No. 09-214

IN THE

SUPREME COURT OF THE

UNITED STATES OF AMERICA

JON SNOW, AND OTHER SIMILARLY SITUATED INDIVIDUALS;

Plaintiff-Petitioner,

v.

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

Defendant-Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT

OF APPEALS FOR THE FOURTEENTH CIRCUIT

BRIEF OF PETITIONER, JON SNOW

TEAM 15

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II. The Appellate Court wrongfully determined that Mr. Snow's negligence claim would be preempted by the Labor Management Relations Act § 301. If the plaintiff's claim cannot be ascertained without the Court interpreting the terms of the collective bargaining agreement, then the claim is preempted. Here, the collective bargaining agreement does not establish a specific duty by which the NFL must act when its medical staff over prescribe painkillers to players, and thus, the Court may resolve the claim without interpreting the agreement.

STATEMENT OF FACTS

Jon Snow was a successful quarterback for Tulania University. R. 13. Apple, Inc. asked Snow and several other well-known players to participate in a trial run for a new Emoji Keyboard. *Id*. This keyboard allows purchasers to use an emoji that depicts Snow's image. *Id*. Apple, Inc. is hopeful that the success of this keyboard will draw attention of football fans. *Id.* In the emoji keyboard agreement, Apple agreed to pay each player $1,000 up front and an additional $1 for each download. *Id.* Snow agreed, and made $3,500 in the first trial run of the keyboard. *Id.*

Cersei Lannister, the head of Tulania compliance, received complaints of Snow's compensation. *Id*. She notified the NCAA, and Snow was suspended indefinitely for violating NCAA Bylaw 12.5.2.1. *Id.* Upon his discharge, Snow commenced legal action against the NCAA for violating §1 of the Sherman Act. *Id.* In the meantime, Snow entered his name in the NFL draft and was drafted by the New Orleans Saints within a year. *Id.*

The Saints is a professional football franchise of the National Football League (NFL). *Id.* Over the course of his rookie year, Snow incurred head and ankle injuries; the doctors and trainers of the team prescribed multiple painkillers to Snow in order to help alleviate the pain. *Id.* However, Snow was never given disclosure about the side effects and risks associated to each medication. *Id.* During his second year with the Saints, Snow was diagnosed with an enlarged heart and permanent nerve damage in his ankle in addition to an addition to painkillers. *Id.* Other players included in the action have experienced issues. *Id.*

ARGUMENT

I. The eligibility rules are not, as a matter of law, exempt from Sherman Act challenges and the NCAA bylaw 12.5.2.1 should be questioned as reasonable through a Rule of Reason Analysis.

The Fourteenth Circuit erred in its finding that the National Collegiate Athletic Association's (NCAA) bylaws are exempt from challenges under the Sherman Anti-Trust Act of 1890 (15 U.S.C. § 1-7). Congress passed the Sherman Anti-Trust Act of 1890 to protect consumers who are vulnerable to abuse by corporations seeking to diminish competition. *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 458 (1993). For a plaintiff to prove a violation of the Sherman Act, he must establish "(1) a contract, combination, or conspiracy, (2) a resultant unreasonable restraint of trade in [a] relevant market, and (3) an accompanying injury." *Denny's Marina, Inc. v. Renfro Prods., Inc.,* 8 F.3d 1217, 1220 (7th Cir. 1993).[1]

In *Agnew v. National Collegiate Athletic Association*, this Court deemed that the first element of requiring a contract to be a non-issue because "there is no question that all NCAA member schools have agreed to abide by the bylaws." 683 F.3d 328, 335 (7th Cir. 2012). However, an accompanying injury cannot be established until there is a showing that a restraint on a cognizable market exists. *See McCormack v. Nat'l Collegiate Athletic Ass'n*, 845 F.2d 1338 (5th Cir. 1988) (citing *Associated General Contractors of Cal. v. Cal. State Council of Carpenters*, 459 U.S. 519, 537, 103 S. Ct. 897, 908, 74 L.Ed.2d 723 (1983)). In *Agnew,* the Court stated,

> Plaintiffs must prove two points: (1) that there is a cognizable market on which the NCAA's action could have had anticompetitive effects (thus implicating the

[1] Section 1 of the Sherman Act states, "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade of commerce among the several [s]tates, or with foreign nations is declared to be illegal." 15 U.S.C. § 1. The cause of action Mr. Snow brings forth is based on the Clayton Act, which allows "any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue. . .and recover threefold the damages by him sustained." 15 U.S.C. § 12.

> Sherman Act); and (2) that plaintiffs did, in fact, identify that market in their complaint.

Agnew, 683 F.3d at 337-38. Courts have contemplated that an injured cognizable market is essential to a Sherman Act challenge. *Id.* Additionally, the injury must stem from a restraint on that market, and it must be "unreasonable" in nature. *Nat'l Collegiate Athletic Ass'n v. Bd. Of Regents of Univ. of Oklahoma*, 468 U.S. 85, 98, 104 S. Ct. 2498, 2959, 82 L.Ed.2d 70 (1984).. However, courts have held that some industries may only exist in light of the restraints placed on the given market. *See id.* at 2960.

Courts have adopted three different categories of analysis to determine the unreasonableness of the restraint: (1) per se illegality, (2) rule of reason, and (3) quick look. *Id. at* 2959. First, the *per se* rules are triggered "when surrounding circumstances make the likelihood of anticompetitive conduct so great as to render unjustified further examination of the challenged conduct. . . Under the Sherman Act[,] the criterion to be used in judgment the validity of a restraint on trade is its impact on competition." *Id.* at 2961-62. Second, when it is inappropriate to apply the per se illegal analysis, courts may use the rule of reason analysis. *Id.* at 2959. The rule of reason analysis places the burden on the plaintiff "to show that the agreement or contract has an anticompetitive effect on a given market." *Agnew*, 683 F.3d at 335. Should the plaintiff meet this burden, "the defendant must come forward with evidence of the restraint's procompetitive effects. The plaintiff must then show that any legitimate objectives can be achieved in a substantially less restrictive manner." *Tanaka v. Univ. of S. Cal.*, 252 F.3d 1059, 1063 (9th Cir. 2001) (citations and internal quotation omitted). *See also, O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 802 F.3d 1049, 1070 (9th Cir. 2015). Lastly, under the quick look analysis, "plaintiff is relieved of its initial burden of showing that the challenged restraints have an adverse effect on competition because the anti-competitive

effects of the restraint are obvious. *See California Dental Assoc. v. Federal Trade Comm'n*, 526 U.S. 756, 770, 119 S. Ct. 1604, 143 L.Ed.2d 935 (1999).

NCAA bylaws *are* subject to challenge under the Sherman Act, and any challenge to the bylaws should be determined under the "Rule of Reason" analysis. Moreover, the NCAA's bylaws concerning eligibility are in violation of the Sherman Act because they are over inclusive in their restrictions of player conduct, creating negative externalities on the markets for sports entertainment that harms the product's consumers.

This Court should find that the eligibility rules are not exempt from Sherman Act challenges for the following reasons: (1) *Board of Regents* held that the NCAA's eligibility rules were not protected from Sherman Act challenges, (2) in spite of contrary case law, the NCAA bylaw 12.5.2.1 is commercial in nature, and (3) even if the respondent demonstrates a procompetitive purpose, the bylaw should be found unreasonable because there are lesser restrictive means to accomplish that same purpose.

A. Mr. Snow's Sherman Act challenge does not fail in light of thirty years of precedent because courts have neither correctly applied the rule of reason analysis nor passed the initial stages of the test.

The Fourteenth Circuit relied on *Board of Regents* in its decision as it is the only controlling case addressing Sherman Act challenges against the NCAA bylaws; however, the Fourteenth Circuit erred in its finding that the bylaws were protected as a result of a significant misinterpretation of Justice Stevens' intent in his opinion. In *N.C.A.A. v. Board of Regents University of Oklahoma*, the petitioner argued that the NCAA rules regulating the sale of broadcasting rights of college football games placed an unreasonable burden on the market of televised college sports and was *per se* illegal as an anticompetitive price fixing scheme under Section 1 of the Sherman Act. *Board of Regents*, 104 S. Ct. at 2959 (1984). This Court held that

the rules were essentially a price fixing scheme which placed an unreasonable restraint on competition having an anticompetitive effect on the market[2]. *Id.* at 2959-60. However, this Court deemed it "inappropriate to apply" a *per se* illegal analysis, reasoning that college football is "an industry in which horizontal restraints on competition are essential if the product is to be available at all." *Id.* at 2959-60. Instead, this Court adopted the rule of reason analysis to determine "whether or not the challenged restraint enhances competition," which made clear that subsequent Sherman Act challenges of NCAA bylaws should *never* be determined under *per se* illegality. *Id.* at 2961.

The Fourteenth Circuit's interpretation of the *Board of Regents* decision is incomplete at best because the appellate court found that establishing a legitimate purpose alone is sufficient to exempt a Sherman Act challenge. R. 5. This Court's discussion of amateurism rules in *Board of Regents* was only to support the decision to exclude applying *per se* analysis to horizontal restraints on markets and to instead apply a rule of reason analysis. *See Board of Regents*, 104 S. Ct. at 2961. The Ninth Circuit in *O'Bannon* commented on Justice Stevens' majority opinion in *Board of Regents*, stating:

> *Board of Regents*, in other words, did not approve the NCAA's amateurism rules as categorically consistent with the Sherman Act. Rather, it held that, because many NCAA rules. (among them amateurism rules) are part of the 'character and quality of the [NCAA's] 'product,' no NCAA rule should be invalidated without a Rule of Reason analysis.

See O'Bannon v. NCAA, 802 F.3d at 1063 (internal citations omitted). This Court was clear in its intentions to create a delineation from the standard practice and carefully forewarned that, "[T]his

[2] This Court stated, "there can be no doubt that the challenged practice of the NCAA constitute a "restraint of trade" in the sense that they limit members' freedom to negotiate and enter into their own television contracts. In that sense, however, every contract is a restraint of trade, and as we have repeatedly recognized, the Sherman Act was intended to prohibit only unreasonable restraints of trade." *Board of Regents*, 104 S. Ct. at 2958-59.

decision is not based. . .on our respect for the NCAA's historic role in preservation and encouragement of intercollegiate amateur athletics." *Id.* at 2906.

Moreover, the Ninth Circuit held in *O'Bannon v. National Collegiate Athletic Ass'n* that Justice Stevens' determination that amateurism rules have a presumed legitimate purpose was *dicta*. *O'Bannon*, 802 F.3d at 1063. The Ninth Circuit stated, "Such dicta should be accorded appropriate deference. . .but we are not bound by *Board of Regents* to conclude that every NCAA rule that somehow relates to amateurism is automatically valid." *Id.* (internal quotes omitted). Furthermore, in the *McCormack* case, the Fifth Circuit "assum[ed], without deciding, that the [A]nti-trust laws apply to the eligibility rules." *McCormack*, 845 F.2d. at 1343. Thus, other circuits incorrectly justified the use of an abridged version of the rule of reason analysis based on dicta that is not binding on this Court. R. 6. In *Agnew*, the Seventh Circuit held that a showing of a procompetitive purpose was sufficient to defeat the challenger's Sherman Act claim[3]. Overcoming the last prong of the rule of reason test without justification defeats the purpose of the analysis that the challenged bylaw is completely unreasonable in light of its restrictive effect. This Court should not overlook the fact that it cannot fully rule a restraint is reasonable without finding that no less restrictive alternative exists.

Although the Fourteenth Circuit states that it "could not ignore the thirty years of unchallenged precedent" of striking down challenges to the NCAA bylaws, this Court should not ignore that this condensed version of the rule of reason analysis does not satisfy what the test is meant to accomplish. Because the appellate court relied on non-binding authority in *Board of*

[3] In both the *Banks* and *Smith* cases, the challenging parties were unable to meet their initial burden of showing an anticompetitive effect on a relevant market, and thus, the rule of reason analysis concluded only in the preliminary phases. *See Banks v. National Collegiate Athletic Ass'n*, 977 F.2d 1081, 1087 (7th Cir. 1992); *see also Smith v. Nat'l Collegiate Athletic Ass'n*, 139 F.3d 180, 187 (3d Cir. 1998).

Regents, this Court should find that the existence of a legitimate purpose does not automatically exempt the Sherman Act challenge if the plaintiff can demonstrate a lesser restrictive means to achieve the same purpose under the rule of reason analysis.

B. Under a rule of reason analysis, this Court should find that NCAA bylaw 12.5.2.1 unreasonable because there exists lesser restrictive means that does not violate the protection of amateurism.

The Fourteenth Circuit incorrectly held that upon a finding of a legitimate procompetitive purpose, the ultimate inquiry of the restraint's unreasonableness under the rule of reason analysis abruptly ends at the second prong of the test in favor of the respondent. Although this Court is not determining the merits of Mr. Snow's Sherman Act claim, applying a rule of reason analysis in its entirety shall prove a legitimate procompetitive purpose alone does not validate an otherwise anti-competitive practice. *See Board of Regents*, 104 S. Ct. at 2960, n. 23.

Under the rule of reason analysis, (1) the challenging party must first show that there is an anti-competitive effect. *Metropolitan Intercollegiate Basketball Ass'n v. National Collegiate Athletic Ass'n*, 339 F.Supp.2d 545, 550 (S.D.N.Y. Oct. 13, 2004). If the challenger is successful, then (2) the respondent must demonstrate a procompetitive purpose. *Id.* Finally, if the respondent successfully establishes a pro-competitive purpose, (3) the burden shifts back to the challenger to show that the restraint is not the least restrictive means. *Id.* By ending the rule of reason analysis at the second point, challengers like Mr. Snow are barred from arguing a less restrictive means to accomplish the established legitimate purpose.

In the first prong of the rule of reason analysis, Rule 12.5.2.1 has an anti-competitive effect because it prevents Mr. Snow from selling his name, image, and likeness to Apple, Inc. In essence, this restriction of the market for players' name, image, and likeness gives the NCAA exclusive rights to that market and blocks players from negotiating a price for their product. In the second

prong, the burden shifts to the NCAA to show the restriction has a pro-competitive purpose. *Tanaka*, 252 F.2d at 1063. The Fourteenth Circuit upheld bylaw 12.5.2.1 which was enacted to "preserve amateurism and the student-athlete" as a legitimate pro-competitive purpose. R.5; *See also Agnew*, 683 F.3d at 342-43. Although there is thirty years of precedent that has followed this methodology to conclude the rule of reason analysis if a legitimate pro-competitive purpose exists, this Court should not deny the fact that this is not a true rule of reason analysis according to *Board of Regents*. The true intent behind Justice Stevens' opinion in *Board of Regents* was to not commend good motives for otherwise anti-competitive practices but to ensure there are no lesser restrictive alternatives. *See Board of Regents*, 104 S. Ct. at 2960 n.23.

Therefore, to complete the rule of reason analysis as envisioned by Justice Stevens, the burden shifts back to Mr. Snow to show that there is a less restrictive mean that still establishes the pro-competitive purpose. *O'Bannon*, 802 F.2d at 1070; *see also Tanaka*, 252 F.3d at 1063. The Fourteenth Circuit did not cite any cases that applied the third stage of the rule of reason analysis. R. 5-6. Apart from the Ninth Circuit in *O'Bannon*, nearly every other court faced with a Sherman Act challenge either circumvented the third stage upon finding a legitimate procompetitive purpose or the parties failed to carry their burden past the first stage.[4] The final prong of this analysis is essential to prevent so called "pro-competitive purposes" to create hubs of abuse against consumers or sellers.

[4] See *Nat'l Collegiate Athletic Ass'n v. Bd. Of Regents of Univ. of Okl.*, 104 S.Ct. 2948, 2970 (1984) (holding that after challengers met their burden showing anticompetitive effect, NCAA could show no legitimate purpose); see also, *Agnew v. National Collegiate Athletic Ass'n*, 683 F.3d 328, 341 (holding that the NCAA scholarship rules were presumed procompetitive); see also *Banks v. National Collegiate Athletic Ass'n.*, 977 F.2d 1081, 1087 (7th Cir. 1992) (holding that NCAA's no-draft rule do not have an anticompetitive impact on a discernable market); see also *Smith v. Nat'l Collegiate Athletic Ass'n*, 139 F.3d 180, 187 (3d Cir. 1998) (holding the post-eligibility rules challenged did not affect commerce)

Here, because the Fourteenth Circuit upheld the respondent's pro-competitive purpose for its bylaw to promote amateurism, Mr. Snow must establish a reasonable alternative that similarly promotes amateurism. This Court should find that completely preventing student-athletes from being compensated is overly restrictive because these individuals should be able to be compensated for what is not directly related to their athletic abilities. Hence, the bylaw should not have prevented Mr. Snow from being compensated for his likeness as part of Apple's Emoji Keyboard because the product has no bearing on his consideration as an amateur athlete. Thus, this Court should find that removing bylaw 12.5.2.1 would not violate the promotion of amateurism and should determine that the bylaw serves as an unreasonable restraint on the market of players' name, image, and likeness.

Because past courts failed to properly apply the rule of reason analysis or did not pass the preliminary stages, this Court should find that in order to resolve the exemption issue, the rule of reason must be applied in its entirety to the facts. This Court should find that Mr. Snow should be free to sell his name, image and likeness where it does not pertain to athletic capabilities. Therefore, this Court should not exempt Mr. Snow's Sherman Act challenge and should remand this case back to the lower courts to make a determination on the merits.

II. This Court should reverse the circuit court's decision that the Labor Management Relations Act (LMRA) preempted Mr. Snow's negligence claim because it is unnecessary to use the collective bargaining agreement in any fashion to resolve his claim.

Mr. Snow's negligence claim is not preempted by the Labor Management Relations Act (LMRA) because his rights are determined by relevant federal and state laws. The purpose of the LMRA is to incentivize employers and employees to jointly establish rights and duties stemming from the employment relationship, which shall be highlighted in a collective bargaining agreement

(CBA). *See* 29 U.S.C. § 185(a). Under § 301, Congress sought to promote arbitration to remedy the grievances of employees that arise from CBAs. *Alaska Airlines Inc. v. Schurke*, 898 F.3d 904, 920 (9th Cir. 2018). This forum preemption section of LMRA does not call upon the Court to look to the merits of the plaintiff's claim, but rather its "legal character." *Schurke*, 898 F.3d at 924 (quoting *Livadas v. Bradshaw*, 512 U.S. 107, 123-24, 114 S. Ct. 2068, 2079 (1994)). § 301 preempts claims that are "founded directly on rights created by collective-bargaining agreements, and also claims substantially dependent on analysis of a collective-bargaining agreement." *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 107 S. Ct. 2425, 2431 (1987) (internal quotes omitted) (quoting *Int'l Bhd. Of Elec. Workers v. Hechler*, 481 U.S. 851, 859 (1987)). If the court finds that the plaintiff's asserted rights are not interwoven with the terms of the CBA, then it can determine the scope of such rights without any analysis of the agreement. *Schurke*, 898 F.3d at 921.

Mr. Snow's claim is not preempted by LMRA § 301 for the following reasons: (1) Mr. Snow's negligence claim is independent of the terms of the collective bargaining agreement and (2) governing federal and state laws of negligence more appropriately dictate the duties owed to Mr. Snow, and (3) Mr. Snow's negligent misrepresentation claim is not preempted because the plaintiffs justifiably relied on the team doctors' treatment.

A. Because the NFL did not rebuke the illegal activities its staff was engaging in, the Court should find that it is not necessary to interpret the terms of the CBA to resolve Mr. Snow's claim.

The Fourteenth Circuit erred in its finding that Mr. Snow's claim was preempted by LMRA § 301 because the matter may be remedied without interpreting the intricacies of the collective-bargaining agreement. The court adopts a two-fold inquiry to determine the claim's preemptive effect. First, the court must determine if the claim contains rights arising from state law and not the CBA. *Burnside v. Kiewit Pacific Corp.*, 491 F.3d 1053, 1059 (9th Cir. 2007). Second, even if

the court finds that the plaintiff's claim is independent of the CBA, the court must still consider "whether it is nevertheless substantially dependent on analysis of a collective-bargaining agreement." *Id*. (internal quotes omitted). The Ninth Circuit has construed "interpretation" narrowly, defining it to be "something more" than mere consideration or reference to the agreement. *Schurke,* 898 F.3d at 921. The court looks to the plaintiff's well-pleaded complaint to discern the federal preemptive effect of the claim. *Id.* at 944. Thus, the claim is not preempted if the terms of the agreement serve as the basis of a party's defense. *See Caterpillar*, 107 S. Ct. at 2433. In *Caterpillar*, this Court explained, "a defendant cannot, merely by injecting a federal question into an action that asserts what is plainly a state-law claim, transform the action into one arising under federal law." *Id.* Additionally, if a party turns to the CBA for a "purely factual inquiry that does not turn on any meaning behind a provision," the court is not obligated to preempt the claim under § 301. *Burnside*, 491 F.3d at 1072. Furthermore, this Court in *Lingle v. Norge Div. of Magic Chef, Inc.* instructed the lower courts on what keeps independent state claims from preemption, by stating,

> Even if dispute resolution pursuant to a collective-bargaining agreement, on the one hand, and state law, on the other, would require *addressing precisely the same set of facts*, as long as the state law claim can be resolved without interpreting the agreement itself, the claim is independent of the agreement for § 301 pre-emption purposes.

486 U.S. 399, 108 S. Ct. 1877, 1883 (1988) (emphasis added). Two subsequent cases further expand upon the *Lingle* decision. In *Livadas*, the district court held that the plaintiff's claim that her employer failed to pay her severance wages was a question of state law; the Supreme Court agreed and found that the issue was free of interpretation of the CBA. *Livadas*, 512 U.S. at 125 (quoting *Lingle*, 486 U.S. at 413). The Supreme Court stated, "when liability is governed by state law, the mere need to 'look to' the collective-bargaining agreement for damages computation is

no reason to hold the state-law claim defeated § 301." *Id.* Likewise, the Ninth Circuit in *Humble v. Boeing Co.* found that a plaintiff is not limited to a remedy provided in a CBA if the situation is "also directly regulated by non-negotiable state law. 305 F.3d 1004, 1009 (9th Cir. 2002) (quoting *Lingle*, 486 U.S., at 412-13) (emphasis omitted).

Here, the Court is not expected to interpret the terms of the collective-bargaining agreement because Mr. Snow's claim does not meet either prong of the *Burnside* test. First, as in *Livadas* and *Humble*, the legal relationship similarly shared between Mr. Snow and the NFL is independent of any prior agreement and is governed by federal and state statutory law. Second, Mr. Snow's claim does not fall within the preemptive confines of the CBA because the terms of the agreement make no reference to the NFL's duties if a player becomes addicted to opioids prescribed by its medical staff[5]. In the NFL's collective bargaining agreement, Art. 39, Section 7 entitled "Substance Abuse" states,

> The parties agree that substance abuse and the use of anabolic steroids are unacceptable within the NFL, and that it is the responsibility of the parties to deter and detect substance abuse and steroid use and to offer programs intervention, rehabilitation, and support to players who have substance abuse problems.

See NFL Collective Bargaining Agreement 2011-2020, Art. XXXIX, Sec. 7. In the CBA, the NFL takes a stance against substance abuse and anabolic steroid use and states its role in educating, detecting, and rehabilitating players who knowingly engage in the dangers of drug abuse. *Id.* However, this article and subsequent articles make no mention of the proper standard and procedures the team must follow if a member of the medical staff negligently prescribes painkillers to its players. Because the CBA is silent on the duties owed to players when personnel negligently

[5] The remainder of this policy discusses its Program on Anabolic Steroids and Related Substances shall include annual and random blood testing and mentions that the parties shall negotiate how the samples may be safely transported for testing.

trigger substance abuse among players, Mr. Snow's state claim may move forward and possibly be resolved without interpretation of CBA.

Moreover, the policy behind collective bargaining agreements infers that both parties had jointly determined the rights and duties that arise out of their employment relationship. As that rationale applies to this case, the Fourteenth Circuit makes the presumption that the players and the NFL negotiated the NFL's liability when its doctors push controlled substances onto the players without proper warnings or directions. However, this Court has held, "the parties to a CBA ***cannot bargain for what is illegal.***" *Allis-Chambers Corp. v. Lueck*, 471 U.S. 202, 212, 105 S. Ct. 1904 (1985) (emphasis added). Therefore, this Court should apply this same finding to the present case to find that the NFL cannot be protected by LMRA preemption because it willfully engaged in illegal activities.

Mr. Snow's claim should not be preempted because it arises from governing state law and would not require any form of CBA interpretation upon review. The NFL's CBA does not set out guidelines for its medical personnel to follow in matters involving the prescription and monitoring of opioid drugs. This would indicate that the Court would be unable to make any sufficient analysis that Mr. Snow's rights were pre-determined by the agreement, and the NFL owed no concrete duty to him in this circumstance outside of state law.

B. Because the negligence claim is independent of the CBA, the Court is not required to interpret its terms to find that the NFL breached its duty to prevent unreasonable harm to its players.

If the Court does find that Mr. Snow's negligent hiring and retention and negligent misrepresentation claims are preempted, it should nevertheless find that Mr. Snow maintains a sufficient claim for negligence per se. Because his claim arises under California law, negligence per se is a doctrine and not as an independent cause of action. *Quiroz v. Seventh Ave. Center*, 45

Cal. Rptr. 3d 222, 244-45 (2006). For Mr. Snow's negligence claim to prevail, he must be able to make out the following elements of a prima facie case for negligence without interpretation of the CBA: (1) the defendant had 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 of that duty proximately caused the plaintiff's injuries and (4) damages. *Corales v. Bennett*, 567 F.3d 554, 572 (9th Cir. 2009) (quoting *McGarry v. Sax*, 70 Cal. Rptr. 3d 519, 530 (2008)). Additionally, a statute may establish the standard of care under the negligence per se doctrine. *Talley v. Danek Medical, Inc.*, 179 F.3d 154, 158 (4th Cir. 1999). Under this doctrine, if violation of the standard of care resulted in injury and the statute seeks to prevent the injury, this constitutes causation. *Elsner v. Uveges*, Cal. Rptr. 3d 530, 102 P.3d 915, 927 (2004). While Mr. Snow is not arguing the merits of his negligence claim, it is necessary to discuss the NFL's duty and standard of care it was bound by to demonstrate the claim is not preempted.

1. Because the CBA does not establish the NFL's duty to its players, the appropriate standard of care is governed by the Controlled Substances Act, the Food, Drugs, and Cosmetics Act, and California Pharmacy Laws.

Because there was no explicit duty regarding the team's doctors prescribing drugs to players in the CBA, the NFL was still expected to act accordingly to laws governing the negligent distribution of substances. There are two ways in which duties are established: (1) by statute or contract or (2) "the general character of the activity in which the defendant engaged." *J'Aire Corp. v. Gregory*, 157 Cal. Rptr. 407, 598 P.2d 60, 62 (1979). Courts turn to a number of factors to assess whether the defendant possessed a specific duty including foreseeability of harm, degree of certainty that the plaintiff suffered injury, causal nexus between the conduct and injury suffered, moral blame to defendant's conduct, policy of preventing future harm, burden on defendant and subsequent consequences on the community of imposing the duty, and availability, cost and

prevalence of insurance for the risk involved. *Regents of Univ. of Cal. v. Supervisor Court*, 230 Cal. Rptr. 3d 415, 413 P.3d 656, 670 (2018) (quoting *Rowland v. Christian*, 69 Cal.2d 108, 70 Cal. Rptr. 79, 443 P.2d 561, 564 (1968)). These factors "must be evaluated at a relatively broad level of factual generality." *Id.*

Dent v. National Football League shares a nearly identical fact pattern as the case at bar. 902 F.3d 1109 (9th Cir. 2018). The plaintiffs consisted of Dent and nine other retired players who brought a class action against the NFL for failing to admonish team doctors who authorized "hundreds, if not thousands" prescription pills and injections containing painkillers for the purpose of keeping players on the field. *Id.* at 1114. The Ninth Circuit found that the plaintiffs' claim was not preempted because the NFL was required to follow laws regarding the deliberate prescription of drugs. *Id.* at 1121. In determining the duty owed to the players, the Ninth Circuit found,

> Any duty to exercise reasonable care in the distribution of medications does not arise through statute or by contract; no statute explicitly establishes such a duty, and as already noted, none of the CBAs impose such a duty. However, we believe that a duty binding on the NFL – or any entity involved in the distribution of controlled substances – to conduct its activities with reasonable care arises from 'the general character of [that] activity.'

Id. Applying the *Rowland* factors, the *Dent* Court found that the NFL owed a duty to its players because "carelessness in the handling of dangerous substances is both illegal and morally blameworthy, given the risk of injury it entails." *Id.* at 1119.

Here, the individual clubs acted negligently by negligently prescribing painkillers to its players, and the NFL is equally culpable by failing to admonish this treatment. Like *Dent*, where the court found that the NFL owed a duty to handle prescription drugs with reasonable care, the NFL has an obligation to preserve its players health and control needless prescriptions of dangerous painkillers.

Therefore, this Court should find that the team doctors owed a duty to the players to adequately warn of the risks involved in taking controlled substances and not continue to prescribe them without ensuring it is essential to prolonging the player's health. Still, if this Court finds that the Respondent is not required to abide by the aforementioned laws, prescribing painkillers to professional athletes is an activity that nevertheless creates a duty of care due to its inherent danger. Thus, the NFL has a duty to avoid creating unreasonable risks of harm to its players when distributing these substances that does not call for the Court to interpret the CBA.

2. Through governing federal and state law, the NFL breached its duty to the players when it failed to handle dangerous substances with care.

The Respondent breached its statutory duty to Mr. Snow and its players when it allowed team doctors to prescribe multiple painkillers as short-term relief without sufficient warning of its harmful side effects. Under the negligence per se doctrine, a statute may provide the proper standard of care. *Dent*, 902 F.3d at 1118. Although this Court should recognize that there was duty by which the NFL was bound by, "establishing that an entity owes a duty does not necessarily establish what standard of care applies, or whether it was breached." *Id.* at 1119. However, the *Dent* court goes on to state, "When it comes to the distribution of potentially dangerous drugs, minimum standards are established by statute." *Id.* If this Court finds that the Respondent violated its statutory duty, it would naturally presume that the defendant "failed to exercise due care if it violated a statute, ordinance or regulation of a public entity," which proximately caused injury of an individual who "was one of the class of persons for whose protection the statute, ordinance, or regulation was adopted." *See* Cal. Evid. Code § 699(a). Regulations such as the Controlled Substances Act (21 U.S.C. § 801 *et seq*.); the Food, Drugs, and Cosmetics Act (21 U.S.C. § 301 *et seq*.); and the California Pharmacy Laws (Cal. Bus & Prof. Code § 4000 *et seq.*) tailors the

proper standard of care owed by which painkillers should be properly prescribed and labeled. *Dent*, 902 F.3d at 1119. In the Controlled Substances Act, the statute provides,

> Except when dispensed directly by a practitioner, other than a pharmacist, to an ultimate user, no controlled substance in schedule II, which is a prescription drug as determined under the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 301 *et seq.*), may be dispensed without the written prescription of a practitioner, except that in emergency situations, as prescribed by the Secretary by regulation after consultation with the Attorney General, such drug may be dispensed upon oral prescription in accordance with section 503(b) of that Act. . .Prescriptions shall be retained in conformity with the requirements of section 827 of this title. ***No prescription for a controlled substance in schedule II may be refilled.***

21 U.S.C. § 829(a) (emphasis added). In a section entitled "Misbranded drugs and devices," the Food, Drugs, and Cosmetics Act similarly states,

> In the case of any prescription drug distributed or offered for sale in any State, unless the manufacturer, packer, or distributor thereof includes in all advertisements and other descriptive printed matter issued or caused to be issued by the manufacturer, packer, or distributor with respect to that drug a true statement of ***(1) the established name as defined in section 503(c), printed permanently and in type at least half as larger as that used for any trade of brand name thereof, (2) the formula showing quantitatively each ingredient of such drug to the extent required for labels under section 502(e), and (3) such other information in brief summary relating to side effects, contraindications, and effectiveness as shall be required in regulations. . .***

21 U.S.C. § 352(n) (emphasis added). Finally, California Pharmacy Laws states,

> A health facility shall establish and implement a written policy to ensure that each patient shall receive information regarding each drug given at the time of discharge and each drug given . . . This information ***shall include the use and storage of each drug, the precautions and relevant warnings, and the importance of compliance with directions.*** This information shall be given by a pharmacist or registered nurse, unless already provided by a patient's prescriber, and the written policy shall be developed in collaboration with a physician, a pharmacist, and a registered nurse. The written policy shall be approved by the medical staff.
>
> A pharmacist shall not dispense any prescription except in a container that meets the requirements of state and federal law and is correctly labeled with all of the following: . . . (7) the strength of the drug or drugs dispensed; (8) the quantity of the drug or drugs dispensed.

Cal. Bus. & Prof. Code § 4001.1 (West 2003).

Here, the NFL breached all three of its statutory duties when its medical staff carelessly prescribed multiple painkillers to Mr. Snow without disclosing the precise side effects that he now suffers from. R. 13; R. 22. First, the NFL breached its duty pursuant to the Controlled Substances Act when it did not prevent individual clubs from refilling painkillers or otherwise designated under this Act as Schedule II Substances[6]. Second, the NFL breached its duty provided by the Food, Drug and Cosmetics Act by not specifically indicating the dangerous side effects of the medication on its label. R. 22. Lastly, NFL breached its duty established by governing state pharmacy laws when it failed to specify the hazardous ingredients and side effects of the medication to its players. *Id.* Because the NFL failed to monitor the extent to which team doctors were prescribing painkillers to players, the Respondent breached its duty, which lead to the players' possible life-long injuries.

According to the standard of care outlined above, the NFL did not act accordingly when its medical staff did not disclose to players the ingredients and risks involved in taking the prescribed medication. *Id.* Because the NFL failed to counteract the doctors' willful mistreatment, this Court should find that the NFL breached its duty to exercise reasonable care to safeguard its players.

3. Since the NFL failed to exercise reasonable care to handle dangerous prescriptive drugs, the players suffered from severe physical and mental illnesses.

The Court is not mandated to interpret the CBA in assessing causation and injury when there is existing federal and state law with established guidelines wherein the NFL must abide by. This Court held in *Hawaiian Airlines Inc. v. Norris* that causation and injury is a "purely factual

[6] The appellate record does not explicitly state the facts surrounding when the team doctors began prescribing controlled substances to players. However, the injuries suffered by the plaintiffs were substantial enough to imply there was a clear violation of this statute. The repeated practice of prescribing substances to players who initially sought treatment for trivial injuries was reasonably related to Mr. Snow's addiction among his other injuries.

question" that "does not require a court to interpret any term of a collective-bargaining agreement." 512 U.S. 246, 261, 114 S. Ct. 2239, 129 L.Ed.2d 203 (1994) (quoting *Lingle*, 286 U.S. at 407, 108 S. Ct. 1877).

For example, in *Williams v. National Football League*, NFL players brought suit following their suspension after unknowingly taking mislabeled dietary supplements containing a banned substance called bumetanide. 582 F.3d 863, 869 (8th Cir. 2009). The court found that the NFL players' 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. Additionally, "it would compare the facts and the procedure that the NFL actually followed with respect to its drug testing of the players with [the statute's] requirements." *Id*. Similarly in *Karnes v. Boeing Co*., the plaintiff, who was a former employee of Boeing, brought suit under Oklahoma's Standards for Workplace Drug and Alcohol Testing Act. 335 F.3d 1189, 1192 (10th Cir. 2003). The Oklahoma statute outlined that the plaintiff must show that the defendant "(1) discharged him based on his drug test and (2) failed to confirm the result through a second test." *Id*. at 1193. Because the plaintiff's claim was "clearly independent of the CBA," the *Karnes* Court held, "neither inquiry requires a court to interpret, or even refer to, the terms of a CBA." *Id*. 1193-94.

In the present case, this Court is not required to interpret the CBA to resolve Mr. Snow's claim. Instead, the Court should assess the NFL's conduct under the stated requirements of state and federal laws governing the distribution of prescription drugs. Unlike the plaintiffs in *Williams*, Mr. Snow and his fellow teammates suffered damages after taking drugs that were prescribed to them by employees of the NFL, whereas the players in *Williams* took the supplements out of their own volition against the objections of the NFL. R. 13; *Williams*, 593 F.3d at 869. Because the NFL

failed to warn the players of the dangerous side effects associated with a high intake of painkillers, Mr. Snow among his fellow teammates suffered long lasting health-related consequences. R. 13.

Because the proper duty of the NFL was governed by the aforementioned statutes, the Court should find that the NFL caused the Petitioners' injuries when it failed to stop team doctors from over-prescribing painkillers. R. 22. Due to the NFL's failure to monitor the negligent prescriptions, the players suffered irreparable physical harm that could potentially end their athletic careers. Therefore, this Court should find that there is a causal nexus between the NFL's failure to act and Mr. Snow's injuries, and as a result, Mr. Snow and his fellow players are entitled to damages.

C. The players suffered irreparable harm because they justifiably relied on the advice and treatment rendered by their doctors.

The appellate court erred upon finding that Mr. Snow's negligent misrepresentation claim was preempted by § 301. In demonstrating a negligent misrepresentation claim, Mr. Snow must assert that "misrepresentation of a past or existing material fact, without reasonable ground for believing to be true and with intent to induce another's reliance on the fact misrepresented; ignorance of the truth and justifiable reliance on the misrepresentation by the party to whom is was directed and resulting damage." *Dent*, 902 F.3d at 1123 (quoting *Shamsian v. Atlantic Richfield Co.,* 107 Cal.App.4th 967, 132 Cal. Rptr.2d 635, 647 (2003)). Moreover, "responsibility for negligent misrepresentation rests upon the existence of a legal duty." *See Eddy v. Sharp*, 199 Cal.App.3d 858, 245 Cal. Rptr. 211, 213 (1988).

In *Dent*, the players trusted that the painkillers that were prescribed by the team doctors were a product of reliable medical advice. *Dent*, 902 F.3d at 1123. In response, the NFL asserted that the plaintiffs' negligent misrepresentation claim would not be able to move forward without the

court interpreting the CBA provision regarding the players' right to medical care.[7] The Ninth Circuit held, "whether the NFL made false assertions, whether the NFL knew or should have known they were false, whether the NFL intended to induce players' reliance, and whether players justifiably relied on the NFL's statement to their detriment are all factual matters that can be resolved without interpreting the CBAs." *Id*. Moreover, where the main inquiries in the case are a factual issue and whether the defendant had intent, "interpretation of the CBA can hardly resolve these factual questions." *Galvez v. Kuhn*, 933 F.2d 773, 778 (9th Cir. 1991). On the other hand, in *Williams*, the Eighth Circuit found that the plaintiffs' negligent misrepresentation claim was preempted because it held that their rights could not be ascertained without interpretation of the CBA. *Williams*, 582 F.3d at 881. The court held that the question of whether the players reasonably relied on the supplement's lack of warning that it contained a dangerous substance could not be determined without looking to the terms of the Policy entitled "Masking Agents and Supplements." *Id*. at 882.

Here, Mr. Snow and the other plaintiffs entrusted their team doctors to treat them for the sake of their health, and not for the sake of keeping their teams successful. R. 13. Like *Dent,* where the players trusted that the medical staff were prescribing safe medication to preserve their health, the Petitioners in the present case never questioned the contents of the medication being prescribed to them because they believed their interests were being protected. *See* R. 13. By contrast, in *Williams*, where the court held that the players' misrepresentation claim could be preempted because there was a specific provision in which it had to interpret, the NFL does not a specific

[7] This specific provision relating to medical care states that the players have a right to access medical facilities, view their medical records, and obtain second opinions. However, this section does not establish any duty that the NFL is expected to use reasonable care when asserting that prescribed medication is safe for players to take.

provision in the CBA that outlines its duty when players relied on the medical staff's representation that the prescribed medicine was safe. *Williams*, 582 F.3d at 881.

Therefore, this Court should find that Mr. Snow's negligent misrepresentation claim is not preempted because there is no specific section in the CBA that describes the NFL's duties under these circumstances. Moreover, the CBA is irrelevant in the Court's inquiry of whether the players reasonably relied on the defendant's statements as an independent issue of law that does not require CBA interpretation.

CONCLUSION AND PRAYER FOR RELIEF

For these reasons, the Petitioner requests that this Court reverse the Fourteenth Circuit's decisions in exempting his Sherman Act Anti-Trust challenge and preempting his negligence claims under the Labor Management Relations Act. The Petitioner specifically requests that this Court find his Sherman Act challenge is not protected as a matter of law because there is a lesser restrictive alternative that would still accomplish the pro-competitive purpose of protecting amateurism. The Petitioner also requests that this Court does not have to interpret the collective bargaining agreement in order to resolve his negligence claims.