interpretation." *Id.* at 211.

CONCLUSION

For the foregoing reasons, this Court should remain consistent with decades of precedent and affirm the Fourteenth Circuit's finding that the NCAA's amateurism and eligibility bylaws are protected as a matter of law from attack under the Sherman Act, and that Petitioners' state law claims are preempted under Section 301 of the LMRA.