No. 09-214

In The

Supreme Court of The United States

Jon Snow, and Other Similarly Situated Individuals
Petitioner,

v.

National Collegiate Athletic Association;
National Football League
Respondent.

On Writ of Certiorari to The United States Court of Appeals for The Fourteenth Circuit

BRIEF FOR PETITIONER

Team 25

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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CONSTITUTIONAL PROVISIONS AND STATUTORY PROVISIONS INVOLVED

The text of the following constitutional and statutory provisions involved are provided below:

29 U.S.C. §185(a) provides in relevant part:

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 organization, 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.

Bylaw 12.5.2.1 (2018-19) provides in relevant part:

After becoming a student athlete, an individual shall not be eligible for participation in intercollegiate athletics, if the individual: (a) Accepts any remuneration for or permits the use of his or her name or picture to advertise, recommend or promote directly the sale or use of a commercial product or service of any kind; or (b) Receives remuneration for endorsing a commercial product or service through the individual's use of such product or service.

SUMMARY OF THE ARGUMENT

This Court should hold that Snow's Sherman Act claim can move forward against the NCAA because relevant precedent and antitrust law both dictate that it should. The relevant precedent here is *NCAA v. Board of Regents of the University of Oklahoma*. In *Board of Regents*, the Court held that college sports are a product that needs regulations to survive and thus any rules made by the NCAA are not per se invalid despite even the clearest anticompetitive effects of the bylaw. *Id.* at 2970. Using the Rule of Reason, the Court held that the television agreement unreasonably regulated commercial activity. Critically, the Court did not rule any NCAA rules or agreements to be per se valid or invalid, thus Snow's Sherman Act claim should be allowed to go forward under Rule of Reason analysis.

This Court should hold that Snow's negligence per se claim is not preempted under Section 301 of the Labor Management Relations Act. In order for a claim to be preempted under Section 301, the claim must either: (1) if the claim is based on a provision of the CBA; and (2) if the claim is substantially dependent on analysis of the CBA. Snow's negligence per se claim regarding the National Football League's failure to provide reasonable care to players, when prescribing controlled substances, is not based on a provision within the CBA nor does the claim substantially depend on an analysis of the CBA. In fact, Snow's claims arise specifically out of the Controlled Substance and Abuse Act as well as California Pharmacy Law, which forbids physicians from administering controlled substances without providing patients with information of risk and benefits of the medication. Therefore, Snow's negligence per se claim is not preempted under Section 301 of the Labor Management Relations Act.

STATEMENT OF THE CASE

A few years ago, Jon Snow (hereinafter "Snow") was a stellar athlete. (R. 13). He was the star quarterback for the Tulania Greenware Football Team. (R. 13). There, he brought the team multiple successful seasons and was nominated for numerous awards for his athletic abilities and achievements. (R. 13). Among those awards was an offer from Apple, Incorporated (hereinafter "Apple"). (R. 13). The offer made would afford Snow the opportunity to work alongside Apple in effort to appeal to college football fans, encouraging fans to download a new Apple Emoji Keyboard. (R. 13).

Per the offer, Apple provided Snow as well as other players with an incentive of receiving $1000 for the use of their image and likeness on the emoji keyboard. (R. 13). Apple further incentivized the players by providing them with an addition one-dollar royalty fee for every Apple consumers' emoji keyboard downloaded. Snow and the other players were eager to interact with college football fans and thus, accepted the offer. (R. 13). From interacting with fans, Snow earned approximately $3500 during the first trial period of the emoji keyboard. (R. 13).

Once students became aware that Apple had provided Snow and other players an incentive to interact with college football fans, the students reported the incentives to the head of Tulania Compliance, Cersei Lannister. (R. 13). Lannister then contacted the National Collegiate Athletic Association ("NCAA") and reported that Snow and the other players had accepted the incentives made by Apple. (R. 13). As a result, NCAA ended Snow's, as well as the other players', collegiate football careers. (R. 13). After learning that he was suspended indefinitely from playing collegiate football, Snow filed a complaint against the NCAA. (R. 13). The complaint alleged that the NCAA violated Section 1 of the Sherman Act and prevented players

from engaging in competition. (R. 13). This complaint is the first part of this combined legal action. (R. 13).

Even though the NCAA ended Snow's collegiate football career, his love for football did not waiver. He entered his name into the National Football League's draft. (R. 13). A year later, he was a draft pick of the New Orleans Saints. (R. 13). The New Orleans Saints are a professional football franchise of the National Football League ("NFL"). (R. 13). During Snow's rookie year, he continued to excel in football as player for the New Orleans Saints. (R. 13). As a player, he received recognition for his athletic abilities, but that recognition did not come without a price. (R. 13).

Snow suffered, throughout the season, from small head collusions and minor ankle injuries. (R. 13). When he would seek medical attention for his various injuries, he would receive quick, but uninformative service from NFL doctors and trainers. (R. 13). The doctors and trainers provided Snow and other players with prescription for various painkillers and failed to provide any information regarding side effects or risk posed with taking the prescribed painkillers and other medications. (R. 13). Now, Snow has been diagnosed with an enlarged heart and permanent nerve damage in his ankle. (R. 13). Sadly, he also addicted to painkillers, a risk of taking them. (R.13). The other players included in this action have similar experiences. (R. 13). As a result of the doctors and trainers' failure to inform Snow and the other players of the risk and side effects of taking these various prescribed medications, Snow filed suit against the NFL. (R. 13). In his complaint, the second part of this combined action, Snow alleged that the NFL and its member clubs were negligent in the distribution and encouragement of excessive painkiller prescriptions. (R. 13).

The District Court decided to consolidate the two actions in the interest of judicial efficiency. (R. 13). The NCAA and the NFL filed motions to dismiss alleging that Snow's

claims were preempted by various federal laws. (R. 13). The District Court ruled in favor of Snow regarding the complaint against the NCAA. (R. 26). The District Court further held that Snow's negligence claims against the NFL were not preempted by federal law. (R. 26). The Appellate reversed the District Courts ruling. (R. 11). This Court granted certiorari.

ARGUMENT

I. THE SUPREME COURT HAS NOT INVALIDATED ANTITRUST CLAIMS TO NCAA BYLAWS AND THEREFORE THE FOURTEENTH CIRCUIT DECISION SHOULD BE REVERSED.

NCAA bylaw 12.5.2.1 is in violation of the Sherman Act because it has an anticompetitive effect against commercial activity that is contrary to antitrust law. Bylaw 12.5.2.1. says that:

> After becoming a student athlete, an individual shall not be eligible for participation in intercollegiate athletics, if the individual: (a) Accepts any remuneration for or permits the use of his or her name or picture to advertise, recommend or promote directly the sale or use of a commercial product or service of any kind; or (b) Receives remuneration for endorsing a commercial product or service through the individual's use of such product or service.

2018-19 NCAA DIVISION I MANUAL, Bylaw 12.5.2.1 (2018-19).

The Sherman Act was enacted to enhance competition and prevent *unreasonable* anti-competitive restraints on trade in a given market. See *NCAA v. Board of Regents of the University of Oklahoma*, 104 S. Ct. 2948, 2958-59 (1984). Thus, the general standard for analysis into competitive effects on a market is done under "the Rule of Reason." *Agnew v. NCAA*, 683 F.3d 328, 335 (7th Cir. 2012). In applying the Rule of Reason, "A court considers all relevant factors in determining a defendant's purpose in implementing the challenged restraint and the effect of the restraint on competition . . . and asks whether the challenged rule promotes or hinders competition." *Smith v. NCAA*, 139 F.3d 180, 186 (3d Cir. 1998). However, courts assessing anti-trust claims have also used "per se" rules, which would invalidate the legal action. The Court, in *Board of Regents*, expressed that per se rules are invoked "when surrounding circumstances make the likelihood of anticompetitive conduct so great as to render unjustified from further examination of the challenged conduct." 104 S. Ct. at 2961. Accordingly, the

Court of Appeals decision not to apply the Rule of Reason should be reversed because there are no per se justifications present for the disputed bylaw.

A. The Supreme Court has not invalidated any Sherman Act claims against the NCAA as inapplicable as a matter of law.

The Supreme Court, in *Board of Regents*, established how antitrust law is applied to Sherman Act claims brought against the NCAA. *Id.* at 2953. *Board of Regents* involved a dispute between the NCAA and two-member Universities over a television contract agreement. *Id.* In the agreement, the NCAA limited the amount of games that could be aired on television per season and set a price at which the television companies would pay to air the games. *Id.* at 2955-56. The Court acknowledged that agreements involving price-fixing and output limits are usually per se invalid because of their inherent anticompetitive nature. *Id.* at 2959. However, the Court then carved out an exception for the NCAA because "horizontal restraints on competition are essential if the product is to be available at all." *Id.* at 2959-60. Thus, because the sporting competitions overseen by the NCAA needed rules that restricted its competition in order to survive, each rule would be assessed for reasonableness under the rule of reason and not deemed to be per se illegal. The court then weighed the anticompetitive nature of the agreement against the NCAA's responsibility to maintain competitive balance and promote amateurism and found that the agreement was not tailored to any of the NCAA's goals. *Id.* at 2970. Therefore, the television agreement violated the Sherman Act. *Id.*

In what turned out to be dicta, the Court also discussed the NCAA's amateurism and eligibility rules. *Id.* at 2960. The Court explained that "The NCAA seeks to market a particular brand of football . . . In order to preserve the character and quality of the product athletes must not be paid, must be required to attend classes, and the like." *Id.* However, at no point does the Court anoint all NCAA eligibility rules as per se reasonable and, thus, safely protected from an antitrust claim. The Court simply uses these types of rules as an example of restraints to

competition that *may* be reasonable. This is done as a showing of proof that the NCAA's actions require a reasonableness assessment. The Court is, therefore, promoting that the NCAA's rules and agreements should all be examined under the Rule of Reason, instead of deeming them per se valid or invalid. The fact that the Court did not intend to deem any NCAA rules are valid as a matter of law is supported in the final paragraph of the majority opinion where the holding is deliberately narrowed to the case at hand and makes no mention of how any other NCAA rules are to be effected. *Id.* at 2970.

The Third, Fifth, and Seventh Circuits have also interpreted whether NCAA eligibility laws can fall under the purview of the Sherman Act. In *McCormack v. NCAA*, of the Fifth Circuit, there was a dispute over Southern Methodist University compensating athletes more than the NCAA rules would allow. 845 F.2d 1338, 1340 (5th Cir. 1988). The court did not hold that the NCAA rules are valid as a matter of law, but instead expressed that, "Assuming without deciding, that the antitrust laws apply to the eligibility rules . . . ." *Id.* at 1343. While it was ultimately decided that the NCAA rule did not violate the Sherman Act, the court used the Rule of Reason to do so. *Id.* at 1345. After developing the standard for the Rule of Reason, the court then concludes, "The goal of the NCAA is to integrate athletics with academics. Its requirements reasonably further this goal." *Id.* Thus, the court examined the NCAA activity through a reasonableness standard and did not accept the activity to be valid or invalid as a matter of law.

The Third Circuit also undertook an assessment of reasonableness in *Smith v. NCAA*. 139 F.3d at 186. The NCAA rule in dispute would not allow graduate students to play sports at any school except for the university that they had received their undergrad degree from. *Id.* at 182. In deciding that the rule did not violate the Sherman Act the Court stated, "The bylaw at issue here is a reasonable restraint which furthers the NCAA's goal of fair competition and the

survival of intercollegiate athletics and is thus procompetitive." *Id.* at 187. They further explicitly announced their use of the Rule of Reason, "Indeed, we think that the bylaw so clearly survives a rule of reason analysis that we do not hesitate upholding it." *Id.* Thus, the Third Circuit also analyzes the reasonableness of the NCAA rule against a Sherman Act claim and does not assume that the *Board of Regents* decision made the claim invalid as a matter of law.

The Seventh Circuit, in *Agnew v. NCAA*, decided that NCAA scholarship regulations were financial aid rules that are not per se protected from Sherman Act scrutiny. 683 F.3d at 332. The Court explained that, "The Supreme Court has not weighed in on this issue directly, but *Board of Regents*, the seminal case on the interaction between the NCAA and the Sherman Act, implies that all regulations passed by the NCAA are subject to the Sherman Act." *Id.* at 339. After quoting from *Board of Regents*, the court further developed that stance, "This presumes the applicability of the Sherman Act to NCAA bylaws, since no procompetitive justifications would be necessary for noncommercial activity to which the Sherman Act does not apply." *Id.* The Supreme Court indicated that the NCAA must justify its actions as procompetitive. *Board of Regents*, 104 S. Ct. at 2969. The Seventh Circuit then advances a presumption, based on that requirement of justification, which finds the Sherman Act as applicable to NCAA bylaws. *Agnew*, 683 F.3d at 339. Thus, the Seventh Circuit, along with the Third and Fifth Circuits, does not accept that the opinion in *Board of Regents* alone has thwarted any applicability of the Sherman Act to NCAA rules.

B. <u>The NCAA bylaw does regulate commercial activity because it restrains transactions that would lead to economic gain and the rule is not designed to meet any procompetitive interests.</u>

The Sherman Act states that "every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade of commerce among the several states is declared to be illegal." 15 U.S.C. § 1. Furthermore, "The modern definition of commerce includes 'almost every activity from which an actor anticipates economic gain.'" *Agnew*, 683 F.3d at 340. The

NCAA now generates over one billion dollars in revenue per year. Steve Berkowitz, *NCAA Reports Revenues of More Than $1 Billion in 2017, USA Today Sports* (March 7, 2018), https://www.usatoday.com/story/sports/college/2018/03/07/ncaa-reports-revenues-more-than-1-billion-2017/402486002/. Athletic Directors at many top universities have seen their pay steadily increase for over a decade and have been "surrounding themselves with well-paid executives and small armies of support staffs to help their premier teams." Will Hobson et al, *As College Sports Revenues Spike, Coaches Aren't the Only Ones Cashing in, Washington Post Sports* (Dec. 29, 2015), https://www.washingtonpost.com/sports/as-college-sports-revenues-spike-coaches-arent-only-ones-cashing-in. Moreover, the member schools of the NCAA are similarly situated to make huge economic gains, "Despite the nonprofit status of NCAA member schools, the transactions those schools make with premier athletes . . . are not noncommercial, since schools can make millions of dollars as a result of these transactions." *Agnew*, 683 F.3d at 340. Due to the potential and reality of the NCAA and its member schools to see large revenues from its athletic transactions, "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. Therefore, on its face the NCAA is regulating commercial activity in anticompetitive ways that are in conflict with the Sherman Act.

However, starting with the decision in *Board of Regents*, such anticompetitive behavior is not deemed to be a per se violation of the Sherman Act because the NCAA has legitimate interests to uphold. 104 S.Ct. at 2960. Those interests may outweigh the anticompetitive effects. *Id.* Moreover, some courts have put NCAA rules that are in furtherance of these goals in a category of noncommercial actions that are protected from antitrust claims. The NCAA rule in *Smith* was determined to be a pure eligibility rule that had no effect on commercial activities, thus, the Sherman Act could not apply. 139 F.3d at 187. In *Banks v. NCAA*, NCAA rules

against players hiring agents and declaring for professional drafts were held as justified by the NCAA's goal of promoting amateurism. 977 F.2d 1081, 1089-90 (7th Cir. 1992). Because the rule was enacted for legitimate purposes of keeping college sports played by amateur athletes, the bylaw was deemed noncommercial in nature. *Id.* Therefore, in order to go forward, an antitrust claim against the NCAA must be over a restraint on commercial activity that is not justified by legitimate interests.

i. The NCAA bylaw should be applicable to the Sherman Act because regulating the market for using a players' likeness is a restraint on commercial activity.

The definition of commercial activity is very broad and can be "including almost any activity which an actor anticipates economic gain." *Agnew*, 683 F.3d at 340. In *O'Bannon v. NCAA*, the Ninth Circuit held that restraining trade over the use of an athlete's name, image, and likeness (NIL) was commercial activity that was subject to the Sherman Act. In referencing what encompasses commercial activity, the Court stated, "That definition surely encompasses the transaction in which an athletic recruit exchanges his labor and NIL rights for a scholarship at a Division I school because it is undeniable that both parties to that exchange anticipate economic gain from it." 802 F.3d 1049,1065 (9th Cir. 2015). The athlete's labor creates markets such as ticket sales, televisions rights, and college products that create economic gains for their university and the NCAA itself. Additionally, players may have the opportunity to benefit commercially by using their own NIL. This benefit does not affect how the player performs on the field or in the classroom. In fact, the athlete using their NIL, in this case, comes from an adherence to all of the rules that do effect such matters. Thus, as in *O'Bannon*, when the NCAA bylaw regulates the use of a player's ability to benefit economically from product that use their NIL, they are restraining commercial activity. *Id.*

The fact that the NCAA labels the restraint as an 'eligibility rule' does nothing to change the reality that it closes off a market for trade where economic gain is expected. The Ninth

Circuit, in *O'Bannon*, develops this point saying, "It is no answer to these observations to say, as the NCAA does in its briefs, that the compensation rules are 'eligibility rules' rather than direct restraints on the terms of agreements between schools and recruits." *Id.* Instead of focusing on what label is thrust upon a rule, the crucial point of analysis should look into its effect on markets of trade. As put in *O'Bannon*, "the substance of the compensation rules matters far more than how they are styled." *Id.* When viewed in that light, the substance of the NCAA bylaw has cut-off the market for such products entirely, thus restraining commercial activity contrary to the goals of the Sherman Act.

ii. The NCAA's interests do not outweigh their anticompetitive behavior because the bylaw is not tailored to meet such goals.

Courts have held that the NCAA has legitimate interests in maintaining a competitive balance amongst member schools and preserving amateurism in college athletics. *Board of Regents*, 104 S.Ct. at 2960. However, like the television agreement in *Board of Regents*, the NCAA bylaw against sponsorship is not tailored to meet those goals. So, just as the anticompetitive effects of the television agreement could not be offset by any legitimate interest of the NCAA, neither can the anticompetitive effects of the prohibition against individual players receiving money from sponsorships.

The challenged NCAA bylaw in this case does not help to maintain a competitive balance among member schools. In *Smith v. NCAA*, the Third Circuit reasoned that, "the bylaw at issue here is a reasonable restraint which furthers the NCAA's goal of fair competition and the survival of intercollegiate athletics and is thus procompetitive." 139 F.3d at 187. So, because the bylaw helped to keep some schools from gaining an advantage over other member schools the provision successfully stimulated fair competition. Critically, the NCAA limited how student-athletes interacted with member schools in *Smith*. *Id.* That is distinguishable from our case where the NCAA is limiting transactional interaction between student-athletes and private

companies. Apple is a private company with no ties to any member university or college sport. Furthermore, the transactions in dispute come between individual players and the company, without any evidence of consideration towards the school that an athlete plays for. Moreover, there is no evidence that Apple has any impact on game play in any NCAA sport. Thus, the NCAA bylaw at issue cannot advance the goal of maintaining a competitive balance between members because the member schools are not involved in the transaction at all and the transaction does not affect any play on the field.

Furthermore, the bylaw in question is not tailored to the preservation of amateurism in the same way that other NCAA 'eligibility rules' are. In *Banks v. NCAA*, a challenge was brought to the NCAA's rules that declare a player ineligible once they agree to representation of an agent or once they declare for a professional draft (no-draft no-agent rules). 977 F.2d at 1083. The Majority in *Banks* held that the plaintiff failed to show anticompetitive effects, but in doing so they also reasoned that the no-draft and no-agent rules are legitimate means of protecting the amateur nature of the sport, "Initially we restate that the no-draft rule and similar NCAA rules serve to maintain the clear line of demarcation between college and professional football." *Id.* at 1090. Likewise, *McCormack*, also based its reasoning on concerns with allowing the NCAA to preserve the line between amateur-athlete and professional-athlete stating, "The goal of the NCAA is to integrate athletics with academics. Its requirements reasonably further this goal." 845 F.2d at 1345.

However, allowing a player to receive a sponsorship does not preserve amateurism in college sports, when the product they are sponsoring has no effect on the sport they play. The sponsorship in question was an emoji keyboard that used the Snow's likeness. This sponsorship in no way suggested that the player was crossing the line from amateur to professional. Unlike in *Banks*, Apple is not paying players or receiving payments from players in order to prepare

them for professional careers. The exchange with Apple is not concerned with the Plaintiffs professional career at all, in fact the product in dispute is catered to college football fans. Furthermore, the sponsorship does not interfere with the stated NCAA goal from *McCormack* because it does not keep the player from attending and participating in classes. The sponsorship demands no additional time from the athletes that would go towards school work, nor does it restrict their ability to be students in any other way.

Finally, the NCAA bylaw is not fashioned to enhance public interest in college athletics. The Court in *Board of Regents*, declares that "It is reasonable to assume that most of the regulatory controls of the NCAA are justifiable means of fostering competition among amateur athletic teams and therefore procompetitive because they enhance public interest in intercollegiate athletics." 104 S.Ct. at 2969. The Court then held that the television contract does not enhance public interest, and, in fact, limits it because the agreement limits the amount of games that the public gets to view on television. *Id.* at 2970. This NCAA bylaw is similar in that it interferes with products like the emoji keyboard that would enhance public interest. College sports fans often engage in products that show their support of their favorite teams, such as shirts and hats. They could also support their favorite players through products that use player likeness. However, because college sports fans are foreclosed from buying any products with a players NIL, the NCAA is working against that public interest, thus, their actions cannot be justified.

II. SNOW'S NEGLIGENCE PER SE CLAIMS ARE NOT PREEMPTED UNDER SECTION 301 OF THE LABOR MANAGEMENT RELATIONS ACT; THEREFORE, THE NFL'S MOTION TO DISMISS SHOULD BE DENIED.

The Supreme Court has well-chronicled the history and preemptive scope of Section 301 of the Labor Management Relations Act ("LMRA"). Under Section 301,

> 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 organization, 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(a). Here, The NFL is arguing that Snow's claims alleging negligence under California state law are preempted under Section 301 of the LMRA. Thus, the dispositive question is whether Section 301 of the LMRA preempts Snow's state-law negligence claims asserted against the NFL. This Court should find that Snow and the other players' (collectively "the Players") claims are not preempted under Section 301 of the LMRA.

Section 301 of the LMRA is a jurisdictional statute that has been interpreted as a "congressional mandate charging federal courts to fashion a body of federal common law to be used to address disputes arising out of labor contracts." *Burnside v. Kiewit Pacific Corp*., 491 F.3d 1053, 1059 (9th Cir. 2007). This Court has explained that the preemptive force of Section 301 is so powerful as too displace entirely any state cause of action for violation of contracts between an employer and a labor organization. *Id.* Once preempted, "any claim purportedly based on [a]... state law is considered a federal claim and therefore arises under federal law. *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 393, 107 S.Ct. 2425, 96 L.Ed.2d 318 (1987). This is true even in instances in which the plaintiffs have not alleged a breach of contract in their contract in their complaint, but rather the plaintiff's claims are grounded in the provisions of the labor contracts. *Burnside*, 491 F.3d at 1059. Accordingly, 301 preempts state-law claims "founded directly on rights created by collective bargaining agreements, and also claims 'substantially dependent on analysis of a collective bargaining agreement.'" *Caterpillar*, 482 U.S. at 394. Without such a provision, parties would be able to evade Section 301 by relabeling their contract claims as tortious claims or some other state cause of action and thus, "elevate form over substance." *Burnside*, 491 F.3d at 1062.

To prevent such evasion, this Court as well circuit courts have illustrated a two-part inquiry to determine if the claim is sufficiently independent to survive section 301 preemption *Williams v. National Football League*, 582 F.3d 863 (8th Cir. 2009); *Atwater v. National Football League Players Ass'n*, 626 F.3d 1170 (11th Cir. 2010); *Stringer v. National Football League*, 474 F.Supp.2d 894 (S.D. Ohio 2007); *Duerson v. National Football League*, 2012 WL 1658353 (N.D. Ill. 2012). First, a state-law claim is preempted if the claim is based on a provision of the CBA, meaning that a CBA provision sets forth the right upon which the claim is based. *Burnside*, 491 F.3d at 1059. See also *Williams*, 582 F.3d at 874; *Atwater*, 626 F.3d at 1177. If so, this Court's analysis ends there. *Burnside*, 491 F.3d at 1059. See also *Williams*, 582 F.3d at 874; *Atwater*, 626 F.3d at 1177. If, however, the right exists independently of the CBA, this Court then considers whether the claim is, none the less, "substantially dependent on analysis of the CBA." *Burnside*, 491 F.3d at 1059. See also *Williams*, 582 F.3d at 874; *Atwater*, 626 F.3d at 1177. If such dependence exists, then the claim is preempted by section 301; if not, the claim can proceed under state law. See *Smith v. National Football League Players Ass'n*, 2014 WL 6776306, *6 (E.D. Mis. 2014) (stating that a court may look to the CBA to determine if the claim would be substantially dependent on it). In sum, this Court will determine whether the claims asserted arise from the CBAs and, if not, whether establishing the elements of the claim will require interpretation of the CBAs *Burnside*, 491 F.3d at 1056-60.

A. Snow's claim is a right asserted by the California negligence statute.

To determine whether a right inheres in state-law or is grounded in the CBA, this Court considers whether the legal character of a claim, is independent of the rights under the CBA [and] not whether grievance from the same set of facts can be pursued. *Burnside*, 491 F.3d at 1060 (*citing Livadas v. Bradshaw*, 512 U.S. 107, 123 (1194)). Thus, this Court will need to look

to California negligence law to determine whether the legal character of the Players' claims are independent of the CBA.

Under California law to state a claim for negligence, the plaintiff must establish: (1) the defendant had a duty, or an "obligation to conform to a certain standard of conduct for the protection of others against unreasonable risks;" (2) the defendant breached that duty; (3) the breach proximately caused the injury; and (4) damages. *Corales v. Bennett*, 567 F.3d 554, 572 (9th Cir. 2009) (quoting *McGarry v. Sax*, 158 Cal.App.4th 983, 70 Cal.Rptr.3d 519, 530 (2008)). Thus, the first question is whether the right at issue – the right of NFL players to receive medical care that does not create an unreasonable risk of harm – arises out of the CBAs. This Court should look to circuit courts to determine whether the right at issue arises out of the CBAs. *Williams*, 582 F.3d 863; Atwater, 626 F.3d 1170.

In *Atwater*, the plaintiffs filed suit against the NFL and the National Football League Players' Association ("NFLPA"). 626 F.3d 1170. According to the plaintiffs, the NFL and NFLPA were negligent when they failed to conduct a proper investigation on the operators of an investment company, International Management Associates ("IMA"). *Id.* at 1174. The NFL and NFLPA argued that Section 301 preempted the plaintiffs' state-law claim of negligence. *Id.* The Eleventh Circuit agreed. *Id.* at 1176. The court held that the state-law negligence claims were preempted. *Id.* at 1178. The court reasoned that the duty owed to the plaintiffs arose out of the terms of the CBA. *Id.* Further, the court reasoned that the CBA specified how the investors were chosen and the required documents that the NFLPA was to receive prior to advising players to invest in a particular company. *Id.* Thus, the CBA terms established a duty of the NFLPA and the NFL to conduct a proper investigation, which went hand-in-and with the plaintiff's argument. *Id.* at 1183. Moreover, the CBA specified that the players were solely responsible for their own personal finances, which the court specified determined the legal relationship between the

plaintiffs and the defendants. *Id.* Thus, not only did the CBA establish a duty that the NFLPA would investigate the investment groups, but it also specified that the plaintiffs would still be responsible for their own personal finances absolving the NFLPA and the NFL from any liability. *Id.* at 1184. Therefore, the plaintiffs' claims were preempted. *Id.*

In *Williams*, the plaintiffs filed suit against the NFL after testing positive for a banned substance. 582 F.3d at 870. The plaintiffs alleged that the NFL committed negligent misrepresentation and gross negligence for failure to inform players that a supplement contained a banned substance. *Id.* at 875. The NFL asserted that the claims were preempted under section 301 because the claim turned on the analysis of the terms of the CBAs. *Id.* The Eighth Circuit agreed. *Id.* The court held that the claims were preempted under section 301. *Id.* at 879-882. The court reasoned that whether the NFL owed the plaintiffs a duty to provide a warning cannot be determined without establishing the parties' legal relationships and expectations, which the CBA established. *Id.* Moreover, the plaintiffs' claims could not be resolved without consulting the CBA because there would be no way for them to establish an element of negligent misrepresentation without addressing the terms of the CBAs. *Id.* Further, the CBA expressly provided that players were responsible for all drugs within their bodies and thus, establishing that the legal relationship between the NFL and the players. *Id.* Therefore, the claims preempted.

This case is distinguishable from *Atwater* and *Williams*. The NFL argues that the Players' claims are preempted because the rights asserted arise out of the CBA. (R. 23). Under the terms of the CBAs, each club was required to retain "board certified orthopedic surgeons" and all trainers must be certified by the National Athletic Trainers Association. (R. 24). Moreover, the NFL asserts that the CBA specified "if a condition could be significantly aggravated by continued performance, the physician must advise the player of such fact in writing before the player is again allowed to perform on field. (R. 23). However, the terms of the CBAs, unlike the

terms of the CBAs in *Atwater* and *Williams*, do not specify the type of medical care that the Players are to receive. Rather, it only specifies that the physician must inform the player of an injury aggravation. This is opposite of informing players of the risks and benefits associated with taking certain medication, which is the issue in this case. The CBA makes no mention that the players are to receive "proper" or "reasonable" medical care, the duty that the CBA establishes is that the medical personnel must be certified. A certified physician and/or trainer can still provide improper and unreasonable medical care, hence medical malpractice. No language in the CBA establishes the type of medical care the certified trainers and physicians should have given the Players. Moreover, the CBA provision expressing "if a condition could be significantly aggravated by continued performance, the physician advise the player of such fact in writing before the player is again allowed to perform on field," does not address the standard that is needed when doctors and/or trainers are prescribing and administering medications. Rather, the provision addresses the steps doctors and/or trainers are required to take, exclusively, before a player returns to the field. This does not speak to the duty the trainers and doctors owe to their patients when administering and prescribing medications.[1] Thus, the CBA does not give rise to the right asserted by the Players.

B. Snow's claims do not require interpretation of the CBA.

The next question for the court to address is whether the Plaintiff's claims nevertheless requires interpretation of the CBAs. This Court has directed that in performing this part of the analysis, a court should determine whether the claim can be resolved by "look[ing] to" versus interpreting the CBA. *Burnside*, 491 F.3d at 1060 *citing Caterpillar*, 482 U.S. at 394. If the

[1] A physician's failure to make adequate disclosure to a patient may subject the physician to liability under the doctrine of informed consent for injury caused by the use of a drug or medicine. *Harbeson v Parke Davis Inc*., 746 F2d 517 (9th Cir 1984).

latter, the claim is preempted; if the former, the claim is not. *Burnside*, 491 F.3d at 1060. See *Cramer v. Consol. Freightways, Inc.,* 255 F.3d 683, 691(9th Cir. 2001) ("looking" the CBA is not the same as having to interpret its language). Alleging a hypothetical connection between the claim and the terms of the CBA is not enough to establish that the court must interpret the claim. *Burnside*, 491 F.3d at 1061. Thus, here, it must be asked whether the Players can make a prima facie case for negligence without interpreting the CBA. Courts have addressed whether the NFL player's negligence claims have required interpretation of the CBAs. *Stringer v. National Football League*, 474 F.Supp.2d 894 (S.D. Ohio 2007); *Duerson v. National Football League*, 2012 WL 1658353 (N.D. Ill. 2012).

In *Stringer*, a widow of a player filed a wrongful death suit against the NFL when her husband died of heat exhaustion at a team's summer training camp. 474 F.Supp.2d 894, 898. Prior to the decedent's death, the NFL issued correspondence detailing the weather conditions and providing warnings to teams of the risk associated with practicing in such extreme heat. *Id.* She argued that the NFL owed her deceased husband a duty to inform the clubs that the heat conditions could cause heat exhaustion leading to death of players. *Id.* The NFL argued that the claims were preempted under section 301 because the claims presented disputes over working conditions. *Id.* at 890. Having found that the plaintiff's claims did not arise from the terms of the CBA, the court moved to the next step determining whether the resolution of the plaintiff's claims required interpretation of the terms of the CBA and if the resolution would be inextricably intertwined with the CBA. *Id.* at 891. The court found that the resolution of the case was intertwined and required interpretation of the CBA. *Id.* at 893. The court reasoned that the correspondence spoke directly to working conditions, as it pertained to team practice. *Id.* at 894. Thus, whether the teams took the necessary precautions was directly related to the working condition provisions with in the CBA. *Id.* Further, the court specified that it was reasonable for

the NFL to simply issue correspondence. *Id.* Moreover, the court specified that what was reasonable under the circumstances, must be considered in light of preexisting contractual duties. *Id.* at 895. Because the degree of care could not be analyzed without analyzing the CBA, the court found that the claim was preempted. *Id.*

In *Duerson*, the plaintiff filed a wrongful death suit against the NFL after his brother committed suicide as a result of brain damage he incurred while playing in the NFL. 2012 WL 1658353 (N.D. Ill. 2012). The plaintiff initial filed the claim in state court; however, the NFL filed to move the case to federal court alleging that at least one of the plaintiff's claims were preempted under section 301. *Id.* at *3. Finding that the duty did not arise out of the CBA, the court addressed the second element of the test. *Id.* The NFL asserted that to determine reasonableness of the NFL's conduct would require interpretation of the terms of the CBA imposing duties on the NFL clubs to protect player health and safety. *Id.* at *7. The court found that the plaintiff's claims required interpretation of the CBA and thus, preempted. *Id.* The court reasoned that the CBA provisions directly discussed player's health and safety; therefore, the CBA established the duty of care that not only the clubs were to provide, but also the duty of care owed to players by the NFL as the clubs are subsidiaries of it. *Id.*

The claims asserted in this case are not inextricably intertwined nor do the claims require interpretation of the terms of the CBAs. Unlike the CBAs in both *Duerson* and *Stringer*, the CBAs signed by the Players, here, do not provide express provisions dealing with the level of care doctors and trainers need to take when interacting with a player. The provisions do not discuss whether doctors and trainers are to inform patients of the risk and benefits associated with taking the medication. The only provision that mentions any type of duty, as it relates to medical care, specifies that the doctors and trainers have to inform players if playing and or practicing would "aggravate" their condition. There is no mention of the duty of care doctors,

trainers, and the NFL should possess when administering prescriptions to players. The NFL, unlike in *Stringer*, did not issue any type of statement expressing the risk and side effects of taking prescribed controlled medications nor did they instruct the teams to provided such information. Therefore, the CBA expresses no duty of care. There is no provision that provides for player health and safety nor does the NFL cite to any provision within the CBA. (R. 23). Without such provisions, it cannot be said that the Players' negligence claims are inextricably intertwined with the CBAs. Because the Players' claims fail to meet the test as established by this Court, the Players' claims are not preempted under section 301 of the LMRA. Therefore, the court should reverse the Fourteenth Circuit's ruling.

C. The duty to exercise reasonable care arises from the general character of the activity.

The Players' claims arise from the general character of the activity. California courts have found that a duty may arise through statute or by contract. *J'Aire Corp. v. Gregory*, 24 Cal.3d 799, 157 Cal.Rptr. 407, 598 P.2d 60, 62 (1979). California courts have also specified that the duty may be based on "the general character of the activity in which the defendant engaged." *Id.* Several factors are considered when analyzing whether a duty exist: foreseeability of harm to the plaintiff , the degree of certainty that the plaintiff suffered injury, the closeness of the connection of the defendant's conduct to the injury suffered; the moral blame attached to the defendant; the policy of preventing future harm; the extent of the burden to the defendant; and the consequences to the community of imposing a duty to exercise care with resulting liability for breach; and the availability, cost, and prevalence of insurance for risk involved. *Regents of Univ. of Cal. V. Superior Court*, 230 Cal.Rptr.3d 415, 413 (2018) (*citing Rowland v. Christian*, 69 Cal.2d 108,111 (1968). The NFL is in the business of employing doctors and trainers that can prescribe controlled substances to players based on their respective injuries. Therefore, the nature of the NFL's duty would arise from the nature of the activity not from the CBAs as specified above.

Thus, the NFLs duty to exercise reasonable care, in relation to the Players' negligence claims, would be analyzed based on the factors presented in *Rowland*.

There is a clear foreseeability of harm to the Players. The NFL, through its employees, are prescribing controlled substances to Players without addressing the benefits and more important, the risk associated with taking the medication. Because the harm of not informing patients of the risk associated with taking controlled substances is so detrimental, Congress has enacted statutes concerning prescribing medications, specifically controlled substances to patient. See the Controlled Substance Act, 21 U.S.C. § 801 *et. seq*; the Food, Drugs, and Cosmetic Act, 21 U.S.C. § 301 *et seq*. Moreover, California legislators have recognized the detrimental harm when enacting California Pharmacy Laws that set forth how medications are to be prescribed and labeled. See the California Pharmacy Laws, Cal. Bus. & Prof. Code, § 4000 *et seq*. By the doctors and trainers failing to inform the Players of the risk of addiction associated with taking a controlled substance, the doctors and trainers created a foreseeable risk of harm to the Players.

Snow has suffered injuries as result of the NFL's conduct. Specifically, Snow has suffered from addiction as well as permanent damage to his limbs. (R. 13). Thus, there is a degree of certainty that Snow was injured as a result of the NFL's failure to inform them of the risk associated with taking the medication. Moreover, if the doctors and trainers had not failed to educate Snow on the risk associated with taking the medication Snow would have been cautious of the potential of addiction and/or would have requested another medication, if any at all. Further, the NFL is morally blameworthy for the conduct. The NFL issued no articles and no information concerning the medications that doctors were prescribing to the Players. The NFL felt the need to issue all types of correspondence as it pertained to supplements and drug testing, but never once took the time to issue any correspondence concerning controlled substances that the doctors were prescribing and NFL knew they were prescribing. Further, the NFL has issued

no policy concerning prescribing controlled substances. The CBAs has the only policy in place as it relates trainers and doctors discussing medical needs with the Players. The policy simply states that players must be informed when their condition will be "aggravated" by practicing and/or playing.

The NFL is a multi-billion-dollar industry. They pay their doctors, trainers, and players millions of dollars each year. Thus, there will not be burden on the NFL to establish a policy concerning prescribing controlled substances and even if there was a burden, it would be slight. Moreover, there would be no consequences to the community to impose liability on the NFL. In fact, the consequences of not imposing liability would be astronomical to the community, but more importantly, the Players. The NFL is liable for the failure of the doctors and trainers to inform players of the risk associated with taking controlled substances and thus, the Players' claims should move forward.

CONCLUSION

For the foregoing reasons, Snow asks this Court to reverse the Fourteenth Circuit's ruling.

Respectfully submitted,

Team 25

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