No. 09-214

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2018

JON SNOW, AND OTHER SIMILARLY SITUATED INDIVIDUALS,

Petitioner,

V.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION; THE NATIONAL FOOTBALL LEAGUE,

Respondent.

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

BRIEF FOR RESPONDENT

Team 6
Counsel for Respondent

QUESTIONS PRESENTED

1. Whether the NCAA's bylaws create an unreasonable restraint of trade when they prohibit student-athletes from receiving any compensation above their cost-of-attendance at any point in their career.

2. Whether players' state law claims are preempted by the Labor Management Relations Act when the claims revolve around a duty to protect players' health and safety which does not appear in state common law.

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JURISDICTION

This Court has jurisdiction over this case under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

1. Section 1 of the Sherman Act, in pertinent part, states that "[e]very contract, combination[,] . . . or conspiracy in the restraint of trade or commerce . . . is declared to be illegal." 15 U.S.C. § 1.
2. Section 301 of the Labor Management Relations Act states that "[s]uits for violation of contracts between an employer and a labor organization . . . may be brought in any district court of the United States having jurisdiction of the parties." 29 U.S.C. § 185(a).

STATEMENT OF THE CASE

1. Jon Snow's Collegiate Career

After three highly successful college football seasons, Jon Snow, the star quarterback for Tulania University and Plaintiff-Petitioner in this case, was approached by Apple Inc., about a business venture. (R. 13.) Apple approached Mr. Snow and other popular college players in order to buy the rights to their images and likenesses for Apple's new Emoji Keyboard application. (R. 13.) Under this agreement, Apple would pay Mr. Snow and the other athletes $1,000 for the right to use their image and likeness along with an additional $1 royalty fee each time the application was downloaded. (R. 13.) Mr. Snow agreed to the agreement with Apple, and was awarded approximately $3,500 by the end of his first trial period. (R. 13.)

Upon receiving complaints from other student athletes about unfair compensation given to Jon Snow, the head of Tulania compliance, Cersei Lannister, notified the NCAA about the potential violation of its amateurism rules. (R. 13.) In response, the NCAA suspended Jon Snow indefinitely. (R. 13.)

2. Jon Snow's NFL Career

After receiving his suspension from the NCAA, Mr. Snow declared himself eligible for the NFL draft. (R. 13.) Mr. Snow was drafted by the New Orleans Saints, a professional football franchise of the NFL and performed exceptionally during his first year in the league. (R. 13.) During that first season, Mr. Snow received treatment for a series of small head collisions and minor ankle injuries. (R. 13.) As a part of treatment, the team doctors and trainers prescribed him several different painkillers. (R. 13.)

However, shortly thereafter, Mr. Snow's condition worsened when he developed an addiction to painkillers and was diagnosed with an enlarged heart and permanent nerve damage in his ankle. (R. 13.) In response, Mr. Snow complained that the team doctors and trainers never disclosed the potential side effects and risks posed with each medication. (R. 13.) Instead, Mr. Snow claimed that he, and many other players who received the same treatments, were simply given the medications and rushed back onto the field of play. (R. 13.)

3. Proceedings Below

Mr. Snow brought suit against the NCAA for violating Section 1 of the Sherman Act by effectively preventing himself and the other players from participating in the market and receiving just compensation. (R. 13.) Mr. Snow also brought suit against the NFL for negligent distribution and promotion of excessive painkiller prescriptions. (R. 13.) In the interest of judicial efficiency, the U.S. District Court for the District of Tulania consolidated Mr. Snow's

Section 1 complaint with current and former NCAA players (the "Student-Athletes") and Mr. Snow's negligence claims with other similarly situated plaintiffs (the "NFL Players"). (R. 13.) The NCAA and NFL moved for the dismissal of the complaints, but the District Court for the District of Tulania denied those motions. (R. 14-19, 26.)

The NCAA and NFL appealed to the United States Court of Appeals for the Fourteenth Circuit, which reversed the opinion of the district court, holding that the NCAA amateurism rules did not violate Section 1 of the Sherman Act and that Mr. Snow's common law negligence claims are preempted by Section 301 of the Labor Management Relations Act of 1947. (R. 11.)

SUMMARY OF ARGUMENT

The NCAA rules should be awarded deference and be ruled as procompetitive as a matter of law as several courts have routinely recognized the procompetitive value of NCAA rules protecting the tradition of amateurism, and those same rules are also necessary for the unique product of college athletics to exist and remain in consumer demand. **Part I A.**

The NCAA's amateurism and eligibility rules are entitled deference because they play an important role in preserving the "revered tradition of amateurism." **Part I B.** The NCAA rules should also be considered presumptively procompetitive because competing firms can form a joint venture and create certain restraints that are presumptively procompetitive as long as they are essential to ensure that the joint venture's product actually becomes available. **Part I C 1.** And although the individual member schools compete athletically and financially, the product of amateur intercollegiate athletics as it exists today is only possible because of schools willingly binding themselves to NCAA rules and bylaws (including the amateurism and eligibility rules)—thus it is a joint venture with restraints of trade used to create and preserve its product, therefore making the arrangement presumptively procompetitive. **Part I C 1.** Similarly, evidence shows

that the NCAA's understanding of amateurism plays some role in preserving demand for college athletics as they exist today—therefore, the amateurism rules should also be considered presumptively procompetitive due to their role in creating and preserving consumer demand. **Part I C 2.** Since the NCAA's rules are entitled to these presumptions of pro-competitiveness and the Players have failed to produce any actual economic evidence of substantial anticompetitive effects, the Players' Section 1 complaint should be dismissed.

With respect to the second issue, resolving the Players' claims of negligent distribution and excessive promotion of painkillers would necessarily require a court to interpret the Collective Bargaining Agreement, largely due to the intricate web of duties apportioned between the players, the individual teams, the staff, and the league itself under the CBA. **Part II B.**

Since no decision in any state has ever proposed that a professional sports league has the inherent duties alleged by the Players, determining if such a duty exists would almost certainly require an examination and interpretation of the CBA in order to see if the NFL somehow voluntarily assumed such a duty. **Part II B 1.** And upon examination, the Collective Bargaining Agreement explicitly disclaims the general duty over player health and safety--instead placing it on the individual teams. **Part II B 1.**

However, even if the Players could show that the NFL voluntarily assumed a duty independent of the Collective Bargaining Agreement, an interpretation would still be necessary to determine the scope of such a duty and whether or not the NFL's actions (or lack thereof) constituted a breach. **Part II B 2.** Additionally, the decision of the appellate court is in alignment with a strong string of precedents committed to the protection of the federal framework of collective bargaining laid out by the LMRA. **Part II B 3.** Therefore, the Players' Section 301 claim should be preempted because properly understanding the NFL's player health

and safety duties, requires a court to examine the relationship between the players, teams, physicians, and the league itself through an interpretation of the Collective Bargaining Agreement.

ARGUMENT

A motion to dismiss is proper under Federal Rule of Civil Procedure 12(b)(6) whenever the pleadings "fail[ ] to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). The Federal Rules require "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). And courts must dismiss a complaint when it fails to "state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Determining the "plausibility" of a claim is context-specific; therefore, the reviewing court should rely on both "judicial experience and common sense" when making its decision. *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009).

As demonstrated below, Mr. Snow, the Student-Athletes, and the NFL Players failed to allege facts sufficient to support either of their claims. Therefore, their complaints under both Section 1 of the Sherman Act, and Section 301 of the Labor Management Relations Act should be dismissed.

I. THE CHALLENGED NCAA RULES ARE PRESUMPTIVELY PROCOMPETITIVE AS A MATTER OF LAW BECAUSE THEY ARE ENTITLED TO DEFERENCE, THEY PROMOTE THE JUDICIALLY PROTECTED "TRADITION OF AMATEURISM" AND THEY ARE A NECESSARY PART OF PRODUCING INTERCOLLEGIATE ATHLETICS.

A. The NCAA Eligibility Rules Should Be Analyzed Under an Abbreviated "Quick Look" Analysis, as Opposed to an Unstructured Rule of Reason.

When determining whether a particular action "unduly restrains trade" under Section 1 of the Sherman Act, a court must decide where the relevant action categorically lays on the "antitrust spectrum." Marc Edelman, *A Short Treatise on Amateurism and Antitrust Law*, 64

CASE W. RES L. REV. 61, 73-74 (2013). On one side of the spectrum are restraints of trade that are so blatantly nefarious that a court can simply assume that there are no redeeming aspects of the defendant's actions. *Id.* These cases deserve a "per-se analysis" which simply presumes illegality with no further inquiries into the nature of the actions. *Id.* However, on the other side of the spectrum are actions that have procompetitive justifications that can outweigh the harmful effects alleged by the plaintiff. *Id.* These cases deserve a "Rule of Reason" analysis where the court weighs the opposing competitive effects against one another. *Id.* This weighing of competitive effects is a long and costly process, but the Rule of Reason analysis is "flexible" and can be applied "in the twinkling of an eye" in certain circumstances. *American Needle v. National Football League*, 130 S. Ct. 2201, 2216 (2010) (quoting *NCAA v. Bd of Regents*, 468 U.S. 85, 109 n.39 (1984)). Accordingly, in some circumstances, the procompetitive effects of a defendant's actions can be so well-recognized and significant that they almost certainly outweigh the comparatively small amount of facts alleged by plaintiffs (like those alleged by Mr. Snow and the other Student-Athletes).

This abbreviated or "truncated" weighing process is known as a "Quick Look" analysis; and over the years, the Supreme Court and many federal circuit courts have created and developed several Quick Look variations based on their experience and judicial learning. Eric H. Grush, American Needle *and a "Positive" Quick Look Approach in Challenges to Joint Ventures*, ANTITRUST Vol. 25, No. 2 at 55 (Spring 2011). Some Quick Look variations are used by courts to secure earlier and more efficient condemnations, but others are used to approve of conduct and dismiss any complaints (i.e. a "Quick Look to Dismiss"). *Id;* Robert Pitofsky, FTC Chmn, Remarks Before the ABA Section of Antitrust Law (Nov. 11 & 12 1999) ("the quick look doctrine may be used not only to find a violation, but also to exonerate a collaboration").

Under a Quick Look to Dismiss, a defendant's conduct receives an immediate presumption of pro-competitiveness if that type of conduct has been repeatedly shown to be procompetitive or consistent with antitrust principles in previous cases. In that circumstance, a claim cannot survive by simply pointing to concentrated market shares, the potential for anticompetitive effects, or other circumstantial evidence. Instead, a plaintiff must demonstrate actual anticompetitive effects that are so substantial that a court could reasonably find that they obviously outweighed the presumed procompetitive effects—otherwise, the conduct remains presumably outside of the scope of Section 1. *See, e.g., Cal. Dental Assoc. v. FTC*, 526 U.S. 756 (1999); *Broadcast Music Inc. v. Columbia Broadcasting Sys.*, 441 U.S. 1 (1979); *Chicago Prof'l Sports Ltd. P'ship v. NBA*, 95 F.3d 593, 597 (7th Cir. 1997).

A Quick Look to Dismiss is well suited for this case because (as explained below) federal courts routinely recognize the procompetitive value of NCAA amateurism rules, and those same rules are also necessary for the unique product of college athletics to exist and remain in demand. And since Mr. Snow and the Student-Athletes failed to produce any actual economic evidence of substantial anticompetitive effects, the NCAA's presumptively procompetitive conduct clearly outweighs the allegations.

B. The NCAA Rules Are Presumptively Procompetitive Because They Are Entitled to Deference Due to Their Role in Preserving the "Tradition of Amateurism."

The NCAA's Constitution specifically defines its "Principle of Amateurism" as a "basic purpose" of "retain[ing] a clear line of demarcation between intercollegiate athletics and professional sports." NCAA Const. Art. 1.3.1. This core principle, and the specific bylaws following it, precisely describes which individuals are permitted to compete and how competition will be performed. In this way, these NCAA rules simply define the product offered

by the NCAA—amateur intercollegiate athletics. However, in order to actually "produce" amateur intercollegiate athletics, the NCAA must "delicate[ly] balance" the principle of amateurism against several other fundamental principles, such as "Institutional Control and Responsibility" (NCAA Const. Art. 2.1), "Student-Athlete Well-Being" (NCAA Const. Art. 2.2), and "Sound Academic Standards" (NCAA Const. Art. 2.5).

Through this balancing, the NCAA produces what the Supreme Court called "the revered tradition of amateurism in college sports." *Bd. of Regents*, 468 U.S. at 120. The Court explained that "[t]here can be no question but that [the NCAA] needs ample latitude to play that role." *Id*. Lower federal courts interpreted those words from the Supreme Court as a requirement that courts "generally afford the NCAA 'ample latitude' to superintend college athletics" whenever considering the NCAA's amateurism rules and their competitive effects. *See, e.g.*, *O'Bannon*, 802 F.3d at 1074; *Law v. NCAA*, 134 F.3d 1010, 1022 (10th Cir. 1998). Therefore, in the wake of *Bd. of Regents*, courts show deference to the NCAA and consider its amateurism rules as presumptively procompetitive when considering their competitive effects.

A cynical observer could argue that this "principle of amateurism" has no place in a Quick Look analysis because antitrust cases are technical and economically-focused while this "principle of amateurism" is difficult to measure and appears amorphous in light of NCAA rule changes. But in reality, although the NCAA has periodically adjusted its eligibility regulations, the "principle of amateurism" itself is quite simple and unchanged. For example, in its most recent rule change, the NCAA adjusted its scholarship rules to allow member schools to offer scholarships above the cost of tuition in order to cover the student-athlete's "cost of attendance"—i.e. taking meals, housing, and other costs of living into account. Blair Kerkhoff, *They're Not Paychecks, But Major College Athletes Got Extra Scholarship Stipends for First*

Time This School Year, KANSAS CITY STAR (June 26, 2016). This increase in student-athlete benefits could be seen as evidence that the delineation between amateurism and professionalism is, in fact, arbitrary. However, the defining feature of the "Principle of Amateurism" is not a specific number of benefits or a dollar amount; it is the fact that the players are *student*-athletes and that they are not paid to play their respective sports. *See O'Bannon*, 802 F.3d at 1076 ("not paying student-athletes is precisely what makes them amateurs."). Each iteration of technical NCAA eligibility bylaws simply *implement* the principle of amateurism—they are not the principle itself.

Therefore, the *revered tradition of amateurism* remains alive and well, and in this case (where the NCAA's limit on student-athlete compensation is once again challenged under Section 1 of the Sherman Act), the NCAA's balancing of interests is entitled to deference and the challenged rules remain presumptively procompetitive.

C. The NCAA Eligibility Rules Are Presumptively Valid Because Traditional Joint Venture Principles of Antitrust Law Recognize That the NCAA's Rules Are Essential to Both the Creation and Preservation of College Athletics as They Exist Today.

1. Precedent dictates that the NCAA rules are essential to the creation of college athletics—a product jointly created by all of the member schools.

In *O'Bannon*, the Ninth Circuit recognized that the NCAA could lawfully adopt and enforce bylaws that limit student-athlete compensation and prohibit student-athletes from being paid by third parties for the use of their image and likeness in video games. *See O'Bannon*, 7 F. Supp. 3d at 985. The decision in *O'Bannon* was consistent with a long history of Supreme Court and appellate decisions recognizing the economic principles of joint ventures and the procompetitive nature of the NCAA eligibility rules. *Id.* And since Mr. Snow and the other Student-Athletes (just like the former student-athletes in *O'Bannon*) argue that it is unlawful for

the NCAA to prohibit student-athletes from being paid by third parties for the use of their image and likeness, those principles correctly applied by the court in *O'Bannon* should also be extended to this present case.

Competing firms can form a joint venture and create certain restraints that are presumptively procompetitive as long as they are essential to ensure that the joint venture's product actually becomes available. Indeed, in the context of a joint venture, a court may analyze the conduct under a Quick Look to Dismiss and deem it procompetitive "in the blink of an eye" if the restraint is related to the availability and continued preservation of the venture's product. *See American Needle*, 560 U.S. at 203; *Bd. of Regents*, 468 U.S. at 101; *Broadcast Music, Inc*., 441 U.S. at 23-24.

This principle is immediately applicable in this case because although the individual member schools compete athletically and financially, the product of amateur intercollegiate athletics as it exists today (the College Football Playoffs, the NCAA Men's Basketball Tournament, etc.) is only possible because of schools willingly binding themselves to NCAA rules and bylaws (including the amateurism and eligibility rules)—a joint venture accepting restraints of trade in order to create and preserve its product. In short, joint venturers are generally permitted to collaborate with respect to any "business practice . . . [that] involves the core activity of the joint venture itself." *Texaco Inc. v. Dagher*, 547 U.S. 1, 7-8 (2006).

These principles are also specifically applicable to the NCAA; the NCAA plays a vital role "in enabling college football to preserve its character." *Bd. of Regents*, 468 U.S. at 101-02. In performing this critical role, the NCAA "enables a product to be marketed which might otherwise be unavailable." *Id.* "[I]ts actions widen consumer choice—not only the choices available to sports fans but also those available to athletes—and hence can be viewed as

procompetitive." *Id.* Therefore "[t]here can be no question," that "the preservation of the student-athlete in higher education adds richness and diversity to intercollegiate athletics and is entirely consistent with the goals of the Sherman Act." *Id*. at 120.

Beyond the Supreme Court and the Ninth Circuit, the Fifth and Seventh Circuits have also repeatedly concluded that the NCAA eligibility rules (particularly those prohibiting payments to student-athletes) have procompetitive effects and are lawful under the Sherman Act. *Marucci Sports, L.L.C. v. NCAA*, 751 F.3d 368, 374 (5th Cir. 2014) (holding that NCAA eligibility rules are "presumptively procompetitive" categorically and "are not generally deemed unlawful restraints on trade"); *McCormack v. NCAA*, 845 F.2d 1338, 1344-45 (5th Cir. 1988) (holding that the NCAA amateurism rules were reasonable as a matter of law and that it had "little difficulty in concluding that the challenged restrictions are reasonable"); *Agnew v. NCAA*, 683 F.3d 328, 343 (7th Cir. 2012) (holding that the NCAA's "no payment rules" were "procompetitive as a matter of law" with no further antitrust analysis required or warranted); *Banks v. NCAA*, 977 F.2d 1081, 1089-90 (7th Cir. 1992) ("None of the NCAA rules affecting college football eligibility restrain trade in the market for college players.").

Furthermore, the Third and Sixth Circuits have concluded that the NCAA eligibility rules are outside of the scope of Section 1 entirely and not even subject to antitrust review at all. *Smith v. NCAA*, 139 F.3d 180, 185-86 (3d Cir. 1998) (holding that "the Sherman Act does not apply to the NCAA's promulgation of eligibility requirements" because "the eligibility rules. . . primarily seek to ensure fair competition in intercollegiate athletics"); *Bassett v. NCAA*, 528 F.3d 426 (6th Cir. 2008) (holding that "similar to the eligibility rules in *Smith*, [the] NCAA's rules . . . prohibiting improper inducements and academic fraud, are all explicitly non-commercial" and therefore outside of the scope of Section 1).

In short, a remarkably strong history of cases recognize that, as a matter of law, the NCAA rules delineate the specific product that the NCAA and its member institutions create as a joint venture—intercollegiate amateur athletics. These cases all affirm the procompetitive nature of the NCAA's amateurism rules and therefore helps create a strong presumption that the NCAA rules are competitive in this case and deserving of a Quick Look to Dismiss.

2. Evidence demonstrates that the NCAA rules play a substantial role in promoting consumer demand for college sports and preserving the quantity of college athletics.

Another circumstance well suited for a Quick Look to Dismiss would be cases of conduct within the context of a joint venture that increases output. As Judge Easterbrook explained in *Chicago Prof'l Sports*, "the core question in antitrust is output," and "[u]nless a contract reduces output in some market . . . there is no antitrust problem." *Chicago Prof'l Sports*, 95 F.3d at 597. In order to demonstrate that the conduct in question will expand output, the NCAA only needs to show "that the NCAA's 'current understanding of amateurism' plays some role in preserving 'the popularity of the NCAA's product,'" or the "particular brand" of amateur sports that is intercollegiate athletics. *O'Bannon*, 802 F.3d at 1059, 1081.

As the NCAA attempts to demonstrate how its amateurism rules contribute to consumer demand for college athletics, the NCAA does not bear the burden of proving that any alternative forms of rulemaking would, in fact, negatively impact consumer demand. Instead, the NCAA only needs to present the procompetitive benefits that are served by the NCAA's existing amateurism rules—courts only consider "less restrictive alternatives" when the burden is borne by the plaintiff. *O'Bannon*, 802 F.3d at 1073 n.17. And when considering the available evidence contained in previous case law, it is clear that the NCAA's "current understanding of

amateurism" certainly plays some role in preserving consumer demand for the NCAA's product of college athletics.

For example, in *O'Bannon*, the NCAA's research expert, Dr. J. Michael Dennis, presented a scientific survey of consumers showing that approximately 69% of respondents expressed opposition to the idea of paying student-athletes, saying that they would be less likely to attend or watch games if they knew the student-athletes were paid. *See O'Bannon*, 7 F. Supp. 3d at 975. The Ninth Circuit relied heavily on this evidence to explain that allowing any type of cash payments to college athletes would almost certainly "hurt consumer demand." *O'Bannon*, 802 F.3d at 1078. The court believed that consumer demand would diminish because "the difference between offering student-athletes education-related compensation and offering them cash sums untethered to educational expenses is not minor [but rather] a quantum leap." *Id.* Even if the district court was not convinced that amateurism was the primary driver of consumer demand for college sports, it was more than enough to show that "the NCAA's 'current understanding of amateurism' play[ed] some role in preserving the popularity of the NCAA's product." *Id.* at 1059.

Since Mr. Snow and the other Student-Athletes have failed to give any reason to believe that this evidence was flawed or that consumer preferences have radically changed, the NCAA rules are presumed to play a sufficiently significant role in promoting and preserving consumer demand. Therefore, the NCAA rules remain presumptively procompetitive and deserving of a Quick Look to Dismiss.

II. THE NFL PLAYERS' STATE LAW NEGLIGENCE CLAIMS ARE PREEMPTED UNDER SECTION 301 OF THE LABOR MANAGEMENT RELATIONS ACT BECAUSE THE CLAIMS REQUIRE AN INTERPRETATION OF THE COLLECTIVE BARGAINING AGREEMENT.

A. Section 301 of the Labor Management Relations Act Preempts All State-Law Claims that Require an Interpretation of a Collective Bargaining Agreement.

Section 301 of the Labor Management Relations Act ("LMRA") preempts a plaintiff's state-law claims when those claims are "inextricably intertwined with terms in a labor contract." *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 210-11 (1985). The practice of allowing labor contracts and Collective Bargaining Agreements ("CBA's") to preempt state laws developed as a doctrine that was necessary to preserve the continued existence and success of federal labor legislation. Stephen F. Befort, *Demystifying Federal Labor & Employment Law Preemption*, 13 The Labor Lawyer 429, 433-34 (1998). Judges analyzing conflicts between CBA's and the labor laws of individual states understood that business owners and organized labor unions would simply have no incentive to invest the time and effort necessary for the collective bargaining if the terms agreed upon could suddenly be superseded by a variety of different state laws and standards. *Id.* Therefore, in order to prevent the destabilization of the entire collective bargaining framework through a variety of state law standards replacing carefully bargained CBA terms, LMRA preemption is applied whenever any individual element of a state-law claim requires an interpretation of any part of a collective-bargaining agreement ("CBA"). *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 407 (1988).

In order to determine whether a state-law claim truly "requires" a court to interpret a CBA, courts must exclusively focus on the precise nature of the plaintiff's claim in and of itself. *Cramer v. Consol. Freightways, Inc.*, 255 F.3d 683, 691 (9th Cir. 2001). However, a defendant's argument for including the CBA interpretation must only reach a "reasonable level of

credibility" for LMRA preemption to apply to a broad variety of plaintiff's state-law claims. *Id.* at 691-92; *Audette v. Int'l Longshoremen's & Warehousemen's Union*, 195 F.3d 1107, 1113 (9th Cir. 1999). As demonstrated below, the NFL's argument for including an interpretation of the CBA certainly reaches a reasonable level of credibility because the claims of the NFL Players require an understanding of the various duties the CBA apportioned between the NFL, the individual teams, the medical staff, and the players themselves.

B. Resolving the NFL Players' Claims Requires an Interpretation of the Collective Bargaining Agreement.

The NFL Players' complaints revolve around state common-law negligence claims—namely breaches of reasonable care occurring in the course of the negligent distribution and excessive promotion of painkillers to players. The elements of these negligence claims relevant to this case are (1) duty; (2) breach; (3) proximate cause; and (4) damages. The appellate court analyzed these elements and correctly concluded that resolving the claims of negligent distribution and excessive promotion of painkillers necessarily requires a court to interpret the CBA. The appellate court reasoned in accordance with several other federal courts that preempted similar claims against the NFL largely due to the intricate web of duties that are apportioned between the players, the individual teams, the staff, and the league itself under the CBA.

1. Since the NFL has no recognized common law duty to police player health and safety, courts must interpret the CBA to determine whether the NFL voluntarily assumed a duty of care associated with players' medical treatment.

In order for the NFL to have a duty to protect the NFL Players from the distribution of excessive promotion of pain medications, the NFL would have to *voluntarily* assume that duty because no state statutes or precedents place a duty over players' health and safety onto sports leagues.

Determining the existence of an implied duty of care often requires an examination and interpretation of the CBA, so negligence claims involving voluntarily assumed duties are often preempted by the LMRA. *See International Bhd. of Elec. Workers v. Hechler*, 481 U.S. 851, 862 (1987); *Brown v. Brotman Med. Ctr., Inc.*, 571 F. App'x 572, 576 (9th Cir. 2014).

The need for an interpretation of the CBA is especially pronounced in this case because in order for the NFL Players' claim to succeed, the NFL's alleged duty must have included not only a duty to monitor player health, but also a duty to intervene into the players' treatments delivered by team doctors—a substantial duty. And since no decision in any state has ever proposed that a professional sports league has such an inherent duty, determining whether the NFL somehow created and assumed this duty voluntarily would almost certainly require an examination and interpretation of the CBA.

Looking at the current CBA, it explicitly states that "[n]othing in this Article, or any other Article in this Agreement, shall be deemed to impose or create any duty or obligation upon either the League or NFLPA regarding diagnosis, medical care and/or treatment of any player." NFL Collective Bargaining Agreement, Art 39. § 3(d). And although the NFL Players could suggest that a broader duty of player health and safety was potentially contemplated within other parts of the CBA, this ambiguity only further demonstrates the necessity of interpreting the CBA. In all other provisions discussing duties for player health and safety, the most general duty over player health and safety is squarely laid upon the individual teams, rather than the NFL. *Id.* at Art 39. § 3(e) ("Each Club shall use its best efforts to ensure that its players are provided with medical care consistent with professional standards for the industry."). Therefore, in order to properly determine if the NFL somehow voluntarily assumed an affirmative duty over player

health and safety, a court would necessarily have to interpret those provisions of the CBA and solve any potential ambiguities created by the language.

2. Even if the NFL held the duty alleged by the NFL Players, an interpretation of the CBA would still be necessary to determine the scope of the NFL's duties and whether the NFL breached that duty.

The threshold inquiry for determining if a negligence cause of action exists is an "examination of the [CBA] to ascertain what duties were accepted by each of the parties and the scope of those duties." *Hechler*, 481 U.S. at 860. So even if the NFL Players could show that the NFL voluntarily assumed some duty independent of the CBA, an interpretation of the CBA itself would still be necessary so that the court could examine the scope of such a duty and whether or not the NFL's actions (or lack thereof) constituted a breach.

When considering the scope of such duties, it is often critical to understand how duties are apportioned between the relevant parties. As noted above, the CBA specifically (and repeatedly) places the duties of player health and safety upon the individual teams and their medical staff. NFL Collective Bargaining Agreement, Art 39. § 2-3. Therefore, even assuming the Players could demonstrate that the NFL had some sort of duty over player health and safety, the scope of the NFL's duty would almost certainly be severely diminished by the fact that so many of the specific duties were squarely borne by the individual teams instead of the NFL. And even if that particular interpretation of the CBA were ultimately rejected by an examining court, the interpretation is manifestly reasonable and its reasonableness alone means that the NFL Players claims should be preempted under the LMRA.

Additionally, an examining court would also have to examine the affirmative actions taken by the NFL to determine if the NFL breached its duty. And one of the crucial actions taken would be the collective bargaining process itself. The fact that the NFL entered into a

CBA, taken alone, and through it bound all of its member teams to a uniform standard of care agreed to by the Players (without respect to any individual state duties) strongly suggests that this CBA would need to be examined and interpreted in detail if a court sought to properly determine if the NFL breached any duty.

C. The Appellate Court's Decision is Properly in Accord with Several Federal Court Opinions That Preempted Similar Claims Against The NFL.

Rather than create duties never before recognized against the NFL and risk destabilizing the incentives across the entire federal collective bargaining system, the appellate court held that the Players' claims were preempted under the LMRA, following the pattern of reasoning employed by several federal courts that preempted similar claims against the NFL.

For example, in *Williams*, professional football players claimed that the NFL had breached a state-law duty to warn the players about the potential danger of side effects of a popular dietary supplement. *Williams v. National Football League*, 582 F.3d 863 (8th Cir. 2009). The players claimed that the duty arose independently under Minnesota state law, however, the Eighth Circuit held that those claims were preempted because determining whether the NFL had the specific duty of providing supplement warnings could not possibly be determined without "examining the parties' legal relationship and expectations as established by the CBA." *Id.* at 881. Similarly, in *Atwater*, the Eleventh Circuit held that courts were required to interpret the CBA to "determine the scope of the legal relationship between [players] and the NFL" anytime the court needed to analyze the scope of a duty related to the NFL and players' CBA-created benefits. *Atwater v. Nat'l Football League Players Ass'n*, 626 F.3d 1170, 1182 (11th Cir. 2010).

Under these holdings, it is certainly possible that the NFL could have some sort of an obligation to provide medication disclosures to players. But under this line of reasoning, that determination would still require an interpretation of the CBA in order to determine whether the

players could justifiably rely on the NFL for medical warnings and disclosures. Since the teams or team physicians are the actors routinely providing medical care and supervision to players under the system designed by the CBA, the NFL Players must provide some evidence to show that their reliance on the NFL was reasonable. And providing this evidence would almost certainly require an in-depth interpretation and understanding of the system of duties laid out by the CBA.

The NFL Players allege that the NFL itself directly or indirectly administered the medications by pressuring teams to rush players back to the field of play, suggesting that this involvement could somehow create a duty by itself. However, the NFL Players' complaint does not change the underlying fact that a court might still reasonably interpret the CBA provisions as imposing the duty of monitoring and managing a player's health on the individual teams. If that interpretation were adopted, it would suggest that the NFL could reasonably rely on the teams to handle the day-to-day duty of managing player health, therefore substantially reducing the duty of care carried by the NFL. *Duerson v. Nat'l Football League, Inc*., No. 12-C-2513, 2012 WL 1658353, at *4 (N.D. Ill. May 11, 2012).

Furthermore, the NFL Players alleging direct or indirect involvement by the NFL is neither novel nor unique as it has already been attempted by players in other professional sports leagues where complaint was quickly preempted by the presiding court. *See Boogaard v. Nat'l Hockey League*, No. 13-cv-04846, 2015 WL 9259519, at *4, 7 (N.D. Ill. Dec. 18, 2015) (holding that although hockey players alleged that the NHL itself directly and indirectly administered pain medications, the hockey players' negligence claims were preempted because an interpretation of the CBA was still necessary to determine both "whether the NHL actually had a duty" and "the scope of any duty that the NHL had actually assumed").

In short, the decision of the appellate court below is both internally consistent and aligned with the strong string of precedents committed to the protection of the federal framework of collective bargaining laid out by the LMRA. Therefore, in this case, in order to properly analyze the existence and/or scope of the NFL's player health and safety duties, a court must necessarily examine the relationship between the players, teams, physicians, and the league itself by interpreting the CBA.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the Court of Appeals for the Fourteenth Circuit.

Respectfully Submitted,

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