Team Number: 9

No. 09-214

In the

SUPREME COURT OF THE

UNITED STATES OF AMERICA

JON SNOW, and other similarly situated plaintiffs,
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 PETITIONERS

QUESTIONS PRESENTED

(1) Whether NCAA Bylaw 12.5.2.1, which forbids student-athletes from receiving compensation from business entities that use their likeness, is in violation of the Sherman Act for foreclosing the commercial market of student-athletes' names and images?

(2) Whether the state law claims of common law negligence and fraud brought against the NFL are preempted by the Labor Management Relations Act, even where those claims are established by law, not the Collective Bargaining Agreement, and where those claims do not require any interpretation of the Collective Bargaining Agreement?

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OPINIONS BELOW

The Court of Appeals' opinion is available at Docket No. 09-2108. The District Court opinion is available at docket number 09-AC-0213.

JURISDICTION

The United States Supreme Court has jurisdiction to review this case pursuant to 28 U.S.C. § 1254(1), which states that the Supreme Court may review cases from the circuit courts of appeals "[b]y writ of certiorari granted upon the petition of any party to any civil or criminal case." This Court granted a petition for writ of certiorari in *Snow v. NCAA*, Docket No. 09-214. (R. 1).

STATUES AND REGULATIONS

The relevant statutory provisions and regulations are reprinted in an appendix to this brief. App., *infra*, a-b.

STATEMENT OF THE CASE

I. Statement of Facts

Jon Snow ("Snow") was a star Quarterback for Tulania University. *Snow v. NCAA*, No. 09-AC-0213 at 13 (S.D. Tulania 2018). After being nominated for multiple awards, Apple, Inc. ("Apple") approached Snow and other similarly situated star players with a proposal to enter a contract in which the players would have their image and likeness used as emojis. *Id.* Apple agreed to pay each participant $1,000, and promised an additional one-dollar royalty fee for each download by Apple consumers. *Id.* Snow agreed to the contract and earned $3,500 during the trial period. *Id.* Other Tulania athletes soon complained to Cersei Lannister, head of Tulania compliance, who subsequently notified the National Collegiate Athletic Association ("NCAA"). *Id.* The NCAA then suspended Snow for violating NCAA Bylaw 12.5.2.1, effectively ending Snow's collegiate career. *Id.*

Snow then declared for the National Football League ("NFL") Draft. *Id.* The New Orleans Saints selected Snow, who performed exceptionally for the team during his rookie season. *Id.* Over the course of his rookie year, doctors and trainers prescribed him multiple painkillers to manage head and ankle pain, but no one ever disclosed the side effects and risks posed with each medication. *Id.* Snow and other similarly situated players were given surface level pain management medication and sent back onto the field. *Id.* Snow, now in the second year of his contract, has an addiction to painkillers and has been diagnosed with an enlarged heart and permanent nerve damage in his ankle. *Id.*

II. Procedural History

Snow filed two actions. *Id.* First, after being suspended by the NCAA, Snow filed suit under Section 1 of the Sherman Act seeking to invalidate NCAA Bylaw 12.5.2.1. *Id.* Second, Snow

and similarly situated players filed suit against the NFL alleging negligence and fraud under state common law. *Id.*

After filing the second suit, the United States District Court for the Southern District of Tulania consolidated the cases, and both defendants filed Motions to Dismiss. *Id.* The district court held that Snow showed injury-in-fact because the NCAA foreclosed on the market for his name, image, and likeness. *Id.* at 19. The district court also held that the negligence claims against the NFL were not preempted under Section 301 of the Labor Management Relations Act ("LMRA"). *Id.* at 26.

Both the NCAA and the NFL appealed to the United States Court of Appeals for the Fourteenth Circuit. *NCAA v. Snow*, No. 09-2108 at 4 (14th Cir. 2018). On appeal, the Fourteenth Circuit reversed the district court's holding, deciding that precedent demands the NCAA Bylaws be upheld and that the NFL Collective Bargaining Agreement ("CBA") preempts the Plaintiffs' common law negligence claims under Section 301 of the LMRA. *Id.* at 4, 11.

Snow filed a petition for writ of certiorari to the United States Supreme Court, which the Court granted. (R. 1, 2).

SUMMARY OF THE ARGUMENT

The Court should reverse the Fourteenth Circuit's holdings that Snow's Sherman Act challenge to NCAA Bylaw 12.5.2.1 could not be sustained under *stare decisis*, and that Snow's claims required interpretation of the NFL CBA and were preempted by Section 301 of the Labor Management Relations Act.

First, NCAA Bylaw 12.5.2.1 is in violation of the Sherman Act under a Rule of Reason analysis because it has an anticompetitive effect on a market without a countervailing procompetitive rationale. The Bylaw is tantamount to wage-fixing for student-athletes that harms both the student-athletes and the product the NCAA seeks to provide: college football. Wage-fixing is per se illegal as a horizontal price restraint, and, accordingly, it is an anticompetitive practice. Not only has the NCAA failed to provide a procompetitive rationale for the Bylaw in this case, its reliance on its own statement that the Bylaw protects the "character" of college athletics is illusory. Accordingly, this Court should find NCAA Bylaw 12.5.2.1 in violation of the Sherman Act.

Second, Snow's claims are established by common law and statute, not the CBA, and the rights conferred are not substantially dependent on interpreting the CBA. The duties within the common law claims are established by statute and apply broadly to society, including to the NFL, and the NFL breached those duties when it failed to disclose the risks associated with various prescription drugs. Additionally, Snow's claims are not substantially dependent on analyzing the CBA. Precedent requires that a CBA provision be directly analogous to the claim, and there are no specific provisions regarding distribution of prescription drugs. Accordingly, this Court should find Snow's claims survive preemption.

ARGUMENT

I. NCAA BYLAW 12.5.2.1 IS IN VIOLATION OF THE SHERMAN ACT, AND SNOW CAN DEMONSTRATE AN INJURY-IN-FACT STEMMING FROM THE ANTICOMPETITIVE EFFECTS OF THE ILLEGAL BYLAW.

In its 114 years of existence, the NCAA has evolved from a forum in which university trustees can discuss the health risks of college athletics to the sole overseer of the multi-billion-dollar college sports industry. *See* Marc Edelman, *A Short Treatise on Amateurism and Antitrust Law: Why the NCAA's No-Pay Rules Violate Section 1 of the Sherman Act*, 64 CASE W. RES. L. REV. 61, 64-65 (2013). Today, the NCAA imposes an official constitution and bylaws on its members—approximately 1,200 universities—of which members are not allowed to opt out. *Id.* at 66. Student-athlete eligibility is one area the NCAA heavily regulates. Article 12 of the NCAA Bylaws codifies athletes' amateurism requirements and contains a subsection of "[n]onpermissible" actions. *See* 2018-19 NCAA Division 1 Manual § 12.5.2, at 76 [hereinafter "NCAA Bylaws"]. Regarding student-athletes' participation in advertisements, Section 12.5.2.1 requires:

> 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 use of such product or service.

While the NCAA touts its eligibility requirements as a means to preserve the character of college athletics, the restrictions on student-athlete compensation are inherently anticompetitive and in blatant violation of the Sherman Act.

A. The Sherman Act Declares Anticompetitive Conduct Illegal

The opening section of the Sherman Act declares: "[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 declared to be illegal." 15 U.S.C. § 1 (2012). First enacted in 1890, the Act "was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade." *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 4 (1958). The Sherman Act is premised on the theory that unrestrained competition will lead to "the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conductive to the preservation of our democratic political and social institutions." *Id.*

While on its face, Section 1 of the Sherman Act seems to restrict almost all contracts, courts have continuously interpreted the provision as only restricting "those contracts or combinations that 'unreasonably' restrain competition." *Id.* at 5 (first citing *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1, 58 (1911), then citing *Chicago Board of Trade v. United States*, 246 U.S. 231 (1918)). There are two broad methods by which a court can deem a contract or combination an unreasonable restriction on competition: as per se illegal or as in violation of the Rule of Reason. *See id.; NCAA v. Bd. of Regents of Univ. of Ok.*, 468 U.S. 85 (1984).

An agreement or practice is per se illegal "when surrounding circumstances make the likelihood of anticompetitive conduct so great as to render unjustified further examination of the challenged conduct." *Bd. of Regents of Univ. of Ok.*, 468 U.S. at 104. These surrounding circumstances warrant per se illegality because "per se unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved." *N. Pac. Ry. Co.*, 356 U.S. at 5.

When an agreement or practice is not per se illegal, it is analyzed under the Rule of Reason. *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 723 (1988). The Rule of Reason is a fact-specific inquiry of "the market power and structure . . . to assess the [agreement or practice's] actual effect" on competition. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768 (1984). In the recent United States Supreme Court case *Ohio v. American Express Co.*, 138 S. Ct. 2247 (2018), the Court used a three-step, burden shifting analysis to determine whether a restriction violated the Rule of Reason. The Court stated:

> Under this framework, the plaintiff has the initial burden to prove that the challenged restraint has a substantial anticompetitive effect that harms consumers in the relevant market. If the plaintiff carries its burden, then the burden shifts to the defendant to show a procompetitive rationale for the restraint. If the defendant makes this showing, then the burden shifts back to the plaintiff to demonstrate that the procompetitive efficiencies could be reasonably achieved through less anticompetitive means.

Id. at 2284 (internal citations omitted). The Court emphasized the goal of the Rule of Reason as "distinguish[ing] between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest." *Id.* (quoting *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877, 886 (2007)).

B. Under NCAA v. Board of Regents of University of Oklahoma, NCAA Bylaw 12.5.2.1 Should Be Analyzed Using the Rule of Reason

In 1984, the United States Supreme Court used the Rule of Reason in *NCAA v. Board of Regents of University of Oklahoma* to determine that an NCAA Bylaw regulating television broadcasting was in violation of Section 1 of the Sherman Act. 486 U.S. 85 (1984). In this case, the NCAA negotiated an agreement with two television networks imposing restrictions on the number of games each network could broadcast, the number of times each university could be featured on television, and the minimum compensation the networks had to pay the universities. *See id.* at 92-94. When an alternative association—the College Football Association ("CFA"),

which contained NCAA member universities with higher-grossing football programs—attempted to negotiate its own agreements with a third network, the NCAA publicly stated it would take severe disciplinary action against any universities that used the CFA agreement. *Id.* at 94-95. The Board of Regents of the University of Oklahoma then filed a claim against the NCAA.

At the beginning of its analysis, the Court found the NCAA's television broadcast agreement and requirements "no doubt . . . creates restraint of trade." *Id.* at 98 (internal quotation marks omitted). While the Court acknowledged that horizontal price fixing of the type at issue is "ordinarily condemned as a matter of law under an 'illegal per se' approach," the Court declined to apply a per se analysis to the case because it "involve[d] an industry in which horizontal restraints on competition are essential if the product is to be available at all." *Id.* at 100-01. Because of the unique nature of the NCAA's role and function in college sports, the Court discussed the NCAA's justifications for the restraint at issue, and thus applied the Rule of Reason. *Id.* at 103. The Court ultimately found the NCAA's agreement and restrictions in violation of Section 1 of the Sherman Act. *Id.* at 120.

The NCAA contends that *Board of Regents* concluded that its amateur rules are "valid as a matter of law." *Snow v. NCAA*, No. 09-AC-0213 at 14 (S.D. Tulania 2018). Not only were the NCAA amateurism rules not at issue in *Board of Regents*, this Court never once used the phrase "as a matter of law" regarding anything other than horizontal price fixing, in which case the phrase was preceded by important language that condemned price fixing as invalid. *Board of Regents*, 468 U.S. at 99, 100, 109, 130. Not only is the NCAA's contention factually incorrect, even if *Board of Regents* did classify the NCAA amateurism rules as "valid," that language would be dicta, because the issue in the case concerned television broadcast restrictions.

While Snow's case contains a wholly different factual scenario than the one addressed in *Board of Regents,* the unique nature of the NCAA remains the same. Accordingly, the Court should use the Rule of Reason to determine that NCAA Bylaw 12.5.2.1 violates Section 1 of the Sherman Act.

C. NCAA Bylaw 12.5.2.1 Violates the Sherman Act Under the Rule of Reason

The United States Court of Appeals for the Fourteenth Circuit erred in reversing the United States District Court for the Southern District of Tulania's holding that the NCAA Bylaw violates the Sherman Act. The Fourteenth Circuit failed to address the merits of the case and instead relied in error on *stare decisis* to uphold Bylaw 12.5.2.1. Accordingly, the Court should use a Rule of Reason analysis to address the *merits* of the case at bar.

As a preliminary matter, the NCAA contends that the Sherman Act does not apply to its Bylaws, because its Bylaws do not regulate a commercial activity. *Snow*, No. 09-AC-0213 at 14. This argument is based on the idea that the NCAA is noncommercial because of its involvement in higher education. This argument, however, is directly in contrast with this Court's precedent holding "[t]he nature of an occupation, standing alone, does not provide sanctuary from the Sherman Act." *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 787 (1975) (citing *Associated Press v. United States*, 326 U.S. 1, 7 (1945)). Furthermore, this argument fails at its most basic level because "[n]o knowledgeable observer could earnestly assert that big-time college football programs competing for highly sought-after high school football players do not anticipate economic gain from a successful recruiting program." *Agnew v. NCAA*, 683 F.3d 328, 340 (7th Cir. 2012). Additionally, this Court's application of a Sherman Act analysis in *Board of Regents* indicates that it did, indeed, find the NCAA's operation to be a commercial activity. Moreover,

the NCAA regulates an eleven-*billion*-dollar industry, and, accordingly, its Bylaws must be seen as regulating commercial activity. *See* Edelman, *supra* at 64.

In order to engage in a Rule of Reason analysis, Snow must first provide a definition of the relevant market that is incurring the anticompetitive effects of the NCAA's antitrust violations. *See Agnew*, 683 F.3d at 336-37. Here, the market affected consists of Division I college athletes. This is a cognizable, commercial market because Division I college athletes—particularly football players—drive huge profits for their universities and for the NCAA as a whole. To acquire these profits, universities engage in commercial transactions with its student-athletes in which the universities exchange grants and scholarships, access to training facilities, and coaching instruction (among other benefits) in exchange for the student-athletes' labor in the form of competitive play.

1. NCAA Bylaw 12.5.2.1 Has an Anticompetitive Effect on Competition

Under the Rule of Reason analysis, an anticompetitive effect is present "where the plaintiff shows that a horizontal agreement to fix prices exists, that the agreement is effective, and that the prices set by such an agreement are more favorable to the defendant than otherwise would have resulted from the operation of market forces." *Law v. NCAA*, 134 F.3d 1010, 1020 (10th Cir. 2010) (using a Rule of Reason analysis to determine that the NCAA's attempt to set compensation limits on assistant coaches was illegal under the Sherman Act). Wage fixing is a type of horizontal price fixing to which antitrust laws apply. *See* Michael Lindsey et al., *Employers Beware: The DOJ and FTC Confirm that Naked Wage-Fixing and "No Poaching" Agreements Are Per Se Antitrust Violations*, ABA (Dec. 2016), https://www.americanbar.org/content/dam/aba/publishing/antitrust_source/dec16_lindsay_12_12f.authcheckdam.pdf. NCAA Bylaw 12.5.2.1 is tantamount to illegal wage fixing for student-athletes that harms both the athletes and the quality of the product the NCAA seeks to provide, creating an anticompetitive effect.

Wage fixing is an "agreement by two or more employers to set the compensation rate of workers at a pre-specified amount." *Edelman, supra* at 76. Wage fixing is illegal "not only because it harms workers but also because it injures the competitive marketplace by driving workers away from their current line of employment and into another field." *Id.*; *see, e.g., Brown v. Pro Football, Inc.*, 50 F.3d 1041, 1061-61 (D.C. Cir. 1995) ("If team owners join together to suppress the price of athletic services through monopsony practices, most athletes will not be able to switch to another line of work. Thus, the labor market for professional athletes' services is one of a very few areas where there is real potential for anticompetitive monopsonistic practices."). Wage fixing agreements, outside of CBAs, "restrain mobility on the part of employees who would otherwise have the opportunity, in a competitive market for services, to transfer to higher paid opportunities offered by other[s]." *Cordova v. Bache & Co.*, 321 F. Supp. 600, 606 (S.D.N.Y. 1970).

The NCAA will certainly argue that student-athletes are not employees and cannot be subject to illegal wage fixing. While student-athletes are not traditionally considered "employees," they certainly meet its definition. To determine whether an employment relationship exists, the Internal Revenue Service ("IRS") uses a multifactor test, which specifically looks at (1) the behavioral control the employer has over the alleged employee, (2) the financial control the employer has over the alleged employee, and (3) the relationship as seen by the parties. *Understanding Employee v. Contractor Designation*, IRS (July 20, 2017), https://www.irs.gov/newsroom/understanding-employee-vs-contractor-designation. Notably, the NCAA and its member universities have significant control over student-athletes' behavior, tasks, schedules, and activities. *See* Michael H. LeRoy, *An Invisible Union for an Invisible Labor Market: College Football and the Union Substitution Effect*, 2012 WIS. L. REV. 1077, 1095 (2012) (illustrating the behavioral controls athletic programs enforce on their student-athletes).

Additionally, the NCAA clearly exercises financial controls over the student-athletes, as evidenced by the no-pay Bylaw at issue as well as the NCAA's thorough financial aid limits. *See* NCAA Bylaws § 15.01-15.5.11. Furthermore, the NCAA itself admits that its Division I football players spend an average of 44.8 hours per week on athletics. *How Student-Athletes Feel About Time Demands*, NCAA (June 28, 2017), https://www.ncaa.org/sites/default/files/2017GOALS_Time_demands_20170628.pdf. Accordingly, student-athletes are equivalent to employees of the NCAA and should be treated as such under the law. *See, e.g., Univ. of Denver v. Nemeth*, 257 P.2d 423 (Colo. 1953) (upholding an award of worker's compensation to an injured student-athlete, because his injuries arose from and in the course of employment).[1]

Because student-athletes should be treated as employees under the law, this Court should look to the United States Court of Appeals for the Tenth Circuit. In *Law v. NCAA*, 134 F.3d 1010 (10th Cir. 1998), the NCAA attempted to impose a salary cap on Division I assistant coaches, indisputably employees of NCAA member universities. *Id.* at 1014-15. In that case, the Tenth Circuit resoundingly found that the "undisputed evidence" of the wage fixing at issue "supports a finding of anticompetitive effect." *Id.* at 1020. Here, NCAA Bylaw 12.5.2.1's no-pay rule is analogous to the assistant coaches' salary cap because 12.5.2.1 also imposes a maximum amount an employee—the student-athlete—can be paid; in the student-athlete's case, that amount is unjustifiably zero dollars. Even if athletic scholarships and financial aid are counted as pay (even

[1] It was only *after* this decision that the NCAA coined the term "student-athlete." Robert A. McCormick and Amy Christian McCormick, *The Myth of the Student-Athlete: The College Athlete as Employee*, 81 WASH. L. REV. 71, 84 (2006). As then-NCAA Executive Director Walter Byers later confessed, "[The] threat was the dreaded notion that NCAA athletes could be identified as employees by state industrial commission and the courts. . . . The NCAA adopted and mandated the term 'student-athlete' purposely to buttress the notion that such individuals should be considered students rather than employees." *Id.* (quoting WALTER BYERS WITH CHARLES HAMMER, UNSPORTSMANLIKE CONDUCT: EXPLOITING COLLEGE ATHLETES 69 (1995)).

though they are not taxable income by the IRS), NCAA Bylaws Article 15 still imposes a maximum amount the student-athlete can receive. Accordingly, NCAA Bylaw 12.5.2.1 has an anticompetitive effect under the Sherman Act.

2. The NCAA Has Not Provided a Sufficient Procompetitive Rationale for Bylaw 12.5.2.1.

When an anticompetitive effect is established under a Rule of Reason analysis, the restraint at issue may still survive under the Sherman Act if "the procompetitive benefits of the restraint justify the anticompetitive effects." *Law,* 134 F.3d at 1021; *see also Clorox Co. v. Sterling Winthrop, Inc.*, 117 F.3d 50, 56 (2d Cir. 1997) (explaining the various steps of a Rule of Reason analysis). Under the Rule of Reason, procompetitive rationale must "tend to show that, on balance, 'the challenged restraint enhances competition.'" *Law*, 134 F.3d at 1021 (quoting *Board of Regents*, 468 U.S. at 104). Other than the NCAA's false contentions that its amateurism rules are "valid as a matter of law," and that its multi-billion-dollar industry is not a "commercial activity," *Snow*, No. 09-AC-0213 at 14, it proposes no argument that Bylaw 12.5.2.1 advances a procompetitive goal, and thus it has not met its burden.

The Fourteenth Circuit implicitly found NCAA Bylaw 12.5.2.1 procompetitive, but it did so in error. Notably, the Fourteenth Circuit relied on a partial, out-of-context quote from *Board of Regents* in which the Court stated in full, "[i]n order to preserve the character and quality of the 'product,' athletes must not be paid, must be required to attend class, and the like. And the integrity of the 'product' cannot be preserved except by a mutual agreement." *Board of Regents*, 468 U.S. at 102. The Fourteenth Circuit erred in relying on this passage that was not only partial but also is purely dicta. A commentary on the "character" of college athletics had nothing to do with the television broadcast restrictions at issue in that case and was irrelevant to the Court's holding. Furthermore, the Court later stated in *Board of Regents* that "[t]he specific restraints on football

telecasts that are challenged in this case do not, however, fit into the same mold as do rules defining . . . the eligibility of participants." *Id.* at 117. Thus, the NCAA cannot rely on *Board of Regents* to assert that eligibility rules are procompetitive.

Traditionally, the NCAA argues that its no-pay and amateurism rules maintain the "character" of college athletics and must be procompetitive on that fact alone. It argues that withholding compensation from the players creating and maintaining the product is essential for the product to exist at all. The sheer number of other restrictions on student-athlete eligibility, however, weakens this assertion significantly. *See generally* NCAA Bylaws Arts. 12, 14. For example, the NCAA requires student-athletes meet a minimum grade-point average, NCAA Bylaws § 14.02.13.1, maintain full-time enrollment, NCAA Bylaws § 14.01.2, and meet NCAA-specified core curriculum requirements, NCAA Bylaws § 14.3.1.3. These requirements are in addition to the strict requirements each member university imposes on its own athletes, which frequently include curfews, study hours, and restricting personal behavior (such as "dry" periods). These and other safeguards protect the "character" of college athletics, making the NCAA's argument that its no-pay rules are the sport's only protection baseless.

Even if this Court were to find that the NCAA provided sufficient procompetitive rationale to shift the burden of proof for violation under the Rule of Reason back to Snow, the anticompetitive effects still outweigh any such procompetitive rationale. The other eligibility restrictions provide a less anticompetitive means by which the NCAA can accomplish its goals. Because the NCAA has not shown that Bylaw 12.5.2.1 has a procompetitive rationale that outweighs its anticompetitive effect, it is in violation of the Sherman Act.

D. Because NCAA Bylaw 12.5.2.1 Violates the Sherman Act, Mr. Snow Can Establish an Injury-in-Fact that Justifies Relief

The final argument the NCAA advanced to the district court was that Snow did not have standing to assert an antitrust injury under the Sherman Act. For a plaintiff to have standing in a Sherman Act claim, they must show "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). As demonstrated above, NCAA Bylaw 12.5.2.1 is in violation of the Sherman Act. Snow acted contrary to an illegal NCAA Bylaw causing the NCAA to strip Snow of his student-athlete eligibility, resulting in clear injury to Snow. Because his injury flows from the NCAA's illegal no-pay provision Bylaw, Snow has standing to assert his injury-in-fact at the hands of the NCAA. Accordingly, this Court should reverse the holding of the Fourteenth Circuit.

II. SNOW'S CLAIMS ARE NOT PREEMPTED BY § 301 OF THE LABOR MANAGEMENT RELATIONS ACT AS SNOW'S CLAIMS ARISE FROM DUTIES CREATED BY STATE LAW AND ARE NOT DEPENDENT ON INTERPRETING THE NFL CBA.

Section 301 of the LMRA grants jurisdiction to appropriate federal courts to resolve "[s]uits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce." 29 U.S.C. § 185(a) (2012). The preemption analysis comes from this Court's interpretation of the statute, with the goal of uniform interpretation of national CBAs. *See e.g. Textile Workers Union of Am. v. Lincoln Mills of Ala.*, 353 U.S. 448, 456 (1957)*; Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 103 (1962). While this Court has previously expressed concern over plaintiffs "elevat[ing] form over substance . . . to evade the requirements of § 301 by relabeling their contract claims as [state law claims]," that is not what Snow attempts to do here. *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 211 (1985).

This Court has not adopted a formal test for Section 301 preemption; rather lower courts interpret this Court's precedents as creating a two-pronged test for preemption. Michael Telis,

Note, *Playing Through the Haze: The NFL Concussion Litigation and Section 301 Preemption*, 102 GEO. L.J. 1841, 1850 (2014). First, courts determine whether the asserted cause of action is created by state law or the CBA, and "[i]f the right exists solely as a result of the CBA, then the claim is preempted." *Burnside v. Kiewit Pacific Corp.*, 491 F.3d 1053, 1059 (9th Cir. 2007). If, however, the right exists independently of the CBA, courts "must still consider whether it is nevertheless 'substantially dependent on analysis of a collective-bargaining agreement.'" *Id.* (quoting *Int'l Bhd. of Elec. Workers v. Helcher*, 481 U.S. 851, 859 n.3 (1987)). "If such dependence exists, then the claim is preempted by section 301; if not, then the claim can proceed under state law." *Id.* at 1059-60.

This Court should find not only that Snow's claims involve rights conferred by state law, not by the CBA, but also that any analysis of the claims is not substantially dependent on interpreting the CBA.

A. Snow's Negligence and Fraud Claims Involve Rights Conferred by State Law, Not the CBA

Snow alleges that the NFL breached statutory and common law duties owed to all players when the NFL prescribed painkillers to Snow without disclosing the side effects and risks posed by each medication. *Snow v. NCAA*, No. 09-AC-0213 at 13 (S.D. Tulania 2018). Specifically, Snow alleges a variety of common law negligence and fraud claims where duties owed by the NFL to Snow are established by state and federal statutes. *Id.* at 23. Even where CBAs exist, there is a presumption against permitting an employer from "acting in a way that might violate the duty of reasonable care owed to every person in society," thus prohibiting preemption for state law claims based on non-negotiable societal standards. *United Steelworkers v. Rawson*, 495 U.S. 362, 371 (1990). Therefore, Snow surpasses the first Section 301 preemption hurdle because the duty owed

to Snow by the NFL arises from the duty to obey the law, and the duty to obey the law is non-negotiable. *See Cramer v. Consol. Freightways, Inc.*, 255 F.3d 683, 695 (9th Cir. 2001).

Snow alleges the NFL breached duties prescribed by both federal statutes—the Controlled Substances Act and the Food, Drugs, and Cosmetics Act—and state statutes—the California Pharmacy Laws. *Snow*, No. 09-AC-0213 at 23. Snow contends the rights created by these statutes exist as law arising independently of contract and applying broadly to society. There is no need to consult the CBA, as the rights are conferred by statute, and this Court has clearly stated that claims based on "non-negotiable state-law rights . . . independent of any right established by contract" are not preempted. *Allis Chalmers Corp.*, 471 U.S. at 213.

Accordingly, Snow's claims are not a basis for preemption, and surpass the first Section 301 hurdle, because the claims arise from non-negotiable statutory duties tethered to common law claims.

B. The Rights Conferred by Statute Are Not Substantially Dependent on Interpreting the CBA

Regarding the second hurdle, this Court has said claims are substantially dependent on interpreting the CBA only if the claim is "substantially dependent on analysis of the terms of an agreement" or "inextricably intertwined with consideration of the terms of the [CBA]." *Allis-Chalmers Corp.*, 471 U.S. at 213. Snow's claims are not substantially dependent on interpreting the CBA because the rights at issue stem from state tort law.

The takeaway from the "substantially dependent" and "inextricably intertwined" tests is simple: merely asserting a right that relates to the CBA or merely "look[ing] to" the CBA does not preempt the claims. *Id.* at 220; *Livadas v. Bradshaw*, 512 U.S. 107, 125 (1994); *see also Balcorta v. Twentieth Century-Fox Film Corp.*, 208 F.3d 1102, 1108 (9th Cir. 2000) ("[I]n the context of § 301 complete preemption, the term 'interpret' is defined narrowly—it means something more than

'consider,' 'refer to,' or 'apply.'"); *Meyer v. Schnucks Market, Inc.*, 163 F.3d 1048, 1051 (8th Cir. 1998) (establishing that "[f]or there to be complete preemption . . . the claim must require the interpretation of some specific provision of the CBA; it is not enough that the events in question took place in the workplace or that the CBA creates rights and duties similar or identical to those on which the state law claim is based"); *Cramer*, 255 F.3d at 691 ("If the claim is plainly based on state law, § 301 pre-emption is not mandated simply because the defendant refers to the CBA in mounting a defense."). The Fourteenth Circuit incorrectly found that "[t]o determine whether the NFL breached [the] duties, we would need to consult, construe, and apply what was required by the CBA." *NCAA v. Snow*, No. 09-2108 at 9 (14th Cir. 2018).

This Court should overturn the Fourteenth Circuit for three reasons. First, Snow has a right to receive proper medical care under the law, and even though certain provisions of the NFL CBA reference medical care, those references do not amount to interpretation. Second, cases interpreting the NFL CBA and finding no preemption support Snow's position. Third, cases interpreting the NFL CBA and finding preemption are distinguishable from this case, supporting Snow's position.

1. The Duties Within Snow's Common Law Claims Arise Exclusively from Statutes

State and federal laws dictate the duty the NFL owes to Snow. Snow alleges the NFL acted in violation of the Controlled Substances Act, 21 U.S.C. § 801-971; the Food, Drugs, and Cosmetics Act, 21 U.S.C. § 301-99f; and the California Pharmacy Laws, Cal. Bus. & Prof. Code § 4000-4429. *Snow*, No. 09-AC-0213 at 23. The duty owed under those statutes applies to everyone in society, not just members of the bargaining agreement. Thus, the rights afforded to Snow under these statutes exist "independent of the employers' obligations under the collective bargaining agreement." *Atchison, Topeka & Santa Fe Rwy. v. Buell*, 480 U.S. 557, 565 (1987).

Labor contracts cannot modify non-negotiable rights created independently under the law. *Cramer*, 255 F.3d at 690. Snow's statutory rights are attached to the aforementioned common law torts claims. Under the statutory scheme of these laws, all residents of the United States are owed a duty of conforming medical practices. *Burnside*, 491 F.3d at 1059. And, whether a defendant has violated the law "is controlled only by the provisions of the . . . statute," not by interpretation of the CBA. *Balcorta*, 208 F.3d at 1111.

Common law claims derived from illegal conduct are not preempted even if no statutory private right of action exists. In *Cramer v. Consol. Freightways, Inc.*, the plaintiffs argued the employer per se violated a state privacy law. 255 F.3d at 695. The United States Court of Appeals for the Ninth Circuit agreed with the plaintiffs and held that the common law claims could survive because plaintiffs sued on non-negotiable state law grounds independent of any CBA. *Id.* The plaintiffs' claim in *Cramer*, like the present claims, had no statutory private right to action but still survived preemption because the duties guaranteed by the various state and federal laws were tethered to a state common law tort claim. *Id.*

Further, in *Burnside*, the plaintiff brought two claims based on illegal conduct made by their employer. *Burnside*, 491 F.3d at 1074. The violation of the plaintiff's rights in that case was not preempted, as "the right came into existence entirely independently of the CBA" and "the claims . . . can be resolved without interpreting these agreements." *Id.* at 1064, 1074. Other cases support the same premise that rights granted by statutes tethered to common law claims can survive preemption, as they are independent of any CBA interpretation. *See Galvez v. Kuhn*, 933 F.2d 773, 777-780 (9th Cir. 1991) (determining common-law claims of assault and battery, tethered to criminal statutes of assault and battery, which had no private right of action, supported the conclusion that plaintiffs' rights were independent of any contract and not preempted); *see also*

Lingle v. Norge Div. Magic Chef Inc., 486 U.S. 399, 410, 413 (1988) (finding the claim to be independent of the CBA and not preempted because the common law tort of wrongful discharge was tethered to a state statute). Therefore, because the present claim is founded on a non-negotiable right separate from the CBA, it should avoid preemption.

2. Cases Finding No Preemption Support Reversing the Fourteenth Circuit

Section 301 preemption must be treated on a case-by-case basis, and "[a]s one would expect in case-by-case analysis, in some situations preemption is found and in others it is not." *In re Bentz Metal Products Co., Inc.*, 253 F.3d 283, 289 (7th Cir. 2001). However, the cases not finding preemption are directly analogous to this case.

In *Dent v. National Football League*, the plaintiffs alleged that the NFL "distributed controlled substances and prescription drugs to its players in violation of both state and federal laws, and that the manner in which these drugs were administered left players with permanent injuries and chronic medical conditions." 902 F.3d 1109, 1114-15 (9th Cir. 2018). Just as we argue here, the plaintiffs in *Dent* argued the NFL "violated state and federal laws governing prescription drugs" and did not allege "that the NFL violated the CBAs." *Id.* at 1118. The United States Court of Appeals for the Ninth Circuit held the NFL "engaged in conduct that was completely outside the scope of the CBAs[,]" any references to the CBA were "simply irrelevant to the question of whether NFL's conduct violated federal laws regarding the distribution of controlled substances and state laws regarding hiring, retention, misrepresentation and fraud[,]" and, most importantly, "no interpretation of the CBAs [was] necessary." *Id.* at 1126.

The Ninth Circuit in *Dent* and the district court in this case correctly found that Section 301 of the LMRA does not preempt these specific claims. For example, both cases allege negligence per se in the distribution of controlled substances, and both courts found that the NFL

owed "a duty to conduct such activities with reasonable care." *Id.* at 1119; *Snow*, No. 09-AC-0213 at 23. Then, both courts determined that the standard of care for distribution of controlled substances is determined by statute, and "whether the NFL breached its duty to handle drugs with reasonable care can be determined by comparing the conduct of the NFL to the requirements of the statutes at issue [with] no need to look to, let alone interpret, the CBAs." *Dent*, 902 F.3d at 1119; *Snow*, No. 09-AC-0213 at 23. Finally, both courts correctly found that determining whether the alleged violation of statute caused the plaintiffs' injuries does not require interpretation of the CBAs. *Dent*, 902 F.3d at 1119-20 (citing *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 261 (1994)); *Snow*, No. 09-AC-0213 at 23.

In *Green v. Ariz. Cardinals Football Club LLC*, former players and their spouses brought common law claims against the Cardinals alleging both that the Cardinals represented concussions as not a serious issue and that the Team forced the players to return to work after they were concussed. 21 F. Supp. 3d 1020, 1024 (E.D. Mo. 2014). The court in *Green* held that the claims raised by plaintiffs "arise independent of CBAs as a function of the common law and thus are not preempted," because the claims were based on "the common law duties to maintain a safe working environment, not to expose employees to unreasonable risks of harm, and to warn employees about the existence of dangers which they could not reasonably be expected to be aware." *Green*, 21 F. Supp. 3d. at 1027, 1030. These are duties that exist independently of the CBAs and "can be adjudged in accordance with the standards set forth in the Missouri common law." *Id.* at 1029.

Similarly, in this case, Snow raises common law claims where the duty is established by statute and applies broadly to everyone distributing prescription drugs. Additionally, Snow alleges the NFL's lack of disclosure is what caused his injuries of an enlarged heart, permanent nerve damage, and addiction to painkillers, *Snow*, No. 09-AC-0213 at 13, which deserves preemption in

light of the face that the court in *Green* found no preemption where Green alleged that concussions *could* lead to CTE. *Green*, 21 F.Supp.3d at 1024. The trial court must be able to examine the facts regarding the NFL's conduct. Therefore, this Court should follow its own precedent that insists "'purely factual questions' about . . . an employer's conduct and motives do not 'require a court to interpret any term of a collective bargaining agreement.'" *Norris*, 512 U.S. at 261 (quoting *Lingle*, 486 U.S. at 407).

This Court should not find preemption because Snow's claims are independent of the CBA, and Snow alleges direct, rather than theoretical, injury caused by the NFL's violation of state and federal statutes. The trial court must now be permitted to find facts regarding the NFL's conduct which does not require interpreting the CBA.

3. Cases Finding Preemption Are Distinguishable from This Case and Support Reversing the Fourteenth Circuit

While some courts have preempted claims brought by players against the NFL, those cases are distinguishable as they required interpretation of the CBAs. Here, Snow's claims should not be preempted as his claims rely on statutes, not on CBA interpretation.

In *Williams v. NFL*, NFL players took supplements, tested positive for a banned substance, and were subsequently suspended under the NFL's rule of strict liability for testing positive for banned substances. *Williams v. NFL*, 582 F.3d 863, 870-71 (8th Cir. 2009). The players sued the NFL, alleging numerous violations of Minnesota common law and violations of two Minnesota statutes. *Id.* at 872. The district court determined the claims were preempted, and the United States Court of Appeals for the Eighth Circuit affirmed. *Id.* at 873. The Eighth Circuit first found that both statutory claims raised by the plaintiffs were not preempted because determining whether the NFL complied with the statute was an application of fact to law that does not require interpreting the CBA. *Id.* at 876, 878, 880. The court then found, however, the common law claims were

preempted by Section 301 because proving the elements of the claims mandated interpretation of the CBAs. *Id.* at 881-83.

In *Williams*, the players disregarded clear statements by the NFL that the NFL "strongly encourage[s] [players] to avoid the use of supplements altogether," and that any player taking supplements does so "AT YOUR OWN RISK!" *Williams*, 582 F.3d at 869 (emphasis in original). This unmistakably clear language led the Eighth Circuit to find that the players' claims required interpretation of the CBA. *Id.* at 881. In Snow's case, however, "no provisions of the CBA even arguably render the players' reliance on the NFL's purported representations unreasonable." *Snow*, No. 09-AC-0213 at 26. Unlike in *Williams*, "a court would have no need to consult the CBAs to resolve the plaintiffs' negligence claim. Instead, it would compare the NFL's conduct with the requirements of the [statutes] governing the distribution of prescription drugs." *Id.*

In *Atwater v. NFLPA*, former NFL players sued the NFL and the NFL Players Association under Georgia law for negligence, negligent misrepresentation, and breach of fiduciary duty because the players lost money using a financial advisor recommended by the NFL. *Atwater v. NFLPA*, 626 F.3d 1170, 1174 (11th Cir. 2010). The district court determined that Section 301 preempted the state-law claims, and the United States Court of Appeals for the Eleventh Circuit affirmed. *Id*. at 1185. Snow's case is clearly distinguishable from *Atwater* for two reasons: (1) there was no statute in *Atwater* providing duties owed to society at large as there is here, and (2) there was a definitive and clear section of the CBA regarding a Career Planning Program in *Atwater* that "provide[s] information to players on handling their personal finances" that is not present in this case. *Id.* at 1174-75.

The Eleventh Circuit looked at the elements of the claim and determined CBA interpretation mandatory because the duties owed to the plaintiffs "arose directly from the CBA's

[Career Planning Program section]." *Id.* at 1179-80. In Snow's case, "interpretation of the CBAs will not be required" because the NFL only cites general provisions related to medical care that stem from the CBA, such as "the right to access medical facilities, view their medical records, and obtain second opinions." *Snow*, No. 09-AC-0213 at 26. These provisions do not "directly address the subject of the litigation: who was responsible for disclosing risks of prescription drugs provided to players by the NFL." *Id*. To determine culpability, Snow's case requires examining the statutes and applying facts to be learned in discovery. Unlike both *Williams* and *Atwater,* the CBA will not be involved in Snow's case, and thus no preemption is warranted. Accordingly, this Court should reverse the holding of the Fourteenth Circuit.

CONCLUSION

For the foregoing reasons, the Petitioners respectively request that this Court reverse the decision of the United States Circuit Court of Appeals for the Fourteenth Circuit.

Respectfully Submitted,

Counsel for Petitioners

APPENDIX

Statutes

15 U.S.C. § 1. Trusts, etc., in restraint of trade illegal; penalty.

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

29 U.S.C. § 185. Suits by and Against Labor Organizations

(a) Venue, amount, and citizenship

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

(b) Responsibility for acts of agent; entity for purposes of suit; enforcement of money judgments

Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

(c) Jurisdiction

For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

(d) Service of process

The service of summons, subpoena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

(e) Determination of question of agency

For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

Regulations

2018-19 NCAA Division 1 Manual § 12.5.2.1

After becoming a student-athlete, an individual shall not be eligible for participation in intercollegiate athletics if the individual:

(a) Accepts any remuneration for or permits the use of his or her name or picture to advertise, recommend or promote directly the sale or use of a commercial product or service of any kind; or

(b) Receives remuneration for endorsing a commercial product or service through the individual's use of such product or service.