No. 9-214

IN THE
SUPREME COURT OF THE UNITED STATES

JON SNOW AND OTHER SIMILARLY SITUATED INDIVIDUALS,
Appellant,

v.

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

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

BRIEF FOR THE APPELLEE

Date
February 4, 2019

TULANE UNIVERSITY
MARDI GRAS SPORTS LAW COMPETITION

Team 4

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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.

STATEMENT OF THE CASE

This case involves the lawful use and enforcement of amateurism and eligibility rules by the National Collegiate Athletic Association (NCAA) against an individual that now attempts to contest decades of Sherman Act precedent. The NCAA has – and continues to – act within its permissible duties to protect the integrity of their amateur sports. The appellate court held that the NCAA bylaws are valid according to the Sherman Act. R. 6.

Appellants brought additional claims alleging that the NFL is liable for negligent distribution of prescription medications among other state-law claims. The appellate court held that Section 301 preempts Appellants' state-law claims. R. 9.

I. Background and Preliminary Matters

Jon Snow, Tulania University's quarterback, violated the NCAA bylaw 12.5.2.1 when he accepted $3,500 from Apple's for their use of his name and likeness new Apple Emoji Keyboard. R. 13. Jon Snow agreed to a trial term agreement with Apple, which included receiving $1,000 compensation for his and an additional $1 royalty fee for each download from the Apple customers. *Id.*

Other students complained about Jon Snow's unfair compensation to Cersei Lannister, the head of Tulania compliance. *Id.* After Cersei Lannister notified the NCAA of violation of NCAA bylaw 12.5.2.1, he was suspended indefinitely. *Id.* After deciding to enter the NFL draft, Jon Snow sued the NCAA for violating Section 1 of the Sherman Act, which prevented himself and others from competition. *Id.*

The New Orleans Saints, a professional football franchise of the National Football league (NFL), drafted Jon Snow. *Id.* During Jon Snow's rookie year doctors and trainers prescribed him various painkillers to subdue his head collisions and ankle injuries. *Id.* Jon Snow and the other players who experienced the same medical treatment were rushed off the field upon injury,

without disclosure of their side effects and risk associated with the treatment. *Id.* In Jon Snow's second contract year, he was diagnosed with multiple injuries and a painkiller addiction. *Id.* Jon Snow among other appellants brought multiple state-law claims against the NFL. *Id.*

The District Court

The United States District Court for the Southern District of Tulania found that the plaintiffs were injured in fact, due to the NCAA rules having foreclosed the market for their name, likeness, and image. (R. at 19.) When discussing NCAA bylaw 12.5.2.1, the District Court held that NCAA bylaw regulate commercial activity, thus they are subject to purview of the Sherman Act. (R. at 17.) The District Court also found the amateurism rules will not be presumed as valid under the Sherman Act and instead must be proved according to the Rule of Reason scrutiny. *Id.*

The District Court determined that Appellants' claims were not preempted by Section 301 because no CBA provisions directly address the subject of the litigation—who was responsible for disclosing the risks of prescription drugs provided to players by the NFL. *Id.* at 26.

The Court of Appeals

The United States Court of Appeals for the Fourteenth Circuit reversed the District court's decision and upheld the NCAA's amateurism and bylaws as valid. (R. at 6.) When analyzing NCAA bylaw 12.5.2.1, the Court of Appeals stated "*stare decisis* demands that this Court cannot simply ignore thirty years of unchallenged precedent striking down challenges to NCAA amateurism and eligibility bylaws. *Id.*

The appellate court determined that all of Appellants' state-law claims were preempted by Section 301. *Id.* at 9.

SUMMARY OF THE ARGUMENT

On issue one, NCAA's amateurism and eligibility Bylaw 12.5.2.1 is protected from attack under Section 1 of the Sherman Antitrust Act, because Appellants' claims would fail under: the rule of reason analysis and Bylaw 12.5.2.1 is a noncommercial regulation designed to protect the tradition of amateurism. First, under Section 1 of the Sherman Act, Appellants must prove that the anticompetitive effects outweigh the procompetitive justification of Bylaw 12.5.2.1. Furthermore, they must also demonstrate there is a less restrictive, reasonable manner in accomplishing the bylaw's objectives. The NCAA created Bylaw 12.5.2.1 to protect amateurism, which courts held is a legitimate procompetitive justification that outweighs the anticompetitive restraints. Additionally, Appellants do not offer a substantially less restrictive manner to achieve this goal and, even if they had, courts concluded that allowing a student-athlete to prosper from their NIL is not a reasonable or effective alternative.

Second, NCAA Bylaw 12.5.2.1 is a noncommercial eligibility rule that is protected from Appellants' antitrust violation attacks. Courts found NCAA bylaws pertaining to student-athlete eligibility are noncommercial, because their goal is to protect collegiate athletics' amateurism. Additionally, courts are more concerned with the character and objectives of NCAA bylaws, rather an individual's possible economic injury he or she may sustain from the restraint. Even though Bylaw 12.5.2.1 restricted Appellants from monetary gain, its goal is to uphold Appellants' amateur status, which is a noncommercial objective and, therefore, protected from antitrust claims.

On issue two, the appellate court determined that Appellants' negligence claims were properly dismissed as preempted under Section 301 of the Labor Management Relations Act (LMRA). The appellate court's straightforward application of Section 301 correctly requires preemption and dismissal of all state-law negligence claims, and this Court should affirm.

First, the appellate court correctly determined that Section 301 preempts Appellants' state-law claims because a court cannot determine whether the NFL assumed a duty of care to employees, or whether the league acted reasonably or negligently, without interpreting the applicable Collective Bargaining Agreement (CBA) provisions.

Second, even if this Court concludes that Appellants' claims arise independently of the CBA, the claims still require the interpretation of the CBA to determine the NFL's compliance and duty of care owed to Class Members—resulting in preemption. Appellants' tort claims are based on a duty addressed in Article 39 of the CBA: Players' Rights to Medical Care and Treatment. Appellants' claim is therefore substantially dependent and inextricably intertwined with the provisions CBA.

Finally, a finding for Appellants would undermine Section 301 and call into question the authority of CBA grievance procedures. Finding a duty of care relying only on an allegation would allow employees to avoid grievance procedures by alleging illegal conduct. Appellants agreed to grievance procedures in an equal bargaining arrangement and allowing subversion would negatively impact the authority of CBA provisions in federal labor law.

ARGUMENT

I. THE APPELLATE COURT CORRECTLY HELD THAT THE NCAA AMATEURISM AND ELIGIBILITY BYLAWS ARE SHIELDED FROM ANTITRUST ATTACKS DUE TO THE NECESSITY TO PRESERVE AMATEURISM AND COLLEGE ATHLETICS AS A WHOLE

The National Collegiate Athletic Association currently defines amateurism as follows:

> Student-athletes shall be amateurs in an intercollegiate sport, and their participation should be motivated primarily by education and by the physical, mental and social benefits to be derived. Student participation in intercollegiate athletics is an avocation, and student-athletes should be protected from exploitation by professional and commercial enterprises . . . A student-athlete may receive athletically related financial aid administered by the institution without violating the principle of amateurism, provided the amount does not exceed the cost of education authorized by the Association; however, such aid as defined by the Association shall not exceed the cost of attendance as published by each institution.

NCAA 2018-2019 Division I Manual, Bylaw art. 2 §§ 2.9, 2.13.

Since the association's inception in 1906, amateurism has been considered "the bedrock principle of the NCAA." *Amateurism*, LSU Compliance, http://www.compliance.lsu.edu/amateurism (last visited Feb. 1, 2019). The NCAA's basic purpose is to "maintain intercollegiate athletics as an integral party of the educational program and the athlete as an integral part of the student body, and, by doing so, retain a clear line of demarcation between intercollegiate athletics and professional sports." NCAA 2018-2019 Manual art. 1 § 1.3.

Alongside the NCAA, courts continually place immense value on protecting amateurism. *See Nat'l Collegiate Athletic Ass'n v. Bd. of Regents*, 468 U.S. 85, 120 (1984). In *National Collegiate Athletic Ass'n v. Board of Regents,* the Supreme Court afforded the NCAA the authority to safeguard the principle of amateurism. *Id.* at 101-02. This decision led to several federal court's ruling in favor of the NCAA when the tradition of amateurism is brought up and questioned. *See Banks v. Nat'l Collegiate Athletic Ass'n*, 977 F.2d 1081, 1094 (7th Cir. 1992);

See McCormack v. NCAA, 845 F.2d 1338, 1340 (5th Cir. 1988). Overall, courts have decided that protecting amateurism far outweighs the residual restraints of the NCAA rules and the line between intercollegiate athletics and professional sports must be maintained. *Bd. of Regents,* 468 U.S. at 120.

The NCAA created a set of bylaws that protect the principle of Amateurism. NCAA 2018-2019 Manual art. 12. The regulation in question, NCAA Bylaw 12.5.2.1 Advertisements and Promotions Following Enrollment, is included in these rules. *Id.* at §12.5.2.1. This rule allows the NCAA to remove a student-athlete's amateur status if the individual 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. *Id.* Essentially, if a student-athlete uses his or her name, image, and likeness (hereafter "NIL") to prosper from their reputation as a college athlete, that individual is no longer considered an amateur and would not be permitted to continue participating in intercollegiate athletics. *Id.*

If NCAA amateurism and eligibility rules like Bylaw 12.5.2.1, are challenged by student-athletes, it is often under the Sherman Antitrust Act. Section 1 of the Sherman Antitrust Act states that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States or with foreign nations, is declared to be illegal." 15 U.S.C. § 1 (2018). To succeed under an antitrust claim, plaintiffs must prove three elements that demonstrate an unreasonable restraint of trade. *Agnew v. Nat'l Collegiate Athletic Ass'n*, 683 F.3d 328, 335 (7th Cir. 2012). These three elements are: (1) an existing contract, combination, or conspiracy, (2) an unreasonable restraint on trade in a relevant market resulting from the contract, combination, or conspiracy, and (3) an injury resulting from the unreasonable restraint of trade. *Id.* If a claim is determined to arise pursuant to the Sherman Antitrust Act, a court will apply either a per se analysis or a rule of reason analysis to determine the

reasonableness of the challenged restraint. *Bd. of Regents*, 468 U.S. at 100-04. The Supreme Court in *Board of Regents* declared that challenges against the NCAA amateurism and eligibility bylaws should be done under a rule of reason analysis. *Id.*

An analysis according to rule of reason consists of four steps. *Law v. Nat'l Collegiate Athletic Ass'n,* 134 F.3d 1010, 1019 (10th Cir. 1998). First, the burden of proof is on the plaintiff to show that the regulation in question has anticompetitive effects. *Id*. If that is proven, the defendant must provide procompetitive justifications for the regulation. *Id.* Next, the plaintiff must then prove that the regulation is "not reasonably necessary to achieve the legitimate objective or that the objective can be achieved in a substantially less restrictive manner." *Id.* Finally, the last step requires the decision maker to weigh both the procompetitive and anticompetitive effects to determine if the regulation constitutes an unreasonable restraint on trade. *Id.*

Furthermore, any claims under Section 1 of the Sherman Antitrust Act are limited to commercial and business endeavors. *Smith v. NCAA*, 139 F.3d 180, 184 (3rd Cir. 1998). An antitrust violation attack against a predominately noncommercial entity or objective will fail. *Id.* In cases involving the NCAA, multiple courts held that NCAA bylaws, including eligibility rules, are noncommercial because of the goal of protecting amateurism. *Id.* at 186. Even if a NCAA bylaw that protects amateurism causes an economic loss for an individual, a court will still determine it is noncommercial because the character of the bylaw is more important than the injury it caused. *Bassett v. NCAA*, 528 F.3d 426, 433 (6th Cir. 2008).

Here, NCAA Bylaw 12.5.2.1 is protected as a matter of law under Section 1 of the Sherman Antitrust Act. Under the rule of reason analysis, the procompetitive effects outweigh the anticompetitive effects that are being presented by Appellants. Additionally, Appellants will not be able to prove that the regulation is unreasonable to achieve the goal of protecting

amateurism, nor will they be able to provide less restrictive alternatives to the Bylaw. Lastly, Bylaw 12.5.2.1 is an eligibility rule and bears no effect on commerce. The overall character of the Bylaw 12.5.2.1 is noncommercial, which would exempt the regulation from any challenge under the Sherman Antitrust Act. For these reasons, this Court should affirm the appellate court's holding that NCAA amateurism and eligibility bylaws are protected from antitrust attacks and Section 301 of the LMRA preempts Appellants' state-law claims.

A. This Court Should Affirm the Appellate Court's Decision of Protecting Bylaw 12.5.2.1 from An Antitrust Attack Because Appellants' Claims Do Not Satisfy the Sherman Antitrust Act's Rule of Reason Analysis.

For a plaintiff to succeed under an antitrust claim, they must prove that the defendant created an unreasonable restraint of trade. *Agnew*, 683 F.3d at 335. To accomplish this, the plaintiff must show that the restraint in question has anticompetitive effects. *Id.* These anticompetitive effects must demonstrate that the restraint substantially and adversely affects competition. *Id.* At this point, the defendant must show that the challenged restraint has a procompetitive objective and is needed to support competition. *Id.* Finally, the burden is shifted back over to the plaintiff who has to prove that the restraint is not reasonably necessary to meet the stated goal and the goal can be achieved in a substantially less restrictive manner. *Id.* at 336. If a plaintiff is unable to prove that the anticompetitive effects outweigh the procompetitive justifications and there is no less restrictive manner in accomplishing the objective, then a court will decide in favor of the defendant.

Here, Appellants' claims that NCAA Bylaw 12.5.2.1 is a violation under Section 1 of the Sherman Act should not succeed after applying the rule of reason analysis. The NCAA's procompetitive justification of protecting amateurism is legitimate and the anticompetitive challenges that Appellants make do not offset this objective. Additionally, NCAA Bylaw 12.5.2.1 and the remaining amateurism and eligibility bylaws are reasonably necessary to

maintain amateurism. It would be virtually impossible for the NCAA to create a less restrictive rule without breaking this tradition.

1. This Court should affirm the appellate court's decision to protect the NCAA from antirust attacks because the procompetitive defense of protecting amateurism outweighs the anticompetitive effects.

An individual cannot succeed in their antitrust claim if the procompetitive justifications to a restraint outweigh the adverse effects from the restraint in question. *Agnew*, 683 F.3d at 335. In cases involving the NCAA, protecting amateurism has been considered a legitimate procompetitive justification. Here, the NCAA created Bylaw 12.2.5.1 for the sole purpose of safeguarding collegiate athletics and the NCAA market as a whole.

Even if the NCAA's actions are subject to antitrust laws, a court will still uphold their bylaws if they are intended to protect amateurism and the unique product of intercollegiate athletics. *Bd. of Regents,* 468 U.S. at 101-02. In *Board of Regents,* the Supreme Court ruled against the NCAA after a number of universities brought an antitrust claim arguing that the NCAA unreasonably restrained trade in the televising of football games. *Id.* at 88. The Court held that the NCAA maintained a legitimate interest in preserving a competitive balance but did not agree that this interest was justified in this case. *Id.* at 117. However, although the Court did not rule on amateurism bylaws, their decision still created monumental implications. *Id.* at 100-01. The Court noted how important it was for college athletics to have certain restraints in order to differentiate itself from professional sports. *Id.* In his opinion, Judge Stevens stated that "[i]n order to preserve the character and quality of the 'product,' athletes must not be paid, must be required to attend class, and the like." *Id.* at 102. The Court made it clear that the NCAA plays a critical role in maintaining the tradition of amateurism and preserving a competitive balance between college athletics and professional athletics is a legitimate concern. *Id.* Although this

decision held that NCAA bylaws are subject to antitrust scrutiny, protecting amateurism is a legitimate procompetitive defense. *Id.*

After *Board of Regents,* cases involving NCAA amateurism bylaws routinely used the Supreme Court's decision that NCAA rules that promote amateurism and preserve the value college athletics are legitimate procompetitive justifications. *Banks*, 977 F.2d at 1090. In *Banks v. Nat'l Collegiate Athletic Ass'n,* the plaintiff filed suit contending that the NCAA's no-draft and no-agent rule that made him ineligible to return to college football constituted an illegal restraint on trade. *Id.* at 1083-84. Similar to *Board of Regents,* the Seventh Circuit held that these amateurism rules did not violate antitrust laws because the procompetitive effect of differentiating between college athletics and its competition, professional athletics. *Id.* at 1090. The court stated that "the regulations of the NCAA are designed to preserve the honesty and integrity of intercollegiate athletics and foster fair competition among the participating amateur college students." *Id.* Furthermore, the court concluded that without amateurism rules, student-athletes would be unprotected from payment-bidding wars and the focus of college athletics would shift from educating student-athletes to building a minor league system for professional sports. *Id.* at 1091. In summary, the *Banks* decision further solidified the idea that the NCAA could use protecting the tradition of amateurism as a justification to contest anticompetitive claims under the Sherman Antitrust Act. *Id.*

Here, Appellants' anticompetitive claims against Bylaw 12.5.2.1 do not outweigh the NCAA's procompetitive justifications and, therefore, would not succeed under the rule of reason analysis. Appellants argue that the unreasonable restraint prohibited them from profiting off of their NIL and, therefore, is anticompetitive in nature. R. 13. In turn, they were suspended from participating in collegiate athletics and chose to enter the NFL draft instead. *Id.* However, cases such as *Bd. of Regents* and *Banks* establish that the NCAA has a legitimate interest in protecting

amateurism through the creation and enforcement of bylaws such as 12.5.2.1. Without this bylaw, Appellants would be able to make money off the reputation that collegiate athletics afforded them. Not only would this substantially affect Appellants' roles as a student-athlete in an educational institution, but it would also completely destroy the very definition of amateurism when compared to professional sports. In the case at hand, the NCAA maintains procompetitive justifications to make sure their product is distinguishable from its competitors and not allow Appellants to profit from being a college athlete.

2. This Court should affirm the appellate court's decision to protect the NCAA from antitrust attacks because Bylaw 12.5.2.1 is reasonably necessary to achieve the legitimate objectives it sets out to protect and there is not a substantially less restrictive manner to achieve these goals.

Under a rule a reason analysis, not only must an individual provide anticompetitive effects from a restraint, but they also must demonstrate that realistic, less restrictive alternatives could achieve the same objective. *Agnew*, 683 F.3d at 336. In antitrust cases involving the NCAA, courts have determined that anticompetitive effects are present but have agreed with the Association that no less restrictive ways exist that also uphold the tradition of amateurism. *O'Bannon v. NCAA*, 802 F.3d 1049, 1076 (9th Cir. 2015).

Even after finding anticompetitive effects in NCAA amateurism and eligibility bylaws, a court will justify the restraints since they are reasonably necessary to achieve their objectives. *Id.* at 1076-77. In *O'Bannon v. NCAA*, the NCAA appealed to the Ninth Circuit after the district court held that the bylaws that prevented student-athletes from profiting off of their NIL had offered more anticompetitive effects than procompetitive justifications. *Id.* at 1057. The plaintiffs presented two less restrictive alternatives rather than a complete ban on NIL compensation. *Id.* at 1061. The district court agreed that neither of these alternatives would damage the NCAA's procompetitive justifications. *Id.* Although the Ninth Circuit agreed that

the bylaw in question had anticompetitive effects, it also found procompetitive justifications in that protecting amateurism helps preserve the popularity of college sports. *Id.* at 1072-73.

After the Ninth Circuit evaluated the reasonableness of the two approved alternatives from the district court, it concluded that increasing scholarships to cover full cost of attendance was the only acceptable alternative to the existing NCAA rules. *Id.* at 1074. The Ninth Circuit determined that raising the amount of grant-in-aid awarded would not violate amateurism as long as the additional money covered "legitimate educational expenses." *Id.* at 1075. As for the other alternative, the Ninth Circuit found that the district court erred in determining that a capped amount for student-athlete NILs was a legitimate alternative. *Id.* at 1076. The Court acknowledged that what makes student-athletes amateurs is that they are unpaid and capping an amount for their NIL would not be a reasonable or effective alternative to preserve amateurism. *Id.* at 1076-77. This decision continued the preservation of amateurism by striking down the notion that student-athletes can get paid from their NILs. *Id.* at 1079.

Here, the NCAA is protected from attack under the Sherman Act because Appellants do not present a reasonable, less restrictive alternative for what NCAA Bylaw 12.5.2.1 is attempting to accomplish. Similar to the plaintiff in *O'Bannon*, Appellants' claims are based around profiting from their NIL. R. 13. However, the Ninth Circuit was clear that even a capped amount from an individual's NIL was not a reasonable alternative. Bylaw 12.5.2.1 is a direct restraint against a student-athlete profiting from their NIL and, therefore, is reasonably necessary to protect amateurism and the NCAA market.

B. This Court Should Affirm the Appellate Court's Decision to Protect Bylaw 12.5.2.1 from Antitrust Attack Because the Bylaw is an Eligibility Rule and Its Overall Objective is Noncommercial.

NCAA Bylaw 12.5.2.1 is noncommercial and, therefore, shielded from Sherman antitrust claims because it falls within the eligibility rules that were created to protect amateurism. The

Supreme Court stated that antitrust laws are limited in their application strictly to commercial and business endeavors. *Smith,* 139 F.3d at 184. Also, the Court concluded that there is only limited application to organizations which have principally noncommercial objectives. *Id.* The NCAA is a non-profit whose principal objective is to protect the tradition of amateurism. NCAA 2018-2019 Manual art. 1 § 1.3. Courts previously concluded that the NCAA bylaws that protect amateurism, including eligibility rules and rules that might affect an individual's monetary income, are noncommercial and, therefore, protected from antitrust attacks. *Smith,* 139 F.3d at 185; *Bassett*, 528 F.3d at 433.

A court should find that NCAA bylaws that deal with eligibility are noncommercial and protected from antitrust claims. *Smith,* 139 F.3d at 186. In *Smith v. NCAA*, the Third Circuit upheld the district court's decision to dismiss the claim after it concluded that the NCAA eligibility bylaw in question did not relate to the NCAA's commercial or business activities. *Id.* at 184. The Third Circuit agreed with the Supreme Court that there is limited applicability of the Sherman Act with noncommercial objectives and that it did not apply to the NCAA's promulgation and eligibility requirements. *Id.* at 185-86. The court held that the eligibility rule was noncommercial and, thus, the plaintiff could not make an antitrust violation claim. *Id* at 186.

Along with eligibility rules, a court should also find that NCAA bylaws are noncommercial even if it affects someone from obtaining a monetary gain. *Bassett*, 528 F.3d at 433. The Sixth Circuit in *Bassett v. NCAA* concurred with *Smith* in its decision that NCAA bylaws that protect the tradition of amateurism are noncommercial. *Id.* In *Bassett*, the plaintiff, a former coach, alleged antitrust violations after he committed a number of NCAA infractions and was unable to find another position in college athletics. *Id.* at 429. The Sixth Circuit claimed that under the Sherman Act, there must be a commercial activity implicated and the plaintiff's complaint was wholly devoid of any activity of that type. *Id.* at 433. The court stated that the

focus should not be on the plaintiff's injury by no longer being able to make a living from coaching, but, instead, on the character of the NCAA's actions to protect amateurism. *Id.* The court even took the *Smith* decision one step further and stated that rules that deal with issues such as eligibility or improper inducement are not only noncommercial, but anti-commercial in that they are designed to promote and ensure competitiveness amongst NCAA members. *Id.* In summary, both *Smith* and *Bassett* support that a range of NCAA bylaws are considered noncommercial and cannot be attacked by antitrust claims.

Here, Appellants do not have an antitrust claim against the NCAA since Bylaw 12.5.2.1 falls within eligibility rules and is designed to guard amateurism. Bylaw 12.5.2.1's objective is to protect amateurism by not allowing student-athletes to prosper off of their NIL. If this bylaw is violated, then the infraction includes the student-athlete losing their eligibility. Therefore, Bylaw 12.5.2.1 has noncommercial objectives and falls within the NCAA's eligibility regulations. As we have seen in *Smith*, noncommercial rules that deal with student-athlete eligibility are protected from antitrust attacks. Additionally, it does not matter if Bylaw 12.5.2.1 prevented Appellants from making a commercial gain without losing their eligibility. R. 13. *Bassett* determined that the character of what the NCAA is trying to accomplish is more important than the injury that came from it. The NCAA created Bylaw 12.5.2.1 not to prevent Appellants from making money, but to protect their amateur eligibility. In conclusion, the NCAA amateurism and eligibility bylaw 12.5.2.1 is noncommercial and, thus, protected as a matter of law from Appellants' Section 1 Sherman Antitrust Act attacks.

II. THE APPELLATE COURT CORRECTLY HELD THAT SECTION 301 PREEMPTS APPELLANTS' CLAIMS BECAUSE THEY ARE SUBSTANTIALLY DEPENDENT UPON THE TERMS OF THE NFL CBA.

The appellate court correctly determined that Section 301 of the LMRA preempts Appellants' state-law negligence claims. This Court's long-standing precedent favors a

determination that Section 301 preempts state-law claims arising from the provisions of a CBA. Even if this Court determines that Appellants' claims arise independently of the agreement, Appellants' claims are still preempted because they are intertwined with the terms of a labor contract. A finding for Appellants that Section 301 does not preempt Appellants' negligence claim would undermine the authority of Section 301 and allow employees to allege illegal behavior to avoid grievance procedures.

A. State-Law Negligence Claims That Require Interpretation of a Collective Bargaining Agreement are Preempted by Section 301 of the Labor Management Relations Act.

The appellate court correctly determined that Section 301 of the LMRA preempts Appellants' state-law negligence claims. A court must consult and apply the necessary provisions of the CBA prior to determining whether the NFL breached a duty to act with reasonable care toward Class Members. Additionally, it is necessary to consider the ways in which the NFL has imposed specific CBA medical duties on the clubs—a requirement leading to preemption.

Section 301 is applicable in "[s]uits for violation of contracts between an employer and a labor organization," or, simply put: suits for breaches of CBAs. 29 U.S.C. § 185(a) (2018). This Court has held that federal law exclusively governs suits for breach of a CBA, *see Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 456 (1957), and that "the pre-emptive force of [section] 301 extends beyond state-law contract actions." *United Steelworkers v. Rawson*, 495 U.S. 362, 369 (1990); *see Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 210 (1985). This Court has further determined that the preemptive force of Section 301 is necessary to "mandate resort to federal rules of law in order to ensure uniform interpretation of collective-bargaining agreements, and thus to promote the peaceable consistent resolution of labor-management disputes." *Lingle v. Norge Div. of Magic Chef, Inc.,* 486 U.S. 399, 404 (1988). Section 301

preemption prevents states from overreaching into "[t]he ordering and adjusting of competing interests through a process of free and voluntary collective bargaining" described as "the keystone of the federal scheme to promote industrial peace." *See Teamsters v. Lucas Flour Co.,* 369 U.S. 95, 104 (1962). If "any attempt to assess liability" involving a tort claim "inevitably will involve contract interpretation," that claim is preempted. *Allis-Chalmers Corp.*, 471 U.S. at 210-11.

Negligence claims are preempted by the LMRA when interpretation of a CBA is required to determine the existence of an implied duty of care or the nature and scope of that duty. *Int'l Bhd. of Elec. Workers v. Hechler*, 481 U.S. 851, 862 (1987) ("The threshold inquiry for determining if a [negligence] cause of action exists is an examination of the [CBA] to ascertain what duties were accepted by each of the parties and the scope of those duties"); *see Brown v. Brotman Med. Ctr., Inc.*, F. App'x 572, 576 (9th Cir. 2014) (preemption appropriate where CBA interpretation required to determine standard of care and whether [defendant's] actions violated that duty). Under these principles, Section 301 has been "broadly construed" to preempt all state-law claims that require interpretation of a collective bargaining agreement. *Aguilera v. Pirelli Armstrong Tire Corp.,* 223 F.3d 1010, 1016 (9th Cir. 2000). Alternatively, a claim is not preempted if it can be litigated without referencing the rights and duties established in a CBA. *Cramer v. Consol. Freightways, Inc.* 255 F.3d 683, 691 (9th Cir. 2001). A defendant's "proffered interpretation argument" in regard to the link between a plaintiff's claim and the CBA must reach a reasonable level of credibility. *Id.* at 691-92.

Here, the appellate court correctly determined that Section 301 of the LMRA preempts Appellants' state law claims. The essence of Appellants' claims is that the individual clubs mistreated athletes and that the league was negligent in failing to intervene and disclose the dangers of medications. R. 8-9. These claims are anchored in state common law duties

suggesting that all states impose precisely the same uniform duty on the league to oversee member clubs, which are the same types of state law claims this Court has determined is preempted by Section 301. As the appeals court correctly held, Appellants' claims exist only by virtue of the NFL's policy imposing uniform duties on all clubs to provide adequate medical care for all players. R. 9. "[I]t would be essential to take into account the affirmative steps the NFL has taken to protect the health and safety of the players, including the administration of medicine." *Id.* Additionally, the CBA addressed the NFL's duty to "hire and retain educationally well-qualified, medically-competent, professionally objective and specifically-trained professionals not subject to any conflicts." *Id.* The CBA further requires that all full-time trainers are "certified by the National Athletic Trainers Associations." *Id.* The appellate court correctly reasoned that negligence cannot be established without first determining the full scope of player benefits contained in the CBA. *Id.*

Appellants' negligence-based claims are preempted by Section 301 because determining the extent of the NFL's assumed duty of reasonable care—or a breach—requires CBA interpretation in two ways:

First, this Court would have to interpret the CBA to determine whether the NFL assumes a duty of care related to players' medical treatment. The appellate court reasoned that, "To determine whether the NFL breached these duties [of care], we would need to consult, construe, and apply what was required by the CBA provision…" R. 9. This finding alone—that the court must interpret the CBA provision to determine a breach of duty—is enough for a determination of preemption under Section 301. A court cannot ascertain a standard of care without an analysis of the terms of the CBA.

Second, determining the scope of the duty of care requires taking into account the steps NFL has affirmatively taken to address the problem of protecting players' heath and safety. As

the appellate court noted, "in deciding whether the NFL has been negligent in policing the clubs and in failing to address medical mistreatment of the clubs, it would be necessary to consider the ways in which the NFL has indeed stepped forward and required proper medical care—which here prominently included imposing specific CBA medical duties on the clubs." R. 9.

Appellants argue that the NFL voluntarily assumed a duty to act with reasonable care toward athletes that is outside the scope of the CBA. However, the CBA addressed this duty by requiring each club to retain a "board-certified orthopedic surgeon." *Id.* As in *Hechler*, Appellants' negligence claims are preempted because an interpretation of the CBA is required to find either the existence of "an implied duty of care on the [defendant]" or "the nature and scope of that duty."

The specific CBA medical duties and the requirements set forth by the NFL on each individual club require the interpretation of the CBA to determine the implied duty of care owed by the league. Appellants cannot assert a duty without first determining the scope of that duty relative to the provisions contained in the CBA, and it is necessary to consider the ways in which the NFL stepped forward and required medical care.

As the appellate court correctly concluded, Appellants' claims are preempted under Section 301 of the LMRA. To find that the NFL owed a duty to Appellants requires an interpretation of the CBA to determine whether the duty existed and to what scope—an analysis that immediately leads to preemption of state-law claims. Additionally, this Court should conclude that the additional steps the NFL took within the language of the CBA to impose proper medical care on individual clubs leads to a finding of preemption.

B. Even If Appellants' Claims Arise Independently of the Collective Bargaining Agreement, the Necessity of Interpreting the CBA to Determine a Standard of Care Still Leads to Preemption.

Appellants' claim arises only by virtue of the CBA provisions relating to player medical care and safety. However, if this Court determines that Appellants' claims arise separately of the CBA, the claims still require the interpretation of the applicable provisions to determine the NFL's compliance and duty owed to Class Members. Courts have held in the context of the NFL that state-law claims arising independently of the CBA are still preempted if they are substantially dependent upon the language of the agreement.

Even if a state-law claim is not necessarily derived from the NFL collective bargaining agreement, it still subject to Section 301 preemption if its resolution is inextricably intertwined with an analysis of the collective bargaining agreement. *See Stringer v. Nat'l Football League,* 474 F. Supp. 2d 894 (S.D. Ohio 2007). Courts have held that "[e]ven if the NFL's duty arises apart from the [collective bargaining agreements]…the necessity of interpreting the [collective bargaining agreement] to determine the standard of care still leads to preemption." *Duerson v. Nat'l Football League,* 2012 WL 1658353, at *3-4 (N.D. Ill. May 11, 2012). A state-law tort claim is also preempted if its resolution is "substantially dependent" or "inextricably intertwined" with the terms of a collective bargaining agreement. *See Stringer,* 474 F. Supp. 2d at 909.

In *Stringer*, an Ohio federal court found a negligence suit was preempted because "[t]he degree of care owed cannot be considered in a vacuum, the court must look to contractual duties set forth in the collective bargaining agreement with respect to the health and safety of NFL players. *Stringer* at 910. In *Williams v. National Football League,* the Eighth Circuit similarly found that state-law claims are preempted in the same manner. *see* 582 F.3d 863, 881-82 (8th Cir. 2009). In *Williams*, NFL players sued the league for fraud, negligence and negligent misrepresentation after players received suspensions for testing positive for a banned dietary supplement substance. *Id.* at 870-81. The players claimed the NFL owed "a common duty,"

separate from the CBA, to provide the players with an ingredient-specific warning regarding the supplements. *Id.* at 881. The Eighth Circuit determined that the finding of a legal a duty is predicated upon an examination of the parties' legal relationship and expectations established by the CBA. *Id.* The court reasoned that the negligence claims were inextricably intertwined with consideration of the terms of the CBA and that because the claims relate to the labor agreement, they must be resolved by reference to a uniform federal law and are preempted by Section 301. *Id.*

In *Duerson,* a federal court determined that concussion-related negligence claims arising separately from the CBA are preempted because "preemption is still possible even if the duty on which the claim is based arises independently of the CBA, so long as resolution of the claim requires interpretation of the CBA." 2012 WL 1658353, at *12. The court reasoned that the CBA provisions relating to player medical care and safety were directly relevant to the particular duty needed to establish negligence. *Id.* at *13.

Here, as in *Stringer*, *Williams* and *Duerson*, Appellants' claims are substantially dependent upon the interpretation of CBA provisions and are therefore preempted. Article 39 of the CBA: *Players' Rights to Medical Care and Treatment*: Section 1(c) states that "all club physicians shall comply with all federal, state, and local requirements, including all ethical rules and standards established by any applicable government and/or other authority that regulates or governs the medical profession in the Club's city." 2011 CBA art. 39, § 1(c). Here, the appellate court correctly held that to determine if the NFL breached its duties to players, the court would need to consult, construe, and apply what was required by the provisions of the CBA.

Appellants strive to argue that no interpretation is required because the CBA cannot condone "illegal" behavior in violation of federal statutes. However, the contention of Appellants' claims is the establishment of the NFL's supposed duty—not the existence of

alleged illegal activity. Neither Appellants nor a court can determine the scope or existence of the NFL's duty without interpretation of the CBA provisions regarding club physicians and compliance with statutory and ethical obligations.

Although Appellants' claims arise only by virtue of the CBA, if this Court determines that Appellants' claims arise independently of the collectively bargained agreement, the necessary interpretation of the agreement still leads to a finding of preemption. Federal courts have determined that claims arising separately of the collectively bargained agreement are still preempted if the claim is intertwined with the language of the agreement. This Court should hold that even if Appellants' claims arise independently of the CBA, they are still preempted through interpretation of the agreement.

C. Allowing Appellants to Forego Mandatory CBA Grievance Procedures By Alleging Illegal Conduct Contradicts This Court's Precedent and Undermines the Authority of the LMRA and CBA Grievance Procedures.

This Court should hold that allowing Appellants to proceed without exercising the CBA's mandatory grievance procedure and arbitration requirement calls into question federal law governing grievance policies. A finding for Appellants would allow future employees to circumvent dispute resolution requirements and devitalize the purpose of Section 301.

Section 301 precludes parties from suing before exhausting bargained-for procedures. *Allis-Chalmers,* 471 U.S. at 219-21. "A rule that [permits] individual[s] to sidestep available grievance procedures would cause arbitration to lose most of its effectiveness, as well as eviscerate a central tenet of federal labor-contract law under § 301 that it is the arbitrator, not the court, who has the responsibility to interpret the labor contract in the first instance." *Id.* at 220. If a party fails to exhaust mandatory grievance procedures, its claims must be dismissed unless it can be said "with positive assurance" that the arbitration provisions are "not susceptible of an interpretation that covers the asserted dispute." *AT&T Techs. Inc. v. Commc'ns Workers of Am.,*

475 U.S. 643, 659 (1986). Only an express exclusion of a particular grievance or "the most forceful evidence of a purpose to exclude the claim from arbitration" will overcome the presumption of arbitrability within a CBA containing a broad arbitration clause. *Dennis L. Christensen Gen. Bldg. Contractor, Inc. v. Gen. Bldg. Contractor, Inc.,* 952 F.2d 1073, 1077 (9th Cir. 1991). The Ninth Circuit has held that federal policy strongly favors the resolution of labor disputes through arbitration in cases involving the National Football League. *Matthews v. Nat'l Football League Mgmt. Council*, 688 F.3d 1107, 1111 (9th Cir. 2012).

Appellants will strive to argue that *Dent v. National Football League* is controlling precedent finding that no examination of the CBA is necessary to determine that the distribution of controlled substances is an activity that gives rise to a duty of care. *Dent v. Nat'l Football League*, 902 F.3d 1109 (9th Cir. 2018). In *Dent*, plaintiffs argued that the NFL breached a duty of care by failing to prevent medication abuse by the teams and that the NFL illegally distributed controlled substances. *Id.* at 1118. The Ninth Circuit held that interpretation of the terms of the CBA was unnecessary because the plaintiffs' claims alleged that when the NFL provided players with prescription drugs, the league engaged in conduct that was outside the scope of the CBAs. *Id.* at 1126. The court expressed no opinion about the ultimate merits of the players' claims. *Id.* "[T]o the extent the NFL is involved in the distribution of controlled substances, it has a duty to conduct such activities with reasonable care." *Id.* at 1119.

The circumstances surrounding *Dent* are distinguishable from the case at hand. The Ninth Circuit erred in concluding that the NFL's duty to care arises out of an involvement in the distribution of controlled substances. First, Appellants *alleged* that the NFL was involved in the distribution of controlled substances. The Ninth Circuit incorrectly accepted this assertion and assigned a duty relying only on Appellants' allegation. In 2014, the Drug Enforcement Agency (DEA) thoroughly investigated allegations that NFL teams flouted federal laws governing the

transporting, handling and disbursement of controlled substances concluding that the agency was "unaware of any new evidence that NFL member teams travel with controlled substances" and "as of fall 2015, [the] DEA was advised that NFL team physicians no longer store inventory of controlled substances at NFL facilities." Rick Maese, *In meeting with DEA, NFL says it has a 'compliance plan' for prescription drug handling*, The Washington Post, June 3, 2017, https://www.washingtonpost.com/sports/redskins/nfl-met-with-dea-on-prescription-drug-handling/2017/06/02/b919c724-47b6-11e7-bcde-624ad94170ab_story.html. In *Dent,* the Ninth Circuit concluded that if the NFL was circumventing federal prescription drug laws in the 1970s, then the league owed a duty of care to distribute drugs properly. However, Appellants' allegations become near impossible after the conclusion of the DEA's investigation in 2015.

If this Court concludes that Appellants can circumvent a grievance procedure by simply alleging that an employer is engaged in illegal conduct—without having to show any evidence of said conduct, then this Court would set precedent that undermines the LMRA and CBA grievance procedures nationwide. A finding for Appellants would allow employees to circumvent the grievance process by merely alleging illegal conduct.

The appellate court correctly concluded that Appellants' state-law claims are preempted by the CBA. However, even if this Court could resolve Appellants' claims without needing to interpret the CBA provisions that guarantee medical care, or if this Court determines that Appellants' claims arise independently of the CBA, the claims still require the application of the provisions to determine the NFL's compliance. This Court should affirm its own precedent and uphold the effectiveness of the LMRA by confirming the appellate court's decision.

CONCLUSION

For the foregoing reasons, the United States Government respectfully request this Court uphold the final judgment of the Fourteenth Circuit court.

Dated February 4, 2019

Respectfully submitted,

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Team 4
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