No. 09-214

IN THE

Supreme Court of the United States

JON SNOW, and other similarly situated individuals

Petitioner,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION;
THE NATIONAL FOOTBALL LEAGUE,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTEENTH CIRCUIT

BRIEF FOR THE RESPONDENTS

Counsel for Respondents
National Collegiate Athletic Association and the National Football League

TEAM NUMBER TEN

QUESTIONS PRESENTED

I. Whether the Fourteenth Circuit correctly held that NCAA Amateurism and eligibility bylaws are protected as a matter of law from attack under Section 1 of the Sherman Act?

II. Whether the Fourteenth Circuit correctly held the negligence-based state law claims brought by the NFL players are preempted by Section 301 of the Labor Management Relations Act?

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The district court had jurisdiction to review whether a state law is preempted by federal labor management law under 29 U.S.C. §185 and 28 U.S.C. § 1331. The court of appeals had jurisdiction to review the district court decision under 28 U.S.C. § 1292(a) and under 28 U.S.C.II § 3701. This Court has jurisdiction under 28 U.S.C. § 1254.

STATEMENT OF THE CASE

I. Violation of NCAA Amateurism and Eligibility Bylaws

The National Collegiate Athletic Association ("NCAA") suspended a student athlete at Tulania University, Jon Snow, for receipt of unfair compensation. R. at 16. Before Snow began his last season as the quarterback for the Tulania Green Wave football team, Apple, Inc. ("Apple") approached Snow to partner with them for the launch of a new product. *Id.* The new product would feature Snow's image and likeness on an emoji keyboard. *Id.* Customers who download the keyboard could send images of Snow via text message. *Id.* Snow's agreement with Apple entitled him to an immediate payment of $1,000.00 and a royalty fee of $1.00 for each download of the keyboard. Snow earned $3,500.00 in royalties during the first trial period of the keyboard. *Id.* Once learning of Snow's new source of income, other student athletes complained to Tulania's head of compliance, Cersei Lannister. *Id.* Lannister alerted the NCAA, which suspended Snow indefinitely for violating NCAA bylaw 12.5.2.1. *Id.* This bylaw states that college athletes lose their eligibility to play college sports if they accept any remunerations for or permit the use of their name or picture or advertise, recommend, or promote directly the sale or use of a commercial product or service in any way. R. at 15. After learning of his suspension, Snow entered his name into the National Football League ("NFL," "the League") draft and was drafted by the New Orleans Saints ("Saints"), an NFL football team. R. at 16.

II. Collective Bargaining Agreement and Prescription by Team Doctors

The NFL Players Association ("NFLPA") and the NFL have a Collective Bargaining Agreement ("CBA") which dictates requirements of players' employment with a team. R. at 11. Snow performed exceptionally for the Saints during his rookie year. R. at 17. Throughout his first year, Snow was prescribed painkillers by team doctors for small head collisions and minor ankle injuries typically sustained by NFL players. *Id.* During Snow's second year with the Saints he was diagnosed with an enlarged heart and permanent nerve damage in his ankle. *Id.* Snow asserts he was prescribed excessive amounts of painkillers without full knowledge of their side effects. *Id.* At this time he developed an addiction to painkillers. *Id.* Other players are joining Snow's claims on this issue. *Id.*

III. Procedural History

Snow filed two actions in the United States District Court for the Southern District of Tulania, which were consolidated into one matter. R. at 15-16. The first involves Snow seeking to invalidate NCAA bylaw 12.5.2.1, alleging the bylaw violates the Sherman Act. R. at 15. The second action involves Snow and other NFL players suing the NFL for negligent distribution of excessive painkiller prescriptions. R. at 15-16. The United States District Court for the Southern District of Tulania ruled in favor of Snow, holding (1) that the Supreme Court's decision in *Board of Regents* did not declare the NCAA's amateurism rules "valid as a matter of law," the NCAA's compensation rules regulate "commercial activity," and the plaintiffs demonstrated that the compensation rules cause them injury in fact, and (2) that Section 301 of the Labor Management Relations Act of 1947 does not preempt the negligence per se, negligent hiring claims. R at 18, 22, 25, 36-37.

The NCAA and NFL appealed the district court's decision to the United States Court of Appeals for the Fourteenth Circuit. The Appellate Court reversed the judgment of the district

court on both grounds, holding that (1) the precedent first established by *Board of Regents* that the NCAA amateurism and eligibility bylaws are non-anticompetitive as a matter of law should be upheld based upon the principle of *stare decisis*, and (2) the negligence based state law claims are preempted by Section 301 of the Labor Management Relations Act of 1947. R. at 6, 8, 14.

Snow subsequently petitioned this Court for a writ of certiorari, which was granted.

SUMMARY OF THE ARGUMENT

The NCAA and the NFL are requesting that this Court affirm the appellate court's decision that NCAA bylaw 5.12.2.1 does not violate the Sherman Act and the state law claims are preempted by Section 301 of the LMRA. NCAA bylaw 12.5.2.1 does not violate Section 1 of the Sherman Act because the bylaws are non-anticompetitive, do not regulate commercial activity, and caused Petitioner no injury. The state law claims are preempted because resolving them depends on interpreting inseparable provisions of a collective bargaining agreement. This Court should affirm the Fourteenth Circuit's decision to apply the relevant federal laws as they were intended and protect the agreements made by athletes and the leagues they play in.

The Fourteenth Circuit was correct in holding that NCAA Bylaw 12.5.2.1 does not violate Section 1 of the Sherman Act. The Supreme Court previously ruled that NCAA amateurism and eligibility rules are non-anticompetitive as a matter of law. Bylaw 12.5.2.1 is such a rule. 12.5.2.1 protects and preserves the ideal of amateurism in collegiate sport and additionally determines how a player may remain eligible to compete in such an environment. Even if this Court were to rule that Bylaw 12.5.2.1 is not non-anticompetitive as a matter of law, the test of reasonableness would find that the rule does not regulate commercial activity. Furthermore, Snow did not demonstrate that the NCAA compensation rules caused him injury in fact, nor is the injury of the type the antitrust laws were intended to prevent and that flows from that which makes NCAA's acts allegedly unlawful.

The Fourteenth Circuit was also correct in holding that Snow's claims of negligent hiring, negligent retention, and negligent misrepresentation are preempted. The Supreme Court previously ruled that state law claims are preempted by federal labor law, when evaluation of the claims requires interpretation of a CBA. It is not necessary for the CBA to explicitly address the state law claims for them to be preempted, if the claims are inextricably intertwined with the

terms of the CBA as they are in this case, Section 301 of the LMRA preempts. Snow, and Petitioners state law claims are preempted because the negligence claims arise form rights created by the CBA and are not sufficiently independent from the CBA to survive preemption. The negligence-based claims require the Court to examine the terms of the CBA to determine what duty of care was imposed. Once the necessary duty of care is determined, only then the Court can evaluate if the NFL failed to meet that duty.

Public policy and congressional intent encourage this interpretation because Congress wanted to protect and foster collective bargaining agreements. By creating minimum standards all employees are protected, however if state law is permitted to supersede the collectively bargained for terms, the CBA is ineffective at creating the uniform standard. Accordingly, this Court should follow precedent and public policy to uphold the Fourteenth Circuit's decision.

STANDARD OF REVIEW

For the purposes of this review, the United States Supreme Court will review all matters *de novo. De novo* review means the Court "makes an independent determination of the issues" and does not "give any special weight to the prior determination of" the lower court. *United States v. Raddatz*, 447 U.S. 667, 690 (1980).

ARGUMENT

I. THE FOURTEENTH CIRCUIT CORRECTLY HELD THAT NCAA BYLAW 12.5.2.1 DOES NOT VIOLATE SECTION 1 OF THE SHERMAN ACT BECAUSE NCAA AMATEURISM AND ELIGIBILITY ARE NON-ANTICOMPETITIVE AS A MATTER OF LAW, BYLAW 12.5.2.1 DOES NOT REGULATE COMMERCIAL ACTIVITY, AND THE PETITIONER DID NOT DEMONSTRATE THAT THE BYLAW CAUSED HIM AN INJURY OF THE TYPE THE SHERMAN ACT WAS MEANT TO PREVENT.

The United States Court of Appeals for the Fourteenth Circuit ruled correctly as a matter of law when it held that NCAA Bylaw 12.5.2.1 does not violate Section 1 of the Sherman Act. Section 1 of the Sherman Act states "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." 15 U.S.C.A. § 1 (West 2004). This Court created binding precedent in *NCAA v. Board of Regents of University of Oklahoma* that NCAA amateurism and eligibility rules are non-anticompetitive as a matter of law. 468 U.S. 85, 101-02, 117 (1984). These rules "preserve the character and quality of the 'product,'… [a]nd the integrity of the 'product' cannot be preserved except by mutual agreement." *Id.* at 102. NCAA Bylaw 12.5.2.1, Advertisements and Promotions Following Enrollment, is such an amateurism and eligibility rule and 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. at 17.

NCAA Bylaw 12.5.2.1 controls a student-athlete's eligibility to participate in amateur sports within its association and can only control eligibility by that athlete agreeing to play for a member-college making it naturally procompetitive. *Bd of Regents*, 468 at 117.

Even if this court were to decide to overrule the precedent established by *Board of Regents*, petitioner's claim would still fail because Bylaw 12.5.2.1 does not regulate commercial activity so Section 1 of the Sherman Act would not apply, and petitioner did not demonstrate that Bylaw 12.5.2.1 caused him injury in fact.

A. The Supreme Court's decision in Board of Regents creates binding precedent that NCAA's amateurism and eligibility rules are non-anticompetitive as a matter of law.

NCAA amateurism and eligibility rules that require for "athletes [to]… not be paid…attend class, and the like" are non-anticompetitive as a matter of law as they "preserve the character and quality of college football." *Bd. of Regents*, 468 U.S. at 87. While the Supreme Court did not hold in *Board of Regents* that NCAA rules were immune to antitrust claims, it does

make clear that NCAA laws that are created to preserve amateurism are not the types of rules the Sherman Act seeks to prevent. *Id.* at 88. Lower courts have also held up this standard, and while some may apply a reasonableness standard, applying such a standard results in the eligibility and amateurism laws being found as non-anticompetitive. *See*, *McCormack v. NCAA*, 845 F. 2d 1338 (5th Cir. 1988).

The Supreme Court specifically found that NCAA bylaws that required that "athletes must not be paid, must be required to attend class, and the like" were necessary to preserve the character and quality of college football and were therefore procompetitive, as they increased consumer choice for both sports fans and athletes. *Board of Regents* It is reasonable to assume that most of the regulatory controls of the NCAA are justifiable means of fostering competition among amateur athletic teams and therefore procompetitive because they enhance public interest in intercollegiate athletics. *Bd. of Regents*, 468 U.S. at 101-02, 117.

Fifth Circuit found that claims of alleged "restrictions on compensation to football players [that] constitute[d] illegal price-fixing" failed as a matter of law: "The NCAA markets college football as a product distinct from professional football. The eligibility rules create the product and allow its survival in the face of commercializing pressures." "That the NCAA has not distilled amateurism to its purest form does not mean its attempts to maintain a mixture containing some amateur elements are unreasonable ... the motion to dismiss was properly granted." *McCormack v. NCAA*, 845 F. 2d at 1338. *Agnew* held that "most if not all" NCAA amateurism and eligibility rules are procompetitive as a matter of law: A certain amount of collusion in college football is permitted because it is necessary for the product to exist. Accordingly, 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 that role" ... *Agnew v. NCAA*, 683 F. 3d 328, 342-43 (7th Cir. 2012).

In this case, NCAA Bylaw 12.5.2.1 would fall under the type of amateurism and eligibility rule that is viewed by courts to be non-anticompetitive. The Bylaw strictly preserves the amateurism quality inherent to the NCAA by prohibiting players from not only being remunerated, but also from being scouted by these large corporations and businesses that seek to profit from their image and likeness. R. at 16. Without this type of Bylaw in place, the NCAA could not protect its student-athletes players from this type of abuse, and while it could be argued that the players have a right to use their own image and likeness how they please, the NCAA is not preventing them from doing so; the NCAA simply states you cannot be an amateur student-athlete while doing so.

B. NCAA Bylaw 12.5.2.1 regarding compensation does not regulate commercial activity.

Section One of the Sherman Act applies only to "restraint[s] on trade or commerce." NCAA Bylaw 12.5.2.1 is merely an eligibility rule that does not regulate commercial activity. As stated in *Jones* "[a]ny limitation on access to intercollegiate sports is merely the incidental result of the organization's pursuit of its legitimate goals," which are "to promote amateurism in college sports and to integrate intercollegiate athletics into the educational programs of its member institutions." *Jones v. NCAA*, No. 74-5519-T, 1975 WL 938, at *1-2 (D. Mass. Mar. 21, 1975).

In this case, Bylaw 12.5.2.1 does not regulate commercial activity, rather it regulates the definition of amateurism. If the player wishes to remain an amateur student-athlete he must conform to the Bylaw in order to prevent the type on animosity among players and exploitation that is inherent in professional sports. The NCAA does not state that Snow cannot profit from his

image and likeness, simply that he cannot do so while being a student-athlete as it defeats the purpose of what it means to be an amateur.

C. The petitioner did not demonstrate that the NCAA compensation rules caused him an injury in fact of the type the antitrust laws were intended to prevent.

Antitrust injury is defined not merely as injury caused by an antitrust violation, but more restrictively as "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." Brunswick Corp. v. Pueblo Bowl–O–Mat, Inc., 429 U.S. 477, 489 (1977). In Brunswick, for example, the Supreme Court held that "a plaintiff must prove that his loss flows from an anticompetitive aspect of the defendant's behavior.... If the injury flows from aspects of the defendant's conduct that are beneficial or neutral to competition, there is no antitrust injury, even if the defendant's conduct is illegal per se." Pool Water, 258 F.3d at 1034. Glen Holly Entm't, Inc. v. Tektronix Inc., 343 F.3d 1000, 1007–08 (9th Cir.), opinion amended on denial of reh'g, 352 F.3d 367 (9th Cir. 2003).

In this case, the injury suffered by Snow is not of the type that the antitrust laws were intended to prevent. The injury claimed by Snow is his loss of eligibility to play as a student athlete in the NCAA. R. at 16. This loss flowed from the fact that Snow violated Bylaw 12.5.2.1, which is not violative of the antitrust laws as it is not anticompetitive. Antitrust laws were meant to prevent corporations from taking advantage of consumers, not to prevent schools from protecting their student-athletes.

II. THE FOURTEENTH CIRCUIT CORRECTLY HELD THAT SECTION 301 OF THE LABOR MANAGEMENT RELATIONS ACT PREEMPTS THE PETITIONERS' COMMON LAW CLAIMS OF NEGLIGENCE BECAUSE THE CLAIMS AROSE FROM RIGHTS CREATED BY THE COLLECTIVE BARGAINING AGREEMENT AND ARE NOT SUFFICIENTLY INDEPENDENT FROM THE TERMS OF THAT AGREEMENT.

The United States Court of Appeals for the Fourteenth Circuit ruled correctly as a matter of law that Section 301 of the Labor Management Relations Act (LMRA) preempts the players'

state law 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). The state law negligence claims are preempted because the rights are created by the CBA terms. Since the issues are inseparable from the CBA's these claims must be resolved under federal law. *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 456 (1957). A state law claim alleging violation of a contract between an employer or labor organization "must either be treated as a Section 301 claim, or dismissed as preempted by federal labor-contract law" when resolution of that claim is "substantially dependent upon analysis of the terms of an agreement made between the parties." *Allis–Chalmers Corp. v. Lueck*, 471 U.S. 202, 220 (1985).

In this case, the state law negligence claims are preempted because the issues both arise from the rights created by the CBA or are inseparable from the CBA's, so these claims must be resolved under federal law. *Textile Workers*, 353 U.S. at 456. While the facts of this case are novel, this Court's established jurisprudence in this area of law provides a reliable basis for affirming the Fourteenth Circuit's ruling and holding that Petitioners' state law claims are preempted by Section 301 of the LMRA.

Additionally, congressional intent furthers the application of Section 301 to these facts because the intent was to promote uniform application of agreed upon terms in a CBA. 29 U.S.C. 185(a); *Textile Workers,* 353 U.S. at 456. By creating minimum standards all employees are protected, however if state law is permitted to supersede the collectively bargained for terms, the CBA is ineffective at creating the uniform standard.

A. Petitioner's negligence claims arise out of rights created by the CBA.

Through Section 301 of the LMRA and *Textile Workers*, Congress and the Supreme Court created a federal cause of action for disputes relating to collective bargaining agreements. 29 U.S.C. § 185(a); *Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 104 (1962); 353 U.S. at 456. If a

state law claim requires analysis of a CBA's terms, then the state law claims are preempted by federal law. *Lueck*, 471 U.S. at 220; *Gore v. TWA*, 210 F.3d 944, 951 (8th Cir. 2000).

State law claims requiring inseparable analysis of a CBA's terms are preempted. *Lueck*, 471 U.S. at 213. In *Lueck*, an employee brought a state law tort claim for alleged bad faith in the employer's handling of disability-payment benefits negotiated under a CBA. 471 U.S. at 204. This Court held that the tort claim was preempted because it was "inextricably intertwined with consideration of the labor contract." *Id.* at 213. This Court indicated that "not every dispute concerning employment, or tangentially involving a provision of a [CBA]" is preempted; however, "[b]ecause the right asserted not only derive[d] from the contract, but [was] defined by the contractual obligation of good faith, [and] any attempt to assess liability . . . inevitably will involve contract interpretation." *Id.* at 212-13, 218.

If the tort claim arises from rights created by the terms of the CBA it is preempted. *Gore*, 210 F.3d at 951. *Gore* involved an airline mechanic who brought negligence claims against his employer, but the claims were preempted by the Railway Labor Act because the rights and duties relating to the negligence claims were created in the CBA. 210 F.3d at 949. The Eighth Circuit stated, "When the collective bargaining contract is the source of the duty allegedly breached, application of the tort remedy is preempted." *Id.* at 951.

In this case, because the rights asserted are derived from the CBA, Snow and the other Petitioner's claims must be preempted. *See Lueck*, 471 U.S. at 204. This Court must first examine whether the CBA between the NFL and the NFLPA placed an implied duty of care on the teams. *International Brotherhood of Electric Workers v. Hechler*, 481 U.S. 851, 862 (1987). Since the state law claims are defined by the contractual obligation good faith as in *Lueck*, the assessment of those claims will require interpretation of the terms of the CBA. 471 U.S. at 218. For the Petitioners to have a negligence claim against the team all elements of

negligence must be met, and to determine if all elements of negligence are met this Court must look at the terms of the CBA.

The CBA mandates that all clubs have numerous board-certified physicians in different fields of medical expertise as well as certified consultants, including a cardiovascular specialist and orthopedic surgeon. These physicians "primary duty is to provide player medical care not the club". NFL CBA Art. 36 § 1(a)-(c). Here, Snow and the other Petitioners do not have a claim for negligent hiring or retention but for the fact that clubs are required to maintain a staff of physicians to treat players. As in *Gore*, the negligence-based claims are preempted by the fact that the rights Snow and Petitioners are claiming were violated, were created by the CBA's provisions establishing the medical care and certification required. Additionally, the CBA creates a duty among clubs and players to "deter and detect substance abuse". NFL CBA Art. 36 § 1(c). Not only does the CBA create this duty to be recognize the effects of substances, but it places some of that responsibilities on the players. *Id.* In this instance, the rights Petitioners claim to sue for a painkiller addiction, arise from the CBA itself.

B. Petitioners' negligence claims are not sufficiently independent from their CBA with the NFL to be brought in state court.

The Petitioner's negligence claims are inextricable from the terms of the CBA made with the NFL, thus are preempted by Section 301 of the LMRA. The CBA creates the rights and obligations of both parties and without them, there would be no claims for the Petitioners' to make. Thus, interpretation of the CBA is required, and so federal law must govern.

To survive preemption, the state law claims must be independent of the CBAs, but express conflict between CBAs and the state law claims are not required for Section 301 to govern. *Hechler*, 481 U.S. at 859. This Court in *Hechler* stated that regarding tort liability, "a court would have to ascertain, first, whether the collective-bargaining agreement in fact placed

an implied duty of care on the union . . . that is whether, and to what extent, the union's duty extended to the particular responsibilities alleged". *Id.* at 862.

Here, the players' rights and the teams' obligations created by the CBA are inseparable from the state law claims because the Court must determine what obligation the CBA imposed and whether the NFL and teams failed to meet those obligations. R. at 12. The NFL created league-wide requirements regarding the health and safety of its players. R. at 12. So to determine if the teams were negligent in their treatment of players, it is necessary to examine the terms of the CBA and then examine the conduct of the teams in relation to the bargained for terms, as was required in *Luecks*. 471 U.S. at 220. Accordingly, the District Court was incorrect in finding that Petitioners' state law claims were only tangentially related to the CBA. R. at 33.

While Petitioner's argued that the ruling in *Rowland* means independent sporting clubs, such as the Saints, owe a common law duty of reasonable care to players, the Fourteenth Circuit was correct in differentiating *Rowland* from the facts of this case. *Rowland v. Christian,* 69 Cal.2d 108, 113 (1968); R. at 10. In *Rowland*, the common law duty was applied to a land possessor and not a sporting club, and there is in fact no case law applying such a duty to a sporting club. R. at 11. Furthermore, Petitioners assume that every state would impose the same common law duty on not only the NFL's independent clubs, but also the League itself. No state has ever held that a professional sports league owed such a duty to prevent and stop mistreatment of players by independent clubs.

1. The petitioners' negligent hiring and retention claim is preempted by Section 301; The petitioner's negligent misrepresentation and negligence per se claims are preempted by Section 301.

The CBA created a uniform health and safety requirement for all teams in the NFL which requires analysis to determine if the Petitioners have claims against the NFL, therefore the negligent hiring and misrepresentation claims are preempted by Section 301 of the LMRA. This

Court recognized that "if the resolution of a state-law claim depends upon the meaning of a [CBA], the application of state law (which might lead to inconsistent results since there could be as many state-law principles as there are States) is pre-empted and federal labor-law principles necessarily uniform throughout the Nation-must be employed to resolve the dispute." *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 405-06 (1988). While there is currently no case law on point for this issue the Fourteenth Circuit was correct in finding that similar cases indicate Section 301 preempts the state law claims in this case.

The current case law examining CBAs and Section 301 preemption indicate that Petitioners' claims are preempted. *Williams v. National Football League*, 582 F.3d 863, 870–81 (8th Cir. 2009); *Smith v. National Football League Players Association*, No. 14 C 10559, 2014 WL 6776306 at *6–8 (E.D. Mo. Dec. 2, 2014); *Duerson v. National Football League, Inc.*, No. 12 C 2513, 2012 WL 1658353, at *3–4 (N.D. Ill. May 11, 2012); *Stringer v. National Football League*, 474 F.Supp. 2d 894, 898–99, 910–11 (S.D. Ohio 2007). The Eighth Circuit held in *Williams* that whether the NFL owed players a duty to warn could not be determined without examining the expectations established in the CBA. 582 F.3d at 870–81. In *Williams,* two NFL players were suing their team for fraud, negligence, and negligent representation after failing to provide them with an ingredient-specific warning about banned substances. *Id.* The Eighth Circuit ruled the presence of a duty was subject to the terms of the CBA and thus the claims were "inextricably intertwined" with the CBA. *Id.* at 881.

If there is a duty of care, courts have held that the degree of care the team owes the players is determined by the terms of CBA. *Stringer,* 474 F.Supp. 2d at 898–99, 910–11. *Stringer* involved negligence claims brought after a player died from heat exhaustion from a summer practice. *Id.* at 898. The court held that the degree of care relied on "pre-existing contractual duties imposed by the CBA on individual NFL clubs concerning the general health

and safety of the NFL players." *Id.* at 910. Specifically, courts need to examine the provisions regarding certification of trainers and duties imposed on physicians to determine the degree of care owed by the NFL. *Id.* at 910-911.

If there is a duty of care imposed on a team, it is necessary to evaluate the terms of the CBA as factors weighing toward or against the NFL failing to meet its duty. *Duerson*, No. 12 C 2513, 2012 WL 1658353, at *3–4. In *Duerson*, the estate of a player who committed suicide as a result of brain damage sued the NFL for negligence and negligence for failure to warn among other claims. *Id.* at *2. The CBA provided that team doctors had to provide a written warning if there was a "significantly aggravated" physical condition. *Id.*at 9-10. The court found that because it was necessary to determine the meaning of "significantly aggravated" within the CBA, Duerson's claims were "substantially dependent" on an interpretation of CBA terms. *Id.* at 11.

Even in cases in which players are suing their union, the NFLPA, and not the league courts have found that it is necessary to examine the terms of the CBA if looking to bring negligence-based claims. *Smith,* No. 14 C 10559, 2014 WL 6776306 at *6–8. In *Smith*, players sued the NFLPA for negligence relating to the treatment of concussions alleging their union had a duty to research mitigating concussions. *Id.* at *3-4. The court held that even though the CBA did not explicitly say the NFLPA had a duty, because there is an implied duty based on the other general medical provisions, it is necessary to interpret the CBA. *Id.* at *19-20.

Petitioners may argue that because their claims relate to prescription drugs, the NFL had a duty of reasonable care in the distribution of the painkillers. However, the District Court of Tulania stated, "[H]ere, any duty to exercise reasonable care in the distribution of medications does not arise through statute or by contract; no statute explicitly establishes such a duty." R. at

31. It is necessary for the Court to look at the terms of the CBA to determine what duty was placed on the clubs and the NFL.

The negligence claims in this case require the examination of the terms of the CBA regarding the general health and welfare of players. Like in *Williams* determining if there is a duty of care imposed on the NFL is "inextricably intertwined" with the terms of the CBA. 582 F.3d at 870–81. Similarly, in *Stringer* the court needed to evaluate the degree of a duty of care by reading what duties were imposed by the negotiated CBA. 474 F.Supp. 2d at 910-911. Here, Petitioners' claims of negligent misrepresentation, retention, and misrepresentation cannot be evaluated without looking at the provisions regarding certification of trainers and duties imposed on physicians. As the court stated in *Duerson*, to determine if the NFL did negligently hire and retain the doctors who prescribed Petitioners' medication, it is necessary to determine the degree of care required by the CBA. No. 12 C 2513, 2012 WL 1658353, at *11. Additionally, for the negligent misrepresentation claims, this Court will need to determine if based on the standards negotiated in the CBA the NFL failed to meet its duty, thus interpreting the terms of the CBA. Therefore, the Petitioners' claims require this Court to interpret the terms of the CBA and are "inextricably intertwined" and Section 301 of the LMRA preempts the state law claims.

CONCLUSION

For the foregoing reasons, respondents respectfully request that this Court affirm the Fourteenth Circuit's holding that NCAA Bylaw 12.5.2.1 does not violate Section 1 of the Sherman Act and that the state law claims are preempted by Section 301 of the LMRA.

Dated January 18, 2019.

Respectfully submitted,

_/s/_____
Team Ten
Counsel for the Respondents, NCAA & NFL