Team 21

In the Supreme Court of the United States

No. 09-214

JON SNOW, and other similarly situated individuals;

Petitioners,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION; THE NATIONAL FOOTBALL LEAGUE,

Respondents.

ON WRIT OF CERTIORATI TO THE
SUPREME COURT OF THE UNITED STATES

BRIEF FOR THE PETITIONER

TEAM 21

Questions Presented

1. Are NCAA athletes precluded from challenging the NCAA's amateurism and eligibility bylaws under the Sherman Act when those bylaws restrict athletes from receiving third-party remunerations?
2. Does § 301 of the Labor Management Relations Act preempt the NFL players' state law claims against the NFL for distributing medication that created an unreasonable risk of harm?

Table of Contents

Table of Authorities

CASES

UNITED STATES SUPREME COURT CASES

COURT OF APPEALS CASES

STATE COURT CASES

STATUTES

IN THE SUPREME COURT OF THE UNITED STATES

No. 09-214

JON SNOW, and other similarly situated individuals;

Petitioners,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION; THE NATIONAL FOOTBALL LEAGUE,

Respondents.

ON WRIT OF CERTIORATI TO THE
SUPREME COURT OF THE UNITED STATES

BRIEF FOR THE PETITIONER

Opinions Below

The decision of the Fourteenth Circuit Court of Appeals reversed the district court's decision in *Snow v. Nat'l Collegiate Athletic Ass'n*. The Fourteenth Circuit Court of Appeal's decision is reported at *Snow v. Nat'l Collegiate Athletic Ass'n,* 820 F.3d 1050 (14th Cir. 2018) and is set out at R.1. The decision of the District Court for the Southern District of Tulania denying the National Collegiate Athletic Association and the National Football League's Motion to Dismiss *Snow v. Nat'l Collegiate Athletic Ass'n, Nat'l Football League*, 120 F. Supp. 3d 1070 (S.D. Tula. 2018) is set out at R.26.

Jurisdiction

The judgment of the Fourteenth Circuit Court of Appeals was entered on November 1, 2018. Petitioners filed the Petition for the Writ of Certiorari on November 3, 2018. This Court granted the Petition on November 12, 2018. The jurisdiction of this Court rests on 28 U.S.C. § 1333 (2012) and 28 U.S.C. § 1337 (2012).

Statutory Provisions Involved

The relevant statutory provisions include § 1 of the Sherman Antitrust Act of 1890 ("Sherman Act"). Section 1 provides that "[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." 29 U.S.C. § 185(a) (2012).

Also relevant, § 301 of the Labor Management Relations Act, 1947 ("Section 301" or "§ 301"). Section 301 provides:

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

29 U.S.C. § 185 (2012).

Statement of the Case

This Court is being asked to reverse the decision of the Fourteenth Circuit Court of Appeals that held (1) the National Collegiate Athletic Association's ("NCAA") bylaws regarding amateurism and eligibility are procompetitive as a matter of law, and (2) the Petitioners' common law claims are preempted by § 301 of the Labor Management Relations Act ("LMRA").

I. Factual Background

Jon Snow, named Plaintiff ("Mr. Snow"), was a star quarterback for Tulania University, and earned nominations for multiple awards for his incredible athletic achievements. R.13. Apple Inc. approached Mr. Snow to participate in a trial run for a new emoji keyboard, and Apple agreed to pay Mr. Snow and other participating athletes an immediate $1,000 for the use of their image and likeness in association with the product. R.13. Mr. Snow earned approximately $3,500 during this agreement. R.13. As of result of this agreement and Mr. Snow's concurrent violation of NCAA Bylaw 12.5.2.1, the NCAA suspended Mr. Snow from competition for the rest of his collegiate career. R.13. NCAA Bylaw 12.5.2.1 states:

> Advertisements and Promotions Following Enrollment. 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 or 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 services.

R.13.

Due to his suspension, Mr. Snow did not obtain his degree from Tulania, and his professional football career prospects were limited to his performance before his suspension. Because Mr. Snow was suspended for earning money for his likeness from a company outside of the NCAA, Mr. Snow brought the first part of this combined legal action against the NCAA for violating § 1 of the Sherman Act, which states that every contract in restraint of trade or commerce is illegal. R.4.

Following his suspension, Mr. Snow entered a professional football draft and was subsequently drafted by the New Orleans Saints within the year. R.13. The Saints are a professional football franchise of the National Football League ("NFL"). R.13. Mr. Snow performed exceptionally well during his rookie year and gained even more recognition. During

Mr. Snow's rookie year, NFL doctors and trainers frequently prescribed painkillers to manage Mr. Snow's pain for all injuries. The NFL's doctors and trainers never disclosed the side effects of the prescribed narcotics to Mr. Snow, specifically the high possibility of addiction, an enlarged heart, or nerve damage—all of which Mr. Snow now suffers. R.13. Other NFL players experienced similar treatment. R.13. Subsequently, Mr. Snow, and other similarly situated players, filed a claim against the NFL for distributing medication that created an unreasonable risk of harm. R.4.

II. Procedural Background

Mr. Snow initially filed two separate claims: one against the NCAA and the one against the NFL. R.13. Mr. Snow filed a claim against the NCAA for violating § I of the Sherman Act, which disallows unreasonable restraints of trade or commerce. R.13. Mr. Snow also filed a claim against the NFL for having its league doctors negligently distributing and encouraging excessive painkiller prescriptions at the expense of NFL players. R.13. The two actions were consolidated by the district court in its opinion. R.13.

The NCAA and the NFL both filed motions to dismiss against Mr. Snow and the other plaintiffs. The NCAA filed its motions to dismiss on the grounds that: (1) the NCAA's amateurism rules are "valid as a matter law," (2) the compensations rules at issue here are not covered by the Sherman Act at all because they do not regulate commercial activity, and (3) the plaintiffs have no standing to sue under the Sherman Act because they have not suffered "antitrust injury." R.9. The NFL filed its motion to dismiss on the grounds that the players' claims were preempted by § 301 of the LMRA and that plaintiffs failed to state a claim upon which relief can be granted. R.9. The district rule denied both motions to dismiss in the consolidated opinion. R.9.

The NCAA and the NFL both appealed the district court's decision. R.9. The Fourteenth Circuit Court of Appeals reversed the district court's opinion in its entirety. R.9. The appellate court ruled the NCAA's amateurism rules valid as a matter of law. R.9. The appellate court also ruled that state law claims are preempted by the LMRA, because the CBA has to be referenced at all in order to resolve the claims. R.9. The appellate court reasoned that because the CBA contained medical provisions, the CBA must be interpreted to resolve the players' claims. R.9. The CBA required each club to "retain a board-certified orthopedic surgeon," and provided players the 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.

Summary of the Argument

All athletic organizations should promote and protect the health, safety, and economic value of its athletes. NCAA athletes who receive compensation from a third-party regarding their athletic talents who are then subsequently denied their collegiate athletic eligibility are entitled to the protections of § 1 of the Sherman Act. As the district court correctly held, (1) the NCAA's compensation rules regulate "commercial activity," (2) the compensation rules caused an injury in fact, and (3) NCAA amateurism and eligibility bylaws are not protected as a matter of law.

NFL players should be entitled to knowledge surrounding their treatment, which can have—and did have—devastating and permanent effects on their bodies. The NFL cannot hide behind the LMRA in order to circumvent liability in the court of law for endangering its employees. The Court should hold that § 301 does not preempt the NFL players state law claims for the following reasons: (1) the players' rights at issue are not conferred by the CBA and (2)

interpretation of the CBA is unnecessary to resolve each element of the players' negligent-based claims.

For these reasons, the NCAA Bylaw 12.5.2.1 must be analyzed under the rule of reason, and the NFL players' claims are not preempted by § 301 of the LMRA. Therefore, this Court must reverse the appellate court's decision and remand this case for further proceedings.

Argument

I. NCAA Bylaw 12.5.2.1 is subject to the Sherman Act and must be analyzed under the Rule of Reason to determine whether the restraint on trade is unreasonable.

This Court must remand this case to apply the rule of reason analysis in order to determine whether the NCAA's restraint on trade is unreasonable under § 1 of the Sherman Act ("the Sherman Act"). The Sherman Act provides, in part, that "[e]very contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce. . ." is illegal. 15 U.S.C. § 1. The purpose of the Sherman Act is to outlaw any "unreasonable" restraints on trade. *State Oil Co. v. Khan,* 522 U.S. 3, 10 (1997). A court determines if the restraint is unreasonable by using either the per se rule or the rule of reason. *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of U. of Okla.*, 468 U.S. 85, 86 (1984). This Court has recently been unwilling to apply the per se rule to the NCAA, because the horizontal restraints of trade can be procompetitive in order to preserve the character and quality of college athletics. *Id*. at 102.

Recent court precedent has found that a NCAA "eligibility" bylaw was not valid as a matter of law under the Sherman Act, that it regulated a commercial activity, and that it caused the plaintiff injury in fact. *O'Bannon v. NCAA*, 802 F.3d 1049 (9th Cir. 2015). In *O'Bannon*—a case very factually similar to this one—plaintiffs challenged NCAA amateurism and eligibility bylaws that restricted college athletes from receiving remunerations when their images and likenesses were used in video games. *Id*. at 1055. There, after reviewing many of the same cases

and arguments before this Court, the court found affirmatively for the plaintiffs on the very questions Mr. Snow asks this Court to consider. *Id*. at 1069. The court then proceeded with the rule of reason analysis, emphasizing in its holding that "the NCAA is not above antitrust laws…" *Id*. at 1079.

This Court should reverse and remand the appellate court's holding and find that a rule of reason analysis must be applied to consider Mr. Snow's claim against the NCAA for three reasons: (1) NCAA Bylaw 12.5.2.1 regulates "commercial activity" and is therefore subject to the Sherman Act, (2) Mr. Snow has met the Sherman Act's heightened injury requirement because the NCAA's compensation rules caused his injury in-fact within a relevant market, and (3) court precedent has not held NCAA amateurism and eligibility bylaws protected as a matter of law from scrutiny under the Sherman Act and instead has applied the rule of reason to these bylaws.

A. NCAA Bylaw 12.5.2.1 regulates "commercial activity" and is therefore subject to the Sherman Act.

NCAA Bylaw 12.5.2.1 ("compensation bylaw") regulates commercial activity, because it restricts student-athlete remuneration and is therefore subject to the Sherman Act. In order for the Sherman Act to apply to a NCAA bylaw, that bylaw must be a "restraint of trade or commerce[.]" 15 U.S.C. § 1. The Supreme Court has interpreted the Sherman Act's purpose as to prevent unreasonable restraints in "business and commercial transactions." *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 490 (1940). It is not enough for the NCAA as an entity to be commercial, but the NCAA rule itself must be "commercial in nature." *Worldwide Basketball and Sport Tours, Inc. v. NCAA*, 388 F.3d 955, 958 (6th Cir. 2004); *see also Smith v. NCAA*, 139 F.3d 180, 185 (3d Cir. 1998), *vacated on other grounds by NCAA v. Smith*, 525 U.S. 459 (1999) ("we consider the character of the NCAA's activities.").

Thus far, some NCAA bylaws have been held as commercial, while others have been held as noncommercial. For example, a NCAA bylaw regulating member institution's television appearances ("television plan") was commercial in nature and violated the Sherman Act, because it constituted a restraint on price and output. *Bd. of Regents*, 468 U.S. 104, 107-08. The Court reasoned that restricting a source of income from television would be no different than restricting alumni donations or tuition rates, which are not inherently competitive activities. *Id*. at 119. As the Court noted, the plan was not intended to ensure competitiveness in any way. *Id*. at 120. Instead the plan "simply impose[d] a restriction on one source of revenue that is more important to some colleges than to others." *Id.* at 119.

Similar to *Bd. of Regents* where the Court determined that a restraint on price and output was commercial in nature, the Sixth Circuit also held that restricting revenue from NCAA member schools is commercial in nature. A NCAA bylaw that restricted the type and number of games teams could play during a season was challenged by promoters of college basketball tournaments. *Worldwide Basketball & Sport Tours, Inc. v. NCAA*, 388 F.3d 955, 957 (6th Cir. 2004). There, the court reviewed whether the rule was commercial when the NCAA argued that the rule was academically motivated. *Id*. at 959. However, the court looked beyond the motivation of the rule and found the rule commercial in nature, because the rule restrained a source of revenue for the member schools and the promoters. *Id*. at 959.

Conversely, four years later, the Sixth Circuit looked at the motivation of a NCAA rule rather than its effects. *Bassett v. NCAA*, 528 F.3d 426, 433 (6th Cir. 2008). In *Bassett*, the court found that NCAA bylaws prohibiting remuneration to student-athletes were noncommercial, because motivation of the rule was to ensure competitiveness. *Id*. at 433. In contrast to *Worldwide Basketball*, the court looked to the motivation of the rules, as the rules were

"designed to promote and ensure competitiveness amongst NCAA member schools." *Id*. at 433. Further, the court reasoned that "providing remuneration to athletes in exchange for commitments to play for the violator's football program" violated the spirit of amateur athletics. *Id*. at 433.

Just as the Sixth Circuit looked to the NCAA's motivation to ensure competition and amateurism, the Third Circuit also looked to the NCAA's motivation. The court held that the NCAA's "Postbaccalaureate Bylaw," which prevented student-athletes from transferring to a postgraduate institution to play their chosen sport, was noncommercial. *Smith v. NCAA*, 139 F.3d 180, 185 (3d Cir. 1998). There, the court determined that the bylaw was not intended to provide the NCAA with a commercial advantage but was in place to "ensure fair competition in intercollegiate athletics." *Id*. at 185.

Here, NCAA Bylaw 12.5.2.1 ("compensation bylaw") is commercial in nature, because it is a restraint of trade in price and output. 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 services.

NCAA Bylaw 12.5.2.1.

On its face, this rule appears to be similar to the bylaws in *Bassett* and *Smith*, because the bylaws are seemingly motivated by preservation of fair competition and amateurism. However, further analysis shows that the rule is exactly the type of rule the Sherman Act was intended to prevent.

First, this rule is entirely different from the Postbaccalaureate Bylaw in *Smith*. The *Smith* bylaw was only in place to ensure fair competition and did not relate to any trade or additional compensation for the student-athlete—it did not have commercial motivation or effects. In other

words, as the court in O'Bannon stated, Smith's bylaw was a "true 'eligibility' bylaw." Unlike the *Smith* bylaw that does not restrain student-athlete remuneration, this bylaw's effects directly restrain student-athletes from receiving remuneration from using their likeness. Unlike the motivation in the *Smith* bylaw, this rule is not in place to ensure fair competition, because all student-athletes would have the same ability to receive remunerations from third parties, and it is unlikely one school would gain an advantage over another.

Further, this compensation bylaw is similar to the *Bassett* bylaw, because this compensation rule governs remunerations to student-athletes. However, the court in *Bassett* failed to consider the commercial effects of its bylaw and instead focused solely on the NCAA's motivations for ensuring competitiveness and preserving amateurism. . Like the court in *O'Bannon* stated, the *Bassett* court was likely "simply wrong" in focusing solely on the motivation instead of considering the bylaw's effects. Here, even if the NCAA's motivation is to preserve fair competition and/or amateur athletics, that does not mean the effects of the compensation rule are inherently noncommercial.

Instead, the compensation rule is entirely commercial. Just as the court in *Worldwide Basketball* looked beyond the motivation of the tournament restriction bylaw to what the NCAA was regulating, this Court should look beyond the motivation of the compensation bylaw and to the effects on the restraint on remuneration. Here, while the compensation bylaw is motivated to preserve amateurism, the bylaw's effects regulate student-athletes' abilities to receive remuneration by selling for likeness. It is difficult to conclude that a rule preventing Mr. Snow from receiving "$3,500 during the first trial period" for allowing his likeness to be used as an emoji is not commercial.

While the NCAA may argue that the Court in *Board of Regents* cited "eligibility rules" as rules needed to foster "competition among amateur athletic teams and therefore procompetitive," presuming a rule procompetitive does not automatically make it noncommercial. Instead, this Court should construe this rule as one that "restrains price and output," the same kind of rule that the Court said the Sherman Act was intended to prohibit. It is clear that the NCAA is restricting the price that student-athletes can receive for their likeness, effectively fixing that value at zero. Further, the NCAA is restricting the output of the players' likenesses, allowing only the NCAA's chosen partners to use players' likenesses, while closing off the market to all other competitors. Because the NCAA's compensation bylaw is restraining trade in both price and output, this bylaw is commercial in nature, and therefore subject to the Sherman Act.

B. The NCAA's compensation rules caused Mr. Snow's injury in fact.

Once this Court finds the NCAA's compensation bylaw regulates "commercial activity," this Court should find that Mr. Snow was injured in fact by the NCAA's compensation bylaw, and he therefore meets the Sherman Act's heightened injury requirement. In order to satisfy the Sherman Act's antitrust heightened injury requirement, Mr. Snow must show "injury of the type the antitrust laws were intended to prevent. . ." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 477 (1977). Further, "[r]estrictions on price and output are the paradigmatic examples of restraints of trade that the Sherman Act was intended to prohibit." *Bd. of Regents,* 468 U.S. at 107-08. In order for Mr. Snow to show an injury in fact, he must show that the NCAA's restrictions on price and output produced "significant anticompetitive effects within a relevant market." *Tanaka v. Univ. of S. Cal,* 252 F.3d 1059, 1063 (9th Cir. 2001) (citing *Hairston v. Pacific 10 Conference,*101 F.3d 1315, 1319 (9th Cir. 1996)). In order to analyze the "significant anticompetitive effects within a relevant market," the court has separately analyzed the "significant anticompetitive effects" and the "relevant market." The relevant market is often

defined by proof of market control in conjunction with geographic location of an area of effective competition where buyers can turn for alternative sources of supply. *Id.*

When there is an agreement not to compete for price or output, proof of market control is not required. *Bd. of Regents*, 468 U.S. at 109. In *Board of Regents,* the Court found that the NCAA's television plan had "a significant potential for anticompetitive effects," and the Court noted that the district court in that case "indicate[d] that this potential has been realized." *Id.* at 104-05. The Court spoke of potential for how the television plan would eliminate competitors from the market. *Id*. at 108. Because the NCAA made "an agreement not to compete in terms of price or output," the Court did not require proof of the NCAA's market control. *Id*. at 109. However, the Court noted that "[a]s a factual matter, it is evident that [the NCAA] does possess market power." *Id*. at 111. The Court labeled college football broadcasts as a separate market and concluded that the television plan constituted a restraint on the operation of that market. *Id*. at 113.

Here, there is a relevant market for student-athletes' names, images, and likenesses ("NIL"), and the NCAA's compensation bylaw is restraining that market. Similar to *Board of Regents*, where the Court found an agreement not to compete, here, the NCAA's compensation bylaw forces an agreement with players not to compete in the NIL market. It is clear that the NIL market exists from the simple fact that Snow and other participating players were approached by Apple and were subsequently paid for the use of their NILs as emojis. Additionally, as shown in *Board of Regents,* Snow need not prove restraint of only the NIL emoji market, but simply show that there is a market for players to sell their NILs for any purpose. As shown in the facts of this case, that market exists.

Though *Board of Regents* does not require proof of market control, it is clear that the NCAA's compensation bylaw has shown anticompetitive effects on the NIL market. As the compensation bylaw states, student-athletes will be ineligible to play their sport if they enter into this market. Losing eligibility means student-athletes lose out on scholarships, housing, and other benefits associated with being student-athletes. Here, Mr. Snow is a prime example of this injury in that he was unable to finish a season in which he was nominated for multiple awards and was unable to finish his college career. That the timing worked out (a college football player must be three years out of high school to enter the NFL draft), and that he was talented enough to enter the NFL draft are inconsequential to whether or not he was injured in fact. It is quite possible that he would have earned those awards, earned a higher draft position in the NFL draft, and received more money on his rookie contract, had he finished the college football season. Unfortunately, Mr. Snow was never availed those opportunities because the NCAA ruled him ineligible after he broke the compensation bylaw.

Ultimately, Mr. Snow was injured in fact after the NCAA's compensation bylaw foreclosed the NIL market to him and other student-athletes. Hence, he has met the Sherman Act's heightened injury requirement.

C. Courts have repeatedly and consistently applied the rule of reason to NCAA amateurism and eligibility bylaws.

Despite the Fourteenth Circuit's holding, court precedent has not found NCAA amateurism and eligibility bylaws protected as a matter of law. Instead, courts have repeatedly and consistently used the rule of reason analysis to review these types of bylaws. It is true that certain NCAA eligibility bylaws have been found noncommercial and procompetitive. *Smith v. NCAA*, 139 F.3d 180, 185-86 (3d Cir. 1998). However, if an NCAA bylaw restrains trade under the Sherman Act, the court must use either the per se rule or the rule of reason to determine if the

restraint was unreasonable. *Law v. NCAA*, 134 F.3d 1016 (10th Cir. 1998). NCAA amateurism and eligibility rules are horizontal restraints; restraints which are often held *illegal per se* as a matter of law. *Bd. of Regents*, 468 U.S. at 85, 99-100. However, because these restraints are needed to "preserve the character and quality of [college football]," courts should use the rule of reason to review these rules. *Id.* at 102-03.

In *Board of Regents*, the Court reviewed whether the NCAA's college football television plan ("television plan") that included certain requirements and appearance limitations violated the Sherman Act. *Id.* at 94. Previously, the appellate court held that the television plan constituted illegal *per se* price fixing in violation of the Sherman Act. *Id.* at 97. However, while the Supreme Court noted that the television plan constituted a "horizontal restraint" (often held unreasonable as a matter of law), the Court explained that college football is "an industry in which horizontal restraints on competition are essential." *Id.* at 99-100. Further, because the NCAA played a "vital role" that expanded consumer choice for fans and student-athletes, such restrictions could "be viewed as procompetitive." *Id*. at 102. Accordingly, the Court used the rule of reason, instead of the per se rule the appellate court used, to review the television plan. *Id*. at 103. Using the rule of reason, the Court held the television plan violated the Sherman Act because the plan's anticompetitive effects outweighed its procompetitive effects. *Id*. at 119.

Since *Board of Regents*, appellate courts have been split over whether the Sherman Act applies to NCAA amateurism and eligibility bylaws, but they have not "repeatedly and consistently" upheld eligibility rules as a matter of law, as the Fourteenth Circuit claims. For example, in *Smith v. NCAA*, a collegiate student-athlete challenged the NCAA's "Postbaccalaureate Bylaw" that prevented student-athletes from participating in "intercollegiate athletics at a postgraduate institution other than the institution from which the student earned her

undergraduate degree." 139 F.3d at 183. There, the Third Circuit found that the Sherman Act did not apply to NCAA eligibility requirements because the rules in question did not relate to the NCAA's commercial or business activities and were primarily in place to ensure fair competition among member schools. *Id*. at 185. However, in an alternative opinion, the court hypothesized that "if the eligibility requirements were subject to the Sherman Act, we would analyze them under the rule of reason." *Id*. at 186. The court found that the rules would survive the rule of reason analysis and upheld the rules as reasonable. *Id*. at 187.

In contrast to the Third Circuit's finding that the Sherman Act does not apply to NCAA eligibility rules, the Fifth Circuit applied the rule of reason and assumed, without deciding, that the Sherman Act did apply. *McCormack v. Natl. Collegiate Athletic Ass'n*,845 F.2d 1338, 1343-44 (5th Cir. 1988). In *McCormack*, football players were among a group of plaintiffs who challenged the NCAA's player compensation rules after the NCAA suspended the Southern Methodist University football team for violating those rules. *Id*. at 1340. There, the court applied the rule of reason to find the NCAA's goal to integrate athletics with academics was reasonably furthered by the compensation restrictions and upheld the rules under the Sherman Act. *Id*. at 1344-45.

Similarly, the Ninth Circuit also applied the rule of reason and assumed without deciding the Sherman Act applied to an NCAA eligibility rule that denied a student-athlete the ability to transfer between intra-conference schools without losing athletic eligibility. *Tanaka v. Univ. of S. Cal*, 252 F.3d at 1062. . There, the court applied the rule of reason analysis and found that the plaintiff had not alleged a relevant market under the Sherman Act to bring her antitrust claim. *Id*. at 1065.

Finally, in a case about athletic scholarship restrictions, the Seventh Circuit broadly interpreted *Board of Regents*. There, the court reasoned that if an NCAA bylaw "fit[s] into the same mold" as those discussed in *Board of Regents*, then the analysis only need be applied "in the twinkling of an eye." *Agnew v. Natl. Collegiate Athletic Ass'n*, 683 F.3d 328, 341 (7th Cir. 2012) *quoting Board of Regents*, 468 U.S. at 109 n.39. The Seventh Circuit took this to mean that, because certain NCAA bylaws were blessed by the Supreme Court as "presumptively procompetitive," the court need not give a full-detailed rule of reason analysis. *Id*. at 341. Notably, the court stated in a footnote that it "need not touch upon the debate of whether all eligibility rules or just *most* eligibility rules are due a presumption, as the Bylaws at issue are not, in fact, eligibility rules." *Id*. at 343 n.6 (emphasis in note). The court found that the scholarship limitations in question were not related to the eligibility rules identified in *Board of Regents*. *Id*. at 344. Accordingly, the "procompetitive presumption" did not apply to the scholarship rules. *Id*. at 345.

Here, the Fourteenth Circuit erred when it found that courts have "repeatedly and consistently" upheld NCAA amateurism and eligibility bylaws as a matter of law. In *Board of Regents*, the preeminent Supreme Court case upon which the Fourteenth Circuit relies, the Court made no clear ruling on whether NCAA amateurism or eligibility rules were presumptively procompetitive as a matter of law. Rather, in dicta, the Court detailed the procompetitive nature of the NCAA's horizontal restrictions in order to justify the Court's decision to use the rule of reason, rather than the per se analysis used by the lower court. Indeed, the Supreme Court made no finding on whether any NCAA amateurism or eligibility rules should be upheld as a matter of law, and subsequent circuit court decisions have not interpreted the Court as doing so.

Instead, circuit courts that have interpreted the Court's dicta as to whether NCAA amateurism and eligibility rules are subject to the Sherman Act have come to different conclusions. As noted, the Third Circuit in *Smith* held that eligibility requirements were noncommercial and did not fall under the Sherman Act. However, it is unclear whether the Third Circuit referred to the specific postbaccalaureate eligibility requirements before the court, or all NCAA eligibility requirements. Furthermore, the court displayed uncertainty when it gave an alternative opinion and used the rule of reason to analyze the postbaccalaureate eligibility requirements. That the court upheld the eligibility rules is inconsequential, as the question here is only whether NCAA eligibility rules are protected as a matter of law, and the Third Circuit's analysis proved otherwise.

In contrast to the Third Circuit, the Fifth and Ninth Circuits both "assumed without deciding" that their respective NCAA bylaws fell under the Sherman Act and were subject to the rule of reason. While the Fifth Circuit in *McCormack* found the NCAA's player compensation rules reasonably furthered the goal to "integrate athletics with academics[,]" the court still used the rule of reason to analyze the rules. Likewise, while the Ninth Circuit in *Tanaka* found the transfer rules valid because the plaintiff did not allege a "relevant market for antitrust purposes[,]" the court's use of the rule of reason shows the court did not consider NCAA eligibility rules protected as a matter of law.

The Fourteenth Circuit's decision weighs heavily on the Seventh Circuit's *Agnew* decision. However, like the Court in *Board of Regents*, the *Agnew* court's "procompetitive presumption" was dicta. And even if the Seventh Circuit's "procompetitive presumption" was in its holding, that presumption would be based on Supreme Court dicta, and would still leave the presumption open to analysis.

Summarily, the Fourteenth Circuit Court erred when it found NCAA amateurism and eligibility bylaws protected as a matter of law. Instead, Supreme Court and circuit court precedent shows a repeated and consistent use of the rule of reason to analyze NCAA amateurism and eligibility bylaws. Accordingly, this Court should find that NCAA amateurism and eligibility bylaws are not protected as a matter of law from scrutiny under the Sherman Act, and instead are subject to a rule of reason analysis.

For the foregoing reasons, Mr. Snow's claim should be considered using the rule of reason analysis. First, NCAA Bylaw 12.5.2.1 regulates "commercial activity" and is therefore subject to the Sherman Act. Second, Mr. Snow has met the Sherman Act's heightened injury requirement because the NCAA's compensation rules caused his injury in-fact within a relevant market. Third, court precedent has not held NCAA amateurism and eligibility bylaws protected as a matter of law from scrutiny under the Sherman Act, and instead has applied the rule of reason to these bylaws. Accordingly, this Court should reverse and remand the circuit court's holding and find that a rule of reason analysis is needed to consider Mr. Snow's claim against the NCAA.

II. The NFL players' state law claims are not preempted by § 301 of the Labor Management Relations Act.

The NFL players' negligence-based claims are not preempted by § 301 of the Labor Management Relations Act ("LMRA"). In enacting § 301, Congress did not intend to preempt state rules that "proscribe conduct, or establish rights and obligations, independent of a labor contract." *Caterpillar Inc. v. Williams*, 482 U.S. 386, 395 (1987) (quoting *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 211–12 (1985)). Section 301 preempts only state law claims that are substantially dependent upon an analysis of the terms of a collective bargaining agreement ("CBA"). *Allis-Chalmers*, 471 U.S. at 220. Section 301 does not preempt a state-law claim

merely because a dispute involves employment or tangentially relates to a provision of a CBA. *Id*. at 211. To determine whether the LMRA preempts a state law claim, courts will conduct a two-step inquiry. First, the court will ask whether the rights at issue are "conferred by state law, independent of the CBAs." *Burnside v. Kiewit Pacific Corp.*, 491 F.3d 1053, 1058 (9th Cir. 2007). Second, if the rights are conferred by state law and exist independently of the CBA, the court asks whether the claim can be resolved without interpreting the CBA. *Id.*

A. The NFL players' right to receive medication that does not create an unreasonable risk of harm does not arise from the CBA.

The NFL players' right to receive medication that does not create an unreasonable risk of harm does not arise from the CBA because the CBA does not contain any provisions related to the safe distribution of medication to players and one cannot bargain for what is illegal. For § 301 to preempt state law claims, interpretation of the CBA "must inhere in the nature of the plaintiff's claim." *Dent v. National Football League,* 902 F.3d 1109, 1116 (9th Cir. 2018). In *Dent*, retired professional football players filed a putative class action alleging that professional football league distributed controlled substances and prescription drugs to its players in violation of both state and federal laws. *Id.* at 1114. The players stated that during their time in the NFL, the players received and were encouraged to take an abundant amount of medication without warning about the side effects and risks. *Id.* at 1115. The players claimed that the manner in which those drugs were administered left players with permanent injuries and chronic medical conditions. *Id.* The *Dent* court conducted a two-step inquiry to determine whether § 301 preempted the players' state-law claims. As to the first prong, the court reasoned that the players' right to receive medical care that does not create an unreasonable risk of harm, was a right that did not arise from the CBA because the CBA does not require the NFL to provide medical care to players. Finding that the players satisfied the second step of the two-step inquiry, the court

found that it did not have to interpret the CBA and thus § 301 did not preempt the players' state law claims. *Id.* at 1118–21.

As to the first prong of the two-step inquiry, here, like in *Dent*, Mr. Snow and the other NFL players' right to receive medication that does not create an unreasonable risk of harm is a right that does not arise from the CBA. The CBA does not require the NFL to provide medication that does not create an unreasonable risk of harm. While the CBA does include a provision requiring "each club to retain a board-certified orthopedic surgeon," this has nothing to do with the players' right to receive medication that does not cause them harm. Similarly, that the CBA provides players with a right to a second medical opinion, access to medical records, access to medical facilities and accurate recovery times, does not relate to the players' right to receive medication that does not create an unreasonable risk of harm. While these provisions provide benefits to players, the provisions do not set standards by which players are to receive medication. The CBA does not provide regulations for prescribing players medication, limits on prescription drugs, or disclosure requirements informing players of medication risks. What is more, the NFL itself illegally distributed controlled substances that harmed the players. But parties to a CBA cannot bargain for what is illegal. *Allis-Chalmers*, 471 U.S. at 212. Accordingly, the right to receive medication free from an unreasonable risk of harm is a right that does not arise from the CBA.

B. The players' negligence-based claims can be resolved without interpreting the CBA.

Mr. Snow and the other NFL players' negligence-based claims are independent of the CBA because the elements of the claims at issue do not require interpretation of the CBA. Under the LMRA preemption two-step inquiry, if the court finds that the rights at issue are independent of the CBA, the court then asks whether the state law claim can be resolved without interpreting the CBA. *Burnside*, 491 F. 3d at 1058. Courts construe "interpretation" narrowly; to interpret

means more than to "consider, refer to, or apply." *Alaska Airlines Inc. v. Schurk*e, 898 F.3d 904, 921 (9th Cir. 2018). Mere consultation to a CBA is not grounds for § 301 preemption. *Livadas v. Bradshaw*, 512 U.S. 107, 124 (1994). Section 301 preempts state law claims only when there is a dispute over the meaning of contracts terms. *See id.*

A state law claim can be resolved without deferring to a CBA whenever each element of the claim does not require interpretation of the CBA. *See Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 407 (1988). In *Lingle*, the petitioner worked for the respondent's manufacturing plant. *Id.* at 401. The petitioner notified respondent that she had been injured during the course of her employment and demanded compensation for her medical expenses pursuant to the Illinois Worker's Compensation Act. *Id.* After, respondent terminated petitioner for filing a false worker's compensation claim. *Id.* Then, petitioner's union filed a grievance for her protection pursuant to a CBA that protected employees from wrongful discharge and established a procedure for the arbitration of grievances. *Id.* at 401–02. Petitioner also filed suit against respondent in Illinois Circuit Court for retaliatory discharge. *Id.* at 402. Respondent moved the case to federal district court asking that the court to dismiss the case because § 301 of the LMRA preempted the state law retaliatory discharge claim or to stay the proceedings until the end of arbitration. *Id.*

The Supreme Court held that § 301 did not preempt the state law retaliatory discharge claim because none of the elements of the claim required interpreting the CBA. *Id.* at 407, 413. The Court reasoned that even though the state law claim involved the same facts as the dispute resolution pursuant to the CBA, the state law claim was independent of the CBA because the state law claim could be resolved without interpreting the CBA. *Id.* at 407. The Court found that § 301 says nothing about the rights that states can provide to employees when those rights do not

depend on the interpretation of CBAs. *Id.* at 409. Therefore, § 301 did not preempt petitioner's state law retaliatory discharge claim. *Id.* at 407, 413.

Here, like the claims in *Lingle*, Mr. Snow's negligence-based claims can be resolved under state law and without reference to the CBA. The elements of Mr. Snow's negligence-based claims do not require interpretation of the CBA. To state a claim for negligence plaintiff, need only show (1) the defendant owed a duty to the plaintiff for the protection against unreasonable risks; (2) the defendant breached that duty; (3) the defendant's breach was the proximate cause of plaintiff's harm; and (4) the plaintiff sustained damages. *Corales v. Bennett*, 567 F.3d 554, 572 (9th Cir. 2009) (quoting *McCarry v. Sax*, 158 Cal. App. 4th 983, 994 (Cal. Ct. App. 2008)).

1. Duty

Whether a defendant owed a duty of care to the plaintiff is a question of law based on the policy considerations that lead the Court to conclude a plaintiff is entitled to protection. *Ileto v. Glock Inc*., 349 F.3d 1191, 1203 (9th Cir. 2003). Critical to the determination is whether the plaintiff is "foreseeably endangered by the defendant's conduct." *Id.* (quoting *Jacoves v. United Merchandising Corp*., 11. Cal. Rptr. 2d 468, 484 (Cal. Ct. App. 1992)). The duty to exercise due care protects the class of persons who may foreseeably be injured as a result of the defendant's conduct. *Id.* Under the general duty of care, a defendant has a duty not to expose the plaintiff to an unreasonable risk of harm through reasonably foreseeable conduct, this includes the reasonably foreseeable negligent conduct of a third person. *Id.* at 1203–04. Further, the Controlled Substances Act, and the Food, Drugs, and Cosmetics Act govern how drugs are to be prescribed and labeled. *See* 21 U.S.C. § 801 *et seq*. (2012); 21 U.S.C. § 301 *et seq*. (2012).

Here, the Court's policy considerations do not require interpretation of the CBA. If the NFL continues to be careless in distributing medication to players, then even more players will likely suffer the same harm as Mr. Snow. This would discourage players from wanting to play

professional football or make them very fearful if they choose to do so. As part of the NFL, players expect that the NFL will care for them by providing adequate medical treatment. In analyzing these policy considerations, the Court need not look at the CBA because these considerations are factual inquiries. Similarly, whether Mr. Snow and other NFL players were foreseeably endangered by the NFL's conduct is a factual inquiry. The CBA makes no reference about carelessness in handling dangerous substances.

Also, that Mr. Snow and other NFL players were of the class of persons foreseeably injured by the NFL's conduct is an inquiry that does not require interpretation of the CBA. Given the nature of the player's job—a tackle sport, it is foreseeable that they would need medication safely administered to them. Moreover, under the general duty of care, the NFL had a duty to distribute and administer medication to players with reasonable care so as to not expose them to harm. At the least, the Controlled Substances Act, and Food, Drugs, and Cosmetics Act impose a duty of care on the NFL because these statutes establish minimum standards for the distribution of dangerous drugs. Also, these statutes mandate how medication must be prescribed and labeled. Thus, the terms of the CBA are unnecessary to determine whether the NFL owed Mr. Snow and other NFL players a duty of care.

2. Breach

To determine whether a defendant breached a duty of care owed to the plaintiff, the Court balances the harm likely to result from a defendant's actions against the social value of the interest the defendant seeks to advance. *Ileto*, 349 F.3d at 1205. To make this determination, the Court need only look to the harm that Mr. Snow and other players suffered and balance that against the social value of the NFL's interests. Mr. Snow suffered permanent damage to his health, which included an enlarged heart, nerve damage, and an addiction to painkillers. Many other NFL players suffered similar harm. In contrast, the NFL sought to enhance their revenue

and entertainment value. The Court need not look at the CBA to balance the harm Mr. Snow and other NFL players suffered against the social value of the NFL's interests. Another reason the Court need not look the CBA is that the Controlled Substances Act, and the Food, Drugs, and Cosmetics Act establish minimum standards for the distribution of drugs. Thus, the Court can determine whether the NFL breached its duty of reasonable care by comparing the NFL's conduct to the requirements of these statutes. Summarily, the Court does not need to interpret the CBA to decide if the NFL breached its duty of care.

3. Causation

Whether the defendant's actions were the proximate cause of a plaintiff's harm is a purely factual inquiry that does not require the Court to interpret the CBA. *Ileto*, 349 F.3d at 1206; *see also Dent*, 902 F.3d at 1119–20. Here, the CBA is unnecessary to determine causation because the CBA does not state anything about the NFL's conduct in question—that they negligently distributed medication. Further, the CBA is unnecessary to determine that Mr. Snow and other NFL players suffered harm. In particular, Mr. Snow suffered an enlarged heart, permanent nerve damage in his ankle, and addiction to pain medication. The CBA is silent as to medication causing an unreasonable risk of harm to players. Rather, the defendant's conduct, the harm suffered, and whether Mr. Snow and other players suffered harm as a result of the NFL's conduct are factual matters that the CBA cannot determine. Thus, the element of causation does not require interpretation of the CBA.

4. Harm

That Mr. Snow and other NFL players suffered harm is also a question of fact. Mr. Snow was not only diagnosed with an enlarged heart and permanent nerve damages in his ankle, he also developed an addition to painkillers. It is impossible for the CBA to resolve whether Mr. Snow and other NFL players suffered harm because of the nature of this factual inquiry. The

CBA contains no terms about any specific harm to Mr. Snow and the other NFL players. For these reasons, the element of harm does not require interpretation of the CBA.

In conclusion, Mr. Snow and the other NFL players' state law claims are independent of the CBA. There is no dispute over the meaning of contract terms. Moreover, their claims can be resolved without interpretation of the CBA because each element of their negligence-based claims does not require interpretation of the CBA. Accordingly, this Court should reverse the Fourteenth Circuit's decision and hold that § 301 does not preempt Mr. Snow and the other NFL players' state law claims.

Conclusion

For the foregoing reasons, NCAA Bylaw 12.5.2.1 must be analyzed under the rule of reason, and the NFL players' claims are not preempted by § 301 of the LMRA. Therefore, this Court must reverse the appellate court's decision and remand this case for further proceedings.

Certificate of Compliance

This document certifies that the work product contained in all copies of the brief is in fact the work product of the team members. This document further certifies that that authors of this brief have complied with all applicable honor code requirements. Furthermore, this brief complies with all the Rules of the Competition.