No. 09-214

In the

SUPREME COURT OF THE UNITED

STATES OF AMERICA

Petitioner

JON SNOW, AND OTHER SIMILARLY SITUATED

INDIVIDUALS;

V.

Respondent

NATIONAL COLLEGIATE ATHLETIC ASS'N; THE NATIONAL FOOTBALL LEAGUE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT

OF APPEALS FOR THE FOURTEENTH CIRCUIT

BRIEF FOR PETITIONERS

THE TULANE MARDI GRAS SPORTS LAW

COMPETITION, 2019

TEAM 27
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QUESTIONS PRESENTED

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

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

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TO THE HONORABLE SUPREME COURT OF THE UNITED STATES

Petitioners, Jon Snow, and other similarly situated individuals—the plaintiffs in the United States District Court for the Southern District of Tulania and the defendants-appellees before the United States Court of Appeals for the Fourteenth Circuit—respectfully submit this brief on the merits in support of their request that this Court reverse the judgment of the Fourteenth Circuit Court of Appeals.

OPINIONS BELOW

The Opinion of the United States District Court for the Southern District of Tulania is found at *Jon Snow on Behalf of Himself and on Behalf of All Others Similarly Situated v. National Collegiate Athletic Association and the National Football League*. The Opinion of the United States Court of Appeals for the Fourteenth Circuit is found at *Jon Snow, on Behalf of Himself and others Similarly Situated v. National Collegiate Athletic Association; The National Football League*.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Fourteenth Circuit entered its final judgment and Mr. Snow timely filed a petition for a writ of certiorari, which this Court properly granted pursuant to 28 U.S.C § 1254 (2012).

STATUTORY PROVISIONS INVOLVED

This case involves determining whether the NCAA bylaw 12.5.2.1 violates federal antitrust laws under Section 1 of the Sherman Act. The case also involves determining whether petitioners' negligence-based claims are preempted by Section 301 of the Labor Management Relations Act of 1947.

STATEMENT OF THE CASE

I. Statement of the Facts

This case involves Mr. Jon Snow, who is currently a quarterback in the National Football League ("NFL") for the New Orleans Saints ("the Saints"). R. at 13. Prior to being drafted into the NFL by the Saints, Snow was the star quarterback for Tulania University for three years, during which time he was nominated for several collegiate athletic awards. R. at 13. As a result of Snow's success at Tulania University, Apple Inc. asked Snow and other players of similar fame and success to participate in a trial run for Apple's new Emoji Keyboard. R. at 13. This keyboard, Apple hoped, would promote college football and new Apple products by allowing users to use the image and likeness of Snow and other college athletes when typing. R. at 13. Apple offered to compensate Snow and the other athletes through a one-time payment of $1,000 for the use of their image and likeness in addition to a $1 royalty fee for each download of the Emoji Keyboard. R. at 13.

Snow agreed to participate in Apple's trial run for the Keyboard, and during this trial period earned roughly $3,500. R. at 13. Upon hearing complaints from other student athletes about the compensation received by Snow, Cersei Lannister, head of compliance for Tulania University, notified the NCAA, which suspended Jon Snow indefinitely for violating NCAA Bylaw 12.5.2.1. Upset with his suspension and inability to complete the season and his collegiate career, Snow brought legal action against the NCAA for violating Section 1 of the Sherman Act and preventing him from competing. R. at 13.

After bringing these claims against the NCAA, Snow entered the NFL draft and was drafted by the Saints, which are a professional football franchise of the NFL. R. at 13. During his rookie year, Snow was prescribed painkillers by NFL doctors and trainers for minor head and ankle injuries. R. at 13. Snow was not provided any information by the Saints or NFL about the side effects or risks associated with the painkillers he was prescribed. R. at 13. Despite this lack of disclosure regarding

the medication, Snow and the other players named in this action were quickly rushed back onto the field. R. at 13. Soon after, Snow was diagnosed with an enlarged heart and permanent nerve damage in his ankle and developed an addiction to painkillers. R. at 13. As a result of these injuries (and similar ones suffered by the other players), Snow and the other players brought action against the NFL and its teams seeking to hold them liable for the negligent distribution and encouragement of excessive painkiller prescription. R. at 13.

II. Nature of the Proceedings

The District Court

Jon Snow, on behalf of himself and other players similarly situated, brought two separate actions in the United States District Court for the Southern District of Tulania against the NCAA and the NFL. R. at 13. Because Snow was a named plaintiff on both cases, and in the interest of judicial efficiency, the court decided to consolidate the two separate matters. R. at 13.

The Court first addressed the issue of whether NCAA Bylaw 12.5.2.1 violates Section 1 of the Sherman Act. R. at 14. The Court did not address plaintiffs' claims on the merits, and instead discussed the NCAA's contention that the Court was precluded from reaching the merits. R. at 14. First, the Court determined that the NCAA's amateurism rules are not valid as a matter of law and must be proved. R. at 17. Second, the Court concluded that the NCAA's compensation can be brought to suit under the Sherman Act. R. at 19. Third the Court stated that plaintiffs had shown that they were injured in fact as a result of the NCAA's rules having foreclosed the market for their name, image, and likeness. R. at 19. Accordingly, the Court found none of the NCAA's arguments persuasive and concluded that it was not precluded from reaching the merits of plaintiffs' claims. R. at 19.

The Court next addressed the issue of whether the NFL was negligent in its prescription and distribution of painkillers to Snow and the other players. R. at 20. Once again, the court did not express an opinion about the ultimate merits of plaintiffs negligence claims, and instead analyzed whether, as argued by the NFL, the plaintiffs' common law claims were preempted by Section 301 of the Labor Management Relations Act of 1947. R. at 20–26. The Court determined that because no interpretation of the terms of the CBAs is necessary to resolve plaintiffs' negligence claims, they are not preempted by Section 301. R. at 26.

The Fourteenth Circuit Court of Appeals

The NFL and NCAA appealed the decision of the district court, and the Fourteenth Circuit Court of Appeal reversed the district court's holding. R. at 11. First the Court determined that there was thirty years of unchallenged precedent striking down challenges to NCAA amateurism and eligibility bylaws. R. at 6. Accordingly, the Court concluded that NCAA Bylaw 12.5.2.1 is valid as a matter of law and therefore were to be upheld. R. at 6. Second, the Court declared that in deciding whether the NFL had been negligent, it would be necessary to interpret the specific language and duties contained in the CBA. R. at 9. As a result, the Court held that the claims made by Snow and the other players were indeed preempted by Section 301 of the Labor Management Relations Act of 1947. R. at 11.

SUMMARY OF THE ARGUMENT

I. The NCAA amateurism rules are covered by and violative of §1 of the Sherman Antitrust Act.

This court should reverse the holding of the Fourteenth Circuit Court of Appeals that Petitioners' challenges to the NCAA's amateurism standards and bylaws are not violations of the Sherman Act and thus upheld. This court has not held that NCAA amateurism bylaws are valid as a matter of law, but rather has state that they must be evaluated according to the Rule of Reason, requiring a procompetitive justification for the challenged rule, which is not present here.

The activity regulated by NCAA Rule 12.5.2.1 is inherently commercial because it regulates the exchange of student-athlete talent for scholarships and the opportunity to train and play with elite coaches and in top-of-the-line facilities. The definition of what is considered commercial is broad and considering college football to be noncommercial is no longer realistic. Less restrictive alternatives exist, such as caps on how much profit an athlete can accrue in a given season or career, that would remove the unlawful anticompetitive nature of the rule.

The petitioners did suffer an antitrust injury that gives them standing per § 4 of the Clayton Act to bring this civil suit for violations of § 1 of the Sherman Antitrust Act. Antitrust injury requires a showing of a more direct causal link between the actions which make the rule at issue unlawful and the injury claimed by the party. Here, the petitioners are the direct recipients of the injury felt from a rule that creates a complete bar against use of college football student-athletes' own names, images, and likeness for profit.

II. The variety of state law-claims brought by the NFL players are not preempted by the Labor Management Relations Act.

This court should reverse the holding of the Fourteenth Circuit Court of Appeals that Petitioners' state-law claims are preempted by § 301 of the Labor Management Relations Act

("LMRA"). Section 301 governs all suits for violations of contracts between an employer and a labor union. Over time, this Court has clarified the extent of this statute's protection by stating that the statute authorizes federal courts to apply it to enforce Collective Bargaining Agreements ("CBA"). State-law claims are not preempted by § 301, however, unless one of two factors are met. First, a state-law claim is not preempted unless the claim arises and is independent of a CBA. Second, the same claim is still not preempted unless establishing the elements of the claim will require interpretation. Of utmost importance in this analysis is the plaintiffs claim, which is the only relevant point of analysis in the § 301 preemption test.

Here, Petitioners' state-law claims neither arise from the NFL CBAs nor require the interpretation of the CBAs in order to establish the elements of the claims. Petitioners made claims of negligence per se, negligent hiring and retention, and negligent misrepresentation. First, the right at issue pled by the Petitioners did not arise from the NFL CBAs and therefore exists independently. The CBAs contain no requirement for the NFL to provide medical care to players, and such a right therefore exists outside the CBAs. Furthermore, the Petitioners' claims are all state-law negligence-based claims containing duties that arise outside of the CBAs. Second, the resolution of Petitioners' negligence-based claims does not require interpretation or analysis of the NFL CBAs. Establishing the elements of Petitioners' claims does not require a court to make anything more than a consultation to the language of the CBAs, which does not warrant preemption. Accordingly, Petitioners' state-law claims are not preempted by § 301 of the LMRA and the holding of the Fourteenth Circuit Court of Appeals should be reversed and remanded.

ARGUMENT

I. THIS COURT SHOULD REVERSE THE FOURTEENTH CIRCUIT'S OPINION BECAUSE THE NCAA AMATEURISM RULES VIOLATE §1 OF THE SHERMAN ANTITRUST ACT AND PETITIONERS SUFFERED ADEQUATE ANTITRUST INJURY.

A. The amateurism rules promulgated by the NCAA are not valid as a matter of law and must be evaluated according to the Rule of Reason.

Horizontal restraints have often been considered "unreasonable as a matter of law." *NCAA v. Bd. of Regents of the Univ. of Oklahoma*, 468 U.S. 85, 99 (1984). Horizontal restraints are restraints that limit output for an identifiable market. *Id*. In some industries, however, "horizontal restraints are essential if the product is to be available at all." *Id.* at 101. For sports to work at all, competitors, coaches, and anyone else involved must agree at minimum to the rules by which they play so as to define their competition. *See id.*

Under a rule of reason analysis, the rule at issue's impact on competition must be evaluated. *See id.* at 104. If the rule is determined to be anticompetitive in nature without sufficient procompetitive justification, it is a violation of the antitrust laws. *See id.* at 112. "When a product is controlled by one interest, without substitutes available in the market, there is monopoly power." *Id.* (citation and quotations omitted).

Here, by barring student-athletes from profiting off their names, images, and likeness, the NCAA has created a monopoly that is anticompetitive with no sufficient justification. The rule at issue is the amateurism rule at issue is NCAA Rule 12.5.2.1, which regulates advertisements and promotions following enrollment and reads:

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

When evaluated under the Rule of Reason the *NCAA v. Board of Regents of the University of Oklahoma* court noted as the appropriate evaluation for a horizontal restraint on a market for a product that requires some collusion and control, Rule 12.5.2.1 should be held to be an unreasonable and anticompetitive restraint. While *Board of Regents* dealt with the television plan at the time for college football games, *see Board of Regents*, 468 U.S. at 89, as opposed to the restriction on players profiting from their status as college football players, R. at 13, the outcome should be the same.

No procompetitive benefit exists for barring players from profiting off their names, images, or likeness once they have become college football student-athletes. Because companies wanting to enter into deals using NILs would presumably target the best players first, if anything the rule takes away another incentive for players to get better and thus to at least some degree is anticompetitive. While some restraints are necessary to preserve the product that is amateur college football, a restraint that keeps players from profiting off being better at the sport is akin to restricting the universities from offering better scholarships to their top recruits.

The crux of the college football market is university football programs expending their resources strategically to create the most competitive team they can. Part of that strategy may include offering higher scholarships for certain players or certain positions. This incentivizes players in high school to get better so they can go to the best school they can for the best scholarship available. In the same way, allowing players to profit off their NILs would not disrupt the competitive nature of amateur football, but rather give an extra incentive for improving their game.

B. The rules at issue do regulate commercial activity in an identifiable market, and thus are covered by the Sherman Act.

Section 1 of the Sherman Antitrust Act makes unlawful "[every] contract . . . in restraint of trade

or commerce." 15 U.S.C. §1 (2018). For trade or commerce to be unlawfully restrained under the Sherman Act framework, there must first be an identifiable market that is allegedly being harmed. *See Agnew v. NCAA*, 683 F.3d 328, 337 (7th Cir. 2012). When student-athletes engage with universities during recruitment, "a transaction clearly occurs." *Id.* at 338. Not every transaction is considered commercial activity, however, so it is necessary to define the category of what is considered commercial. *See id*. "'Today the term "commerce" is much broader than it was [in the past] . . ., including almost every activity from which [an] actor anticipates economic gain.'" *Id.* (quoting Areeda & Hovenkamp, *Antitrust Law*, ¶260b, at 250 (2000). Thus, "[the] Sherman Act clearly applies to at least some of the NCAA's behavior." *Id.* (citing *Board of Regents*, 468 U.S. at 85).

Today it is no longer realistic to consider the NCAA's eligibility rules to be noncommercial. *See id.* at 340 (quoting *Banks v. NCAA*, 977 F.2d 1081, 1095 (7th Cir. 1992) (Flaum, J. dissenting)). College football is a high-profit market that requires an exchange of talent for training. *See generally id*. "Thus, the transactions between NCAA schools and student-athletes are, to some degree, commercial in nature, and therefore take place in a relevant market with respect to the Sherman Act." *Id.* at 341.

Whether or not a specific NCAA bylaw is actually violative of the Sherman Act is a question to be decided by the court regarding whether or not the regulation is "presumptively procompetitive." *Id.* For college football to exist as an amateur, competitive sport, "a certain amount of collusion . . . is permitted because it is necessary." *Id.* at 342. Under a Rule of Reason test, the procompetitive nature of an action is evaluated by determining first that the actor has market power sufficient to adversely affect the relevant market and second showing "that the restraint in question is not reasonably necessary to achieve the procompetitive objective." *Id.* at 335–36.

Here, the market of commercial activity occurs in the same market as the court in *Agnew* identified: a market where athletic talent is exchanged for training opportunities and both the players

and the universities stand to profit from said exchange. Top college football programs make millions of dollars each year and prepare players for competition at the next, professional level. However, preserving the amateur nature of college football does not necessarily require a rule restricting any economic gain by players off their own NILs.

It is not reasonably necessary to maintain a competitive amateur sport to restrict all use of the athletes' NILs and their ability to engage in that market. While it may be reasonable to place a cap on how much any one athlete may profit off their NILs in a given year or career, there is nothing to suggest that such a less restrictive policy would destroy competition. As a policy, it would be applied to all member schools and athletes alike, so with the proper parameters it would only affect the recruitment process insofar as students who are unsure if they will accept a scholarship at all may be inclined to do so because they also see an opportunity to profit off their NILs.

In some cases where a student-athlete does not have the resources available to live sufficiently even with a scholarship, this may be able to substitute for a part-time job that a normal student has more time available for and a Division 1 football player does not. The activity being regulated is commercial in nature with an identifiable market that is being unreasonably restrained by nature of the fact that less restrictive alternatives that would not disrupt competition exist.

C. Petitioners do have standing because they did suffer adequate antitrust injury.

Section 4 of the Clayton Act defines those people with proper standing to sue for antitrust violations under the Sherman Antitrust Act as anyone "who shall be injured in his business or property by reason of anything forbidden in the antitrust laws." 15 U.S.C. §15(a) (2018).

Plaintiffs have standing to sue for damages stemming from proper antitrust injury when the link between the violations and the injury is sufficiently direct. *See Associated Gen. Contractors v. Cal. State Council of Carpenters*, 459 U.S. 519, 534–535 (1983). A person

suffers antitrust injury when the injury is caused by reason of that which makes the illegal action at issue unlawful. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488–89 (1977).

To show the causal link between the injury and the unlawful acts, "the injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation. *Id.* at 489. Strong evidence of antitrust injury exists when the injury is "they type of loss that the claimed violations of the antitrust laws would be likely to cause." *Zenith Radio Corp. v. Hazeltine Research*, 395 U.S. 100, 125 (1969).

Actions that cause the type of loss expected from antitrust violations do not have to "entirely exclude its victims from the market," to be considered an unlawful restraint on trade. *Associated Gen. Contractors*, 459 U.S. at 528. If those victims cannot make "free choices between market alternatives," the practice is considered to be "inherently destructive of competitive conditions and may be condemned even without proof of its actual market effect." *Id*.

Here, plaintiffs have demonstrated a proper antitrust injury sufficient to give them standing to bring this suit. The NCAA has a blanket policy forbidding the creation of college sports emojis. R. at 19. The NCAA cannot avoid the antitrust laws by foreclosing an entire subset of the college sports market. Were that to be acceptable, the NCAA and other similar entities could restrict trade down to the narrowest scope and claim no injury occurred because the opportunity was simply eliminated as a whole.

The NCAA's bar against college sports emojis and their broader policy of forbidding "the use of student-athletes' NILs in non-NCAA approved applications," are the unlawful actions that violate the antitrust laws. R. at 19. The plaintiffs here are the college athletes that are directly impacted by those unlawful actions, demonstrating a sufficiently direct link between the individuals and their business as specified in the Clayton Act. 15 U.S.C. 15(a) (2018).

While victims do not have to be entirely excluded from a market to have suffered an antitrust injury, here the plaintiffs are. By instituting a blanket policy against any use of the athletes' name, image, or likeness in non-NCAA approved applications, the NCAA has exerted full control over the limited use of their NILs and excluded the athletes from choosing between market alternatives entirely. As the district court in this case noted, while college football may be an amateur sport, "[there] is real money at issue here." R. 18. By restricting the athletes from engaging in the college athlete NIL market in any way, the athletes lose all ability to profit off their own selves simply so the NCAA can maintain a monopoly on their persons.

II. THIS COURT SHOULD REVERSE THE FOURTEENTH CIRCUIT'S OPINION BECAUSE THE NFL PLAYERS' STATE-LAW NEGLIGENCE-BASED CLAIMS ARE NOT PREEMPTED BY § 301 OF THE LABOR MANAGEMENT RELATIONS ACT.

Section 301 of the Labor Management Relations Act ("LMRA") controls "[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) (2006). Courts generally agree that the NFL is an organization that affects and engages in interstate commerce. *See Herbert v. L.A. Raiders, Ltd.*, 23 Cal.App.4th 414, 422 (1991) (determining that the NFL engages in interstate commerce); *see also Flood v. Kuhn*, 443 F.2d 264, 267 (2d Cir. 1971) *aff'd*, 407 U.S. 258 (1972) (describing factors determinative of interstate commerce that apply to professional sports leagues). Section 301 of the LMRA is therefore applicable to contracts made between the NFL and the NFLPA. 29 U.S.C. 185(a); *see* U.S. Const. art. 1, § 8, cl. 3.

This Court illustrated the extent of this application in 1957 when it held that the statute authorizes federal courts to apply § 301 to enforce Collective Bargaining Agreements ("CBAs"). *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 455 (1957). This Court further concluded in 1962 that § 301 established a federal common law for interpreting CBA disputes, which can

preempt state law. *See Local 174 v. Lucas Flour*, 369 U.S. 95, 103 (1962) (holding that the state should have applied federal contract law instead of state law to resolve a dispute). Not all state-law claims, however, are preempted by § 301 and claims are only preempted they are "inextricably intertwined with consideration of the terms of the labor contract." *Allis-Chalmers v. Lueck*, 471 U.S. 202, 213, 220 (1985). As a result, the statute does not preempt claims that simply "relate[] in some way to a provision in a collective-bargaining agreement." *Id.* Indeed, "the bare fact that a collective-bargaining agreement will be consulted in the course of state-law litigation plainly does not require the claim to be extinguished." *Lividas v. Bradshaw*, 512 U.S. 107, 124 (1994).

Accordingly, courts conduct a two-pronged test to determine whether state-law claims are preempted by § 301. *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 399 (1988). First, preemption will not be found if the cause of action involves "rights conferred upon an employee by virtue of state law, not by a CBA." *Burnside v. Kiewit Pacific Corp.*, 491 F.3d 1053 (9th Cir. 2007) (citing *Lueck*, 471 U.S. at 1212). Second, if such rights exist interpedently of the CBA, preemption will still not be found unless the litigation of the rights is "substantially dependent on analysis of a [CBA]." *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)). In sum, if a state-law claim can be litigated without interpreting the CBA in question, it is not preempted by § 301. *See Cramer v. Consolidated Freightways, Inc.*, 255 F.3d 683, 689–93 (9th Cir. 2001). It is important to note that when conducting this two-part inquiry, courts must conduct an examination of the plaintiff's claim to determine if preemption is warranted. *Trs. of Twin City Bricklayers Fringe Ben. Funds v. Superior Waterproofing, Inc.*, 450 F.3d 324, 331 (8th Cir. 2006).

Petitioners' state-law claims of negligence per se, negligent hiring, negligent retention, and negligent misrepresentation are not preempted by § 301 of the LMRA. First, these claims are

common-law tort causes of action and are therefore clearly not founded on any rights created by the NFL CBAs. Second, the litigation of these claims requires no interpretation or analysis of the CBAs. Therefore, the holding of the Fourteenth Circuit Court of Appeals should be reversed, and case remanded.

A. Petitioners' negligence -based claims are not founded on rights created by the NFL CBAs

Petitioners' negligence-based claims are not founded on rights created by the NFL CBAs. The first step in determining that state-law claims are not preempted by § 301 is concluding that the cause of action involves "rights conferred upon an employee by virtue of state law, not by a CBA." *Burnside*, 491 F.3d at 1059. This Court has further clarified this inquiry for tort claims by holding that preemption will only be found when the claim is based on a breach of duties created by the CBA. *Lingle*, 486 U.S. at 409–10. It is generally understood that § 301 governs only "claims founded directly on rights created by [CBAs]." *Caterpillar*, 482 U.S. at 394. As a result, preemption will only be found through this analysis "[i]f the rights exist solely as a result of the CBA." *Burnside*, 491 F.3d at 1059; *see also Lueck*, 471 U.S. at 212 (noting that § 301 cannot "preempt state rules that proscribe conduct, or establish rights and obligations, independent of a labor contract").

Here, Petitioners' right at issue does not arise from the NFL CBAs and therefore exists independently. Petitioners define this right as the "right to receive medical care that does not create an unreasonable risk of harm." R. at 22. The CBAs, however, "do not require the NFL to provide medical care to players." R. at 22. Furthermore, Petitioners do not contend that the CBAs create such a requirement nor that the NFL violated the CBAs in any way. R. at 22. Petitioners instead claim that the NFL violated various federal and state laws governing prescription drugs. R. at 22. In addition, all duties that Petitioners claim the NFL breached are

created by such state and federal laws and not by the CBAs. *See Lingle*, 486 U.S. at 409–10. Petitioners assert claims of negligence per se, negligent hiring and retention, and negligent misrepresentation; all of which establish duties created by state law and not the CBAs. Therefore, since the right at issue does not arise from the CBAs, it exists independently and is not preempted under the first prong of the § 301 preemption test. *Burnside*, 491 F.3d at 1059.

B. The resolution of Petitioners' negligence-based claims does not require interpretation or analysis of the NFL CBAs

The resolution of Petitioners' negligence-based claims does not require interpretation or analysis of the NFL CBAs. If, as established above, the right at issue arises independently from a CBA, preemption will still not be found unless establishing the elements of the claim requires an interpretation of the CBA. *Lingle*, 486 U.S. at 409-10. Making simple references to the language of a CBA does not warrant preemption. *Associated Builders & Contractors, Inc. v. Local 302 Int'l Broth. Of Elec. Workers*, 95-16202, 1997 WL 23629 (9th Cir. May 12, 1997). Indeed, this Court has noted that "the mere need to 'look to' the [CBA] . . . is no reason to hold the state-law claim [preempted] by § 301." *Lividas*, 512 U.S. at 125. In conducting this inquiry, courts have construed the term "interpret" narrowly and have recognized that interpretation must be "something more than 'consider,' 'refer to,' or 'apply.'" *Balcorta v. Twentieth Century-Fox Film Corporation*, 208 F.3d 1102, 1108 (9th Cir. 2000). Additionally, the need to conduct a factual inquiry in a CBA is not enough to warrant preemption, *Lingle*, 486 U.S. at 407, nor are consultations of a CBA to calculate damages. *Lividas*, 512 U.S. at 125. Without such a narrow definition, any action brought by a unionized employee would be preempted by § 301 since courts are required to look at a CBA when conducting this inquiry. *Ramirez v. Fox Television Station, Inc.*, 998 F.2d 743, 748–49 (9th Cir. 1993).

When determining whether a state law is preempted by § 301, courts must look to the

plaintiff's claim itself. *Cramer*, 255 F.3d at 691 (9th Cir. 2001). As long as the claim is based on state law, it will not be preempted even if a party raises a defense that "requires a court to interpret or apply a [CBA]." *Caterpillar*, 482 U.S. at 398. Furthermore, courts must consider only the "legal character of [the] claim," not the claim's merits, to determine whether it is preempted by § 301. *Lividas*, 512 U.S. at 123-24. Accordingly, in conducting a § 301 preemption analysis, a court's "only job is to decide whether, as pleaded, the claim in [the] case is 'independent' of the CBA in the sense of 'independent' that matters for preemption purposes: resolution of the state-law claim does not require construing the collective-bargaining claim." *Alaska Airlines Inc. v. Schurke*, 898 F.3d 904, 924 (9th Cir. 2018) (quoting *Lingle*, 486 U.S. at 407).

Here, Petitioners pled claims of (a) negligence per se, (b) negligent hiring and retention, and (c) negligent misrepresentation in their original complaint. R. at 9. As a result, this Court must determine whether establishing the elements of each of these individual claims will require interpretation of the CBAs. *Burnside*, 491 F.3d at 1059–60. Since doing so for Petitioners' claims require no such interpretation, the claims are not preempted by § 301. *Id.*

1. Negligence Per Se Claim

Petitioners' negligence per se claim is not preempted by § 301 because establishing its elements requires no interpretation of the NFL CBAs. The District Court noted that negligence per se is not an independent cause of action, and correctly construed this claim as a traditional negligence claim, applying the negligence per se doctrine. *Quiroz v. Seventh Ave. Ctr.*, 140 Cal.App.4th 1256 (Cal. Ct. App. 2006). A traditional negligence claim has four elements: "(1) a duty by defendant to conform to a certain standard of conduct; (2) a breach by defendant of that duty; (3) a causal connection between the breach and injury to plaintiff; and (4) loss or damage to plaintiff." *Lago v. Costco Wholesale Corporation*, 233 So.3d 1248, 1250 (Fla. Dist. Ct. App. 2017). Because each element of the prima facie case for negligence can be made out without

interpretation of the CBAs, Petitioners' negligence claim is not preempted.

First, determining whether the NFL had a duty of care requires no interpretation of the CBAs. Such a duty can arise "through statute [or] contract," or can be "premised upon the general character of the activity in which the defendant engaged." *J'Aire Corp. v. Gregory*, 24 Cal.3d 799, 803 (Cal. 1979). In assessing whether such a duty exists, courts consider a variety of factors, which include the foreseeability of harm to the plaintiff, the moral blame associated with the defendant's conduct, and the extent of the burden to the defendant. *Rowland v. Christian*, 69 Cal.2d 108, 112 (Cal. 1968). In its opinion below, the Fourteenth Circuit held that these factors could not be used to establish that the NFL had a duty to "intervene and stop mistreatment by the league's independent clubs." R. at 8. In making this determination, however, the Court failed to correctly identify Petitioners' alleged duty. Petitioners are not alleging that the NFL had a duty to prevent medication abuse by teams, but that instead that the NFL directly injured players by illegally distributing controlled substances.[1] R. at 22. A court, therefore, can and should apply the factors from *Rowland v. Christian* to determine whether the NFL itself had a duty to exercise reasonable case in the distribution of medications.

Here, this Court is able to determine that the NFL had a duty in this case without interpreting the NFL CBAs. The CBAs establish no such duty, R. at 23., and as the District Court noted, "any entity involved in the distribution of controlled substances," has a duty of reasonable care that comes from "the general character of [that] activity. *See J'Aire Corp.*, 157 Cal.3d at 803; R. at 23. By applying the *Rowland* factors, there is first foreseeable harm in the

[1] The complaint "alleges that the NFL 'directly and indirectly supplied players' with drugs. It also alleges that the NFL implemented a 'League-wide policy' regarding Toradol, that 'medications are controlled by the NFL Security Office in New York,' that 'the NFL coordinat[ed] the illegal distribution of painkillers and anti-infalmmatories for decades,' and that "NFL doctors and trainers' gave players medications 'without telling them what they were taking or the possible side effects.'" R. at 22.

lack of reasonable care in the distribution of controlled substances. R. at 23. Additionally, the risk of injury related to the distribution of such substances means that any carelessness in the handling is illegal and morally blameworthy. R. at 23. Accordingly, this Court need not interpret the CBAs at all to determine if the NFL had such a duty of care.

Second, determining whether the NFL breached its duty of care would also not require interpretation of the CBAs. Under the doctrine of negligence per se, breach can be proven "by merely showing that the defendant committed or omitted a specific act prohibited or required by a statute." *Lang v. Holly Hill Motel, Inc.*, 909 N.E.2d 120, 124 (Ohio 2009). Here, there are several statutes that set minimum standards for the handling and distribution of controlled substances such as the painkillers proscribed to Petitioners. *See* 21 U.S.C. § 801; 21 U.S.C. § 301. Thus, a court simply need to compare "the conduct of the NFL to the requirements of the statutes at issue," there is no need to interpret the CBA. R. at 23. The Fourteenth Circuit claimed that when assessing if the NFL breached a duty, "it would be essential to take into account the affirmative steps the NFL has taken to protect the health and safety of the players." R. at 9. Doing so, the Court claimed, would require an interpretation of the CBAs. R. at 9. Under the doctrine of negligence per se, however, such an interpretation would not be necessary because breach could be established by simply looking at the statutes that establish the NFL's standard of care. *See Lang*, 909 N.E.2d at 124.

Third, determining whether the NFL's breach of its duty caused Petitioners' injuries would not require an interpretation of the CBAs. A court needing to look at a CBA for factual findings does not constitute interpretation and therefore will not warrant preemption. *Lingle*, 486 U.S. at 407. In negligence cases, causation is a question of fact for the jury to decide. *Conerly v. State of Louisiana ex rel. the Louisiana State Penitentiary and the Department of Corrections*, 858 So.2d 636, 646 (La. App. Ct. 2003). Furthermore, the Eighth Circuit has held that showing

causation for statutory claims can be done without interpreting a CBA.[2] *See Williams v. National Football League*, 582 F.3d 863, 876 (8th Cir. 2009) ("[The court] would compare the facts and the procedure that the NFL actually followed with respect to its drug testing of the Players with [the statute's] requirements). Here, the court would need only conduct a similar comparison to determine whether the NFL's breached cause Petitioners' injury, and no interpretation of the CBAs would be necessary.

Fourth, the calculation of damages would not require interpretation of the CBAs. The act of consulting a CBA for the purpose of calculating damages does not rise to the level of interpretation that would warrant preemption. *See Lividas*, 512 U.S. at 125. Here, the court could therefore perform such a consultation without any need to interpret the CBAs.

Because all four prima facie elements of Petitioners' traditional negligence claim could be established without any reference to the CBAs, this claim is not preempted by § 301 of the LMRA.

2. Negligent Hiring and Retention Claims

Petitioners' claims of negligent hiring and retention are similarly not preempted by § 301 because establishing their elements requires no interpretation of the NFL CBAs. Like all negligence claims, a plaintiff must establish duty, breach, causation, and damages in order to succeed on claims of negligent hiring and retention. *Phillips v. TLC Plumbing, Inc.*, 172 Cal.App.4th 1133, 1139 (Cal. Ct. App. 2009). While breach, causation, and damages are

[2] In its opinion below, the Fourteenth Circuit noted that *Williams v. National Football League* provided no support for Petitioners because § 301 preempted the plaintiff's state law claims. R. at 10. As the District Court correctly pointed out, however, *Williams* involved players that procured controlled substances on their own in direct opposition to the advice of the NFL. R. at 24. These facts are entirely distinguishable from the issue at hand, in which Petitioners claim that the NFL directly distributed the controlled substances. R. at 24.

determined identically to traditional negligence,[3] duty arises in negligent hiring and retention cases when there is an employment relationship and foreseeability of injury. *Abrams v. Worthington*, 861 N.E.2d 920, 924 (Ohio 2006). These claims will therefore not be preempted by § 301 unless the establishment of this duty requires interpretation of the CBAs. *Ward v. Circus Circus Casinos, Inc.*, 473 F.3d 994, 999 (9th Cir. 2007).

Here, determining whether the NFL had a duty arising from an employment relationship and foreseeability of injury would not require interpretation of the CBAs. Petitioners allege that the NFL hired doctors and trainers that provided controlled substances to players "without telling them what they were taking or the possible side effects." R. at 22. If the NFL hired and retained such individuals, there would certainly be an employment relationship and no interpretation of the CBAs would be required to establish such a relationship. *See Abrams*, 861 N.E.2d at 924. Furthermore, injury arising from distribution of such controlled substances would be foreseeable given the dangers inherent in the practice. *See id.* There would be no need to interpret the CBAs to determine whether the NFL had a duty based on these two factors and preemption would not be warranted. *Burnside*, 491 F.3d at 1059–60. In its opinion below, the Fourteenth Circuit held that such interpretation would be necessary because the CBAs required teams to hire and retain "board-certified orthopedic surgeon[s]" and certified full-time trainers. R. at 9. The duty in question here, however, is that of the NFL and not the individual teams. Accordingly, since the CBAs contain no guidance on the hiring and retention of these employees, it is not necessary to interpret them when establishing duty and the claims of negligent hiring and retention are not preempted by § 301.

[3] Since these claims allege violations of the same prescription drug statutes, the establishment breach, causation, and damages would not require any interpretation of the CBAs. This section, therefore, will focus exclusively on whether the establishment of a duty for these claims would require interpretation of the CBAs.

3. Negligent Misrepresentation Claim

Finally, Petitioners' claim of negligent misrepresentation requires no interpretation of the CBAs and is therefore not preempted by § 301. To state a claim for negligent misrepresentation, a plaintiff must allege "[m]isrepresentation of a past or existing material fact, without reasonable ground for believing it to be true, and with intent to induce another's reliance on the fact misrepresented; ignorance of the truth and justifiable reliance on the misrepresentation by the party to whom it was directed; and resulting damage." *Shamsian v. Atlantic Richfield Co.*, 107 Cal.App.4th 967, 982 (Cal. Ct. App. 2003).. Negligent misrepresentation responsibility must also rest, like all other negligence claims, on the existence of a legal duty. *Eddy v. Sharp*, 199 Cal.App.3d 858, 863 (Cal. Ct. App. 1988). Such a claim will not be preempted by § 301 unless the establishment of any of the listed factors requires interpretation of the CBAs. *See Lingle*, 486 U.S. at 409–10.

Here, establishment of the elements for negligent misrepresentation requires no interpretation of the CBAs and this claim is therefore not preempted by § 301. Determining whether the NFL made misrepresentations of fact, whether the NFL intended to induce reliance by players, and whether the players justifiably relied on the misrepresentations are all inquiries of fact and therefore require no interpretation of the CBAs. *See Lingle*, 486 U.S. at 407. Furthermore, since Petitioners allege that the NFL directly supplied controlled substances to players, there was a duty owed by the NFL to these players when making representations about the substances. *See Garcia v. Superior Court*, 50 Cal.3d 728, 757 (Cal. 1990) (noting that a voluntary disclosure of information in such a relationship created a duty to use reasonable care). Accordingly, when establishing the factors of negligent misrepresentation or the duty associated with this claim, no interpretation of the CBAs is required.

In its opinion below, the District Court recognized two Circuit Court cases that held that

misrepresentation claims brought by NFL players were preempted. R. at 25. These cases held that determining whether the reliance of players was reasonable would require interpreting the CBAs. *See Williams*, 582 F.3d at 881; *Atwater v. Nat'l Football League Players Ass'n*, 626 F.3d 1170, 1183 (11th Cir. 2010). The court successfully distinguished the issue at hand from these cases, however, since both involved "specific provisions in the CBAs [that] arguably rendered the players' reliance on the NFL's representations unreasonable," thus requiring an interpretation of the CBA to assess the claims. R. at 25. Here, however, there are no provisions in the CBAs that address the responsibility of "disclosing the risks of prescription drugs provided to players by the NFL." R. at 26. As a result, determining whether such reliance was reasonable requires no interpretation of the CBAs and Petitioners' claim of negligent misrepresentation is not preempted by §301.

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In sum, establishing Petitioners' claims of negligence per se, negligent hiring and retention, and negligent misrepresentation requires no interpretation of the NFL CBAs and they are therefore not preempted by § 301. In its opinion below, the Fourteenth Circuit cites several Federal cases in which the court found preemption for state-law negligence-based claims brought by NFL players. *See Williams*, 682 F.3d 863; *Stringer v. National Football League*, 474 F.Supp.2d 894 (S.D. Ohio 2007); *Duerson v. National Football League, Inc.*, No. 12 C 2513, 2012 WL 1658353 (N.D. Ill. May 11, 2012); *Smith v. National Football League Players Association*, No. 14 C 10559, 2014 WL 6776306 (E.D. Mo. Dec. 2, 2014); R. at 10–11. All four cases, however, are distinguishable from this case[4] and were given improper weight in the opinion below. Accordingly, the NFL should be treated like any

[4] As detailed earlier, *Williams v. National Football League* is distinguishable from this case because the players alleging injury took controlled substances on their own and not under direction from the NFL. R. at 24. The three additional cases are distinguishable because they were decided on a duties owed by the specific NFL teams or the NFL Players Association, not the NFL itself. *See* R. 10–11.

other defendant in § 301 preemption cases and Petitioners' state-law claims should not be preempted.

CONCLUSION

For the reasons stated above, the decision of the Fourteenth Circuit Court of Appeals should be reversed, and case remanded.

Respectfully submitted,

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