No. 09-214

IN THE

Supreme Court of the United States

JON SNOW, AND OTHER SIMILARLY SITUATED INDIVIDUALS

Petitioner,

v.

NATIONAL COLLEGIATE ATHETIC ASS'N; THE NATIONAL FOOTBALL LEAGUE

Respondent.

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

BRIEF FOR PETITIONER

Attorneys for Petitioner

Team 11

QUESTION 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 Fourteenth Circuit erred in holding various state and federal claims preempted by the Labor Management Relations Act?

STANDARD OF REVIEW

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

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STATEMENT OF THE FACTS

Apple INC., (Apple) in an effort to appeal to college football fans, approached successful and well-known college football players to participate in a trial run for their new Emoji Keyboard. R at 13. Among those that Apple approached was star quarterback Jon Snow ("Snow") of Tulania University. *Id*. Snow, just commencing his Junior year of football, had been recognized for multiple nominations stemming from his athletic achievements. *Id*. The keyboard allows users to type using the image and likeness of college athletes. *Id*. As part of their agreement, Apple would pay all participating athletes an immediate $1,000 for use of their image and likeness on the emoji keyboard. *Id*. Apple further promised participating athletes an additional $1 royalty fee for each download by Apple consumers. *Id*. Snow agreed to the trial terms with Apple and he earned approximately $3,500 during the first trial period. *Id*.

Subsequent to receiving this income for Snow's image and likeness, the head of Tulania compliance received grievances from other student athletes about Snow receiving unfair compensation. *Id*. Snow was indefinitely suspended by the NCAA for violating NCAA Bylaw 12.5.2.1. Snow promptly brought suit against the NCAA for violating Section 1 of the Sherman Act and preventing himself and others from competition. *Id*.

Unable to compete his Senior year of college, Snow instead entered the National Football League ("NFL") Draft where the New Orleans Saints selected him. *Id*. Snow went on to have an exceptional season, all the while gaining more recognition. *Id*.

During his rookie year, doctors and trainers prescribed him multiple painkillers to manage pain from small head collisions and minor ankle injuries. *Id*. The treatments mirrored that of other NFL players with similar injuries and in most instances the doctors and trainers would dispatch the players back to the field. *Id*. Snow, like other players, was never given disclosure on the side

effects and risks posed with each medication he was prescribed. In the midst of Snow's second contract year, he was diagnosed with an enlarged heart, permanent nerve damage in the ankle, and had developed an addiction to painkillers. *Id.*

PROCEDURAL HISTORY

In a consolidation of two actions, Snow first filed suit against the NCAA for violating Section 1 of the Sherman Act alleging it had prevented himself and others from competition. *Id.* In the second issue, Snow, along with other NFL players, filed various claims against the NFL to hold them liable for its doctors' negligent distribution and encouragement of excessive painkiller prescriptions. *Id.* In regard to the first issue, the District Court of Tulania held that Mr. Snow's antitrust claim could go forward. *Id.* at 19. In ruling for the Plaintiffs', the District Court made three determinations. First, the court rejected the argument that *Board of Regents* declared the NCAA's amateurism rules valid as a matter of law. *Id.* at 17. Second, it held the NCAA's compensation rules regulate commercial activity and are within the ambit of the Sherman Act. *Id.* at 18. Finally, the court held that the plaintiffs had standing to bring the antitrust claim. *Id.* at 19.

In the second issue, the District Court held the claims were not preempted by Section 301 of the LMRA because the alleged claims "do not arise from the CBAs and do not require their interpretation." *Id.* at 26. In doing so, the court held that the claims of negligence "alleging violations of federal and state statutes does not turn on how the CBA allocated duties among the NFL, the teams and the individual doctors." *Id.* at 24.

On appeal, the Fourteenth Circuit Court of Appeals reversed the lower court's decision and found in favor of the NCAA and the NFL. *Id.* at 11. The Court of Appeals held that the NCAA's amateurism standards and bylaws are upheld. *Id.* at 6. The court reasoned that "*stare decisis* demands that this Court cannot simply ignore thirty years of unchallenged precedent striking down

challenges to NCAA amateurism and eligibility bylaws." *Id*. Regarding the second issue, the court held that Mr. Snow's claims were preempted by Section 301. *Id*. at 11. They reasoned that if the NFL was "negligent in policing the clubs and in failing to address medical mistreatment by 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." *Id*. at 9. The court further reasoned that prevailing Case Law favors preemption and analogized *Williams v. National Football League*, *Stringer v. National Football*, *Duerson v. National Football League* and, *Smith v. National Football League Players Association.* *Id*. at 10-11.

SUMMARY OF THE ARGUMENT

This Court should find that the NCAA's amateurism and eligibility rules are not valid as a matter of law. This Court's decision in *National Collegiate Athletic Association v. Board of Regents of University of Oklahoma* did not rule the NCAA's amateurism and eligibility bylaws valid as a matter of law under Section 1 of the Sherman Act. Furthermore, the NCAA's amateurism and eligibility rules regulate commercial activity, and therefore, are subject to Sherman Act scrutiny. Finally, the players have standing bring this antitrust claim because they have shown they have suffered antitrust injury.

Section 301 of the Labor Management Relations Act does not preempt the claims by the players. This Court should apply the two-step inquiry laid out by the Ninth Circuit in *Dent v. NFL* and find the players' claims are not preempted because the rights are conferred by state or federal law and no interpretation of the CBA is needed. The NFL owed a duty to the players under federal and state law, which the CBA does not address. Lastly, resolving the claims in federal or state court would not threaten the proper roles of grievance or arbitration.

ARGUMENT

I. The NCAA's compensation rules are not valid as a matter of law.

Section 1 of the Sherman Antitrust Act "literally prohibits *every* agreement" that restrains trade. *Ariz. v. Maricopa Cnty. Med. Soc.*, 457 U.S. 332, 342 (1982). The Act states "[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 hereby declared to be illegal." 15 U.S.C.S. § 1.

Congress enacted the Sherman Act to create a "comprehensive charter of economic liberty" with the purpose of preserving and ensuring "free and unfettered competition as the rule of trade." *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 4 (1958). The Act rests on the ideal that "unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions." *Id*. More simply, the underlying policy most widely accepted is the promotion of competition. *Id*.

Per se analysis

There are certain practices or agreements deemed to be *per se* unreasonable under the Sherman Act because of their "pernicious effect on competition and lack of any redeeming virtue[.]" *Id*. at 5. These are presumed to be unreasonable and illegal without any inquiry into the specific harm they caused or the justification for its use. *Id*. at 5. The Supreme Court has used *per se* analysis in numerous situations. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940) (finding agreements between certain major oil companies that artificially raised and fixed gasoline prices to be *per se* illegal); *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211

(1899) (holding that an agreement between companies engaged in manufacture, sale, and transportation of iron pipe to not compete with each other in certain territories was *per se* illegal); *Fashion Originators' Guild, Inc. v. FTC*, 312 U.S. 457 (1941) (finding that an agreement between a group of clothing manufacturers to boycott and decline to sell their products to retailers who sold copied garments was *per se* illegal); *Int'l Salt Co. v. United States*, 332 U.S. 392 (1947) (holding that a salt company's practice of leasing machines that used salt and requiring the lessees to purchase the required salt from the salt company was *per se* illegal); *Ariz. v. Maricopa Cnty. Med. Soc.*, 457 U.S. 332 (1982) (finding that an agreement by competing member physicians to set maximum prices that they could claim in full payment for health services provided to policyholders was a *per se* violation of the Sherman Act). However, *per se* analysis has fallen in favor in the eyes of the Supreme Court which has predominately begun using the "rule of reason."

Rule of Reason Analysis

Since this Court's decision in *Standard Oil Co. of New Jersey v. United States* in 1911, the Court has analyzed most restraints under what it calls the "rule of reason." *Maricopa Cnty. Med. Soc.*, 457 U.S. at 343. As the name suggests, the rule of reason allows the fact finder to conclude whether under the circumstances of the case, the challenged practice "imposes an unreasonable restraint on competition." *Id*. This Court consistently holds that the rule of reason analysis questions whether the challenged conduct "promotes competition" or "suppresses competition." *Nat'l Soc. of Prof'l Eng'rs v. United States*, 435 U.S. 679, 691 (1978) (using the rule of reason analysis to find a practice by a society of engineers of prohibiting competitive bidding among member firms to be unreasonably in restraint of trade). The rule of reason has given the Sherman Act "flexibility and definition" while keeping its central principle of antitrust analysis constant. *Id*. at 688.

A. *Board of Regents* did not rule the NCAA's amateurism and eligibility bylaws valid as a matter of law under Section 1 of the Sherman Act.

The NCAA erroneously relies on the Court's decision in *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Okla.* for their assertion that the NCAA's amateurism and eligibility rules are valid as a matter of law. The Court did not declare the NCAA's amateurism and eligibility rules valid as a matter of law in reaching its conclusion and should not be read to have.

In *Board of Regents*, the NCAA appointed a television committee to report to the NCAA its findings. *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Okla.*, 104 S. Ct. 2948, 2954 (1984). The committee found television coverage of college football games had adverse effects on stadium attendance. *Id.* Unless the problem was remedied, there could be "serious harm to the nation's overall athletic and physical system." *Id.* (internal quotations omitted). The report emphasized the problem was national in nature and one which required the collective action of the member colleges. *Id.* The NCAA adopted a television plan for the 1982-1985 college football seasons which incorporated "appearance requirements" as well as "appearance limitations." *Id.* at 2955-56. The appearance requirements mandated television networks to schedule appearances for at least 82 member schools during a two-year period. *Id.* The appearance limitations restricted the number of appearances on the network to six times locally and four times nationally, divided between the two networks equally. *Id.* at 2956.

Nowhere in *Board of Regents* does the Court conclude the NCAA's amateurism and eligibility rules are valid as a matter of law or immune from antitrust scrutiny. The Court applied a rule of reason analysis and found the NCAA violated the Sherman Act by engaging in broadcast limitations which did not serve any legitimate procompetitive purpose. *Id.* at 2970. The Court justified its use of the rule of reason and explained its decision not to apply *per se* analysis, stating:

> Our decision to not apply a *per se* rule to this case rests in large part on our recognition that a certain degree of cooperation is necessary if the type of competition that petitioner and its member institutions seek to market is to be preserved. It is reasonable to assume that most of the regulatory controls of the NCAA are justifiable means of fostering competition among amateur athletic teams and therefore procompetitive because they enhance public interest in intercollegiate athletics.

Id. at 2969. In its opinion, the Court noted the college football industry needs to be given special consideration because it involves an industry, "which horizontal restraints on competition are essential if the product is to be available at all." *Id*. at 2960.

In *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, the Ninth Circuit ruled that the Supreme Court's decision in *Board of Regents* did not validate the NCAA's amateurism rules as a matter of law. *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 802 F.3d 1049, 1061 (9th Cir. 2015). The facts surrounding *O'Bannon*, like this case, dealt with player compensation. Ed O'Bannon, a former NCAA basketball player for UCLA was depicted in an NCAA video game. *Id*. at 1055. O'Bannon never consented to the use of his likeness in any video game and was not compensated for its use. *Id*.

In the present matter, as in *O'Bannon*, the NCAA incorrectly relies on the dicta in *Board of Regents* to assert a presumption of validity under antitrust law for all NCAA eligibility rules governing amateurism. The Court did not rule the NCAA's rules were valid as a matter of law because the NCAA's rules were not before the Court in *Board of Regents*. *Id*. at 1064. The Court discussed the NCAA's amateurism and eligibility rules at length to explain why NCAA rules should not be held to be a *per se* violation of antitrust law but should instead be analyzed under the rule of reason. *Id*. As outlined above, *per se* analysis is used in instances where an agreement or practice's "pernicious effect on competition and lack of any redeeming virtue" are presumed to

be unreasonable and illegal without any inquiry as the specific harm they have caused or the justification for its use. *N. Pac. Ry. Co.*, 356 U.S. at 4.

In *Board of Regents*, the Court merely recognized the importance of allowing some horizontal agreements in collegiate athletics because college sports could not exist without certain agreements. However, that does not mean the NCAA has an antitrust exemption. As the Ninth Circuit in *O'Bannon* states:

> Nothing in *Board of Regents* supports such an exemption. To say that the NCAA's amateurism rules are procompetitive, as *Board of Regents* did, is not to say that they are automatically lawful; a restraint that serves a procompetitive purpose can still be invalid under the Rule of Reason if a substantially less restrictive rule would further the same objectives equally well.

O'Bannon, 802 F.3d at 1063-64; *See Bd. of Regents*, 104 S. Ct. at 2960 n.23 ("While as the guardian of an important American tradition, the NCAA's motives must be accorded a respectful presumption of validity, it is nevertheless well settled that good motives will not validate an otherwise anticompetitive practice").

As in *O'Bannon*, the NCAA will likely rely on the Seventh Circuit's decision in *Agnew v. NCAA* for its flawed argument that NCAA amateurism rules are presumed procompetitive. *Agnew v. NCAA*, 683 F.3d 328, 342-43 (7th Cir. 2012). In *Agnew*, two former college football players who lost their scholarships challenged the NCAA rules that prohibited schools from offering multi-year scholarships and capped the number of football scholarships each school was able to offer. *Id*. at 332-33. With an overbroad reading of *Board of Regents*, the court concluded that "when an NCAA bylaw is clearly meant to help maintain the 'revered tradition of amateurism in college sports' or the 'preservation of the student-athlete in higher education,' the bylaw [should] be presumed procompetitive." *Id*. at 342-43 (quoting *Bd. of Regents*, 104 S. Ct. at 2970). However, the court ultimately found the scholarship issue before it did not implicate the NCAA's goal of

preserving amateurism because awarding more or longer scholarships to athletes would not have an effect on their amateur status. *Id*. at 344.

This Court should adopt the Ninth Circuit's view of the Supreme Court's intent in the dicta of *Board of Regents*. Similar to the Court in *Board of Regents*, the Seventh Circuit's discussion of a procompetitive presumption in *Agnew* was unnecessary to the resolution of the case and was also merely dicta. However, as the Ninth Circuit states in *O'Bannon*, "even if it were not dicta," we should not adopt the presumption. *O'Bannon*, 802 F.3d at 1065. *Agnew*'s analysis is founded on "the dubious proposition that in *Board of Regents*, the Supreme Court 'blessed' NCAA rules that were not before it and did so to a sufficient degree to virtually exempt those rules from antitrust scrutiny." *Id*. at 1064 (quoting *Agnew*, 683 F.3d at 341).

B. The NCAA's amateurism and eligibility rules regulate commercial activity, and therefore, are subject to Sherman Act scrutiny.

The NCAA incorrectly argued at the district court level the Sherman Act does not have force against its compensation rules. Section 1 of the Sherman Act applies to "restraint[s] of trade or commerce." 15 U.S.C.S. § 1. The NCAA argued their compensation rules are actually "eligibility" rules that do not regulate commercial activity. The NCAA is correct in one respect, restraints that have no effect on commerce are in fact exempt from Sherman Act scrutiny. However, the legal understanding and use of the word "commerce" is broad.

The word "commerce" can be read to include "almost every activity from which the actor anticipates economic gain." Phillip Areeda & Herber Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, ¶ 260b (4th ed. 2013). That definition cannot be found to exclude a transaction in which a student-athlete "exchanges his labor and [name, image, and likeness] rights for a scholarship at a Division I school because it is undeniable that both parties to that exchange anticipate economic gain from it." *O'Bannon*, 802 F.3d at 1066; *see, e.g.*, *Agnew*,

683 F.3d at 340 ("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"). Furthermore, as the Ninth Circuit held in *O'Bannon*, the Supreme Court in *Board of Regents* discussed procompetitive justifications for the NCAA amateurism rules which is an indication the Court "presume[d] the applicability of the Sherman Act to NCAA bylaws, since no procompetitive justifications would be necessary for noncommercial activity to which the Sherman Act does not apply." *Agnew*, 683 F.3d at 339.

Simply because the NCAA characterizes their compensation rules as "eligibility" rules does not change the fact that they regulate compensation and make them immune from the Sherman Act. If the NCAA were allowed to do this, they could simply call all of their rules "eligibility" rules and insulate itself from antitrust scrutiny. The antitrust laws of the United States are not to be avoided by such "clever manipulation of words." *Simpson v. Union Oil Co.*, 377 U.S. 13, 21-22 (1964).

The NCAA cited two cases in their argument on this point, *Smith v. NCAA* and *Bassett v. NCAA*, both of which were distinguished in the Ninth Circuit's opinion in *O'Bannon*. In *Smith*, the Third Circuit dismissed a challenge to the NCAA's bylaw which prohibited athletes from participating in athletics at postgraduate schools other than their undergraduate schools, ruling the Sherman Act did not apply to the bylaw. *Smith v. NCAA*, 139 F.3d 180, 185 (3d Cir. 1998). The *Smith* court found the eligibility bylaw in question was "not related to the NCAA's commercial or business activities." *Id*. As the Ninth Circuit stated, the bylaw challenged in *Smith* was a true "eligibility" rule, "akin to the rules limiting the number of years that student-athletes may play collegiate sports or requiring student-athletes to complete a certain number of credit hours each

semester." *O'Bannon*, 802 F.3d at 1066. This is separate from the present case where the NCAA is touting a compensation rule as an "eligibility" rule.

In *Bassett*, the Sixth Circuit found NCAA rules which prohibited "improper inducements" to recruits were "explicitly noncommercial." *Bassett v. NCAA*, 528 F.3d 426, 430, 433 (6th Cir. 2008). The Ninth Circuit stated it "simply could not understand this logic," and found "rules that are '*anti-commercial* and designed to promote and ensure competitiveness,' surely *affect* commerce just as much as rules promoting commercialism." *O'Bannon*, 802 F.3d at 1066 (quoting *Bassett*, 528 F.3d at 433). The court recognized the NCAA's intent underlying the compensation rules does not change the fact that they regulate "labor for in-kind compensation," which is "a quintessentially commercial transaction." *Id*. Therefore, this Court should adopt the Ninth Circuit's view and conclude the NCAA's compensation rules regulate commercial activity and are thus within the ambit of the Sherman Act.

C. The players have standing to bring their claim under the Sherman Act because they have demonstrated they have suffered antitrust injury.

The players' Section 1 claim reaches the merits of the case because the players have shown they suffered "antitrust injury." The standing requirement in Sherman Act matters is a heightened threshold that applies to private parties attempting to enforce the antitrust laws. In order to reach this threshold, a plaintiff must show "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Glen Holly Entm't, Inc. v. Tektronix Inc.*, 343 F.3d 1000, 1007-08 (9th Cir. 2003) (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977)) (internal quotation marks omitted).

The players have suffered antitrust injury in this case, just as the plaintiff in *O'Bannon* suffered antitrust injury. The NCAA has created and enforced rules that have "foreclosed the market for their [name, image, and likeness] ..." *O'Bannon*, 802 F.3d at 1067. This Court should

find that the players have standing in this action and that the NCAA has violated Section 1 of the Sherman Act with its eligibility rules.

II. Section 301 of the LMRA does not preempt the various claims by the players.

Section 301 of the Labor Management Relations Act ("LMRA") is a jurisdictional statue that has been interpreted 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." *Dent v. NFL*, 902 F.3d 1109, 1116 (9th Cir. 2018) (quoting *Kobold v. Good Samaritan Reg'l Med. Cty*., 832 F.3d 1024, 1032 (9th Cir. 2016)) (internal quotations omitted). Section 301 of the LMRA reads:

> [s]uits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, 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.

29 U.S.C. 185 (a). Congress intended for Section 301 to "protect the primacy of grievance and arbitration as the forum for resolving collective bargaining agreement disputes and the substantive supremacy of federal law within that forum." *Dent*, 902 F.3d at 1113. Accordingly, Section 301 preempts state law claims "founded directly on rights created by collective-bargaining agreements, and also claims 'substantially dependent on analysis of a collective bargaining agreement.'" *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 394 (1987) (quoting *Int'l Bhd. of Elec. Workers v. Hechler*, 481 U.S. 851, 859 n.3 (1987)).

In determining whether state law claims are preempted by Section 301 of the LMRA there exists a two-step inquiry. *Dent*, 902 F.3d at 1113 (citing *Burnside v. Kiewit Pac. Corp*., 491 F.3d 1053, 1059 (9th Cir. 2007)). There must first be a determination into whether the cause of action involves "rights conferred upon an employee by virtue of state law, not by a CBA." *Id*. If the

rights at issue "exist solely as a result of the CBA, then the claim is preempted," and the Court's analysis ends there. *Id*. If the right exists independently of the CBA, then the second step of the inquiry is to determine "whether litigating the state law claim nonetheless requires interpretation of a CBA, such that resolving the entire claim in court threatens the proper role of grievance and arbitration." *Alaskan Airlines v. Schurke*, 898 F.3d 904, 904 (9th Cir. 2018).

Although a claim that requires interpretation of a collective bargaining agreement ("CBA") is preempted, "[i]nterpretation is construed narrowly; it means something more than 'consider,' 'refer to,' or 'apply.'" *Dent*, 902 F.3d at 1113 (quoting *Schurke*, 898 F.3d at 904). A claim is "only preempted to the extent that there is an active dispute over the meaning of contract terms." *Id*. A hypothetical connection between the claim and the terms of the CBA is not enough to preempt the claim. *Id*. Further, "a CBA provision does not trigger preemption when it is only potentially relevant to the state law claims, without any guarantee that interpretation or direct reliance on the CBA terms will occur." *Humble v. Boeing Co.*, 305 F.3d 1004, 1010 (9th Cir. 2012)). Rather, "adjudication of the claim must require interpretation of a provision of the CBA." *Cramer v. Consol. Freightways, Inc.*, 255 F.3d 683, 691-92 (9th Cir. 2001). Lastly, "the need for a purely factual inquiry that 'does not turn on the meaning of any provision of a collective bargaining agreement is not cause for preemption' under [Section] 301." *Dent*, 902 F.3d at 1117 (quoting *Burnside*, 491 F.3d at 1072).

The Ninth Circuit has found, "[t]he plaintiff's claim is the touchstone" of the Section 301 preemption analysis; "the need to interpret the CBA must inhere in the nature of the plaintiff's claim." *Cramer*, 255 F.3d at 691. Therefore, a defense based on a CBA does not give rise to preemption. *Caterpillar*, 482 U.S. at 400. Finally, "LMRA [Section] 301 forum preemption inquiry is not an inquiry into the merits of a claim; it is an inquiry into the 'legal character'—

whatever its merits—so as to ensure it is decided in the proper forum." *Schurke*, 898 F.3d at 924 (quoting *Livadas v. Bradshaw*, 512 U.S. 107, 123-124 (1994)).

Prior to a preemption analysis, it is important to understand the relationship the NFL has with the individual clubs and the CBA. The Eighth Circuit stated "[t]he NFL is an unincorporated association of [32] member clubs which own and operate professional football teams." *Williams v. Nat'l Football League*, 582 F.3d 863, 868 (8th Cir. 2009). The NFL utilizes the National Football League Management Council ("NFLMC") as their exclusive bargaining agent when forming a CBA. *Id*. Also bound by the CBA is the NFL Players Association ("NFLPA"), whom bargains on behalf of the players employed directly by the 32 individual club teams. *Id*. Ultimately, the CBA binds the NFLMC, the NFLPA, and the NFL itself. *Dent*, 902 F.3d at 1114 n.2.

In the CBA, Article 39 states that healthcare responsibilities are placed on the individual clubs and the NFL has no duty or responsibilities to the players under the CBA. *See* Appendix. However, in an employee/employer relationship, "a duty of care may arise through statute or by contract." *J'Aire Corp. v. Gregory*, 24 Cal.3d 799, 801 (1979). It may also be based on "the general character of the activity in which the defendant engaged." *Id*. at 803.

A synthesis of major Supreme Court decisions regarding preemption analysis states:

> First, section 301's preemption purpose is to ensure that CBA provisions are interpreted under the same principles from state to state. Second, section 301's preemptive scope is limited to only those state-law principles that require an explicit interpretation of, or understood as being "inextricably intertwined" with, the CBA. Finally, this preemption does not extend to any state-law claim that provides rights and obligations outside the CBA.

Andrew F. Gann, Jr., *The Limitation of Labor Preemption: Survivability of Contract Rights During Employer Lockouts*, 27 Marq. Sports L. Rev. 397, 410 (2017) (synthesizing Supreme

Court decisions of: *Hawaiian Airlines, Inc. v. Norris*; *Lingle v. Norge Div. of Magic Chef, Inc.*; *Allis-Chalmers Corp. v. Lueck*; *Avco Corp. v. Aerolodge No. 735, Int'l Ass'n of Machinists & Aerospace Workers*; *Local 174, Teamsters, Chauffeurs, Warehousemen & Helpers of Am. v. Lucas Flour Co.*; and *Textile Workers Union of Am. v. Lincoln Mills of Alaska*).

Plaintiffs' four claims are broadly categorized under two areas of tort law—negligence and fraud. When undertaking a preemption inquiry under Section 301 of the LMRA, the merits of the claim are not addressed. *Schurke*, 898 F.3d at 924; *Livadas*, 512 U.S. at 123-24. The analysis requires a determination of the claim's "legal character" in order to assure the proper forum is reached. *Id*. The question before the Court is whether the claims, as pleaded, demand an interpretation of the CBA or whether the claims are independent from the CBA. *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 407 (1988).

A. Negligence claims are not preempted by Section 301 of the LMRA.

To prove negligence under California law, generally, one must show (1) the defendant had a duty or "obligation to conform to a certain standard of conduct for the protection of others against unreasonable risks," (2) the defendant breached that duty, (3) that breach proximately caused the plaintiff's injuries, and (4) damages. *Corales v. Bennett*, 567 F.3d 554, 572 (9th Cir. 2009) (quoting *McGarry v. Sax*, 158 Cal.App.4th 983, 994 (2008)).

The three negligence claims—negligence per se, negligent hiring and retention, and negligent misrepresentation—require a variation of what must be shown in order to establish liability. Each will be examined according to their elements along with any CBA provisions. California courts consider several factors when deciding whether a duty exists, including:

> The foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing

> future harm, the extent to the burden to the defendant and the consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost and prevalence of insurance for the risk involved.

Regents of Univ. of Cal. v. Super. Ct., 4 Cal.5th 607, 628 (2018).

i. The players' negligence per se claim is not preempted because it does not require interpretation of the CBA.

Under California Law, negligence per se is not an independent cause of action. *Quiroz v. Seventh Ave. Ctr.*, 140 Cal.App.4th 1256, 1284-85 (2006). It functions as a method to establish a presumption of negligence for a common law cause of action by statute, ordinance, or regulation. *Id*. The alleged violation of statute may establish the standard of care under the negligence per se doctrine. Cal. Evid. Code § 699(a); *see also Elsner v. Uveges*, 34 Cal.4th 915, 937 (2004). This approach requires proof of proximate cause of the injury from an event which the nature of the statute, ordinance, or regulation was designed to prevent. *Id*. Furthermore, the person who was harmed must be of the class in which the law was designed to protect. *Id*.

To determine if any provisions require interpretation to make out a prima facie case for negligence per se, the Court need only merely reference the CBA. A glance to the CBA reveals the NFL is not required provide medical care to the players and the claim is strictly regarding state and federal law violations. *See* Appendix. Although the CBA does not confer a duty or responsibility on the NFL to provide healthcare, a duty of care may arise through statute. *J'Aire Corp.*, 24 Cal. 3d at 803.

a. Federal and State Regulations conferred a duty upon the NFL.

The NFL's duty in handling and distributing controlled substances requires a certain standard of care and is considered by the following laws and regulations: the Controlled

Substances Act, 21 U.S.C. § 801 et seq.; the Food, Drugs, and Cosmetics Act, 21 U.S.C. § 301 et seq.; and the California Pharmacy Laws, Cal. Bus. & Prof. Code § 4000 et seq.

Controlled Substances Act

The Controlled Substances Act, authorizes the process of proper distribution of controlled substances. 21 U.S.C.A. § 829a (West). The act further regulates packaging, labeling, and distribution of controlled substances. 21 U.S.C.A. § 825 (West).

The Food, Drugs, and Cosmetics Act

The Food, Drugs, and Cosmetics Act regulates the distribution of drugs, inter alia. 21 U.S.C.A. § 331 (West). One of the prohibitions governed by the act includes failure to keep proper records of drug distribution. *Id*. Moreover, the regulation prohibits mislabeling and false representation of distributed drugs. *Id*.

California Pharmacy Laws

California has state laws which regulate similarly to the previously described federal regulations. Cal. Bus. & Prof. Code § 4000 (West). California state law regulates licensing, distribution, labeling, and proper procedures when handling controlled substances. *Id*.

Each federal and state regulation provides the rules governing the distribution and representation of controlled substances to patients. Due to the nature of the substances the regulations provide standards of care regarding their distribution. This Court should look to the CBA not to interpret but to determine the applicability of controlled substance within. The CBA does not confer any duty on the NFL for the actions of doctors and trainers concerning distribution of controlled substances.

With a lack of a legal duty provided by the CBA, the remaining elements of the negligence claim are breach, proximate cause, and damages. Each of the remaining elements are factual

questions which much be addressed by jury or judge. Searching the CBA for these determinations would be unaccommodating. The alleged violations are federal and state statutes and do not depend on how the CBA assigned duties among the teams, and the individual doctors. The CBA needs no interpretation or construction for establishing the defendant's obligatory standard of care owed to the players regarding the handling and distribution of controlled substances.

ii. The players' negligent hiring and retention claims are not preempted because they do not require interpretation of the CBA.

Narrowed beyond the familiar elements of negligence, negligent hiring and retention claims require a more specific showing. Liability of an employer to a third party for negligent hiring or retention may be found when an employee is incompetent or unfit. *Phillips v. TLC Plumbing, Inc.*, 172 Cal.App.4th 1133, 1139 (2009). There are two elements which show this duty: (1) "the existence of an employment relationship[;]" and (2) "foreseeability of injury." *Id.* at 1142. Legal duty to use reasonable care is a question of law for courts to decide and the elements of breach and causation are factual questions determined by the jury. *Vasquez v. Residential Inv., Inc.*, 118 Cal.App.4th 269, 278 (2004). Although, "causation may be a question of law if on undisputed facts there can be no reasonable difference of opinion on causal nexus." *Nichols v. Keller,* 15 Cal.App.4th 1672, 1687 (1993). The preemption determination does not address the merits of a claim and is only a view of whether the CBA needs interpretation for the claim to be addressed.

Reference to the CBA shows a lack of any provision requiring the NFL "to hire employees to treat players or oversee the distribution of medications." *Dent*, 902 F.3d at 1122. The CBA also lacks any requirement to hire or demand qualifications for the employees by which the complaint alleges were responsible for the distribution. *Id.* Therefore, the CBA is not and cannot be

preempted under Section 301 of the LMRA. *See Burnside*, 491 F.3d at 1059; *Ward v. Circus Circus Casinos, Inc.*, 473 F.3d 994, 999 (9th Cir. 2007).

The Fourteenth Circuit incorrectly held the CBA required interpretation for the negligent hiring and retention claim because the duty imposed for providing doctors and trainers is directed toward the individual clubs and not the NFL. An argument against any duty on the NFL due to their distinct position from the individual clubs may be examined under agency law, but such an argument is not for this Court to decide as a preemption issue.

The present case is similar to the Ninth Circuit decision in *Ward*, where the state law negligence claims were not preempted. In *Ward*, no interpretation was required because the CBA did not address procedures for the employees regarding the conduct of their employer. *Ward*, 473 F.3d at 998. The negligence complaints were wholly based on state law and the CBA did not include provisions which needed interpretation. *Id*. Analogous to the current case, the California state law claim requires no interpretation of the CBA to establish the elements of the negligent retention and hiring claim. Therefore, the Fourteenth Circuit erred in holding players' negligent hiring and retention claim was preempted.

iii. The players' negligent misrepresentation claim is not preempted because it does not require interpretation of the CBA.

Negligent misrepresentation claims, as with all tort claims, require the defendant to owe the injured party legal duty. *Eddy v. Sharp*, 199 Cal.App.3d 858, 864 (1988). In order to show the defendant negligently misrepresented, the plaintiff must prove "[m]isrepresentation of a past or existing material fact, without reasonable ground for believing it to be true, and with intent to induce another's reliance on the fact misrepresented; ignorance of the truth and justifiable reliance on the misrepresentation by the party to whom it was directed; and resulting damage." *Shamsian v. Atlantic Richfield Co.*, 107 Cal.App.4th 967, 983 (2003).

Other than the question of duty, the proof required under a negligent misrepresentation claim involves purely factual questions not to be addressed by the preemption analysis. *See Galvez v. Kuhn*, 933 F.2d 773, 778 (9th Cir. 1991). Therefore, we refer to the CBA again to determine if a duty is imposed on the NFL regarding the representation relating to distribution of controlled substances. The CBA addresses medical care, medical facilities, medical records, and an option to obtain a second medical opinion. *Dent*, 902 F.3d at 1123. None of these provisions relate to representation when there is a distribution of prescription drugs, therefore no interpretation of the CBA is necessary. *See Cramer*, 255 F.3d at 692. Thus, California state law is controlling on the merits of the claim.

The present case is dissimilar to *Williams* and *Atwater* because in each of those cases a provision of the CBA directly addressed and discouraged the actions taken by the players. *See Williams*, 582 F.3d at 868; *see Atwater v. NFL Players Ass'n*, 626 F.3d 1170, 1181 (11th Cir. 2010). In *Williams*, the players argued a duty was owed to them to disclose certain information relating to the banned substance list. *Williams*, 582 F.3d at 868. Nonetheless, the CBA required interpretation because it directly stated, "if you take these products, you do so AT YOUR OWN RISK!" and "a positive test result will not be excused because a player was unaware he was taking a Prohibited Substance." *Id.*

Atwater involved a claim against the NFL for negligence relating to background checks of financial advisers. *Atwater*, 626 F.3d at 1181. Again, unlike the current case, the CBA specifically addressed the matter in a provision stating players were "solely responsible for their personal finances." *Id.*

Unlike both cases, the CBA does not directly address any relief from a duty as it related to the representation of distributed controlled substances. The claim here is not alleging a duty to

disclose information regarding drugs, but instead is a claim of misrepresenting the drugs which were distributed. The distinction is important because reasonably relying on the representations made by the NFL regarding controlled substances is not addressed in the CBA and requires no interpretation.

B. State law fraud claims are not preempted by Section 301 of the LMRA.

The California State law claim for fraud is set out as a "(a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity . . . (c) intent to defraud, i.e. to induce reliance; (d) justifiable reliance; and (e) resulting damage." *Engalla v. Permanente Med. Grp., Inc.*, 15 Cal.4th 951, 974 (1997) (internal citations omitted).

Lastly, California defines fraudulent concealment as "concealment or suppression of a material fact; by a defendant with a duty to disclose[;] . . . the defendant intended to defraud[;] . . . plaintiff was unaware of the fact and would not have acted . . . if he or she had known[;] . . . and plaintiff sustained damage as a result . . . [.]" *Hambrick v. Healthcare Partners Med. Grp., Inc.*, 238 Cal.App.4th 124, 162 (2015).

i. The players' fraud and fraudulent concealment claims are not preempted because they do not require interpretation of the CBA.

Whether the NFL owed a duty to the players under claims of fraud and fraudulent concealment turn on a factual determination. *Dent*, 902 F.3d at 1123 (citing *Galvez v. Kuhn*, 933 F.2d 773, 778 (9th Cir. 1991) (noting the questions involved purely factual inquiries and the CBA was irrelevant to answering them). The determination is factual because if the NFL distributed controlled substances, as claimed, then they owed a duty to whomever they distributed. The CBA needs no interpretation because it does not provide a duty for the NFL to distribute drugs to players in any scenario. *Id*. at 1123. The CBA has provisions relating to medical care, but no provision

provides any duty on the NFL to distribute drugs or make representations. *Id*. Therefore, any duty the NFL owed to players based on the claim falls under the state law of California. *Id*.

This case is similar to *Garcia* because although no duty existed for an officer to make representations about the information communicated to another, his duty formed and heightened when he voluntarily made certain representations. *Garcia v. Super. Ct.*, 50 Cal.3d 728, 736 (1990). The court concluded the officer had a duty to use "reasonable care" when he offered the information. *Id*. The outcome is fact determinative because it depends on whether a material fact occurred prior to the determination of what duty existed, exactly like the fraud and fraudulent concealments claims here.

Each of players' claims involves state or federal law; none are inextricably intertwined with the CBA. Resolving the claims in either state or federal court would not threaten the proper role of grievance or arbitration because no provision in the CBA allocates the duties on the NFL which the federal and state laws apportion.

Finally, when looking to the factors California courts consider when evaluating general duty, the NFL has an uphill battle. Although many factors depend on facts which can only be known through discovery, looking to the pleaded claims provides guidance. It is foreseeable that harm would ensue from improperly distributing controlled substances to players in an effort to get them back on the field. There is a strong nexus between the NFL's conduct and the injury to the players. Strong policy reasons support reasons why the NFL must prevent situations like this from occurring in the future. This duty on the NFL will provide them with a sense of security for the wellbeing of current and future NFL players.

CONCLUSION

Because *Board of Regents* did not rule the NCAA's amateurism and eligibility rules valid as a matter of law, and because there is no preemption of any claim, this Court should respectfully reverse the Fourteenth Circuit decision and remand for further proceedings.

Respectfully submitted,

Team 11

Team 11

APPENDIX

ARTICLE 39
PLAYERS' RIGHTS TO MEDICAL CARE AND TREATMENT

Section 1. **Club Physician:**

(a) **Medical Credentials.** Each Club will have a board-certified orthopedic surgeon as one of its Club physicians, and all other physicians retained by a club to treat players shall be board-certified in their field of medical expertise. Each Club will also have at least one board-certified internist, family medicine, or emergency medicine physician (non-operative sports medicine specialist). Any Club medical physician (internist, family medicine or emergency medicine) hired after the effective date of this Agreement must also have a Certification of Added Qualification (CAQ) in Sports Medicine; any head team physician (orthopedic or medical) hired after the effective date of this Agreement must have a CAQ in Sports Medicine; and any current team physician promoted to head team physician after the effective date of this Agreement has until February 2013 to obtain a CAQ in Sports Medicine or relinquish the position.

(b) **Team Consultants.** All Clubs shall have the consultants with the following certifications:

(i) Neurological (head trauma): Board certification in neurosurgery, neurology, sports medicine, emergency medicine, or psychiatry, with extensive experience in mild and moderate brain trauma;

(ii) Cardiovascular: Board certified in cardiovascular disease;

(iii) Nutrition (athletes): licensed;

(iv) Neuropsychologist: Ph.D and certified/licensed.

(c) **Doctor/Patient Relationship.** The cost of medical services rendered by Club physicians will be the responsibility of the respective Clubs, but each Club physician's primary duty in providing player medical care shall be not to the Club but instead to the player-patient. This duty shall include traditional physician/patient confidentiality requirements. In addition, all Club physicians and medical personnel 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. All Club physicians are required to disclose to a player any and all information about the player's physical condition that the physician may from time to time provide to a coach or other Club representative, whether or not such information affects the player's performance or health. If a Club physician advises a coach or other Club representative of a player's serious injury or career threatening physical condition which significantly affects the player's performance or health, the physician will also advise the player in writing. The player, after being advised of such serious injury or career-threatening physical condition, may request a copy of the Club physician's record from the examination in which such physical condition was diagnosed and/or a written explanation from the Club physician of the physical condition.

(d) **NFLPA Medical Director.** The NFL recognizes that the NFLPA Medical Director has a critical role in advising the NFLPA on health and safety issues. Accordingly, the NFL agrees that the NFLPA Medical Director shall be a voting member of all NFL health and safety committees, including but not limited to the NFL Injury & Safety Panel and its subcommittees and shall have access to all of the same data,
records and other information provided to the NFL Medical Advisor and/or any other members of such committees.

(e) **Home Game Medical Coverage-Neutral Physician:** All home teams shall retain at least one RSI physician who is board certified in emergency medicine, anesthesia, pulmonary medicine, or thoracic surgery, and who has documented competence in RSI intubations in the past twelve months. This physician shall be the neutral physician dedicated to game-day medical intervention for on-field or locker room catastrophic emergencies.

Section 2. **Club Athletic Trainers:** All athletic trainers employed or retained by Clubs to provide services to players, including any part time athletic trainers, must be certified by the National Athletic Trainers Association and must have a degree from an accredited four-year college or university. Each Club must have at least two full-time athletic trainers. All part-time athletic trainers must work under the direct supervision of a certified athletic trainer. In addition, each Club shall be required to have at least one full time physical therapist who is certified as a specialist in physical therapy to assist players in the care and rehabilitation of their injuries.

Section 3. **Accountability and Care Committee:**

(a) The parties agree to establish an Accountability and Care Committee, which will provide advice and guidance regarding the provision of preventive, medical, surgical, and rehabilitative care for players by all clubs during the term of this Agreement. The Committee shall consist of the NFL Commissioner and the NFLPA Executive Director (or their designees). In addition, the Commissioner and Executive Director shall each appoint three additional members of the Committee, who shall be knowledgeable and experienced in fields relevant to health care for professional athletes.

(b) The Committee shall meet in person or by conference call at least three times per year, or at such other times as the Commissioner and Executive Director may determine.

(c) The Committee shall: (i) encourage and support programs to ensure outstanding professional training for team medical staffs, including by recommending credentialing standards and continuing education programs for Team medical personnel; sponsoring educational programs from time to time; advising on the content of scientific and other meetings sponsored by the NFL Physicians Society, the Professional Football Athletic Trainers Association, and other relevant professional institutions; and supporting other professional development programs; (ii) develop a standardized preseason and postseason physical examination and educational protocol to inform players of the primary risks associated with playing professional football and the role of the player and the team medical staff in preventing and treating illness and injury in professional athletes; (iii) conduct research into prevention and treatment of illness and injury commonly

experienced by professional athletes, including patient care outcomes from different treatment methods; (iv) conduct a confidential player survey at least once every two years to solicit the players' input and opinion regarding the adequacy of medical care provided by their respective medical and training staffs and commission independent analyses of the results of such surveys; (v) assist in the development and maintenance of injury surveillance and medical records systems; and (vi) undertake such other duties as the Commissioner and Executive Director may assign to the Committee.

(d) If any player submits a complaint to the Committee regarding Club medical care, the complaint shall be referred to the League and the player's Club, which together shall determine an appropriate response or corrective action if found to be reasonable. The Committee shall be informed of any response or corrective action. Nothing in this Article, or any other Article in this Agreement, shall be deemed to impose or create any duty or obligation upon either the League or NFLPA regarding diagnosis, medical care and/or treatment of any player.
(e) Each Club shall use its best efforts to ensure that its players are provided with medical care consistent with professional standards for the industry.

Section 4. **Player's Right to a Second Medical Opinion:** A player will have the opportunity to obtain a second medical opinion. As a condition of the Club's responsibility for the costs of medical services rendered by the physician furnishing the second opinion, such physician must be board-certified in his field of medical expertise; in addition, (a) the player must consult with the Club physician in advance concerning the other physician; and (b) the Club physician must be furnished promptly with a report concerning the diagnosis, examination and course of treatment recommended by the other physician. A player shall have the right to follow the reasonable medical advice given to him by his second opinion physician with respect to diagnosis of injury, surgical and treatment decisions, and rehabilitation and treatment protocol, but only after consulting with the club physician and giving due consideration to his recommendations.

Section 5. **Player's Right to a Surgeon of His Choice:** A player will have the right to choose the surgeon who will perform surgery provided that: (a) the player will consult unless impossible (e.g., emergency surgery) with the Club physician as to his recommendation regarding the need for, the timing of and who should perform the surgery; (b) the player will give due consideration to the Club physician's recommendations; and (c) the surgeon selected by the player shall be board-certified in his field of medical expertise. Any such surgery will be at Club expense; provided, however, that the Club, the Club physician, trainers and any other representative of the Club will not be responsible for or incur any liability (other than the cost of the surgery) for or relating to the adequacy or competency of such surgery or other related medical services rendered in connection with such surgery.

Section 6. **Standard Minimum Preseason Physical:** Each player will undergo the standardized minimum preseason physical examination and tests outlined in Appendix K, which will be conducted by the Club physician(s) as scheduled by the Club. No Club may conduct its own individual testing for anabolic steroids and related substances or drugs of abuse or alcohol.

Section 7. **Substance Abuse:**

(a) **General Policy.** The parties agree that substance abuse and the use of anabolic steroids are unacceptable within the NFL, and that it is the responsibility of the 173 parties to deter and detect substance abuse and steroid use and to offer programs of intervention, rehabilitation, and support to players who have substance abuse problems.

(b) **Policies.** The parties confirm that the Program on Anabolic Steroids and Related Substances will include both annual blood testing and random blood testing for human growth hormone, with discipline for positive tests at the same level as for steroids. Over the next several weeks, the parties will discuss and develop the specific arrangements relating to the safe and secure collection of samples, transportation and testing of samples, the scope of review of the medical science, and the arbitrator review policy, with the goal of beginning testing by the first week of the 2011 regular season. Pending agreement by both parties regarding the implementation of this program of blood testing, and such other policy amendments as the parties may agree upon, the Policy and Program on Substances of Abuse and the Policy on Anabolic Steroids and Related Substances, will remain in full force and effect as each existed during the 2010 season.