No. 09–214

In the Supreme Court of the United States

February Term, 2019

JON SNOW, AND OTHER SIMILARLY SITUATED INDIVIDUALS;

Petitioners,

v.

NATIONAL COLLEGIATE ATHLETIC ASS'N; THE NATIONAL FOOTBALL LEAGUE,

Respondents.

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

BRIEF FOR PETITIONERS

Team Number: 5
Attorneys for Petitioners

Table of Contents

Table of Authorities

Cases

Statutes

Other Authorities

Questions Presented

1. Under Section 1 of the Sherman Act, whether the NCAA Amateurism and Eligibility bylaws void where they unnecessarily restrict the commerce and trade of players to market their name, image, and likeness.
2. Whether state law claims against the National Football League that do not arise from a player's collective-bargaining agreement are preempted by the Labor Management Relations Act.

Statement of the Case

This Court is asked to consider whether the National Collegiate Athletic Association's ("NCAA") Amateurism and Eligibility bylaws (hereinafter, "NCAA bylaws") violate Section 1 of the Sherman Act by restricting the trade and commerce rights of athletes seeking to monetize their own name and likeness. Additionally, this Court must determine whether the Petitioners' state claims alleging the National Football League ("NFL") negligently distributed and misrepresented controlled substances are preempted by Section 301 of the Labor Management Relations Act ("LMRA").

Before this Court is Jon Snow, the named Petitioner. R. at 13. Mr. Snow starred for three years as quarterback for the Tulania University Greenwave. R. at 13. When he was not winning games or being recognized for his athletic achievements, Mr. Snow was a regular student. R. at 13. In recognition of Mr. Snow's athletic success, and in an effort to appeal to college football fans, Apple Inc. ("Apple") sought to partner with Mr. Snow and other successful, well-known student-athletes. R. at 13. Specifically, Apple approached Mr. Snow to license his name and likeness for a trial run for a new Apple Emoji Keyboard. R. at 13. As part of an agreement between Mr. Snow and Apple, Mr. Snow and other participating athletes would receive $1,000 for the use of their image and likeness on the emoji keyboard. R. at 13. Additionally, Apple paid Mr. Snow a $1 royalty fee for each Apple Emoji Keyboard download. R. at 13. As a result of his license agreement with Apple, Mr. Snow earned approximately $3,500. R. at 13.

After the conclusion of the trial run, Cersei Lannister, head of Tulania compliance, received complaints from other Tulania student athletes about the allegedly unfair compensation Apple paid Mr. Snow for licensing his name image and likeness. R. at 13. Ms. Lannister

notified the NCAA, which suspended Mr. Snow indefinitely for violating NCAA bylaws relating to compensation. R. at 13. After years of success for Mr. Snow and Tulania University, an NCAA bylaw sacked Mr. Snow's collegiate career. R. at 13. Mr. Snow decided to forego his final year of college and enter the NFL draft. R. at 13.

Thereafter, Mr. Snow was drafted by the New Orleans Saints and completed a successful rookie campaign, gaining even more recognition. R. at 13. When injuries threatened Mr. Snow's career, NFL doctors and trainers prescribed multiple painkillers to treat minor head and ankle injuries. R. at 13. NFL doctors never disclosed the side effects and risks of taking numerous painkillers. R. at 13. Rather than treating his injuries, NFL doctors rushed Mr. Snow back to the field. R. at 13. Indeed, the medical treatment Mr. Snow received was not individually tailored, but experienced by other players receiving similar treatments before being sent back to the field. See R. at 13. Unfortunately, during Mr. Snow's second year in the NFL, he was diagnosed with an enlarged heart and permanent nerve damage to his ankle. R. at 13. Mr. Snow also developed an addiction to painkillers. R. at 13.

Mr. Snow, and the players who join him in this litigation, seek to challenge the restrictive bylaws of the NCAA that prevent him from fully expressing his personal and legal rights. R. at 13. Mr. Snow also seeks to litigate his state negligence claims against the NFL in the court of his choosing. R. at 13. This unique procedural posture allows this Court to vindicate both of those rights for Mr. Snow and other similarly situated collegiate and professional athletes. R. at 13. While Mr. Snow filed two separate actions – one against the NCAA and the other against the NFL – the District Court of the Southern District of Tulania consolidated both actions in the interest of judicial efficiency. R. at 13.

After an intensive examination of the NCAA bylaws and the NFL players' state negligence claims, the District Court found in favor of Mr. Snow on both counts. R. at 19, 26. On appeal, the Fourteenth Circuit reversed. R. at 11. Mr. Snow now respectfully requests this Court reverse the Fourteenth Circuit, and find that NCAA bylaws are subject to Rule of Reason analysis under Section 1 of the Sherman act, and that the NFL players' state law claims are not preempted by Section 301 the LMRA.

Summary of the Argument

The current organizational frameworks of the NCAA and NFL limit the rights of players to pursue their economic goals and litigate in a forum of their choosing. This is a case about individual autonomy, and Petitioners urge this Court to examine the practices of these dual organizations in order to fully protect the rights and interests of labor.

The Fourteenth Circuit Court erred in reversing the United States District Court for the Southern District of Tulania because the circuit court failed to properly evaluate the NCAA Amateurism and Eligibility bylaws under the Rule of Reason analysis under Section 1 of the Sherman Act. The Fourteenth Circuit erroneously read *NCAA v. Board of Regents* to imply that NCAA Amateurism and Eligibility bylaws are immune from attack by the Sherman Act as a matter of law. To the contrary, *Board of Regents* stands for the broad proposition that restrictive covenants must be struck where courts find that the covenant unreasonably restricts trade and has a significant anti-competitive effect on a relative market. Passing references to the high-minded ideals of amateurism were not intended to insulate NCAA bylaws from the Sherman Act, but rather to explain why seemingly monopolistic agreements between the NCAA and its member associations were not "per se" invalid. The Rule of Reason is the presumptive antitrust analysis framework, and a misreading of this Court's precedent should not deny student athletes an avenue to vindicate their right to compensation for their name, image, and likeness.

As a threshold matter, NCAA Amateurism and Eligibility bylaws regulate commercial activity because the grant of a scholarship for student athlete labor represents a transaction in which both groups expect economic return. Under the Rule of Reason, NCAA Rule 12.5.2.1 unreasonably restricts Mr. Snow's access to the Apple Emoji Keyboard Market, and any economic benefit that flows therefrom. But for the NCAA compensation rules, college athletes

would be able to sell group licenses for the use of their name, image, and likeness. NCAA Rule 12.5.2.1 fixes the price of Mr. Snow's name, image, and likeness to zero in a market where that name, image, and likeness has clear value to both corporation and consumers.

This Court should also find that the circuit court improperly determined that the NFL players' state negligence claims required interpretation of the collective-bargaining agreements ("CBAs"). Under this Court's precedent, Section 301 of the LMRA is a jurisdictional statute governing disputes arising from labor contracts. To determine whether a state law claim will be preempted by the LMRA, courts conduct a two-part inquiry. First, they must determine if the state law claimed rights arise from the CBAs. If the answer is yes, then the claims are preempted. If the claimed rights do not arise from the CBAs, then the court must determine if litigating the claims will require interpretation of the CBAs. Under this Court's analysis, interpretation has been construed narrowly, and merely referring to the CBAs is not sufficient.

Here, the NFL players are alleging negligent distribution of controlled substances and negligent misrepresentation by NFL doctors regarding the dangers of the medications. By handling, distributing, and administering controlled substances, the NFL's action created a duty to do so with reasonable care. Both the NFL's action and the duty that arises from it are independent of the CBAs because the CBAs do not contain provisions requiring the NFL to provide medical care to the players.

Additionally, no interpretation of the CBAs is required for the NFL players to make out the state negligence claims. The NFL's minimum standard of care when distributing controlled substances is governed by applicable state laws regarding prescription drugs. Since the NFL players' state law claims do not arise from the CBAs nor do they require interpretation of the

CBAs, this Court should reverse the circuit court and find the state law claims are not preempted by Section 301 of the LMRA.

Argument

I. THIS COURT SHOULD REVERSE THE HOLDING OF THE CIRCUIT COURT BECAUSE THE NCAA AMATEURISM AND ELIGIBILITY BYLAWS RESTRICT TRADE AND COMMERCE IN VIOLATION SECTION I OF THE SHERMAN ANTI-TRUST ACT.

NCAA rules prohibiting student athletes from receiving any compensation for the use of their name, image, and likeness violate Section 1 of the Sherman Anti-trust Act (the "Sherman Act). Section 1 of the Sherman Act provides that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared illegal." 15 U.S.C.S. § 1 (2004). An agreement which unreasonably restricts competition and affects interstate commerce violates the Sherman Act. *See id.; Northern Pacific Ry. Co. v. United* States, 356 U.S. 1, 4 (1958).

The Sherman Act was designed to be "a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade." *Northern Pacific Ry. Co.*, 356 U.S. at 4. In achieving this goal, courts consider whether a challenged practice promotes or suppresses market competition. *Id.* "Whether the ultimate finding is the product of a presumption or actual market analysis, the essential inquiry remains the same whether or not the challenged restraint enhances competition." *National Collegiate Athletic Association v. Bd. of Regents of Ok.*, 468 U.S. 85, 104 (1984) (Hereinafter, "*Board of Regents*"). Therefore, although there are "per se" violations of the Sherman Act, the Rule of Reason is the "traditional framework of analysis" to determine whether Section 1 is violated. *Continental Television, Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 49 (1977).

Under the Rule of Reason, a totality of the circumstances test, courts analyze facts "peculiar to the business, the history of the restraining, and the reasons why [the restraint] was imposed" to determine the effect on competition in the relevant product market. *Nat'l Soc'y of*

Professional Eng'rs. v. United States, 435 U.S. 679, 692 (1978). The Rule of Reason is the presumptive standard for making the determination of whether a challenged rule is unreasonable. *Texaco Inc. v. Sagher*, 547 U.S. 1, 5 (2006). This Court has specifically held that concerted actions undertaken by joint ventures, as is the case here with the NCAA and its nearly 1,100 members, should be analyzed under the Rule of Reason. *American Needle, Inc. v. Nat'l Football League*, 560 U.S. 183, 203 (2010). Accordingly, NCAA bylaw 12.5.2.1[1] must be fully analyzed under this framework. *See id.*

Under this framework, the NCAA Amateurism and Eligibility bylaws unreasonably restrictive of competitive conditions. *See Standard Oil Co. v. United States*, 221 U.S. 1, 58 (1911) (holding that Congress intended to prohibit agreements that restricted unreasonably competitive conditions).

Additionally, NCAA Rule 12.5.2.1 explicitly regulates commercial activity, because "the modern legal understanding of 'commerce' is broad, 'including almost every activity from which the actor anticipates economic gain.'" *O'Bannon v. NCAA*, 802 F.3d 1049, 1065 (2015) (quoting Phillip Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, ¶ 260b (4th ed. 2013)). When an athletic recruit exchanges his labor and name, image, and likeness rights for a collegiate scholarship, "it is undeniable that both parties to that exchange anticipate economic gain from it." *Id.; see also Agnew v. NCAA*, 683 F.3d 328,

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[1] This provision of the NCAA bylaws Petitioner challenges is stated, in full, as follows:
> NCAA Rule 12.5.2.1 – 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 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."

342–43 (7th Cir. 2012) (“"No knowledgeable observer could earnestly assert that big-time college football programs competing for highly sought-after high school football players do not anticipate economic gain from a successful recruiting program."). While the NCAA contends that Rule 12.5.2.1 is characterized as an eligibility rule, the key to this Court’s analysis should be the rule’s effect on commerce. *See Simpson v. Union Oil Co. of Cal.*, 377 U.S. 13, 21-22 (1964) (finding that the “clever manipulation of words” does not insulate a corporation from antitrust scrutiny).

As Apple Inc.’s successful trial launch of their Apple Emoji Keyboard indicates, there is a market for personal license agreements between corporations and high-level collegiate athletes like Mr. Snow. *See* R. at 13. Antiquated NCAA bylaws and Supreme Court dicta should not restrict Mr. Snow and others’ access to this market, and thereby reducing the importance of consumer preference and setting price and output. *See Bd. of Regents*, 468 U.S. at 107 (“A restraint [on trade] that has the effect of reducing the importance of consumer preference in setting price and output is not consistent with this fundamental goal of anti-trust law.”).

While the circuit court here found in favor of the NCAA, the record reflects that the circuit court did not conduct as robust an investigation as the Southern District Court of Tulania into the current market conditions that affect the NCAA, and specifically, Mr. Snow. *Compare* R. at 4–6; R. at 14–19. The NCAA and its 1,100 member schools entered into an “eligibility” scheme that devalues the name, image, and likeness rights of student athletes, and forecloses their access to a market to sell those rights. Accordingly, Petitioner respectfully requests this Court reverse the Fourteenth Circuit’s Holding, and find NCAA Rule 12.5.2.1 invalid under the Sherman Act.

A. ***Board of Regents*** **does not foreclose analysis of NCAA bylaws where the bylaws have a significant anti-competitive effect.**

Board of Regents did not stand for the proposition that the NCAA bylaws are immune from attack, but rather encouraged courts to analyze NCAA bylaws under the Rule of Reason given the unique business the NCAA engages in. Specifically, this Court in *Board of Regents* found that NCAA bylaws that do not serve any legitimate procompetitive purpose must be struck down. *See Bd. Of Regents*, 468 U.S. at 113–20 (striking down NCAA television rules on the grounds that they did not serve any legitimate procompetitive purpose).

In reaching its opinion, this Court in *Board of Regents* observed that the NCAA needs ample latitude to achieve its goal of maintaining amateurism in collegiate athletics. *Id.* at 120. The Court observed further that, in order to preserve the "product" of college football, "athletes must not be paid, must be required to attend class, and the like." *Id* at 102. These observations were just that, observations that had little bearing on the outcome of the case. *Id.* at 120 ("Today we hold only that the record supports the District Court's conclusion that by curtailing output and blunting the ability of member institutions to respond to consumer preference, the NCAA has restricted rather than enhanced the place of intercollegiate athletics in the Nation's life.").

While this Court made broad statements on amateurism and its preservation, it is critical for this Court to note that *Board of Regents* occurred in the context of the NCAA's then prevailing rules for televising college football games. *Id.* at 91. The case involved the NCAA and its member organizations, not student athletes specifically. *Id.* at 91–92. In describing the unique characteristics of the NCAA product, the Court explained that Rule of Reason analysis must apply to NCAA bylaws because collegiate athletics would not be able to exist without rules that in another context would be per se invalid. *Id.* at 103; *compare Broad Music, Inc. v. Columbia Broadcasting Sys*., 441 U.S. 1, 19–20 (1971) (holding that horizontal agreements that

restrict competition and decreases output are per se illegal). This Court articulated this point to demonstrate that no NCAA rule should be invalidated without Rule of Reason analysis, even if, on its face, it was a per se violation of the Sherman Act because many NCAA rules are part of the "character and quality of the NCAA's 'product.'" *Board of Regents*, 486 U.S. at 102.

Board of Regents has been used by the NCAA to stand for the proposition that its amateurism bylaws are immune from attack under the Sherman Act. *See McCormack v. NCAA*, 845 F.2d 1338, 1338-40 (5th Cir. 1988) (finding that student athletes could not receive compensation in excess of educational expenses); *Smith v. NCAA*, 139 F.3d 180, 180-81(3d Cir. 1998) (finding that NCAA graduate eligibility bylaws serve a valid procompetitive purpose); *Agnew*, 683 F.3d at 342–43 (finding that most if not all of NCAA amateurism and eligibility rules are procompetitive as a matter of law). Nevertheless, in *Smith* and *McCormick*, the Third and Fifth Circuits respectively subjected the NCAA's rules to Rule of Reason scrutiny. *See Smith*, 139 F.3d at 186; *McCormack*, 845 F.2d at 1344–45.

Only the Seventh Circuit presumed that NCAA bylaws intended to maintain amateurism were procompetitive and immune from attack under the Sherman Act. *Agnew*, 683 F.3d at 342-43. However, the Seventh Circuit's broad reading of *Agnew* and its supposed "procompetitive presumption" did not affect the outcome of the case. *See Id.* at 344. The plaintiffs in *Agnew* challenged NCAA rules that prohibited schools from offering multi-year scholarships, and capped the number of football scholarships that each NCAA school could offer collegiate athletes. *Id.* at 332–33. In finding that scholarship limitations "did not implicate the preservation of amateurism," the *Agnew* court concluded that the NCAA's scholarship rules were not subject to any "procompetitive presumption." *Id.* at 334–45.

Notably, the Seventh Circuit observed that "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. Additionally, the court reasoned that "transactions [] schools make with premier athletes – full scholarships in exchange for athletic services – are not noncommercial, since schools can make millions of dollars as a result of these transactions." *Id.* at 340. The case was dismissed by the Seventh Circuit not because their anti-trust claim against the NCAA lacked merit, but because the plaintiffs had failed to plead the existence of a cognizable market. *Id.* at 345. In dismissing the case, the *Agnew* court observed that "proper identification of a labor market for student athletes . . . would meet plaintiff's burden for describing a cognizable market under the Sherman Act." *Id.* at 346.

Most recently, the Ninth Circuit has adopted the Rule of Reason analysis and applied it specifically to NCAA amateurism and eligibility bylaws. *See O'Bannon v. NCAA*, 802 F.3d. In *O'Bannon*, the Ninth Circuit affirmed most of a Northern District of California opinion that found that NCAA bylaws restricting student athletes from compensation resulting from licensing their own name, likeness, and image in video games unreasonably restrain trade in violation of Section 1 of the Sherman Act. *Id.* at 1053. While the court agreed that many of the NCAA's amateurism rules are likely to be procompetitive, the Ninth Circuit held that NCAA amateurism and eligibility rules must be analyzed under the Rule of Reason. *Id.* The Ninth Circuit specifically addressed *Board of Regents*, accepting its guidance as informative with respect to the procompetitive purposes served by the NCAA's amateurism rules, but declined to go "further than that." *Id.* at 1064. "The amateurism rules must be proved, not presumed." *Id.*

The observations made in *Board of Regents* are exactly that – observations not supported by factual considerations and not emblematic of the collegiate athletics landscape today.

Therefore, this Court's dicta in *Board of Regents* regarding the spirit of amateur athletics in 1984 does not bind the Court today. *See Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 379 (1994) ("It is to the holdings of our cases, rather than their dicta, that we must attend."). As the Court in *Board of Regents* specifically noted, its holding only applied to the NCAA's anticompetitive practices in its TV deals. Therefore, even in *Board of Regents* own words, this Court's observations regarding the spirit of amateurism and preventing compensation do not prevent this Court's antitrust inquiry today.

While "the preservation of the student-athlete in higher education adds richness and diversity to intercollegiate athletics and is entirely consistent with the Sherman Act…, rules that restrict outputs[2] are hardly consistent with the Sherman Act." *Board of Regents*, 486 U.S. at 102. Therefore, NCAA amateurism and eligibility bylaws are not immune from attack under the Sherman Act, and must be subjected to the Rule of Reason analysis.

B. Under the Rule of Reason, NCAA Rule 12.5.2.1 violates Section 1 of the Sherman Act because the rule unreasonably restricts the ability of student athletes to participate in the Apple Emoji Licensing market through licensing their own name, image, and likeness, resulting in injury-in-fact.

NCAA rules restricting the ability of student athletes to participate in the market of interstate commerce through licensing their own name, image, and likeness violate Section 1 of the Sherman Act under the Rule of Reason. Courts have found that an agreement which unreasonably restricts competition and affects interstate commerce violates the Sherman Act. *See id.; Northern Pacific Ry. Co. v. United* States, 356 U.S. 1, 4 (1958). Snow has met that burden, and the NCAA has not met its. Therefore, this Court should invalidate NCAA Rule 12.5.2.1 as it applies to the licensing of a player's own name, image, and likeness.

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[2] "Output" is defined as products, services, work or energy that is produced by a company, machine, or individual in a given period. Black's Law Dictionary, 2d ed. (2014).

NCAA Rule 12.5.2.1 significantly limits Mr. Snow's ability to compete in the Emoji Licensing Market. In defining a relevant market, this Court has held that "no more definite rule can be declared that that commodities reasonably interchangeable by consumers for the same purposes make up that part of the trade or commerce, monopolization of which may be illegal." *United States v. E.I. Du Pont de Nemours & Co.*, 351 U.S. 377, 395 (1956).

The Ninth Circuit confirmed a Northern District of California court's finding that "but for the NCAA's compensation rules, college football and basketball athletes would be able to sell group licenses for the use of their name, image, and likeness." *O'Bannon*, 802 F. 3d at 1067. The court broke the group licensing market down intro three submarkets in which players name image and likeness could be licensed: "(1) live game telecasts, (2) sports video games, and (3) game rebroadcasts, advertisements, and other archival footage." *Id.* The court found demand in all three markets, and additionally noted that the NCAA had licensed and profited off corporation's right to use a student-athletes name image and likeness. *Id.* The *O'Bannon* court ultimately held that the NCAA compensation rules foreclosed the market for student athletes' name, image, and likeness in sports video games, reasoning that video game makers, if permitted to do so, would negotiate with student athletes for the right to use their name, image, and likeness in video games. *Id.*

In reaching its conclusion, the Ninth Circuit dismissed the NCAA's contention that the value of a student athlete's name, image, and likeness is zero. *Id.* at 1071. By valuing a student athlete's name image and likeness at zero, the NCAA and its member schools effectively fixed the price of that commodity. *Id.*; *see Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co.*, 334 U.S. 219, 235 (1948) ("[C]ombination[s] condemned by the [Sherman] Act" also include

"price-fixing . . . by purchasers" even though "the persons specially injured . . . are sellers, not customers or consumers.").

Here, Mr. Snow has sufficiently plead the existence of significant anticompetitive effects within a relative market. Specifically, Mr. Snow has demonstrated that NCAA Rule 12.5.2.1 stifles competition in the Apple Emoji Keyboard Licensing Market. R. at 13. Mr. Snow's claim is analogous to student athletes in *O'Bannon*, whose right to be compensated for the use of their name, image, and likeness in video games was recognized by the Ninth Circuit. However, Mr. Snow can demonstrate actual anticompetitive practices in a market where the Ninth Circuit was left to theorize if video game developers would contract student athletes for their name, image and likeness in video games. In Mr. Snow's case, Apple approached him and other premier student athletes to be the face of its new Apple Emoji Keyboard. R. at 13. Apple thought Mr. Snow's name, image, and likeness valuable enough to offer him $1,000 for its license, and agreed to pay an additional royalty for each download by Apple consumers. R. at 13.

Apple ultimately paid Mr. Snow $3,500 by the end of the first trial period. R. at 13. Therefore, it can be concluded that the NCAA anticompetitive compensation rules foreclosed Mr. Snow's access to a market composed of around 2,500 consumers. *See* R. at 13. However, while the existing market is 2,500 consumers, the future, potential market is considerably larger. In 2016, there were 90.1 million iPhone users in the United States alone. *iPhone users in the US 2012-2016*, Statista, https://www.statista.com/statistics/232790/forecast-of-apple-users-in-the-us/ (last visited Feb 2, 2019).

Particularly damaging to the NCAA's contention that this Apple Emoji Keyboard Market is not a cognizable market protected by the Sherman Act, is the fact that Apple already hosts

numerous emoji keyboards for other licensed properties.[3] Perhaps even more damaging, is the fact that the NCAA already has a licensing agreement for an emoji keyboard of its own on the Apple platform. *See CollegeMoji: College Emojis and Sticker Keyboard*, 2ThumbZ Entertainment, Inc, https://itunes.apple.com/us/app/collegemoji-college-emojis-and-sticker-keyboard/id1092087786 (last visited Feb 2, 2019). Through *CollegeMoji*, consumers are able to buy emoji's for each of their favorite teams.[4] *See id.*

Although the NCAA argues that Mr. Snow has not been able to show an injury in fact, NCAA Rule 12.5.2.1 prevents Mr. Snow and others similarly situated from enjoying competitive access to a market in which the NCAA already profits. Therefore, Rule 12.5.2.1 fails under the Rule of Reason by unreasonably restricting student athletes' participation in the Apple Keyboard Emoji Market.

II. THIS COURT SHOULD REVERSE THE HOLDING OF THE CIRCUIT COURT AND FIND THAT NFL PLAYERS' STATE LAW CLAIMS ARE NOT PREEMPTED BY THE LMRA BECAUSE THE CLAIMS DO NOT ARISE FROM THE CBAS AND DO NOT REQUIRE THE CBAS' INTERPRETATION.

The NFL players' state law negligence claims are not preempted by Section 301 of the LMRA because the players' claims do not arise from the CBAs, and litigating their claims do not require the CBAs interpretation. Holding that the state law negligence claims are preempted by Section 301 of the LMRA would defeat the statute's purpose. Section 301 of the LMRA governs "[s]uits for violation of contracts between an employer and a labor organization." 29 U.S.C. §

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[3] To illustrate, a search online revealed licensed emoji keyboards for Marvel and DC Superheroes, Star Wars, and Harry Potter to name a few.

[4] For example, a consumer can purchase an emoji set for the University of Michigan, the University of Alabama, Florida State University, Duke University, and Notre Dame University, among others, for the price of $.99. *See CollegeMoji: College Emojis and Sticker Keyboard*, 2ThumbZ Entertainment, Inc, https://itunes.apple.com/us/app/collegemoji-college-emojis-and-sticker-keyboard/id1092087786 (last visited Feb 2, 2019).

185(a) (1947). This Court has interpreted the LMRA as a jurisdictional statute that is "to be used to address disputes arising out of labor contracts." *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 209 (1985).

As such, this Court has only required LMRA preemption of state law claims where a claim is "inextricably intertwined with consideration of the terms of the labor contract." *Id.* at 213. This Court has further explained that Section 301 preempts state law claims "founded directly on rights created by the collective-bargaining agreements" and claims "'substantially dependent on analysis of a collective-bargaining agreement.'" *Caterpillar Inc. v. Williams*, 482 U.S. 386, 394 (1987) (quoting *Int'l Bhd. Of Elec. Workers v. Hechler*, 481 U.S. 851, 858 (1987)). State law claims are not preempted when the claim asserted "confers nonnegotiable state-law rights on employers . . . independent of any right established by contract." *Allis-Chalmers*, 471 U.S. at 212.

Based on the analysis of this Court in *Allis-Chalmers*, courts have followed a two-part test that determines whether state law claims are preempted by Section 301 of the LMRA. *See Burnside v. Kiewit Pacific Corp.*, 491 F.3d 1053, 1059 (9th Cir. 2007); *Williams v. National Football League*, 582 F.3d 863, 874 (8th Cir. 2009); *Atwater v. National Football League Players Ass'n*, 626 F.3d 1170, 1181 (11th Cir. 2010). First, courts determine "whether the asserted cause of action involves a right conferred upon an employee by virtue of state law, not by a CBA." *Burnside*, 491 F.3d at 1059. If the rights do not arise from the CBA, then a court must determine "whether litigating the state law claim nonetheless requires interpretation of a CBA, such that resolving the entire claim in court threatens the proper role of grievance and arbitration." *Alaska Airlines Inc. v. Schurke*, 898 F.3d 904, 921 (9th Cir. 2018) (citing *Hawaian*

Airlines, Inc. v. Norris, 512 U.S. 246, 262 (1994); *Livadas v. Bradshaw*, 512 U.S. 107, 124–25 (1994).

In the present case, the NFL players' state law negligence claims allege that the players were "injured by the NFL's 'provision and administration' of controlled substances without written prescriptions, proper labeling, or warnings regarding side effects and long-term risks." R. at 22. The player's claimed right is thus to "receive medical care from the NFL that does not create an unreasonable risk of harm," which arises from state laws governing prescription drugs, not from a CBA. R. at 22. The NFL players also assert a claim for negligent misrepresentation, alleging that the NFL had a duty to "disclose to them the dangers of Medications." R. at 9.

Further, the NFL players are able to make out each element of a prima facia case for negligence without interpretation of the CBAs. The Fourteenth Circuit erroneously considered the CBAs to determine "the affirmative steps the NFL has taken to protect the health and safety of the players," despite this Court's determination that a defense based on a CBA does not give rise to preemption. *See Catepillar Inc. v. Williams*, 482 U.S. 386, 398–99 (1987) (explaining that "a federal question must appear on the face of the complaint" to require removal to federal court). Since the NFL players' state law negligence claims neither arise from the CBAs nor require interpretation of the CBAs, the players' state law negligence claims should not be preempted by Section 301 of the LMRA. The lower court erred in holding to the contrary, and thus, this Court should reverse.

A. <u>The NFL players' state law negligence claims arise from state laws governing prescription drugs, not from the CBAs, because the CBAs do not require the NFL to provide medical care to players.</u>

The NFL players' state negligence claims arise solely from the NFL's actions and state laws governing prescription drugs, not from the CBAs. The NFL players were "injured by the

NFL's 'provision and administration' of controlled substances without written prescriptions, proper labeling, or warnings regarding side effects and long-term risks." R. at 22. This Court must determine if "the players' right to receive medical care from the NFL that does not create an unreasonable risk of harm" arise from the CBAs. R. at 22. Because the NFL violated state and federal law governing prescription drugs, not the CBAs, the negligence claims arise from state laws governing prescriptions drugs.

When examining the CBAs, the record reflects that the CBAs "do not require the NFL to provide medical care to players." R. at 22. Instead, the NFL players are arguing that NFL "violated state and federal laws governing prescription drugs." R. at 22. The Circuit Court erroneously focused on the NFL's action of imposing "CBA medical duties on the clubs." R. at 9. However, the NFL players' complaint asserts that "the NFL *itself* illegally distributed controlled substances" because it "'directly and indirectly supplied' players with drugs." R. at 22. Regardless of what obligations were imposed on the clubs, the NFL cannot avoid liability if it was also distributing controlled substances. This Court has made clear that "§ 301 does not grant the parties to a collective-bargaining agreement the ability to contract for what is illegal under state law." *Allis-Chalmers*, 471 U.S. at 212. Therefore, because the NFL players' state negligence claims arise out of state laws governing prescription drugs, the claims are not preempted under the first step in the *Allis-Chalmers'* analysis.

B. Litigating the NFL players' state law negligence claims does not require interpretation of the CBAs because the NFL's duty to the NFL players and the NFL's standard of care are both independent of the CBAs.

Under the second part of this Court's analysis, litigating the NFL players' state negligence claims will not require interpretation of the CBAs because the NFL's duty to the players and its standard of care of both independent of the CBAs. This Court has identified the

standard for determining whether a state law claim is preempted by the LMRA: "if the resolution of a state-law claim depends upon the meaning of a collective-bargaining agreement, the application of state law . . . is pre-empted and federal labor-law principles-necessarily uniform throughout the Nation-must be employed to resolve the dispute." *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 405–06 (1988). When this Court refers to the *meaning* of a CBA, it requires the claims be "'substantially dependent on analysis of a collective-bargaining agreement.'" *Caterpillar*, 482 U.S. at 394 (quoting *Hechler*, 481 U.S. at 858). Since the CBA does not need to be analyzed or interpreted to litigate the claims, the NFL players' state negligence claims will not be preempted by Section 301 of the LMRA.

As defined in the Restatement (Second) of Torts, "negligence is conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm." Restatement (Second) of Torts § 282 (1965). Using California law as an example, a prima facia negligence case requires: "(1) defendant's obligation to conform to a certain standard of conduct for the protection of others against unreasonable risks (duty); (2) failure to conform to that standard (breach of the duty); (3) a reasonably close connection between the defendant's conduct and resulting injuries (proximate cause); and (4) actual loss (damages)." *McGarry v. Sax*, 158 Cal.App.4th 983, 994 (Cal. 2008). "In California, the violation of a statute creates a presumption of negligence" if there is a duty imposed on the defendant. *Waldon v. Arizona Public Service Co.*, 642 Fed.Appx. 667, 669 (9th Cir. 2016). Additionally, a duty may also arise from "the general character of the activity in which the defendant engaged." *J'Aire Corp. v. Gregory*, 157 Cal.Rptr. 407, 598 (Cal. 1979).

Here, if the NFL distributed controlled substances, it would have a duty towards the NFL players to do so with reasonable care because of the general character of that activity. Further,

the NFL's minimum standards of care when distributing controlled substances is established by state laws governing prescription drugs. *See, e.g., Cal. Bus & Prof. Code § 4000 et seq* (requiring prescribers of drugs to consult with patients prior to providing the drugs). The element of causation is a factual question that does not require this Court to interpret the CBA. *See Lingle*, 486 U.S. at 407. As for damages, consulting a CBA to calculate damages is not deemed interpretation of the CBA. *See Livadas*, 512 U.S. at 125. Since the NFL players are able to establish a prima facia case for negligence without interpreting the CBAs, this Court should find that the state negligence claims are not preempted by Section 301 of the LMRA.

1. Under the NFL players' state negligence claims, the NFL's duty of care arises from the NFL's handling, distribution, and administration of controlled substances.

This Court should find that the NFL's duty of care arises from the NFL's handling, distribution, and administration of controlled substances. Under California law, "[a] duty of care may arise through statute or by contract" or may arise through "the general character of the activity in which the defendant engaged. *J'Aire*, 157 Cal.Rptr. at 598. Furthermore, California has established several factors determinate as to whether a duty exists, which include: "'the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and 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 the risk involved.'" *Regents of Univ. of Cal. v. Superioer Court*, 230 Cal.Rptr.3d 415, 432 (Cal. 2018) (quoting *Rowland v. Christian*, 69 Cal.2d 108, 113 (Cal. 1968)).

Here, the NFL players are alleging that "the NFL *itself* illegally distributed controlled substances" and "'directly and indirectly supplied players' with drugs." R. at 22. As such, the NFL players are alleging that the NFL handled, distributed, and administered controlled substances. R. at 23. A duty to do so with reasonable care arises when considering the "general character of [that] activity." *J'Aire*, 157 Cal.Rptr. at 598.

Application of the *Rowland* factors further clarify why the NFL has a duty to exercise reasonable care when distributing controlled substances. The district court explained it clearly: "lack of reasonable care in handling, distribution, and administration of controlled substances can foreseeably harm the individuals who take them." R. at 23. Since controlled substance overuse or misuse can cause addictions and long-term health problems, they are "controlled." *See, e.g.*, 21 U.S.C. §§ 801(2), 812 (1970) (declaring that the "improper use of controlled substances have a substantial and detrimental effect on the health and general welfare of the American people."). Further, addiction and long-term health problems can be established with certainty, and carelessness when distributing controlled substances is both illegal and morally blameworthy. *See, e.g., Cal. Bus & Prof. Code § 4000 et seq* (requiring prescribers of drugs to consult with patients prior to providing the drugs). From a policy view, enforcing state laws governing prescription drugs will encourage all entities that distribute controlled substances to do so with reasonable care. Considering these factors, along with the general character of the NFL's handling, distribution, and administration of controlled substances, this Court should find that the NFL has a duty to do so with reasonable care.

Regarding the NFL players' claim for negligent misrepresentation and reasonable reliance, the NFL players argue that the NFL had a duty to "'disclose to [the players] the dangers of Medications,'" which is a duty entirely independent of the CBAs. R. at 9. In *Atwater v.*

National Football League Players Ass'n, the Eleventh Circuit evaluated claims brought by NFL players alleging the NFL's negligence in conducting background checks on financial advisors. 626 F.3d 1170, 1174–75 (11th Cir. 2010). In its analysis, the Eleventh Circuit noted that there was a CBA provision stating that, under the relevant program, players were "solely responsible for their personal finances." *Id.* at 1181. As such, the Court explained that interpretation of the CBA was required in determining whether the player's reliance was "reasonable" based on interpretation of the CBA, and that "the duties underlying the claim arose directly from the CBA." *Id.* at 1181-82. (citing *United Steelworkers v. Rawson*, 495 U.S. 362, 369–71(1990) (recognizing "that a state-law tort action ... may be pre-empted by § 301 if the duty" underlying the tort claim "is created by a [CBA]")). Thus, the court properly found those claims to be exempted by Section 301.

Similarly, in *Williams v. National Football League*, the Eighth Circuit determined that that the reasonableness of a player's reliance could not be determined without interpreting the CBA. 582 F.3d 863, 876 (8th Cir. 2009). In that case, NFL players brought both common-law and state-law claims against the NFL after being suspending for testing positive for banned substances. *Id.* at 872–73. In order to determine what duty, if any, the NFL had for disclosing that certain dietary supplements had banned substances in them, the Eighth Circuit found that the NFL's drug policy, incorporated into the CBA, contained clear statements as to the duties of the parties. *Id.* at 868. Specifically, players were warned that taking supplements were "AT YOUR OWN RISK," and that "a positive test result will not be excused because a player was unaware he was taking a Prohibited Substance." *Id.* Because of these specific CBA terms and provisions, the Eighth Circuit found that those claims were preempted because interpretation of the CBA was required.

Unlike both *Atwater* and *Williams*, no CBA provisions directly address who was responsible for disclosing the risks of prescription drugs provided to players by the NFL. R. at 1–26. Both *Atwater* and *Williams* required either that the duty was established by the CBAs, or that the determination of the duty required CBA interpretation. Here, since no CBA provision speaks to the negligent misrepresentation claim by the NFL players, there will be no need to interpret or look to the CBA to litigate this claim. Therefore, this Court should find that the NFL players' negligent misrepresentation claim is not preempted by Section 301 of the LMRA.

2. The NFL's minimum standard of care when handling, distributing, and administering controlled substances is established by state statute.

This Court should also find that the standard of care applicable to the NFL is established by statute, and thus does not require interpretation of the CBAs. Along with federal laws, state laws exist to regulate how drugs are to be prescribed, labeled, and distributed. *See, e.g.*, *Cal. Bus & Prof. Code § 4000 et seq* (requiring prescribers of drugs to consult with patients prior to providing the drugs)[5]. Under the NFL players' negligence claim, deciding if the NFL breached its duty to handle, distribute, and administer drugs with reasonable care would require a court to merely compare the NFL's conduct with the requirements of the individual state statutes. As such, there is no need to look to the CBAs to determining the NFL's standard of care.

The Eighth Circuit came to a similar decision regarding the statutory claim against the NFL in *Williams*, discussed above. 582 F.3d at 876. There, NFL players brought both common-law and state-law claims against the NFL after being suspending for testing positive for banned substances. *Id.* at 872–73. Even though the NFL argued that all the claims were preempted by

[5] Specifically, the CDC has found that "forty-seven states and the District of Columbia have laws that set time or dosage limits for controlled substances." Centers for Disease Control, *Prescription Drug Time and Dosage Limit Laws*, (2015, p. 2).

Section 301 of the LMRA, the Eighth Circuit held that the statutory claim was not preempted because "a court would have no need to consult the [CBA] in order to resolve the Players' [statutory] claim." *Id.* at 876. Rather, the court would only need to "compare the facts and the procedure that the NFL actually followed with respect to its drug testing of the Players with [the statute's] requirements. *Id.*

It is important to note that the Eighth Circuit did find the plaintiffs' common-law claims, including a negligence claim, preempted by Section 301. *Id.* at 881–82. There, the players claimed that the NFL was negligent in failing to warn players that a certain supplement had a banned substance in it. *Id.* at 881. However, the players obtained the supplements on their own, and against the advice of the NFL. *Id.* at 869. Under those facts, the Eighth Circuit found that a determination of whether the NFL had a duty to warn players about the supplements would require "examining the parties' legal relationship and expectations as established by the CBA and the [Drug] Policy." *Id.* at 881. That policy stated that players taking supplements did so "at [their] own risk." *Id.* at 869.

Here, similar to the Eighth Circuits analysis regarding the statutory claim, the NFL players' claims for negligent handling, distribution, and administration of controlled substances is based in state statutes governing prescription drugs. R. at 22. Unlike the common-law negligence claim in *Williams*, where the players procured supplements themselves, the NFL in the present case distributed controlled substances to players. R. at 22. The affirmative action on the part of the NFL creates the duty to avoid unreasonable risks of harm when distributing controlled substances, and the standard of care is established by the state laws governing prescription drugs. Therefore, this Court should reverse the lower court's erroneous holding to

the contrary, and find that interpretation of the CBAs is unnecessary for determining the standard of care applied to the NFL.

Conclusion

As set forth above, the NCAA Amateur and Eligibility bylaws are not protected from attack under Section 1 of the Sherman Act. Additionally, the NFL players' state negligence claims are not preempted by Section 301 of the LMRA. As such, Petitioners respectfully request this Court reverse the Fourteenth Circuit.

Respectfully Submitted,
Team Number 5

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Attorneys for Jon Snow, and other similarly situated individuals,
Petitioners