NO. 09-214

IN THE

SUPREME COURT OF THE UNITED STATES

SPRING TERM 2019

JON SNOW, and other similarly situated individuals,
Petitioner,

v.

NATIONAL COLLEGIATE ATHLETIC ASS'N, and the NATIONAL FOOTBALL LEAGUE,
Respondent.

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

BRIEF FOR RESPONDENT

January 29, 2019

Team 16
Counsel for Respondent

QUESTIONS PRESENTED

I. Are the NCAA amateurism and eligibility bylaws that preserve the unique product of intercollegiate athletics protected as a matter of law from attack under Section 1 of the Sherman Act?

II. Are state law negligence claims brought by NFL players preempted by the Labor Management Relations Act by virtue of being dependent upon the terms of the NFL Collective Bargaining Agreement?

TABLE OF CONTENTS

TABLE OF CONTENTS (CONT.)

TABLE OF AUTHORITIES

Page(s)

Cases

SUPREME COURT OF THE UNITED STATES

TABLE OF AUTHORITIES (CONT.)

Page(s)

UNITED STATES COURTS OF APPEALS

TABLE OF AUTHORITIES (CONT.)

UNITED STATES DISTRICT COURTS

STATE COURTS

TABLE OF AUTHORITIES (CONT.)

NO. 09-214

IN THE

SUPREME COURT OF THE UNITED STATES

SPRING TERM 2019

JON SNOW, and other similarly situated individuals,
Petitioner,

v.

NATIONAL COLLEGIATE ATHLETIC ASS'N, and the NATIONAL FOOTBALL LEAGUE,
Respondent.

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

BRIEF FOR RESPONDENT

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of Tulania is reported at *Jon Snow, et. al. v. National Collegiate Athletic Ass'n and the National Football League.*, No. 09-AC-0213 (S.D.T. 2018). The opinion of the United States Court of Appeals for the Fourteenth Circuit is reported at *National Collegiate Athletic Ass'n. v. Jon Snow et. al.*, No. 09-2108 (14th Cir. 2018).

JURISDICTIONAL STATEMENT

This Court has jurisdiction to review the decision of the United States Court of Appeals for the Fourteenth Circuit upon granting a writ of certiorari pursuant to 28 U.S.C. § 1254(1).

STANDARD OF REVIEW

This Court reviews questions of law *de novo*. *Pierce v. Underwood*, 487 U.S. 552, 558 (1988).

STATUTES INVOLVED

The relevant language from Section 1 of the Sherman Antitrust Act, NCAA Bylaw 12.5.2.1 ("Bylaw 12.5.2.1"), the Labor Management Relations Act, and all relevant provisions of the National Football League Collective Bargaining Agreement can be found in Appendices A, B, C, and D respectively.

STATEMENT OF THE CASE

Statement of Facts

The National Collegiate Athletic Association's ("NCAA") Bylaw 12.5.2.1 declares ineligible those student athletes that accept any remuneration for the use of their name or picture to directly advertise, recommend, or promote the sale or use of a commercial product or service, or receive remuneration for endorsing a commercial product or service through the individual's use of such product. (R. 14.) Jon Snow ("Snow"), quarterback for Tulania University ("Tulania"), violated this NCAA rule by accepting payment and royalties from Apple, Inc. ("Apple"). (R. 13.) Apple paid Snow $1,000 for the use of his name, image, and likeness for a new emoji keyboard. (R. 13.) Apple also promised an additional $1 royalty fee for each download of the keyboard. (R. 13.) Snow earned approximately $3,500 from his deal with Apple. (R. 13.) Other Tulania student-athletes complained to Cersei Lannister, head of the

university's compliance department, that Snow was receiving unfair compensation. (R. 13.) Accordingly, the NCAA suspended Snow indefinitely for violation of Bylaw 12.5.2.1. (R. 13.)

No longer eligible to play football for Tulania, Snow decided to enter the National Football League ("NFL") draft. (R. 13.) The New Orleans Saints, a professional football franchise of the NFL, drafted Snow. (R. 13.) During Snow's rookie year, team doctors and trainers treated his injuries, and prescribed him painkillers to manage pain resulting from head collisions and ankle injuries. (R. 13.) The painkillers' side effects were neither disclosed to Snow, nor other players receiving the same medication. (R. 13.) Snow was diagnosed with an enlarged heart, developed permanent nerve damage in his ankle, and became addicted to painkillers. (R. 13.)

Procedural History

Snow filed two separate claims in the United States District Court for the Southern District of Tulania. (R. 13.) First, following his indefinite suspension for violating Bylaw 12.5.2.1, Snow, on behalf of himself and other similarly situated collegiate athletes, brought suit against the NCAA alleging that Bylaw 12.5.2.1 violated Section 1 of the Sherman Antitrust Act. (R. 4, 13.) Second, Snow, on behalf of himself and other similarly situated NFL players, alleged that the NFL was liable for negligent distribution and encouragement of excessive painkiller prescriptions. (R. 4, 13.) The district court consolidated the cases in the interest of judicial efficiency. (R. 13.)

The district court found for Snow on both issues. (R. 14, 26.) As to Snow's Sherman Act claim against the NCAA, the court found that the NCAA's amateurism rules are not valid as a matter of law. (R. 14.) The court accepted *Board of Regents'* guidance with respect to the procompetitive purposes served by the NCAA's amateurism rules, but went no further, holding the amateurism rules' validity must be proved, not presumed. (R. 17.) Further, the court held

that compensation rules are a restraint on "commercial activity," thus subject to the Sherman Act, and that Snow sufficiently showed that he suffered antitrust injury as a result of Bylaw 12.5.2.1. (R. 19.)

As to Snow's claim against the NFL, the district court found that the complaint alleged claims that do not arise from the collective bargaining agreement, and thus are not preempted by the Labor Management Relations Act. (R. 26.)

The NCAA and NFL appealed the decision of the district court to the United States Court of Appeals for the Fourteenth Circuit. (R. 4.) The circuit court reversed the district court's decision. (R. 11.) As to whether the NCAA's amateurism and eligibility bylaws are protected as a matter of law against Sherman Act claims, the court held that *stare decisis* demands that thirty years of unchallenged precedent upholding the NCAA's standards and rules be maintained. (R. 6.) As to the NFL's appeal, the court held that Snow's common law claims require interpreting the collective bargaining agreement, and are therefore preempted by the Labor Management Relations Act. (R. 11.)

Snow filed a petition for a writ of certiorari in the United States Supreme Court requesting an appeal from the Fourteenth Circuit's decision for both of its decisions. (R. 1.)

SUMMARY OF ARGUMENT

The Fourteenth Circuit correctly held the NCAA's amateurism and eligibility bylaws are procompetitive as a matter of law. *NCAA v. Board of Regents* and its progeny affirm that NCAA bylaws aimed at regulating and preserving the intercollegiate model of amateurism are necessary for the survival of the product. The NCAA's amateurism bylaws are noncommercial in nature and outside the purview of the Sherman Act, as there is no relevant market for a noncommercial regulation.

Even if Bylaw 12.5.2.1 is subject to Rule of Reason scrutiny, it survives because regulating amateurism has significant procompetitive effects and any modification to the NCAA's amateurism model would result in the destruction of the product itself. Moreover, Petitioner fails to demonstrate any antitrust injury; any injury suffered by Snow stemmed from violating eligibility rules, not from any anticompetitive goal of the NCAA.

Further, the Fourteenth Circuit correctly held that Petitioners' state law claims are preempted under Section 301 of the Labor Management Relations Act. Because Petitioners' allegations pertain to the NFL's duty to provide medical care to players, this Court must analyze the medical provisions in the parties' collective bargaining agreement to discern whether the NFL assumed and breached the duty Petitioners assert. This Court has expressed its intent to have a national labor law rather than having employment disputes governed by inconsistent local rules. Specifically, this Court has held that all disputes arising out of collective bargaining agreements be governed by federal law.

Petitioners' state law negligence claims arise directly from the language of the parties' collective bargaining agreement, and to hold otherwise will subject this suit to the inconsistent local laws sought to be avoided by this Court. Petitioners' claims concerning controlled substances under the negligence *per se* doctrine are unfounded because the statute upon which Petitioners' seek relief does not apply to the NFL. The NFL itself does not prescribe medications, and instead the parties' collective bargaining agreement reviews team doctors' medical care requirements. Accordingly, we ask this Court to AFFIRM the holding of the Fourteenth Circuit Court of Appeals.

ARGUMENT

I. THE NCAA'S UNIQUE POSITION IN PROMOTING AND PROVIDING AMATEUR ATHLETICS RENDERS ITS AMATEURISM RULES PROCOMPETITIVE AS A MATTER OF LAW.

Section 1 of the Sherman Act states "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . . is hereby declared to be illegal." 15 U.S.C. § 1 (2004). A traditional Section 1 claim must satisfy three elements: (1) an agreement, which (2) unreasonably restrains competition, and (3) affects interstate commerce. *Bhan v. NME Hosps., Inc.*, 929 F.2d 1404, 1410 (9th Cir. 1991).

A. *NCAA v. Board of Regents* and its Progeny Affirm That NCAA Amateurism Rules Are Procompetitive as a Matter of Law.

Dr. Mark Emmert, the President of the NCAA, stated that the priorities of the NCAA are "student-athlete well-being and the protection of the collegiate model that we feel strongly and visceral about."[1] In order to protect its product, the NCAA must promulgate rules to preserve amateurism. NCAA Bylaw 12.5.2.1 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. 4.) A price fixing scheme like this would ordinarily be deemed *per se* illegal. *NCAA v. Board of Regents*, 468 U.S. 85, 100 (1984). However, in *Board of Regents*, this Court recognized the unique and essential position that the NCAA holds in providing its product. *Id.* The NCAA operates in an industry in which "horizontal restraints on competition are essential if the product is to be available at all." *Id.* at 101.

[1] Office of the President: On the Mark, NCAA, http://www.ncaa.org/about/who-we-are/office-president/office-president-mark (accessed Jan. 25, 2019).

In *Board of Regents*, the Court's extended analysis of NCAA amateurism rules demonstrates that while non-amateurism rules promulgated by the NCAA must survive Rule of Reason scrutiny, amateurism rules are necessary to maintain the integrity of amateurism and are procompetitive. 468 U.S. 85, 100 (1984). "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." *Id.* at 117. The Court reinforces that the NCAA must be granted ample latitude to preserve the tradition of the student-athlete: "the preservation of the student-athlete in higher education adds richness and diversity to intercollegiate athletics and is entirely consistent with the goals of the Sherman Act." *Id.* at 120. The unique and necessary role of the NCAA has remained unchanged in the years since *Board of Regents*.

Following *Board of Regents*, the Fifth Circuit held that the NCAA's restrictions on compensation to football players failed as a matter of law. *McCormack v. NCAA*, 845 F.2d 1338, 1345 (5th Cir. 1988). In *McCormack*, the petitioners challenged the NCAA eligibility rules limiting compensation allowed to football players. *Id.* at 1340. The court indicated that *Board of Regents* advises the NCAA's eligibility rules expressly satisfied the goals of the Sherman Act. *Id.* at 1344. Importantly, the court identified the niche that the NCAA operates in: "[t]he 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." *Id.* at 1344-45. The Fifth Circuit followed this Court's guidance in recognizing that the sole purpose of the NCAA is to integrate athletics with academics. *Id.* The NCAA's eligibility rules serve to achieve this goal; holding to the contrary would strip the NCAA of its functionality and destroy amateurism in intercollegiate athletics.

The Third Circuit also affirmed the ability of the NCAA to regulate eligibility without undergoing antitrust scrutiny. *Smith v. NCAA*, 139 F.3d 180, 187 (3d Cir. 1998). In *Smith*, a graduate student challenged the NCAA bylaw rendering a student-athlete ineligible from competing at a school other than the one where a student-athlete earned an undergraduate degree. *Id*. at 182. The court held that the bylaw at issue was a reasonable restraint that furthered the purpose of promoting amateurism. *Id*. at 187. The court described how even if it were to apply a Rule of Reason analysis, "we think that the bylaw so clearly survives a rule of reason analysis that we do not hesitate upholding it by affirming an order granting a motion to dismiss Smith's antitrust count for failure to state a claim on which relief can be granted." *Id*.

Finally, in *Agnew v. NCAA*, the Seventh Circuit described in powerful terms the presumption of procompetitiveness of the NCAA's eligibility and compensation bylaws. 683 F.3d 328, 342-43 (7th Cir. 2012). The court reasoned that when an NCAA bylaw is intended to maintain the tradition of amateurism or the preservation of the student-athlete, the bylaw is presumed procompetitive. *Id.* Only when the bylaw in question is not, on its face, aiding in the preservation of amateurism in intercollegiate athletics should a court apply Rule of Reason analysis. *Id.* at 343. Here, Bylaw 12.5.2.1 is targeted at maintaining amateurism in intercollegiate athletics; it addresses eligibility and how accepting compensation for selling the athlete's name, image, or likeness ("NIL") will render that athlete ineligible. (R. 4.) Looking at Bylaw 12.5.2.1 on its face, it cannot be interpreted as anything other than an eligibility rule serving precisely the purpose that *Board of Regents*, *McCormack*, and *Agnew* respected as necessary to preserve the tradition of intercollegiate athletics.

The NCAA's amateurism and compensation rules are consistently presumed procompetitive, allowing the NCAA to protect amateurism and provide opportunities for young adults to attain an affordable education. *See Banks v. NCAA*, 977 F.2d 1081, 1089-90 (7th Cir.

1992) (holding a no draft eligibility rule provides a bright line between professional and college football and is therefore procompetitive); *see Justice v. NCAA*, 577 F. Supp. 356, 378 (D. Ariz. 1983) (holding that NCAA regulations preserving amateurism and fair competition have been held up as reasonable restraints); *see Jones v. NCAA*, 392 F. Supp. 295, 304 (D. Mass. 1975) (reasoning that "[a]ny limitation on access to intercollegiate sports is merely the incidental result of the organization's pursuit of its legitimate goals."). Every year, the NCAA and its member institutions award over $3.3 billion in athletic scholarships to over 150,000 student-athletes competing in twenty-four different sports.[2] The reality is that a vast majority of student-athletes will not compete professionally after graduation.[3] For example, only 1.2% of all eligible Men's Basketball student-athletes and only 1.9% of all eligible Men's Football student-athletes will compete in a professional league.[4] Discussing the importance of football and basketball to the NCAA model, President Dr. Mark Emmert stated "[w]e couldn't do any of those other sports if we are not successful in football. In the NCAA, we can't support anything else we love unless we're successful in Division I men's basketball. Whether you like that or not, it's just a fact."[5]

The only student-athletes affected by NIL ineligibility requirements will be premier athletes like Snow. If Snow could accept compensation for the use of his NIL, this Court must consider the consequences of that decision for the remaining 480,000 student-athletes that rely on the NCAA to support the integration of athletics and education. Allowing student-athletes to accept compensation for the use of their NIL will eviscerate the infrastructure and fundamental purpose of the NCAA. If this practice were permitted, member institutions would likely refocus

---

[2] Where Does the Money Go?, NCAA, http://www.ncaa.org/about/resources/finances (accessed Jan. 25, 2019).
[3] Estimated Probability of Competing in Professional Athletics, NCAA, http://www.ncaa.org/about/resources/rese arch/estimated-probability-competing-professional-athletics (accessed Jan/ 25, 2019).
[4] *Id.*
[5] NCAA, *supra* note 1.

their funds to compete for these elite student-athletes, restricting access to education for thousands of students.

B. The *O'Bannon* Decision Does Not Pave the Way for This Court to Extend Compensation Allowed to Student-Athletes Past the Full Cost of Attendance.

O'Bannon v. NCAA incorrectly held that the NCAA's compensation rules should be subjected to Rule of Reason scrutiny. 802 F.3d 1049, 1053 (9th Cir. 2015). In *O'Bannon*, former student-athletes sued the NCAA over the prohibition on student-athletes receiving compensation for the use of their NIL in video games. *Id.* at 1055. At the time, the NCAA limited compensation to "grant in aid," the total cost of tuition and fees, room and board, and course-related books. *Id*. The court concluded that permitting student-athletes to receive compensation for the full cost of attendance would not violate the principles of amateurism in intercollegiate athletics. *Id*. at 1075. The Ninth Circuit erred, however, in ignoring the precedence set from *Board of Regents* and its progeny. The court dismissed the guidance in *Board of Regents* that the amateurism rules were separate and distinct from rules governing television-licensing agreements. *Id*. at 1063. This Court should ignore the Ninth Circuit's misguided understanding of *Board of Regents* because it flies in the face of the Supreme Court's discussion of the NCAA's amateurism regulations.

However, even if this Court adopts the Ninth Circuit's view, *O'Bannon* made an important distinction between compensation up to the full cost of attendance and any compensation above that threshold. *Id*. at 1053. The court agreed with the NCAA that "courts should not use antitrust law to make marginal adjustments to broadly reasonable market restraints." *Id*. at 1075 (citing *Am. Motor Inns, Inc. v. Holiday Inns, Inc.*, 521 F.2d 1230, 1249 (3d Cir. 1975) (denying that "the availability of an alternative means of achieving the asserted business purpose renders the existing arrangement unlawful if that alternative would be less restrictive of competition no matter to how small a degree")). The Ninth Circuit reversed the

district court's decision to allow student-athletes to receive up to $5,000 per year for the use of their NIL. *O'Bannon*, 802 F.3d at 1053. "The difference between offering student-athletes education-related compensation and offering them cash sums untethered to educational expenses is not minor; it is a quantum leap. Once that line is crossed, we see no basis for returning to a rule of amateurism and no defined stopping point." *Id*. at 1078-79.

This recognizes the severity of any departure from amateurism. Once the NCAA is forced to give an inch, the result will inevitably lead to incremental erosion of the amateurism model in intercollegiate athletics. Here, this is precisely what Mr. Snow asks for, to be allowed to use his NIL to receive compensation untethered to his education. (R. 13.) Allowing Mr. Snow to receive compensation for his NIL will lead to the collapse of the NCAA's revered model of amateurism.

C. Even if This Court Adopts a Rule of Reason Analysis, Bylaw 12.5.2.1 Survives Rule of Reason Scrutiny Because its Procompetitive Effects Cannot Be Achieved by a Substantially Less Restrictive Alternative.

The Rule of Reason, as applied to antitrust claims, contains three steps. *Tanaka v. Univ. of S. Cal.*, 252 F.3d 1059, 1063 (9th Cir. 2001). First, the plaintiff must demonstrate that the restraint produces significant anticompetitive effects within a relevant market. *Id.* Second, the defendant must show evidence of the restraint's procompetitive effects. *Id.* Lastly, the plaintiff must then show that any legitimate objectives could be achieved in a substantially less restrictive manner. *Id.*

1. Bylaw 12.5.2.1 does not produce significant anticompetitive effects in a relevant market because an eligibility rule is noncommercial and cannot affect any market.

Bylaw 12.5.2.1 is an eligibility rule that is unrelated to the commercial activity of the NCAA, and therefore outside the scope of the Sherman Act. By its plain language, Section 1 of the Sherman Act only applies if the rule at issue is commercial in nature. *Worldwide Basketball*

& Sport Tours, Inc. v. NCAA, 388 F.3d 955, 958 (6th Cir. 2004). Many district courts have held that the Sherman Act does not apply to the NCAA's eligibility bylaws. *See Gaines v. NCAA*, 746 F. Supp. 738, 744-46 (M.D. Tenn. 1990) (holding that antitrust law cannot be used to invalidate NCAA eligibility rules); *see Jones*, 329 F. Supp. at 303 (D. Mass. 1975) (holding that antitrust law does not apply to NCAA eligibility rules). Though some NCAA rules have been held to be commercial in nature, Bylaw 12.5.2.1 here is not that. *See Board of Regents*, 468 U.S. at 98 (holding that NCAA rules limiting live broadcasting of college football games are subject to scrutiny under the Sherman Act); *see Law v. NCAA*, 134 F.3d 1010, 1024 (10th Cir. 1998) (applying the Sherman Act to NCAA rules limiting compensation to basketball coaches).

The dispositive inquiry is whether a particular NCAA bylaw itself is commercial, not whether the entity promulgating the rule is commercial. *Worldwide Basketball*, 388 F.3d at 959. Where in *Board of Regents,* the particular rule had a potential effect of reasonably restraining commercial activity in terms of television output and viewer demand, this Court distinguished the NCAA's television plan from its rulemaking and did not address whether the Sherman Act would apply to the latter. *Smith*, 139 F.3d at 185, vacated on other grounds by *NCAA v. Smith*, 525 U.S. 459 (1999). Since *Board of* Regents did not foreclose the possibility that eligibility rules are not commercial, by analyzing Bylaw 12.5.2.1 itself, it is clear that it governs eligibility and not commercial activity, thus not subject to antitrust scrutiny.

In *Smith*, the NCAA's "postbaccalaureate bylaw" prohibited athletes from participating in athletics at postgraduate schools other than the undergraduate school from which they earned their degree. *Id.* at 183. The Third Circuit held that "eligibility rules are not related to the NCAA's commercial activities . . . [because] rather than intending to provide the NCAA with a commercial advantage, the eligibility rules primarily seek to ensure fair competition in intercollegiate athletics." 139 F.3d at 185. Just as the bylaw in *Smith*, Bylaw 12.5.2.1

prohibiting student-athletes from selling their NIL is an eligibility rule because it seeks to ensure fair competition in intercollegiate athletics. Simply, if Bylaw 12.5.2.1 did not exist, the NCAA would not exist.

Further, the Sixth Circuit in *Bassett v. NCAA* held a coach's complaint lacked the critical commercial activity component required to permit application of the Sherman Act. 528 F.3d 426, 433 (6th Cir. 2008). There, a coach resigned due to allegations of breaking the NCAA rule against improperly inducing potential recruits. *Id.* at 429. The court analogized to the Third Circuit's decision in *Smith* to explain: "the NCAA's rules on recruiting student-athletes, specifically those rules prohibiting improper inducements . . . are all explicitly non-commercial." *Id.* at 433. These rules are non-commercial because they are designed to ensure competitiveness among schools. *Id.* Without such rules, the spirit of amateur athletics would be violated because a competitive advantage would be given to schools that can afford to pay highly prized student-athletes. *Id.* Similarly, Bylaw 12.5.2.1 is simply an eligibility rule designed to preserve the competitive nature among the 1,115 NCAA member schools.[6] By inquiring about the nature of Bylaw 12.5.2.1 itself, it necessarily follows that it is simply an eligibility rule that protects the integrity of amateur intercollegiate athletics. Ultimately, Petitioner fails the first step of the Rule of Reason analysis because a noncommercial bylaw cannot cause antitrust injury in a relevant market.

2. The NCAA's eligibility rule is designed to maintain the tradition of amateurism in intercollegiate athletics and has significant procompetitive effects.

As previously discussed, courts consistently hold that the NCAA's eligibility and compensation rules have significant procompetitive effects in promoting the tradition of amateurism. *See Board of Regents*, 468 U.S. at 120 (holding the preservation of the student-

[6] NCAA Member Schools, NCAA, http://www.ncaa.org/about/resources/research/ncaa-member-schools (accessed Jan. 25, 2019).

athlete in higher education adds richness and diversity to intercollegiate athletics and is entirely consistent with the goals of the Sherman Act); *see Smith*, 139 F.3d at 187 (holding that eligibility rules allow for the survival of the product and are procompetitive on balance); *see Agnew*, 683 F.3d at 342-43 (holding that eligibility rules intended to maintain the tradition of amateurism or the preservation of the student-athlete are presumed procompetitive).

Assessing Bylaw 12.5.2.1 and its procompetitive effects follows the same reasoning espoused in the holdings above. The goals of maintaining amateurism and preserving the revered model of intercollegiate athletics cannot be anything other than procompetitive. Restricting the ability of student-athletes to receive compensation for their NIL is essential to the ongoing viability of the NCAA. Without Bylaw 12.5.2.1 the NCAA will succumb to the commercial forces, placing it in direct competition with the likes of the NFL, NBA, etc. The effect would likely be major college athletic programs consolidating resources into acquiring talent and destroying the ability of smaller programs to compete on a national stage to provide access to higher education.

3. Any alternative to the amateurism model in intercollegiate athletics extinguishes the functionality of the NCAA and prevents the unique product from reaching consumers.

As the court in *O'Bannon* noted, once student-athletes are able to receive compensation for their NIL, "we have little doubt that plaintiffs will continue to challenge the arbitrary limit imposed by the district court until they have captured the full value of their NIL. At that point the NCAA will have surrendered its amateurism principles entirely." 802 F.3d at 1079. There is no viable alternative to the model in place. Any compensation above the full cost of attendance renders every student-athlete no longer an amateur.

Courts repeatedly follow the logic that eligibility rules, even if hypothetically subjected to Rule of Reason, are procompetitive. *See Banks*, 977 F.2d at 1087-94 (holding that NCAA's

"no-draft" and "no-agent" rules do not have an anticompetitive impact on a discernable market); *see Gaines*, 746 F. Supp. at 746; *see Jones*, 392 F. Supp. at 304 (noting in dicta that "any limitation on access to intercollegiate sports is merely the incidental result of the organization's pursuit of its legitimate goals"); *see also Justice*, 577 F. Supp. at 379 (holding that NCAA sanctions such as rendering a college team ineligible for post-season play imposed for violations of rule against providing compensation to student-athletes did not violate antitrust law because sanctions were reasonably related to the NCAA's goals of preserving amateurism). The fundamental principles of the NCAA must be preserved if the product of amateur collegiate athletics will be available at all. This Court should adopt the view of the aforementioned courts and hold that Bylaw 12.5.2.1 does not violate the Sherman Act and is procompetitive as a matter of law.

D. Petitioner Fails to Demonstrate Any Antitrust Injury.

Antitrust injury is a heightened standing requirement necessary to enforce antitrust laws. Petitioners must demonstrate "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Glen Holly Entm't, Inc. v. Tektronix Inc.*, 343 F.3d 1000, 1007-08 (9th Cir. 2003). Petitioners cannot satisfy this heightened standing requirement because there is no economic harm stemming from an eligibility rule; if Snow wanted to receive compensation for his NIL he can, but he would no longer be eligible to compete as a student-athlete.

In *Basset*, the court discussed the insufficiency of a head coach's alleged antitrust injury that stemmed from a ban for violating NCAA rules on offering compensation to potential student-athletes. 528 F.3d at 434. The court held that Basset's injury was the result of rules violations, not from some anticompetitive purpose. *Id*. Similarly, Snow's alleged injury stems and suffers from the same flaw as in *Basset*, any injury occurred as a result of a rules violation

rather than from an anticompetitive purpose. This Court should follow the logic from the Sixth Circuit and hold Mr. Snow cannot satisfy the heightened antitrust injury requirement because it did not occur due to any anticompetitive purpose.

II. STATE LAW NEGLIGENCE CLAIMS BROUGHT BY NFL ATHLETES AGAINST THE NFL ARE PREEMPTED BY THE LABOR MANAGEMENT RELATIONS ACT.

The Labor Management Relations Act ("LMRA") governs alleged violations of contracts between employers and labor organizations, and Section 301 provides that "suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . may be brought in any district court of the United States having jurisdiction of the parties." 29 U.S.C. § 185(a) (2018). Section 301 of the LMRA is therefore "a congressional mandate to the federal courts to fashion a body of federal common law to be used to address disputes arising out of labor contracts." *Kobold v. Good Samaritan Reg'l Med. Ctr.*, 832 F.3d 1024, 1032 (9th Cir. 2016) (quoting *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 209 (1985)). As such, Section 301 preempts state law claims "founded directly on rights created by collective-bargaining agreements, and also claims 'substantially dependent on analysis of a collective-bargaining agreement.'" *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 394 (1987) (quoting *Int'l Bhd. of Elec. Workers v. Hechler*, 481 U.S. 851, 859 n.3 (1987)).

This Court has held that Congress intended Section 301 to authorize federal courts to create a body of law for enforcing collective bargaining agreements ("CBA") that would be "fashion[ed] from the policy of our *national* labor laws." *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 456 (1957) (emphasis added) (aff'd by *Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 104 (1962) (noting that "Congress intended doctrines of federal labor law uniformly to prevail over inconsistent local rules")). Under this principle, when interpreting a state law claim brought between parties to a CBA, a court must first look to the terms of that CBA. *Lincoln Mills*, 353 U.S. at 456. Then, if "resolution of [the] state-law claim is substantially dependent

upon analysis of the terms of [the] agreement [or otherwise intertwined with the agreement] made between the parties to a labor contract, that claim must either be treated as a Section 301 claim or dismissed as preempted by federal labor-contract law." *Allis-Chalmers Corp. v. Lueck,* 471 U.S. 202, 220 (1985). Therefore, an *express* conflict between a state law claim and the terms of a CBA is not required for the state law claim to be preempted. *Id.* Accordingly, claims are not preempted when "the matter at hand can be resolved without interpreting the CBAs" whatsoever. *Burnside v. Kiewit Pac. Corp.*, 491 F.3d 1053*,* 1058 (9th Cir. 2007).

Even if the claim arises under state law, this Court must still determine "whether litigating the state law claim nonetheless requires interpretation of a CBA." *Alaska Airlines Inc. v. Schurke*, 898 F.3d 904, 920 (9th Cir. 2018). If the CBA must be interpreted, then the state law claim is preempted by Section 301. *Id.* The connection cannot be only proximally related, instead it must "inhere in the nature of the plaintiff's claim." *Cramer v. Consol. Freightways, Inc*., 255 F.3d 683, 691 (9th Cir. 2001). This "inquiry is not an inquiry into the merits of a claim; it is an inquiry into the claim's 'legal character.'" *Schurke*, 898 F.3d at 924 (quoting *Livadas v. Bradshaw*, 512 U.S. 107, 123-24 (1994)).

When required, preemption is critical because otherwise, "the process of negotiating an agreement would be made immeasurably more difficult by the necessity of trying to formulate contract provisions in such a way as to contain the same meaning under two or more systems of law which might someday be invoked in enforcing the contract." *Lucas Flour*, 369 U.S. at 103 (1962); *see also Cloverleaf Butter Co. v. Patterson*, 315 U.S. 148, 167-69 (1942); *see also Pa. R. Co. v. Pub. Serv. Comm'n*, 250 U.S. 566, 569 (1919). Allowing for preemption ensures "peaceable *consistent* resolution" of disputes arising from CBAs across the nation. *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 404 (1988) (emphasis added); *see also Anderson v. Ford Motor Co.*, 803 F.2d 953, 955 (8th Cir. 1986) (noting that "[u]niformity in the

interpretation of collective bargaining agreements is considered essential to the federal scheme favoring collective bargaining"). This Court's reasoning in *Lucas Flour* should be applied to hold that federal labor law rules should be "paramount" under Section 301, and that claims covered under Section 301 should "be decided according to the precepts of federal labor policy." 369 U.S. at 103.

A. The Petitioners' Negligence Claims Regarding Access to Medical Care Arise Solely from the CBA and Do Not Require Interpreting State Law.

Petitioners' claim that the National Football League ("NFL") was negligent in failing to intervene in the medical mistreatment of players arises directly from the CBA entered between the athletes and the NFL, and therefore should be interpreted under federal law. *See Atwater v. NFL Players Ass'n*, 626 F.3d 1170, 1174-75 (11th Cir. 2010). In *Atwater*, NFL players contended that the NFL was negligent in failing to conduct background checks on its players' financial advisers. *Id.* The plaintiffs' argument that their claim should be interpreted under state law was rejected by the Eleventh Circuit because the CBA between the players and the NFL explicitly addressed the players' financial obligations. *Id.* at 1181. The CBA provided that players were "solely responsible for their personal finances." *Id.* at 1181. Because of this language in the CBA, the Eleventh Circuit held that to determine if the NFL had acted negligently, the court would first need to interpret that provision of the CBA to assess the NFL's duty to players. *Id.* at 1182. Accordingly, the state law negligence claim was preempted by Section 301. *Id.*

Petitioners allege that the NFL breached its duty to "hire and retain educationally well-qualified, medically-competent, professionally-objective and specifically-trained professionals." (R. 9.) The CBA between Petitioners and Respondent explicitly addresses the NFL's medical responsibility to players, and therefore Section 301 preempts the state law negligence claim. The CBA contained "provisions related to medical care, including those that give players the right to

access medical facilities, view their medical records, and obtain second opinions." (R. 25.) The agreement also outlined "provisions related to team doctors' disclosure obligations," required each club to retain a board-certified orthopedic surgeon, and required all full-time trainers to be "certified by the National Athletic Trainers Association." (R. 9, 25.) Not only does the NFL address players' medical care through these provisions, it also establishes standards and liability for ensuring that players are protected in various aspects of their care. This agreement existing between the parties to this suit should preempt claims in state law in favor of a uniform federal law governed by the terms of the parties' agreement.

The district court incorrectly concluded that the CBA does not require the NFL to provide medical care to players. (R. 22.) For example, the CBA plainly provides that if any player's medical "condition could be significantly aggravated by continued performance, the physician will advise the player of such fact in writing before the player is again allowed to perform on-field activity." (R. 9.) The NFL requires that team trainers and physicians be properly certified and specifies that these professionals should monitor players' conditions and performance and react accordingly to maintain players' good health. (R. 9.) Because the CBA is anything but silent on standards for the provision of NFL players' medical care, the state law claim must be preempted by Section 301.

When the success of a state law claim lies completely outside any provision of the CBA, preemption is not required, and the state law claim may be brought. *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399 (1988). In *Lingle*, the plaintiff filed suit against her employer for discharging her after she requested workers' compensation. *Id.* at 402. The employee subsequently sued for retaliatory discharge, a state law claim, which this Court held should not be preempted by the LMRA. *Id.* at 413. This Court's decision rested upon the reasoning that because retaliatory discharge is a purely factual determination pertaining to the conduct of the

employee and the employer surrounding the employee's termination, the terms of the CBA were completely irrelevant to this analysis. *Lingle,* 486 U.S. at 407. This Court held that analyzing whether the employee was discharged and what the employer's motive for the discharge was did not "turn on the meaning of any provision of a collective-bargaining agreement." *Id.* at 407.

Unlike retaliatory discharge, negligence is not a purely factual inquiry. Instead, interpreting a negligence claim requires examining the duty of the alleged tortfeasor. *Rowland v. Christian*, 69 Cal. 2d 108, 112 (Cal. 1968). To determine what duty the NFL owes to its players, this Court must first look to the terms of the CBA that establish standards for players' medical care. Because the CBA contains language pertaining to matters such as required medical certifications, communication of players' medical prognoses, and players' access to medical records and other doctors, analyzing the NFL's duty to players turns on several provisions within the CBA. (R. 9.) Unlike in *Lingle*, the analysis of the claim brought by Petitioners requires a close look at the CBA, an agreement that outlines the responsibilities the NFL assumed to players regarding medical care. The necessary analysis of the CBA therefore demands that the Section 301 claim preempt the state law negligence claim. This decision will allow federal law to remain paramount in interpreting collective bargaining agreements, as sought by this Court in *Allis-Chalmers. See* 471 U.S. at 202.

B. Even if the Petitioners' Claims Arise Independently of the CBA, Establishing the Petitioners' Claims Requires Interpreting the CBA.

To prevail in their claim in this suit, Petitioners must allege all the elements of a negligence claim without referencing the CBA. *See Burnside*, 491 F.3d at 1058. A plaintiff must establish the following elements of negligence in California: (1) the defendant had a duty, (2) the defendant breached that duty, (3) that breach proximately caused the plaintiff's injuries, and (4) damages resulted from the breach. *Corales v. Bennett*, 567 F.3d 554, 572 (9th Cir. 2009) (citing *McGarry v. Sax*, 158 Cal. App. 4th 983, 994 (Cal. 2008)). Only when "resolution of the

state-law claim does not require construing the collective-bargaining agreement" is the state law claim valid. *Corales*, 567 F.3d at 572.

1. Petitioners' negligence claim extends more broadly than the Controlled Substances Act.

The district court incorrectly noted that Petitioners' claim relies only on the negligence *per se* theory of a violation of the Controlled Substances Act. (R. 22.) Instead of making a narrow claim regarding the Controlled Substances Act, Petitioners have more broadly contended that "the individual clubs mistreated their players and the NFL was negligent in failing to intervene and stop their alleged mistreatment." (R. 22.) The district court alternatively reasons that the NFL's duty should arise from the "general character" of the activity in question because the administration of controlled substances should be conducted with reasonable care. (R. 34.) Although the district court correctly notes that no statute explicitly establishes such a duty, this Court has never recognized such a vague construction of duty. (R. 23); *see J'Aire Corp. v. Gregory*, 24 Cal. 3d 799, 803 (Cal. 1979) (explaining that duty can arise from the general character of an activity). Because Petitioners' claim challenges a broad "mistreatment" rather than a specific breach of a statute, Petitioners' claim extends beyond the Controlled Substances Act. Because of the scope of Petitioners' claim, this Court must examine the NFL's broader medical duty to players.

Even if this Court holds that Petitioners' claim under the Controlled Substances Act falls outside of the scope of the CBA, the claim should still be dismissed because the NFL does not directly distribute controlled substances to its players, and therefore its duty does not arise from the Controlled Substances Act. This argument will be addressed in Subsection 3 below.

2. Establishing that the NFL had a duty to Petitioners requires interpreting the CBA.

The *Rowland* factors provide courts with a number of considerations for determining

whether a duty exists. 69 Cal. 2d at 112. Each of these factors turns on evaluating the language of the CBA to understand the ways in which the NFL oversees the teams and individual players, and the methods the NFL has implemented to do so. Considering these elements together with lower court decisions, the CBA between Petitioners and the NFL should be interpreted to determine whether a duty exists. *See e.g.*, *Williams v. National Football League,* 582 F.3d 863, 870-81 (8th Cir. 2009).

Preemption is required when a CBA must be reviewed to examine the parties' legal relationship and expectations for a negligence claim. *Id.* In *Williams*, football players sued the NFL after the players were suspended for using banned substances. *Id.* at 881. The players alleged that the NFL had a duty to warn players about the ingredients in various dietary supplements, and that this duty arose from general negligence principles rather than from the parties' CBA. *Id.* However, the Eighth Circuit held that "whether the NFL . . . owed the Players a duty to provide such a warning [could not] be determined without examining the parties' legal relationship and expectations as established by the CBA." *Id.* (emphasis omitted). As a result, the plaintiffs' claim was preempted under Section 301. *Id.* Similarly, whether the NFL has a duty to Petitioners to intervene and prevent mistreatment requires examining the parties' legal relationship as established by the CBA. The CBA provides substantial guidance and assigns duty pertaining to medical care, and as such must be examined. (R. 9, 10, 24, 25.)

A CBA may also require interpretation even if a party to the CBA publishes medical guidelines separate from a CBA. *Stringer v. NFL*, 474 F. Supp. 2d 894, 910-11 (S.D. Ohio 2007). In *Stringer*, a plaintiff alleged that the NFL breached its duty to "use ordinary care in overseeing, controlling, and regulating practices . . . to minimize the risk of heat-related illness" when a player died from heat exhaustion. *Id.* The court rejected the plaintiff's argument that the NFL had assumed a duty to players when it voluntarily issued "Hot Weather Guidelines." *Id.* at

905. The court held that the plaintiff's claim required interpreting the CBA because the CBA mandated that trainers be certified. *Stringer*, 474 F. Supp. 2d at 910. The court concluded that because the CBA required trainers to have proper certifications, "the degree of care owed by the NFL in republishing the Hot Weather Guidelines [could not] be determined without first analyzing the significance of the CBA provision requiring athletic trainers to be certified." *Id.* The court reasoned that if, "by virtue of the certification process, the trainers are fully prepared to handle heat-related illnesses, the degree of care owed by the NFL in publishing the Hot Weather Guidelines is diminished." *Id.* As such, the claim was "inextricably intertwined with th[e] CBA provision" and therefore required preemption. *Id.*

Petitioners argue that the NFL's implementation of a "League-wide policy" for the drug Torodol creates a separate duty owed by the NFL to players related to prescription drugs. (R. 30.) However, interpreting whether the Torodol policy establishes a duty separate from the NFL's broader duty to provide adequate medical care requires consulting the CBA. Like in *Stringer*, the CBA-mandated certifications for team trainers will illustrate whether the NFL violated its duty of care. If these certifications provide trainers with adequate instruction on administering prescription drugs, the CBA addresses this behavior and must be consulted. Therefore, the Petitioners' state law claims are inextricably intertwined with the CBA and must be preempted.

3. Establishing that the NFL breached a duty to Petitioners requires interpreting the CBA.

Petitioners' allege that the NFL breached its duty by failing to properly "provi[de] and [administer] controlled substances without written prescriptions, proper labeling, or warnings regarding side effects." (R. 22.) However, as noted by the district court, the "CBAs place medical disclosure obligations 'squarely on Club physicians, not on the NFL.'" (R. 24.) Without explanation, the district court proceeded to conclude that "the teams' obligations under

the CBAs are irrelevant to the question of whether the NFL breached an obligation to players by violating the law." (R. 24.) The district court concluded that the NFL violated its duty to players as established by the Controlled Substances Act, a statute that establishes standards for distributing dangerous drugs. *See* 21 U.S.C. § 801 *et seq.* (2018).

However, because the NFL itself is not distributing drugs, as explained by the district court, the Controlled Substances Act does not provide guidance on whether the NFL breached any duty. Instead, this Court should examine the CBA, through which "the NFL addressed the problem of adequate medical care for players . . . through a bargaining process that imposed uniform duties on all clubs." (R 11.) These duties include hiring properly-certified medical professionals, who, as agents of the *teams* rather than the NFL, distribute the drugs protected by the Controlled Substances Act. (R. 9.) Therefore, to discern whether the NFL breached a duty to players, the CBA must be consulted to properly identify and subsequently evaluate the duties the NFL *does* have to players. The breach that Petitioners have alleged does not result from any actual duty assumed by NFL.

4. Establishing that the NFL caused Petitioners' injury and that damages exist does not require interpreting the CBA.

As the district court correctly noted, determining causation does not require interpreting the CBA. (R. 21) (citing *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 261 (1994)). Similarly, the existence and calculation of damages is a factual inquiry that does not hinge upon the terms of a CBA. Therefore, this analysis does not impact whether the state law claim is preempted. However, because any reference to the CBA preempts the state law claim, as is required to determine duty of and breach by the NFL, Petitioners' claim must be preempted.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the Fourteenth Circuit Court of Appeals and hold that the NCAA's amateurism and eligibility bylaws are

procompetitive as a matter of law, and Petitioners' state law claims are preempted under Section 301 of the Labor Management Relations Act.

Dated: January 29, 2019

Respectfully submitted,

Team 16

Counsel for Respondent

APPENDIX A

Sherman Antitrust Act

Section 1 of the Sherman Antitrust Act (specifically 15 U.S.C §1 (2004)) is as follows:

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

APPENDIX B

NCAA Rule 12.5.2.1 Advertisements and Promotions Following Enrollment

NCAA Rule 12.5.2.1 is as follows:

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 through the individual's use of such product or services.

APPENDIX C

Labor Management Relations Act

The relevant language of the Labor Management Relations Act (specifically 29 U.S.C. §185(a) (2018)) is as follows:

[S]uits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . may be brought in any district court of the United States having jurisdiction of the parties.

APPENDIX D

National Football League Collective Bargaining Agreement

The relevant provisions from the National Football League Collective Bargaining Agreement are as follows:

The NFL requires each of its teams to retain a board-certified orthopedic surgeon. (R. 9.)

The CBA requires all full-time trainers to be certified by the National Athletic Trainers Association. (R. 9.)

If a medical condition could be significantly aggravated by continued performance, the physician will advise the player of such fact in writing before the player is again allowed to perform on-field activity. (R. 9.)

Other CBA provisions outlined above that would need consultation and interpretation provide for a player's right to a second medical opinion, access to medical records, access to medical facilities, and require that the prognosis of the player's recovery time should be as precise as possible. (R. 9.)

The NFL pointed to a 1993 CBA provision that required team physicians to advise a player in writing about "significantly aggravated" physical conditions *(one of the same collective-bargaining provisions at issue here)*. (R. 9-10) (emphasis added).

Team doctors are required to advise players in writing if a medical condition could be significantly aggravated by continued performance. (R. 24.)

The CBA contains "provisions related to medical care, including those that give players the right to access medical facilities, view their medical records, and obtain second opinions." (R. 25.)

The CBA contains "provisions related to team doctors' disclosure obligations." (R. 25.)