No. 09-214

IN THE

Supreme Court of the United States

JON SNOW, AND OTHER SIMILARLY SITUATED INDIVIDUALS,
Petitioner,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION; THE NATIONAL FOOTBALL LEAGUE,
Respondent.

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

BRIEF FOR PETITIONER

TEAM NUMBER 17
Counsel of Record
Counsel for Petitioner

Team 17

QUESTIONS PRESENTED

I. Whether the NCAA Amateurism and eligibility bylaws are protected as a matter of law from attack under Section 1 of the Sherman Act.

II. Whether the variety of state law claims brought by the NFL Players are preempted by the Labor Management Relations Act.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

IN THE

Supreme Court of the United States

No. 09-214

JON SNOW, AND OTHER SIMILARLY SITUATED INDIVIDUALS,
Petitioner,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION; THE NATIONAL FOOTBALL LEAGUE,
Respondent.

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

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion and order of the United States Court of Appeals for the Fourteenth Circuit is unreported and reproduced in the record. R. 4–11. The memorandum opinion and order of the United States District Court for the Southern District of Tulania is also unreported and reproduced in the record. R. 13–26.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1254.

STATEMENT OF THE CASE

This cases involves the consolidation of two separate actions because Petitioner John Snow ("Snow") is a party in both actions. R. 13. The district court consolidated these two actions in the interest of judicial efficiency. *Id.* The first action involves Snow's suit to invalidate the National Collegiate Athletic Association's ("NCAA") amateurism bylaw 12.5.2.1 which governs the

eligibility of student athletes to participate in collegiate athletics if they accept any remunerations for or permit the use of their name or image to advertise, recommend, or promote directly the sale or use of a commercial product or service. The second action was brought by Snow and other former football players against the National Football League ("NFL") for the negligent distribution and encouragement of excessive painkiller prescriptions by the NFL's doctors.

A. Factual Background

Snow was previously the star quarterback for Tulania University and led the Tulania Greenwave football team to multiple successful seasons. R. 13. Snow's success was recognized when he was nominated for multiple awards following his third season at the helm of the Greenwave team. *Id.* Due to Snow's growing notoriety, Apple Inc. ("Apple") approached Snow and other well-known collegiate players with an offer to participate in a trial run of the new Apple Emoji Keyboard. *Id.* In order to appeal to college football fans and promote both college football and Apple, the Emoji Keyboard would allow users to type using the image and likeness of athletes like Snow that participated in the trial run. *Id.* In exchange for their participation, athletes were given $1000 and were paid an additional $1 royalty for each download of the Apple Emoji Keyboard. *Id.* Snow agreed to participate in the trial term and earned approximately $3,500 during the trial period. *Id.*

During the Keyboard's trial period, several student athletes filed complaints with the University alleging that Snow was receiving unfair compensation in violation of NCAA rules. *Id.* The University notified the NCAA and Snow was suspended indefinitely for violating NCAA bylaw 12.5.2.1. *Id.* In response to his suspension, Snow brought suit against the NCAA for violating Section 1 of the Sherman Act and preventing himself and other athletes from taking part in collegiate competition. *Id.*

Snow's indefinite suspension, for all intents and purposes, ended his collegiate career. *Id.* Accordingly, Snow decided to enter the NFL draft and was drafted by the New Orleans Saints. *Id.* Snow had an exceptional rookie season, in part due to the multiple painkillers prescribed by doctors and trainers to manage pain from small head collisions and minor ankle injuries. *Id.* Although team doctors and trainers prescribed pain killers for Snow's multiple injuries, they never disclosed the side effects and health risks inherent with the use of prescription painkillers. *Id.* Instead, Snow and other players were given a rushed cookie-cutter treatment and dispatched back to the field. *Id.*

Unfortunately, Snow's NFL career—much like his collegiate career—was cut too short. *Id.* During Snow's second NFL season, he was diagnosed with both an enlarged heard and permanent nerve damage in his ankle which rendered him unable to compete. *Id.* Moreover, due to the multiple prescriptions during his rookie season, Snow developed an addiction to painkillers. Snow, along with other former NFL players ("the players") with similar experiences, filed suit alleging that NFL is liable for the negligent distribution and encouragement of excessive painkiller prescription. R. 4.

B. Proceedings Below

In addressing Snow's challenge to the NCAA's amateurism bylaw, the district court made three findings. First, the court rejected the NCAA's assertion that the organization's amateurism rules were valid as a matter of law. R. 17. Instead, the court concluded that NCAA rules must be evaluated under a "Rule of Reason analysis" meaning that the validity of the NCAA's amateurism rules "must be proved, not presumed." R. 16–17.

Next, the court rejected the NCAA's argument that its bylaws were not subject to the Sherman Act due to the fact that they are "eligibility rules" and not a regulation of the commercial activity contemplated under the Sherman Act. R. 17. The court reasoned that Snow's challenge could be brought under the Sherman Act because the bylaws at issue did in fact regulate a

commercial market by both setting the price of labor at the heart of the college athletics and by regulating what and how much compensation NCAA affiliated schools could give to student-athletes. R. 18.

Finally, the court held that Snow had sufficiently alleged that he and other plaintiffs had suffered an "antitrust injury" by showing that they were injured in fact as a result of the NCAA's rules foreclosing the market for their name, image, and likeness. R. 19.

In response to Snow's negligence claim against it, the NFL asserted that Snow's state-law tort claims were preempted by Section 301 of the Labor Management Relations Act ("Section 301") because the state-law claims at issue were founded on rights created by the collective bargaining agreement ("CBA") between the NFL and the players. R. 22. In analyzing the NFL's response, the district court held that Snow's state-law claims were not preempted by Section 301 because an interpretation of the terms of the CBA was not necessary since the meaning of certain CBA terms was "simply irrelevant" to the question of whether the NFL's conduct violated federal laws regarding the distribution of controlled substances and state law regarding hiring, retention, misrepresentation and fraud. R. 26.

On appeal, the United States Court of Appeals for the Fourteenth Circuit reversed the district court on both issues. R. 11. In addressing the amateurism challenge, the court relied on thirty years of case law that held that the NCAA's amateurism bylaws were not anticompetitive as a matter of law because they were necessary to preserve the character, quality, and nature of collegiate sports and sought to promote the legitimate goals of amateurism and fair competition in collegiate sports. R. 5–6. Accordingly, the court concluded that *stare decisis* demanded that the it hold that the NCAA's amateurism bylaws were not in violation of the Sherman Act. R. 6.

In analyzing Snow's negligence claim against the NFL, the court held that Snow's state-law claims were preempted by Section 301 of the Labor Management Relations Act. R. 11. The court concluded that Snow's state-law claims were preempted because the question of whether or not the NFL was negligent could not be answered without an analysis of the affirmative steps that the NFL had taken to protect the health and safety of players within the clauses of the CBA. R. 9–10. Accordingly, the need to analysis the legal relationship of the parties under the CBA led the court to conclude that Snow's state-law claims were preempted under Section 301 of the Labor Management Relations Act. R. 11.

Snow filed a petition of certiorari with this Court, appealing the Fourteenth Circuit's ruling on both the amateurism and preemption issues.

SUMMARY OF ARGUMENT

This case provides the Court with two clear opportunities. First, the Court can loosen the stranglehold that the NCAA has on competition in the market for collegiate athletics by finding that NCAA bylaw 12.5.2.,1 which governs amateurism, is not an eligibility rule and is subject to judicial scrutiny under the Sherman Act. The Court should then conclude that 12.5.2.1 is in violation of section 1 of the Sherman Act because it illegally restrains commerce.

Second, the Court has the opportunity to vindicate the rights of injured players like Snow who are suffering from a mental and physical addiction to painkillers that were recklessly given to them by their employer. It's no secret that there is a drug crisis in this country due, in part, to the reckless prescription of pills and painkillers. Today the Court has the opportunity to stem the tide of this crisis by holding the NFL accountable for its actions. Whereas the NFL only sought the short-term benefits of player production, the Court can step in and protect the long-term health and welfare of the players who were irreparably injured by the NFL's shortsightedness.

The Fourteenth Circuit's opinion below improperly reversed the district court on issues. First, the court ignored and incorrectly applied both the opinions of other circuit courts and precedent from this Court in concluded that the NCAA bylaws are not anticompetitive as a matter of law due and not subject to scrutiny under the Sherman Act. Second, the court failed to recognize that, while other NFL players in previous suits had failed to allege claims that were independent of the CBA, the Snow has properly alleged state law claims independent of the CBA and which require no interpretation of the CBA. Accordingly, the Fourteenth Circuit should be reversed on both issues.

I. NCAA amateurism bylaws are not protected as a matter of law from scrutiny under the Sherman Act. This is because this Court and other circuit courts have concluded that NCAA rules are not presumptively valid as a matter of law. In fact, this Court and other courts have struck down anticompetitive NCAA rules and bylaws. Accordingly, because NCAA rules are subject to antitrust scrutiny, the Court should apply the rule of reason analysis to determine the anticompetitive effects of NCAA bylaw 12.5.2.1 and whether it is in violation of the Sherman Act.

In applying the rule of reason analysis, the Court should find that the NCAA bylaws violate the Sherman Act because they are an effective restraint on trade because they have anticompetitive effects on the college education and student-athlete market and because the NCAA cannot provide a valid procompetitive reason for their use. Alternatively, even if the NCAA can provide a valid procompetitive purpose, the Court should still hold that the rules violate the Sherman Act because Snow can produce less restrictive alternatives to the NCAA rules at issue.

II. Section 301 of the Labor Management Relations Act ("Section 301") was intended to address disputes arising out of labor contracts and CBAs and preempts state law claims arising out of rights created by the CBAs. To determine whether a state law claim is preempted, courts

apply a two-part analysis. First, the court determines whether the claimed right at issue arises out of the CBA. If it does not, courts then look to see if the claim requires interpretation of the terms of the CBA. If it does, then the state-law claim is preempted.

The Court should conclude that the players' state law negligence claims are not preempted because they are founded upon independent rights that arise outside of the CBA. Since these rights are founded on duties established by both state and federal law, the Court would not need to interpret the CBA in order to adjudicate the players' claims. Finally, the Court should conclude that the players' claims are not preempted because they can establish a prima facie case of negligence independent and outside of the collective bargaining agreement.

STANDARD OF REVIEW

For the purposes of this review, the United States Supreme Court will review all matters *de novo*. R. 2.

ARGUMENT

I. THE NCAA AMATEURISM AND ELIGIBILITY RULES ARE NOT PROTECTED AS A MATTER OF LAW UNDER SECTION 1 OF THE SHERMAN ACT

The NCAA's amateurism and eligibility rules are not protected as a matter of law under Section 1 of the Sherman Act for three reasons. First, this Court, and circuit courts, have held that NCAA rules are subject to antitrust scrutiny under the Sherman Act, 15 U.S.C. § 1 (2018), and are not presumptively valid as a matter of law. Second, courts have struck down NCAA rules prohibiting compensation to college athletes for the use of their names, images, and likeness on the grounds that such rules are unreasonable restraints on trade in violation of Section 1 of the Sherman Act. Third, applying the rule of reason analysis, which this Court established as the appropriate test for scrutinizing the anticompetitive effects and validity of NCAA rules under the Sherman Act, the NCAA amateurism and eligibility rules violate the Sherman Act. These rules

violate the Sherman Act under the rule of reason analysis because they have an anticompetitive effect on the college education and student-athlete market, and the NCAA cannot provide a valid procompetitive purpose for their use. Even if the NCAA can provide a procompetitive purpose, the rules still violate the Sherman Act because Snow can produce less restrictive alternatives to the NCAA's amateurism and eligibility rules.

A. This Court has held that NCAA actions and rules are subject to antitrust scrutiny, and therefore are not presumptively valid as a matter of law.

Recent cases addressing the eligibility of the NCAA's amateurism and eligibility rules have held that such rules are subject to antitrust scrutiny under Section 1 of the Sherman Act, and are not presumptively valid as a matter of law. *See Nat'l. Collegiate Athletic Ass'n v. Board of Regents*, 468 U.S. 85, 102–103 (1984); *McCormack v. Nat'l. Collegiate Athletic Ass'n*, 845 F.2d 1338, 1343–45 (5th Cir. 1988); *O'Bannon v. Nat'l. Collegiate Athletic Ass's*, 802 F.3d 1049, 1063 (9th Cir. 2015); *Banks v. Nat'l Collegiate Athletic Ass'n*, 746 F. Supp. 850, 858–62 (N.D. Ind. 1990).

Most significantly, in *National Collegiate Athletic Association v. Board of Regents*, this Court held that the NCAA's actions are not protected from antitrust scrutiny and are instead subject to the "rule of reason" analysis. 468 U.S. at 86. Under the rule of reason analysis, an NCAA rule will only be upheld when its harm to competition outweighs its procompetitive effects. *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 7 F.Supp.3d 955, 985 (N.D. Cal. 2014). The rule of reason "place[s] upon the NCAA a heavy burden of establishing an affirmative defense that competitively justifies this apparent deviation from the operations of a free market." *Board of Regents,* 468 U.S. 113. In *Board of Regents*, this Court struck down NCAA rules which imposed limits on the number of games that could be broadcast on television each year and the number of games that each school could televise on the grounds that they did not serve any legitimate procompetitive purpose, and thus failed the rule of reason analysis. 486 U.S. at 120. Although this Court mentioned in dicta that

adopting certain amateurism and eligibility rules may be necessary to preserve the "character and quality" of college athletics, it did not hold that the NCAA amateurism and eligibility rules are categorically protected under the Sherman Act. *Id*. Instead, this Court held that, because some of these rules may be useful in preserving the amateurism of the college athletics, no rule should be found to violate the Sherman Act without applying the rule of reason analysis. *Id.*

Both the Fifth and Ninth Circuit followed this Court's direction and rejected the NCAA's argument that its amateurism and eligibility rules were protected as a matter of law under the Sherman Act. *See McCormack*, 845 F.2d at 1343–45; *O'Bannon*, 802 F.3d at 1063. Instead, these courts applied a rule of reason analysis to determine whether the rules violated the Sherman Act. *Id.*

This Court's holding in *Board of Regents*, and similar decisions from the Fifth and Ninth Circuits, establish that the NCAA's amateurism and eligibility rules are not presumptively protected under the Sherman Act, but instead must be tested under the rule of reason analysis to determine their validity. *Board of Regents*, 486 U.S. at 120; *McCormack*, 845 F.2d at 1343–45; *O'Bannon*, 802 F.3d at 1063.

B. The Ninth Circuit struck down NCAA rules prohibiting compensation to college athletes for the use of their names, images, and likeness on the grounds that they are unreasonable restraints on trade in violation of Section 1 of the Sherman Act.

Additionally, the NCAA's amateurism and eligibility bylaws are not protected as a matter of law under the Sherman Act because NCAA rules prohibiting compensation to college athletes for the use of their names, images, and likeness have been struck down by the Ninth Circuit for violating Section 1 of the Sherman Act. *See O'Bannon*, 802 F.3d at 1063.

In 2015, in *O'Bannon v. National Collegiate Athletic Association*, the Ninth Circuit held that the NCAA's amateurism and eligibility rules are not presumptively procompetitive, meaning

they are not per se exempt from antitrust scrutiny as a matter of law. 802 F.3d at 1063. Rather, the Ninth Circuit upheld the district court's application of the rule of reason and affirmed that an NCAA rule which prohibited compensation for the use of college athletes' names, images, and likenesses was an unreasonable restraint on trade, in violation of the Sherman Act. *Id.* at 1079.

At the first step of the rule of reason analysis, which examines the anticompetitive effect of the rule, the court concluded that the NCAA rule had an anticompetitive effect on the college education market because it barred schools from offering recruits compensation in excess of the cost of attendance. *Id.* at 1057. The court explained:

> "The rules prohibiting compensation for the use of student-athletes' NILs are thus a price-fixing agreement: recruits pay for the bundles of services provided by colleges with their labor and their NILs, but the 'sellers' of these bundles—the colleges—collectively 'agree to value [NILs] at zero.' Under this theory, colleges and universities behave as a cartel—a group of sellers who have colluded to fix the price of their product."

Id. at 1057 (quoting *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 7 F. Supp. 3d 955, 973 (N.D. Cal. 2014).

At the second step of the rule of reason analysis, which considers the NCAA's procompetitive purposes for its rule, the court rejected the NCAA's argument that its no-compensation rule promotes competitive balance and increases output in the college education market. *O'Bannon*, 7 F. Supp. 3d at 973–983. Additionally, the court partially rejected the NCAA's contention that its restriction on student-athlete compensation for their name, image, and likeness was necessary to preserve amateurism in college sports and integrate academics and athletics. *Id.*

At the final step of the rule of reason analysis, which examines whether there are less restrictive means for achieving the NCAA's procompetitive purpose, the district court held that the plaintiff identified two appropriate alternatives to the NCAA's no-compensation rule: (1)

allowing schools to award stipends to student-athletes up to the full cost of attendance, and (2) permitting schools to hold a portion of student-athletes licensing revenues in trust, to be given to the students after they leave college. *Id.* at 982. On appeal, the Court of Appeals rejected the second, but upheld the first alternative. *O'Bannon*, 802 F.3d at 1074–1079.

O'Bannon establishes that NCAA amateurism and eligibility rules, particularly those concerning the compensation of student-athletes for use of their name, image, and likeness, do not withstand the rule of reason analysis and are in violation of Section 1 of the Sherman Act.

C. Applying the rule of reason, NCAA amateurism and eligibility rules violate Section 1 of the Sherman Act because they have an anticompetitive effect and the NCAA cannot produce a valid procompetitive purpose for such rules. Even if the NCAA can produce a procompetitive purpose, Snow still succeeds because it can present less restrictive alternatives to the NCAA rules.

The NCAA's amateurism and eligibility bylaws violate the Sherman Act, and thus are not protected as a matter of law, because they have an anticompetitive effect, and the NCAA cannot provide a procompetitive purpose for the rules which outweigh its anticompetitive effects.

As this Court held in *Board of Regents*, the rule of reason analysis is the appropriate test for scrutinizing the anticompetitive effects and validity of NCAA rules and under the Sherman Act. 468 U.S. at 102–103. The rule of reason analysis includes the three steps discussed above in *O'Bannon*. The first step examines the anticompetitive effects of the NCAA rule. *O'Bannon*, 802 F.3d at 1070. The second step places the burden upon the NCAA to produce procompetitive reasons, if any, for the promulgation of the rule. *Id.* If the NCAA is able to provide a procompetitive reason for the rule, Snow can still succeed under the third step of the analysis by presenting less restrictive alternatives to achieving the NCAA's proffered procompetitive purpose. *Id.*

NCAA amateurism and eligibility rules violate Section 1 of the Sherman Act because they have an anticompetitive effect on the college education and student-athlete market, and the NCAA

cannot provide a sufficient procompetitive purpose for implementing the rule. Even if the NCAA can produce a procompetitive purpose, Snow still succeeds because he can present less restrictive alternatives to the NCAA's amateurism and eligibility rules.

1. The NCAA amateurism and eligibility rules violates Section 1 of the Sherman Act because they have an anticompetitive effect on the college education and student- athlete market.

Under step one of the rule of reason analysis, the NCAA amateurism and eligibility rules violate Section 1 of the Sherman Act because they have an anticompetitive effect on the college education and student-athlete market. To succeed on step one of the rule of reason analysis, Snow need only establish: "(1) there is a cognizable market on which the NCAA's actions could have had anticompetitive effects (thus implicating the Sherman Act); and (2) that plaintiffs did, in fact, identify that market in their complaint." *Agnew v. Nat'l Collegiate Athletic Ass'n*, 683 F.3d 328, 338 (7th Cir. 2012).

Both the Ninth and Seventh Circuits have found that a cognizable market exists upon which the NCAA's actions can have anticompetitive effects. *Agnew*, 683 F.3d at 338; *O'Bannon*, 802 F.3d at 1070-72. In *Agnew*, the Seventh Circuit stated:

> 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. Despite the nonprofit status of NCAA member schools, the transactions those 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. Indeed, this is likely one reason that some schools are willing to pay their football coaches up to $5 million a year rather than invest that money into educational resources.

Agnew, 683 F.3d at 340–41. Therefore, the Seventh Circuit concluded that the transactions between schools and student-athletes are commercial in nature and thus take place in a cognizable market of which the Sherman Act applies. *Id.*

The Ninth Circuit also found that a cognizable market exists upon which the NCAA's actions can have anticompetitive effects. *O'Bannon*, 802 F.3d 1056–57. In *O'Bannon*, the court concluded that there is a "college education market" where "FBS football and Division I basketball schools compete to recruit the best high school players by offering them 'unique bundles of goods and services' that include not only scholarships but also coaching, athletic facilities, and the opportunity to face high-quality athletic competition." *Id.* at 1056–57 (quoting *O'Bannon*, 7 F. Supp. 3d at 965–66). For the reasons set forth in *Agnew* and *O'Bannon*, this Court should find that transactions between student-athletes and schools take place in a cognizable market, thus implicating the Sherman Act.

Further, the *O'Bannon* court establishes that NCAA rules denying compensation to student-athletes for the use of their name, image, and likeness have an anticompetitive effect on the college education and student-athlete market. *O'Bannon*, 802 F.3d at 1057–58. As the *O'Bannon* court found, NCAA rules prohibiting the compensation of student-athletes are a "price-fixing agreement" whereby the recruited athletes "pay" colleges with their labor and name, image, and likeness, but the colleges collectively agree to value the athlete's name, image and likeness at "zero." *Id.* (quoting *O'Bannon*, 7 F.Supp.3d at 972). Even if you consider student athletes to be the "sellers" of their labor, and the colleges as the "purchasers" of their services, the *O'Bannon* court explained that "the college education market is a monopsony—a market in which there is only one buyer (the NCAA schools, acting collectively) for a particular good or service (the labor and NIL rights of student-athletes), and the colleges' agreement not to pay anything to purchase recruits' NILs causes harm to competition." *Id.*

Because a cognizable market exists upon which courts have found the NCAA's rules and actions have an anticompetitive effect, this Court should find that Snow succeeds on step one of the rule of reason analysis.

2. The NCAA amateurism and eligibility rules violate Section 1 of the Sherman Act because the NCAA cannot produce a valid procompetitive purpose for their use.

Under step two of the rule of reason analysis, the NCAA cannot produce a valid procompetitive purpose for their NCAA amateurism and eligibility rules because several of the reasons it has proffered have been invalidated by the *O'Bannon* court. *O'Bannon*, 7 F.Supp.3d at 999–1005. An NCAA rule is procompetitive, and thus protected under the Sherman Act, if it is a "justifiable means of fostering competition among amateur athletic teams" and thus "enhance[s] public interest in intercollegiate athletics." *Board of Regents*, 468 U.S. at 117.

In *O'Bannon*, the district court rejected several of the NCAA's proffered procompetitive purposes for its rules restricting student-athletes from receiving compensation. *O'Bannon*, 7 F.Supp.3d at 999–1005. These purposes included "promoting competitive balance in FBS football and Division I basketball" and "increasing output on the college education market." *Id.* Additionally, the district court partially rejected the NCAA's purpose of "preserving amateurism in college sports." *Id.* The Ninth Circuit held that, although amateurism "may serve some procompetitive purposes," it is not the "primary driver of consumer demand for college sports." *O'Bannon*, 802 F.3d at 1058–59. Furthermore, it held that amateurism was not a "core principal" of the NCAA. *O'Bannon*, 7 F. Supp. 3d at 1000. Additionally, the district court rejected the NCAA's contention that the no-compensation rule was necessary to "integrate academics and athletics and thereby "improve the quality of educational services provided to student-athletes." *O'Bannon*, 802 F.3d at 1059. Rather, the court concluded that these objectives are achieved

through rules requiring college athletes to "attend class, prohibiting athletes-only dorms, and forbidding student-athletes to practice more than a certain number of hours per week." *Id.*

For the reasons explained in *O'Bannon*, this Court should reject the NCAA's procompetitive purposes, as the Ninth Circuit did, and find that the NCAA cannot meet its burden on step two of the rule of reason analysis.

3. The NCAA amateurism and eligibility rules violate Section 1 of the Sherman Act because there are less restrictive alternatives to such rules.

Even if the NCAA can produce a procompetitive purpose for its amateurism and eligibility rules, Snow still prevails under the rule of reason analysis because there are less restrictive alternatives to these rules. Under step three of the rule of reason analysis, an NCAA rule is in violation of Section 1 of the Sherman Act if there are less restrictive alternatives to achieving the NCAA's proffered procompetitive purposes for the rule. *O'Bannon*, 802 F.3d at 1070. In essence, this final step provides challengers of an NCAA rule with another chance to establish the rule's invalidity under Section 1 of the Sherman Act.

The district court in *O'Bannon* found that two less restrictive alternatives existed to the NCAA's no-compensation rules: (1) allowing schools to award stipends to student-athletes up to the full cost of attendance, and (2) permitting schools to hold a portion of student-athletes licensing revenues in trust, to be given to the students after they leave college. *O'Bannon*, 7 F.Supp.3d at 982. The court held that both of these alternatives would achieve the NCAA's proffered procompetitive purposes – preserving amateurism, and integrating athletics and academics – and would be less restrictive than its total ban on compensation for student-athletes. *Id.* at 1004–07. Although the Court of Appeals ultimately only upheld the first alternative, it affirmed that a less restrictive alternative exists to the NCAA's no-compensation rules. *O'Bannon*, 802 F.3d at 1074–79.

For the reasons set forth in *O'Bannon*, this Court should also find that less restrictive alternative exist to the NCAA's amateurism and eligibility rules. Because a legally-recognized less restrictive alternative exists, Snow prevails under the rule of reason analysis, and the NCAA amateurism and eligibility rules are in violation of Section 1 of the Sherman Act.

II. THE VARIETY OF STATE LAW CLAIMS BROUGHT BY THE NFL PLAYERS ARE NOT PREEMPTED BY THE LABOR MANAGEMENT RELATIONS ACT.

Section 301 of the Labor Management Relations Act ("Section 301") was designed to create a body of federal law to address disputes arising out of collective bargaining agreements ("CBA"). 29 U.S.C. § 185(a) (2018); *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 209 (1985) (stating that Section 301 is "as a congressional mandate to the federal courts to fashion a body of federal common law to be used to address disputes arising out of labor contracts."). In an effort to achieve uniformity, Section 301 has been interpreted to preempt traditional state common law claims that are "founded directly on rights created by the collective bargaining agreement." *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 394 (1987). Additionally, Section 301 preempts the state-law claim if the claim is "substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract." *Lueck*, 471 U.S. at 220.

However, simply because a claim involves a labor dispute does not automatically make subject to preemption under Section 301. If "the matter at hand can be resolved without interpreting the CBA," then the state law claim is not preempted. *Burnside v. Kiewit Pacific Corp.*, 491 F.3d 1053, 1058 (9th Cir. 2007). In deciding if the claim is preempted, courts use a two-step analysis that first focuses on the rights at issue, determining whether they arise under the CBA or by state law. *Caterpillar*, 482 U.S at 394; *Burnside*, 491 F.3d at 1059. As long as the rights arise independent of the CBA, the court then engages in the second part of the analysis, looking at if proving the elements of the claim requires interpreting the CBA. *Burnside*, 491 F.3d at 1059.

Here, the players, claims against the NFL for distributing and encouraging the use of painkillers that ultimately led to the players' addiction are simply state law negligence claim that are not founded on the CBA. Furthermore, the second part of the test is met because establishing the elements for the claims of negligence do not involve interpreting the collective bargaining agreement, Thus, since both prongs of the inquiry are satisfied, Section 301 of the Labor Management Relations Act does not preempt the player's negligence claim.

A. The Players' Right to Receive Medical Care from the NFL That Does Not Create an Unreasonable Risk of Harm, Arises Under State Law and Not the Collective Bargaining Agreement

The first prong of the preemption analysis focuses on the specific right at issue that the claim is founded upon. *Burnside*, 491 F.3d at 1059. Here, that is "the players' right to receive medical care from the NFL that does not create an unreasonable risk of harm." *See* R. 22. By the very nature of the player's claim, it is clear the rights arise under state law and not under the CBAs. In order for the rights to have arisen under the CBA, there would have had to have been some requirement in the CBA that governed the medical treatment of the players. The players did not allege any such provision of the CBA, nor do they allege a breach of contract action in violation of the CBA. Instead, the players' claims for negligent hiring, retention, misrepresentation, and fraud are based on the common law and state and federal statutes that require the NFL to ensure there is not an unreasonable risk of harm.

B. Establishing a Prima Facie Case of Negligence Does Not Involve Interpreting the Collective Bargaining Agreement

If the rights at issue do not arise from the CBA, the claim is only preempted if establishing its elements requires a court to interpret the CBA. *Burnside*, 491 F.3d at 1059. This is based only on the plaintiff's claim and disregards any counterclaims or affirmative defenses that may require looking to the CBA. *See e.g.*, *Cramer v. Consolidated Freightways, Inc.*, 255 F.3d 683, 691 (9th

Cir. 2001) ("The plaintiff's claim is the touchstone for this analysis . . . If the claim is plainly based on state law, § 301 preemption is not mandated simply because the defendant refers to the CBA in mounting a defense."). Furthermore, a potential requirement of interpretation is not enough. The Ninth Circuit has held that the CBA must be of actual relevance to an element of the claim in order to preempt state common law. *Id.* To establish a prima facie case of negligence, the plaintiff must show (1) the defendant had a duty, (2) the defendant breached that duty (3) the defendant's breach caused the injuries and (4) the plaintiff was actually injured. *See e.g.*, *Sport Supply Grp., Inc. v. Columbia Cas. Co.*, 335 F.3d 453, 466 (5th Cir. 2003); *Sandage v. Bankhead Enters, Inc.*, 177 F.3d 670, 675 (8th Cir. 1999). Since the players can show these elements without looking to the CBA, the claim satisfies the second prong of the test and is therefore not preempted.

1. Establishing The Duty Owed to the Players By the NFL Does not Involve Interpreting the Collective Bargaining Agreement

In general, a duty requires an individual to "act as would a prudent and reasonable person under the circumstances." *Vazquez-Filippeti v. Banco Popular*, 506, F.3d 43, 49 (1st Cir. 2007). A specific duty to an individual can arise through statute or contract, or based on "the general character of the activity in which the defendant is engaged." *J'Aire Corp. v. Gregory*, 598 P.2d 60, 62 (Cal. 1979).

In this instance, the NFL's duty to the players arose from the general character of the activity as well as statutory law. The NFL was engaged in distributing the medication to the point where addictive painkillers were used "to subdue small head collisions and minor ankle injuries." R. 13. By actively participating in the players' treatment, the NFL has to duty to the use reasonable care in distributing the controlled substances by hiring and retaining qualified personal to provide treatment as well as not misrepresenting information about the addictive qualities of the prescriptions. This duty extends to the players because it was foreseeable that the NFL's failure to

use reasonable care would have caused harm to the players since they were directly being treated by the NFL. *Rodriguez v. Bethleham Steel Corp.*, 525 P.2d 669, 680 (Cal. 1974) ("The defendant owes a duty of care to all persons who are foreseeably endangered by his conduct, with respect to all risks which make the conduct unreasonably dangerous."). As the District Court noted, these pain medications are inherently dangerous which is why they "are 'controlled' in the first place." *See* R. 23. Thus, a failure to take reasonable care in providing controlled substances to the players could harm them based simply on the general activity of distributing the painkillers, regardless of whether the CBA established a separate duty to the particular plaintiffs.

Furthermore, beyond the duty implied by the general character of the NFL's activity, a duty also arose from the violation of state and federal statutes governing controlled substances. *See* R. 21 ("Many state . . . laws govern the administration of controlled substances to alleviate pain."). A statute can provide a duty of care when "the injured person is a member of a class for whose benefit the legislation was enacted," *Butler v. Frieden*, 158 S.E.2d 121, 122 (Va. Ct. App. 1967). Determining if there is a duty to the players based on state[1] and federal statutory law is a matter of statutory interpretation and does not arise from or require an interpretation of the CBA. Thus, both the general nature of the activity as well as the presence of regulating statutes support a duty outside of the CBA.

2. Establishing the NFL's Breach of the Duty Owed to the Players Does Not Involve Interpreting the Collective Bargaining Agreement

Once a duty has been established, the plaintiff must show that it has been breached. *Sports Supply*, 335 F.3d at 466. Whether there has been a breach of a duty is generally based on a standard

[1] While the Record does not specify if Tulania has a controlled substance act, the Record states the Players allege "many state and federal laws govern the administration of controlled substances to alleviate pain" and the players allege a claim of negligence per se. R. 22 Accordingly, it can be assumed that Tulania has state laws that are on-point. The federal statutes are the Controlled Substances Act, 21 U.S.C. § 801 *et seq;* and the Food, Drugs, and Cosmetics Act, 21 U.S.C. § 301 *et seq. Id.*

of objective reasonableness. *Talley v. Danek Medical, Inc.*, 179 F.3d 154, 158 (4th Cir. 1999). Additionally, a statute can provide the requisite standard of care, the violation of which creates a *presumption* of negligence. *Id.* (emphasis added).

In *Williams v. National Football League*, the players brought an action against the NFL based on violation of the Minnesota Drug and Alcohol Testing in the Workplace Act. 582 F.3d 863, 872 (8th Cir. 2009). Concluding it was not preempted by Section 301, the Eighth Circuit stated:

> [h]ere, a court would have no need to consult the [CBA] in order to resolve the Players' DATWA claim. Rather, it would compare the facts and the procedure that the NFL actually followed with respect to its drug testing of the Players with the DATWA's requirements for determining if the Players are entitled to prevail.

Id. at 876.

In *Karnes v. Boeing, Inc.*, the plaintiff brought a complaint based on Oklahoma's Drug Testing Act. Noting the statutory elements, the plaintiff must show the defendant violated, the Tenth Circuit concluded "neither inquiry requires a court to interpret, or even refer to, the terms of a CBA. 335 F.3d 1189, 1193 (10th Cir. 2003). Similarly, both state and federal statutes regulate controlled substances, and the Court can look to those to determine if the NFL met the minimum standards required of someone engaged in distributing painkillers including disclosing associated risks and side effects. This involves comparing the defendant's actual conduct to the statutory requirements, and does not involve looking to the CBA.

Furthermore, while the CBAs have their own specific provisions addressing hiring and retention, the element of breach focuses on the reasonable person standard. R. 9 (The CBA requires all clubs to have a "board-certified orthopedic surgeon" and requires trainers to be "certified by the National Athletic Trainers Association.). The breach of duty inquiry is not concerned with whether or not the CBA provides more or less protection, it merely looks at whether the facts show

the defendant met the minimum standard of reasonableness. If the NFL also violated the CBA provisions, the players could bring a breach of contract claim, however that is separate from the determination of reasonableness which could lead to a breach of duty. *See e.g.*, *Williams*, 582 F.3d 863 at 875 ("Where the employer does not comply with either [the statute] or its CBA that provides equivalent or greater protection than [the statute], the employee could potentially have two claims."). Thus, in establishing this element, the Court must simply compare the defendant's conduct to that of a reasonable person, and the terms of the CBA are inapplicable.

3. Establishing the NFL Caused the Plaintiff's Injuries Does Not Involve Interpreting the Collective Bargaining Agreement

In addition to duty and breach, the players must also show the NFL's negligence is what caused their addictions. *See e.g. Sport Supply* 335 F.3d at 466. The question of causation encompasses the NFL's actions as being the cause in fact as well as the proximate cause of the players' injuries. *Peckham v. Continental Cas. Ins. Co.*, 895 F.2d 830, 836 (1st Cir. 1990). This is generally determined by the jury. *Swift v. United States*, 866 F.2d 507, 508 (1st Cir. 1989) ("Application of the legal cause standard to the circumstances of a particular case is a function ordinarily performed by, and peculiarly within the competence of, the factfinder."). The Supreme Court has held that when an inquiry is purely factual there is no need to look to the CBA. *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 407 (1988) ("[T]his purely factual injury . . . does not turn on the meaning of any provision of a collective-bargaining agreement.").

Since causation has routinely been held to be a factual question, establishing this element does not require looking to the CBA. *Coyne v. Taber Partners I*, 53 F.3d 454, 460 (1st Cir. 1995) ("In most situations, causation questions are both fact bound and case-specific. Thus, such questions ordinarily are grist for the factfinder's mill."). Here, establishing the defendant's negligence in distributing and encouraging the excessive use of controlled substances by

overprescribing and failing to disclose the side effects and risks caused the players' addictions is a question of fact that does not involve looking to the terms of the CBA. R. 13, 22.

4. Establishing the Players' Damages Does Not Involve Interpreting the Collective Bargaining Agreement.

In proving a claim of negligence, the last element the plaintiff must show is damages. *See e.g.*, *Sport Supply*, 335 F.3d at 466. This requires a showing that the players actually suffered a cognizable injury and the damages they are entitled to. Often times, the collective bargaining agreement may contain information that may be helpful in the damages determination. *Lingle*, 486 U.S. 399 at 413 n. 12. However, "the mere need to 'look to' the CBA for damages computation is no reason to hold the state-law claim defeated by Section 301. *Livadas v. Bradshaw*, 512 U.S. 107, 124 (1994). Thus, while likely unnecessary in this instance, even if the court uses the CBA in the damages determination, it will not lead to preemption.

Accordingly, for the reasons state above, the players' claims are not preempted by Section 301 of the Labor Management Relations Act. This is because both the players' rights arose outside of the CBA and the adjudication of their claims requires no reference to the CBA. Specifically, the duty owed to the players by the NFL arises out of statutory and common law. Additionally, the adjudication of these claims does not require the court to interpret the CBA between the parties because the players' can establish a prima facie case of negligence against the NFL independent of the CBA. Therefore, the Court should reverse the Fourteenth Circuit and hold that the players' claims are not preempted under Section 301.

CONCLUSION

For the foregoing reasons, the judgment of the Fourteenth Circuit Court of Appeals should be reversed.

Respectfully submitted,

TEAM NUMBER 17
Counsel for Petitioner

FEBRUARY 4, 2019

APPENDIX
Relevant NCAA and Statutory Provisions

NCAA Bylaw 12.5.2.1

After becoming a student-athlete, an individual shall not be eligible for participation in intercollegiate athletics if the individual:

> (a) Accepts any remuneration for or permits the use of his or her name or picture to advertise, recommend or promote directly the sale or use of a commercial product or service of any kind; or
> (b) Receives remuneration for endorsing a commercial product or service through the individual's use of such product or service.

Sherman Antitrust Act of 1890 § 1, 26 Stat. 209 (1890), 15 U.S.C. § 1 (2018)

Every 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 to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

Labor Management Relations Act (Taft-Hartley Act) § 301(a), 61 Stat. 156 (1947), 28 U.S.C. § 185(a) (2018)

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