No. 09-214

In the

Supreme Court of the United States

Petitioner

JON SNOW, AND OTHER SIMILARLY SITUATED INDIVIDUALS;

v.

Respondent

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION; THE NATIONAL FOOTBALL LEAGUE

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

BRIEF FOR THE RESPONDENT

Team 18
Counsel for Respondent

QUESTIONS PRESENTED

I. Whether NCAA Eligibility Rules are subject to scrutiny under Section 1 of the Sherman Act.

II. Whether Plaintiffs' various state and common law negligence claims require interpretation of the NFL Collective Bargaining Agreement, triggering preemption pursuant to Section 301 of the Labor Management Relations Act of 1947.

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STATEMENT OF THE CASE

I. The Course of Proceedings Below

Jon Snow brought two separate suits in the Southern District of Tulania. (R. 13). The first sought to overturn National Collegiate Athletic Association (NCAA) Bylaw 12.5.2.1 under the Sherman Act; and the second a suit against National Football League (NFL) for negligently distributing and encouraging excessive painkiller prescriptions by league doctors. *Id.* The District Court consolidated the two claims in the spirit judicial efficiency. *Id.* Judge Lannin held in favour of Snow on both counts. *Id.* Upon appeal, the Fourteenth Circuit which reversed the District Court's opinion in favor of the NCAA and NFL. (R. 6, 11). Supreme Court of the United States granted Snow's timely petitioned for writ of certiorari. (R. 1).

II. Statement of Facts

Tulania University (Tulania), offers several extracurricular activities for its student body to participate in. (R. 13). One of which is the Tulania Greenwave Football Team (Greenwave). *Id.* Jon Snow a former student-athlete at Tulania, was the member of the Greenwave. *Id.* Snow had a successful three-year collegiate career as the Greenwave quarterback and was nominated for various awards for his achievements as a student-athlete. *Id.*

Apple Inc. (Apple) created an Emoji Keyboard as part marketing plan directed at college football fans. *Id.* The Emoji Keyboard was to feature Snow and other well-known college football players to promote college football and updated Apple products. *Id.* As part of the agreement with Apple, Snow received $3,500. After receiving complaints from other student-athletes, the head of compliance at Tulania notified the NCAA of Snow's acts. *Id.* Snow was then suspended by the NCAA indefinitely for violating NCAA Bylaw 12.5.2.1. *Id.* Incensed he was unable to continue his collegiate career, Snow declared himself eligible for the NFL draft. *Id.*

Within the year, Snow was drafted by the New Orleans Saints, a professional franchise in the NFL. *Id.* During his rookie season, Snow was prescribed painkillers by doctors and trainers to treat small head collisions and minor ankle injuries. *Id.* During his second season, Snow was diagnosed with an enlarged heart, permanent nerve damage in his ankle, and developed an addiction to painkillers. *Id.* Snow claims he was never given disclosure on the side effects and risks associated with each medication. *Id.* Snow, and other players who experienced similar treatment, were allegedly rushed back on to the field. *Id.*

III. Statement of Standards of Review

The United State Supreme Court will review both matters *de novo*. *O'Bannon v. National Collegiate Athletic Ass'n*, 802 F.3d 1049, 1061 (9th Cir. 2015).

SUMMARY OF ARGUMENT

This Court should affirm the Fourteenth Circuit's decision on both issues. First, NCAA eligibility rules are not subject to Section 1 of the Sherman Act because they are non-commercial. Even if this Court deemed eligibility rules to be commercial, Bylaw 12.5.2.1 survives the Rule of Reason. Second, the NFL Collective Bargaining Agreement (CBA) preempts plaintiffs' various negligence claims because the NFL's duty owed to the players directly arises from the CBA's provisions. Even if the NFL's duty existed independent of the CBA, resolution of the claims requires interpretation of its terms, and is thus inextricably intertwined with various provisions inherent in the CBA.

ARGUMENT

I. THIS COURT SHOULD AFFIRM THE FOURTEENTH CIRCUIT'S ORDER UPHOLDING NCAA ELIGIBILITY RULES AGAINST ANTITRUST SCRUTINY BECAUSE THEY ARE NON-COMMERCIAL IN NATURE AND SUPPORT THE AMATEURISM WITHIN THE NCAA.

In 1890, Congress enacted the Sherman Act to control the major concentrations of power which interfere with trade and diminish competition in the United States. Section 1 of the Sherman Act states in part that "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C.A. § 1. This Court outlined two types of antitrust inquiries; *per se* and the Rule of Reason. *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 8 (1979). Both are used by courts "to form a judgement about the competitive significance of the restraint." *Nat'l Soc'y of Prof'l Engineers v. United States*, 435 U.S. 679, 692 (1978). *Per* se violations are practices where the principal purpose of decreasing output and restricting competition are so evidently anticompetitive that they lack any redeeming virtue. *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211 (1899).

The Rule of Reason came about due to the sweeping language of the Section One restricting "every" agreement. *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1, 66 (1911). This Court held that a more thorough approach was needed to determine the legality of such practices. *Id. Chicago Board of Trade* further refined the inquiry, by stating that every agreement and regulation involving trade has a restraining effect, and pursuant to *Standard Oil*, only those which *unreasonably* restrict trade should be deemed illegal. *Bd. of Trade of City of Chicago v. United States*, 246 U.S. 231, 238 (1918) (emphasis added). Justice Brandeis explained the proper legal test is "whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition." *Id*. Once a restraint is not deemed illegal *per se*, courts apply "the structured Rule of Reason analysis."

A. NCAA Eligibility Rules Are Shielded from Antitrust Scrutiny Because They Are Non-Commercial.

United States antitrust laws are in place to govern commercial transactions and prevent restraints on free competition. *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 493 (1940). Inquiries under Section 1 of the Sherman Act are limited to the impact on competitive conditions of a given restraint. *Soc'y of Prof'l Engineers*, 435 U.S. at 690. Conduct will not be deemed a restraint of trade or commerce if does not repress "commercial competition in the marketing of goods or services." 310 U.S. at 495.

The NCAA engages in two types of activities to create its product of amateur college athletics. *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Oklahoma*, 468 U.S. 85, 117 (1984). In dealing with the NCAA's television plan limiting the number of games to be broadcast, *Board of Regents* delineated that because NCAA actions are not plainly anticompetitive or unreasonable *per se*, the proper inquiry is the Rule of Reason. *Bd. of Regents*, 468 U.S. at 692. Justice Stevens explained that most NCAA bylaws "were necessary to preserve the character and

quality of college football and were therefore procompetitive," due to their positive effect on consumer demand. *Id.* This Court put forward that rules governing athletic eligibility like requiting class attendance and barring student-athletes from being paid, fell into that procompetitive category, but a restraint limiting the number of games broadcast on television did not. *Id.*

Justice Stevens implied that NCAA eligibility rules were procompetitive and not subject to scrutiny under the Sherman Act, by citing to a case with approval, that said explicitly just that. *Id.* at 102 n. 24 (citing *Jones v. NCAA*, 392 F. Supp 295 (D.Mass.1975)) (holding because eligibility rules did not have any nexus to commercial or business activities engaged in by the NCAA, a plaintiff losing eligibility due compensation received while playing junior hockey did not have standing to sue because Section 1 does not apply to NCAA eligibility rules).

The Sherman Act only applies to NCAA rules if they are deemed to be commercial in nature. *Law v. Nat'l Collegiate Athletic Ass'n*, 134 F.3d 1010 (10th Cir. 1998) (bylaw restricting the earnings of basketball assistant coaches); *Worldwide Basketball & Sport Tours, Inc. v. Nat'l Collegiate Athletic Ass'n*, 388 F.3d 955 (6th Cir. 2004) (rule limiting the number of preseason tournaments a basketball team could participate in); *O'Bannon*, 802 F.3d 1049 (9th Cir. 2015) (NCAA rules limiting student-athlete compensation).

Eligibility rules do not fall into that category because they are not related to the NCAA's commercial or business activities and are meant to preserve the character of college athletics and the notion of amateurism. *Board of Regents*, at 102 n. 24; *McCormack v. Nat'l Collegiate Athletic Ass'n*, 845 F.2d 1338, 1345 (5th Cir. 1988) (NCAA eligibility rules create and allow for the survival of a distinct product despite commercial pressures); *Banks v. Nat'l Collegiate Athletic Ass'n*, 977 F.2d 1081, 1089-90 (7th Cir. 1992) (NCAA "no-draft, no-agent" rule is similar to other eligibility requirements and non-commercial); *Smith v. Nat'l Collegiate Athletic Ass'n*, 139 F.3d

180, 187 (3rd Cir. 1998), *vacated on other grounds by Nat'l Collegiate Athletic Ass'n v. Smith*, 525 U.S. 459 (1999) (holding the NCAA "Post-Baccalaureate Bylaw" eligibility rule was non-commercial because it was intended to ensure fair competition in intercollegiate athletics).

In determining whether Section 1 should apply to a certain NCAA regulation, courts look at the nature of the activity or rule, and not the plaintiff's alleged injuries. *Smith*, 139 F.3d at 185; *see Pugh v. Nat'l Collegiate Athletic Ass'n*, No. 115CV01747TWPDKL, 2016 WL 5394408, *3 (S.D. Ind. Sept. 27, 2016) (NCAA rules listed in the *NCAA Division I Manual* under "Academic Eligibility" are directly related to student eligibility and presumptively procompetitive). Moreover, the inquiry should focus on "whether the rule itself is commercial, not whether the entity promulgating the rule is commercial." *Bassett v. Nat'l Collegiate Athletic Ass'n*, 528 F.3d 426, 433 (6th Cir. 2008).

NCAA Bylaw 12.5.2.1 "Advertising and Promotions After Becoming a Student Athlete," is an eligibility rule and thus, non-commercial. Similar to the rule in *Smith*, the nature of Bylaw 12.5.2.1 is directly related to the NCAA objectives of preserving amateurism and fair competition. Though petitioner would liken the rule to those in *Law*, *Worldwide Basketball*, and *O'Bannon*, it is different from those rules because by all definitions Bylaw 12.5.2.1 is an eligibility rule. Like *Pugh*, Bylaw 12.5.2.1 was deliberately placed by the NCAA within the "Amateurism and Athletic Eligibility" section of the *NCAA Division I Manual*. It states:

> After becoming a student-athlete, an individual shall not be eligible for participation in intercollegiate athletics, if the individual: (a) Accepts any remuneration for or permits the use of his or her name or picture to advertise, recommend or promote directly the sale or use of a commercial product or service of any kind; or (b) Receives remuneration for endorsing a commercial product or service through the individual's use of such product or service.

2018-2019 NCAA Division I Manual § 12.5.2.1 at 76 (2018). Both the title and the language of the rule make clear that Bylaw 12.5.2.1 governs student-athlete eligibility and is meant to further the NCAA's commitment to amateurism.

Snow violated a rule that is neither commercial nor related to the NCAA's commercial activities. Bylaw 12.5.2.1 can be equated to the "no-draft, no-agent" rule in *Banks*, the "Post-Baccalaureate Bylaw" in *Smith*, and the sanctions handed down in *McCormack*. All four rules are designed to maintain amateurism by ensuring college football players are students first, like the rest of the student body pursuing academic degrees designed to prepare them for non-athletic employment opportunities. Most importantly, NCAA rules provide an opportunity for competition between amateur students pursuing a college degree. The preservation of amateurism through the prohibition of improper remuneration ensures that Snow and other student-athletes keep their status as amateurs.

Moreover, eligibility rules containing the mere possibility of some commercial effect have also been upheld as non-commercial. *Basset*, 528 F.3d at 433; *Adidas America, Inc. v. Nat'l Collegiate Athletic Ass'n*, 40 F. Supp. 2d 1275, 1281 (D. Kan. 1999) (rule limiting the size of commercial logos on uniforms was non-commercial). In *Basset*, the Sixth Circuit likened the rules governing the prohibition on improper inducements of student-athlete recruits and academic fraud, to the eligibility rules in *Smith* and found them to be "explicitly non-commercial." *Id.* The court went so far as to deem those rules anti-commercial. *Id.*

Bylaw 12.5.2.1 and the rules at issue in both *Basset* and *Adidas*, all involve the possibility of a commercial transaction. However, due to the NCAA's longstanding protection of amateurism, the purpose behind Bylaw 12.5.2.1 is also explicitly non-commercial. Petitioner will point to the broad definition of "commerce" used by the District Court to categorize this rule as commercial.

However, no student-athlete participating in Division I Football could anticipate any economic gain from their eligibility. There is a clear understanding between student-athletes and NCAA member institutions that athletics are an extracurricular activity designed to supplement the education student-athletes receive. Only a small number of student-athletes play Division I sports, and the percentage from that who are able to play their sport professionally is microscopic. Regardless of any ancillary commercial effects the rule may have, NCAA Bylaw 12.5.2.1 was designed specifically to protect amateurism, and therefore Snow violated a non-commercial eligibility rule.

Two recent cases in the Seventh Circuit took the language from *Board of Regents* even further and held that NCAA eligibility rules are presumptively procompetitive. *Agnew v. Nat'l Collegiate Athletic Ass'n*, 683 F.3d 328, 343 (7th Cir. 2012); *Deppe v. Nat'l Collegiate Athletic Ass'n*, 893 F.3d 498, 499 (7th Cir. 2018) (holding the NCAA "year in residence" transfer bylaw is a presumptively procompetitive eligibility rule). *Agnew* found the procompetitive presumption *Board of Regents* created was based on the necessary collusion by the NCAA for its product to exist and that this presumption applies to most if not all NCAA eligibility rules. *Agnew*, 683 F.3d at 342. Though the court ultimately held the presumption does not apply to a rule limiting the number of scholarships given and restricting athletic scholarship to one year, it explained the primary purpose of eligibility rules is to maintain the "revered tradition of amateurism in college sports" or the "preservation of the student-athletes in higher education." *Id*. Relying on *Agnew*, *Deppe* articulated that because the "year-in-residence" rule stops transfer students from essentially being traded from one school to another and is "clearly meant to help maintain the revered tradition of amateur college sports." *Deppe*, 893 F.3d. at 503.

Bylaw 12.5.2.1 is an eligibility rule granted the *Board of Regents* procompetitive presumption. Snow is challenging a rule with a definite procompetitive purpose because the primary purpose of Bylaw 12.5.2.1 is to both uphold amateurism in college athletics and protect student-athletes. This rule was enacted to prevent exactly what resulted from Snow's actions, the creation of a rift between student-athletes and the rest of the student body. The record demonstrates the improper compensation Snow received created dissention among his peers resulting in this suspension. Without Bylaw 12.5.2.1, the door would be open for companies to commercially exploit student-athletes and destroys the amateur status within the NCAA.

Thus, stare decisis requires that this rule too be held non-commercial in nature and exempt from antitrust scrutiny.

B. Even if NCAA Eligibility Rules Were Subject to Antitrust Scrutiny, They Would Survive A Rule of Reason Analysis.

Assuming NCAA eligibility rules are commercial and subject to Section 1 scrutiny, Bylaw 12.5.2.1 would be deemed procompetitive under the Rule of Reason. This analysis requires "the factfinder weigh all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition." *Cont'l T. V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49 (1977). If, on balance, the procompetitive effects outweigh the anticompetitive effects, the restraint is reasonable. *Id.* However, if the anticompetitive effects outweigh the procompetitive effects, the restraint is an unreasonable restraint of trade in violation of Section 1. *Id.*

The Rule of Reason is a burden shifting analysis. *See California Dental Ass'n v. F.T.C.,* 526 U.S. 756, 775 n. 12 (1999). First, the plaintiff must show the conduct in question has, or is likely to have, anticompetitive effects in a defined market. *Id.* If anticompetitive effects are shown, or likely, the burden shifts to the defendant to offer procompetitive justifications for the restraint. *Id.*

If the defendant is able to provide sufficient procompetitive effects, the burden shifts back to the plaintiff to demonstrate the restraint is nevertheless unreasonable because less restrictive alternatives are available to achieve the same results. *Id.* The fact finder then weighs the anticompetitive and procompetitive effects in light of any least restrictive alternatives provided. 433 U.S. at 49.

1. Jon Snow Did Not Suffer the Type of Injury the Sherman Act Was Enacted to Protect.

To meet its burden, the plaintiff must show a heightened level of injury "the type the antitrust laws were intended to prevent and that flow from that which makes defendants' acts unlawful." *Brunswick Corp. v. Pueblo Bowl–O–Mat, Inc.*, 429 U.S. 477, 489 (1977). The plaintiff must establish that the challenged restraint produces significant anticompetitive effects within a relevant market. *Banks*, 977 F.2d at 1094 (holding plaintiff did not prove any anticompetitive effects in a defined market); *Rock v. Nat'l Collegiate Athletic Ass'n*, No. 1:12-CV-1019-JMS-DKL, 2013 WL 4479815, *8 (S.D. Ind. Aug. 16, 2013) (concluding plaintiff did properly define a relevant market and identify anticompetitive effects). The alleged antitrust injury must be felt within the market and not just by the plaintiff himself. 977 F.2d at 1094.

Jon Snow has not suffered an antitrust injury. Snow could have utilized the defined market that was accepted in *Rock*, yet the record is void of Petitioner even attempting to define a relevant market. The lack of a defined market is evidence Bylaw 12.5.2.1 survives the Rule of Reason. Furthermore, similar to *Banks*, Snow has also failed to allege an anticompetitive impact because any injury he may have suffered is unique to him. Snow has not presented any evidence of any anticompetitive effects caused by Bylaw 12.5.2.1.

As a student athlete who had completed three years of eligibility, Snow's knowledge and understanding of the NCAA Manual, specifically the rules governing eligibility, can be strongly inferred. He did not suffer any harm because his eligibility was rightfully revoked. Snow deliberately violated NCAA Bylaw 12.5.2.1 when he agreed to participate in a trial run of Apple's new Emoji Keyboard. Shortly after the NCAA imposed Snow's punishment, he declared for the NFL draft and became a professional football player for the New Orleans Saints. Snow is part of the small class of student-athletes who are able to have a professional career in their given sport. By declaring for the NFL draft, Snow was no longer bound by the NCAA restrictions and could market himself and profit off of his name, image and likeness in any manner he chose.

Snow's claims that his suspension and revoked eligibility prevented him from competition, are not sufficient to plead anticompetitive effects in a relevant market, and therefore he has not been harmed in the manner requiring enforcement of the Sherman Act. Thus, his challenge of NCAA Bylaw 12.5.2.1 should fail.

2. There Are Viable Procompetitive Justifications for Bylaw 12.5.2.1.

Assuming Snow had alleged anticompetitive effects in a relevant market, and this Court continue to the next step of the Rule of Reason analysis, the NCAA's procompetitive justifications outweigh any anticompetitive effects the Bylaw may cause.

Two procompetitive justifications offered by the NCAA have consistently been accepted: the preservation of amateurism, and the integration of athletics with academics. *O'Bannon*, 802 F.3d at 1072. NCAA eligibility rules create a "particular brand of college football" derived from the integration of academics and athletics which makes college football more popular than traditional competitors to professional football. *Board of Regents*, 468 U.S. at 101-02. The fact that students are amateurs is a vital characteristic distinguishing college football from professional

football. 468 U.S. at 101-02. These two justifications aid the NCAA in maintaining its character and "enables a product to be marketed which might otherwise be unavailable." *Id.*

The NCAA offers amateurism and the integration of athletics with academics as procompetitive justifications for Bylaw 12.5.2.1. This is the precise rule that was discussed in both *Board of Regents* and *O'Bannon* as helping the NCAA create its own product, college football. Unlike a rule which caps the number of games to be broadcast on TV, or bars student athletes from receiving full cost of attendance in scholarships, Bylaw 12.5.2.1 is clearly meant to preserve the most important characteristic of the NCAA's unique product, that it is played by amateurs. By enacting and enforcing Bylaw 12.5.2.1, and stopping student-athletes from being paid, the NCAA is actively taking steps to protect its core value and ensure the integration of academics with athletics. If Snow was so eager to earn money from his football talent, he could have declared for the draft and done so legally.

3. A Least Restrictive Alternative is Not Available.

Any least restrictive alternative offered by the plaintiff must be virtually as effective in achieving the procompetitive benefits of NCAA rules without significantly increasing costs. *O'Bannon*, 802 F.3d at 1074. The plaintiff must keep in mind that this Court directed the NCAA be given "ample latitude" to regulate college athletics and protect amateurism. *Board of Regents,* 468 U.S. at 120.

In *O'Bannon* the Ninth Circuit struck down a least restrictive alternative that would permit schools to make cash payments to student athletes untethered to educational expenses. *Id.* at 1076. Giving student-athletes cash compensation above cost of attendance does not further the NCAA's goal of promoting amateurism because the fact that student-athletes are not paid is precisely what makes them amateurs. *Id.* at 1077.

The record lacks any evidence of a least restrictive alternative offered by Snow. Moreover, there is no least restrictive alternative to NCAA Bylaw 12.5.2.1 that furthers amateurism. The least restrictive alternative struck down in *O'Bannon* is nearly identical to Bylaw 12.5.2.1. The NCAA enacted this bylaw to further preserve amateurism within collegiate athletics and prevent student-athletes from receiving payments untethered to educational expenses. Apple's payment to Snow for use of his image and likeness in the Emoji Keyboard is exactly the type of payment the NCAA identifies as destroying amateurism. Apple approached Snow and other successful and well-known college football players because of their ability to be recognized with Apple's target consumers, and not for their success in the classroom. Therefore, Snow and the other college athletes were paid explicitly for use of their image and likeness, which they earned as student-athletes.

The evidence demonstrates NCAA Bylaw 12.5.2.1 does survive the Rule of Reason.

II. THIS COURT SHOULD AFFIRM THE FOURTEENTH CIRCUIT'S DECISION BECAUSE SOLVING THE PETIONERS' NEGLIGENCE CALIMS REQUIRES INTERPRETATION OF THE NFL COLLECTIVE BARGAINING AGREEMENT REGARDING THE STANDARD OF CARE THE INDIVIDUAL CLUBS MUST UPHOLD WHEN TREATING INJURIES OF ITS PLAYERS, AND THUS IS PREEMPTED BY SECTION 301 OF THE LABOR MANAGEMENT RELATIONS ACT OF 1947.

This Court should affirm the Fourteenth Court's decision because resolving each of the Petitioner's various negligence claims necessarily requires it to interpret several provisions of the CBA to establish the minimum standards of care that the NFL must adhere to when administering controlled substances. First, the NFL's common law duty owed to its players directly arises from the CBAs terms. Second, establishing whether the NFL breached its duty, alleged in these claims, necessarily requires this Court to interpret and construe the terms of the CBA and thus, resolving the negligence-based claims is "inextricably intertwined" with its terms, and therefore must be pre-empted by Section 301 of the Labor Management Relations Act of 1947.

A. This Court Established That Section 301 Preempts State Law Claims That Require Interpretation Of A CBA And Therefore Must Be Preempted.

Section 301 of the Labor Management Relations Act governs "[s]uits for violation of contracts between an employer and a labor organization[.]" 29 U.S.C. § 185(a). This Court has understood Section 301 as a "congressional mandate to federal courts to fashion a body of federal common law to be used to address disputes arising out of labor contracts." *Allis-Chalmers Corp v. Lueck*, 471 U.S. 202, 209 (1985). (quoting *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 461 (1957)). *Allis-Chalmers* concluded that Congress intended to enforce "doctrines of federal labor law uniformly to prevail over inconsistent state rules." *Id.* at 210. (quoting *Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 104 (1962)).

A suit in state court, alleging violations of provisions of a labor contract, must be brought under Section 301 and resolved under uniform federal law principles. *Id.* In essence, a state rule that attempts to define the "meaning or scope of a term in a contract suit" must be preempted by federal labor law. *Id.* However, whether arising out of a suit for breach of contract or a suit for liability in tort, federal law must uniformly govern questions relating to what the parties in a labor contract agreed to, and what legal consequences were intended to flow from breaches of these agreements. *Id.* at 211. To maintain this Congressional intent, this Court held that Section 301 preempts any state law claim where the resolution of that claim is "substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract." *Id.* at 220. (holding that the bad faith contract claim asserted under Wisconsin law required interpretation of the CBA, and therefore underlie any finding of tort liability because the tort claims were inextricably intertwined with the agreement); *but see Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 407 (1988) (holding that the factual inquiry set forth by the tort claim did not turn

on the meaning of any provision of a CBA and thus, resolution of the state law claim did not require "construing" the CBA).

Even if plaintiff has not alleged a breach of contract in their complaint, if the claim is grounded in the provisions of the labor contract or if it requires interpretation of it, it is preempted. *Burnside v. Kiewit Pacific Corp.,* 491 F.3d 1053, 1059 (9th Cir. 2007). *Burnside* established a two-part inquiry to determine whether or not a particular right "inheres in state law or instead, is grounded in a CBA." *Id.* First, the inquiry begins by considering the legal character of the claim as "independent of rights under the CBA as opposed to whether or not a grievance arising from the same set of facts could be pursued. *Id.* at 1061. Second, to determine whether a state law right is "substantially dependent" on the terms of a collective bargaining agreement, this Court is tasked with deciding whether the plaintiff's claim can be resolved by "looking to" versus "interpreting" the CBA. *Id.* If the claims resolution requires "interpretation" of the CBA, then it is preempted. *Id.* (holding that a wage claim regarding compensation for travel time existed as a matter of state law, independent of the terms of the CBAs, and ultimately can be resolved without interpreting the agreements). The plaintiff's claim is the touchstone of the analysis; the need to interpret the relevant CBA must be rooted in the nature of claim. *Cramer v. Consolidated Freightways, Inc.*, 255 F.3d 683, 691 (9th Cir. 2001). Merely alleging a hypothetical connection between the claim and the terms of the CBA does not qualify for preemption under Section 301; the interpretation argument must reach a "reasonable level of credibility." *Id.* at 692. (holding that plaintiffs' state law claims were not preempted by Section 301 because defendants "hypothetical exercise," resulted in mere consultation of the CBA).

B. The NFL's Duty Of Care Does Not Exist Independent From The Rights Under The CBA And Thus Assessing The Legal Character Of The Plainitffs' Negligence Claims Cannot Be Pursued Under State Law Principles.

The NFL is bound by the CBAs terms, that much is clear. The NFL is an unincorporated association of thirty-two independently operated football "clubs" or teams. *Williams v. Nat'l Football League*, 582 F.3d 863, 868 (8th Cir. 2009). The 2011 NFL Collective Bargaining Agreement was entered into between the National Football League Players Association ("NFLPA"), "which is recognized as the sole and exclusive bargaining representative of present and future employee players in the NFL" and the National Football League Management Council, which is recognized as the sole and exclusive bargaining representative of present and future employer member Clubs of the National Football League. *2011 NFL CBA*, Preamble. Additionally, the CBA states that "all players, clubs, the NFLPA, the NFL, and the NFL Management Council will be bound hereby," and that "the NFL shall be considered a signatory to this Agreement." *2011 NFL* CBA, Art 2 § 1.

Following the *Burnside* inquiry, this Court should first examine the legal character of the claims alleged and determine whether the rights exist as a matter of state law or if they are inherent in the terms of a CBA. 491 F.3d at 1059. Thus, this Court is charged with resolving the issue of whether the NFL's duty of care owed to its players exists as a matter of state law or directly from the terms of the CBA. Because the claims for relief are recognized under the common law of at least the state of California, the common law theories are taken at face value and analyzed as to whether or not the NFL's common law duty exists independent of the CBA.

California common law states, "all persons are required to use ordinary care to prevent others from being injured as a result of their conduct." *Rowland v. Christian*, 443 P.2d 561, 564 (Cal. 1968) (holding that the proper test to determine liability of a land possessor was whether he acted reasonably in managing his property in light of potential injuries to others). *Rowland* expressed a number of considerations when determining the requisite standard of liability and

revealed that the most important is "the foreseeability of harm to the plaintiff," to determine the reasonableness of certain conduct. *Id.* at 112-13. A duty of care may also arise through statute or by contract. *J'Aire Corp. v Gregory*, 598 P.2d 60, 62 (Cal. 1979) (holding that a duty may be established based off of the "general character of the activity in which the defendant engaged" or through "the relationship between the parties").

Aside from traditional notions of negligence, negligence per se is a doctrine and not an independent cause of action. *Quiroz v. Seventh Ave. Ctr.*, 45 Cal. Rptr. 3d 222, 244 (6th Cal. Ct. App. 2006). California allows for creation of a presumption of negligence if there is proof of a statutory violation. Cal. Evid. Code § 699(a); *see also Elsner v. Uvegas*, 102 P.3d 915, 927 (Cal. 2004). In claims grounded in negligence, this presumption gives statutes the ability to "establish duties and standards of care." *Id.* In turn, a defendant's violation of a statute gives rise to a presumption that they failed to exercise due care if they "violated a statute, ordinance, or regulation of a public entity," and the person who suffered the injury "was one of the class of persons for whose protection the statute, ordinance, or regulation was adopted." *Id.*

1. The NFL's Duty Of Care, Based On Foreseeability Of Harm, Directly Arises From The CBA.

No decision in any state has ever held that a professional sports league owed such a duty to intervene and stop mistreatment by the league's independent clubs. *Dent v. Nat'l Football League*, No. C 14-02324 WHA, 2014 WL 7205048 (N.D. Cal. Dec. 17, 2014), *rev'd and remanded*, 902 F.3d 1109 (9th Cir. 2018). The case law surrounding litigation against the NFL has established that determining the scope of the league's duty arises directly from the CBA. *Atwater v. Nat'l Football League Players Ass'n*, 626 F.3d 1170 (11th Cir. 2010); *see also Williams*, 582 F.3d at 863.

In *Atwater*, plaintiffs brought forth a variety of state-law negligence claims against the NFL alleging that it owed them a "duty to exercise reasonable care," and "to act reasonably and competently in the provision of information" while performing due diligence background checks on potential financial advisors. 626 F.3d at 1181-82. The court held that any duty the NFL owed to plaintiffs, to conduct investigations with reasonable care, directly arose from the CBA, because the NFL performed these background checks pursuant to the CBA mandated Career Planning Program which states, "the parties will use best efforts to establish an in-depth comprehensive Career Planning Program," which would include "providing information to players on handling their personal finances." *Id.* at 1182.

In *Williams*, plaintiffs, who tested positive for a banned substance, brought forth Minnesota state law claims, among other statutory violations, against the NFL, alleging that the NFL breached its common law duty to disclose information about a known banned substance. 582 F.3d at 881. The players asserted that this duty directly arose from Minnesota law that implicates the NFL as an employer who "voluntarily undertook" its actions. *Id.* However, the court held that NFL's duty directly arose from the CBA because determining whether the NFL owed the players a duty could not be ascertained without "examining the parties' legal relationship and expectations as established by the CBA," which incorporates the Policy on "Anabolic Steroids and Related Substances." *Id*; *but see Dent,* 902 F.3d at 1120 (holding that plaintiffs' statutory and common law claims were not preempted because distributing controlled substances is an activity that gives rise to a duty of care, and because the NFL distributed prescription drugs, it was required to follow the governing laws of the state). However, in *Williams*, the court held that the plaintiff's statutory claims were not preempted because a court would only need to compare the procedures that the NFL actually followed against the statute's requirements. *Williams*, 582 F.3d at 876; *see also Dent,*

902 F.3d at 1120 (holding that plaintiffs' statutory claims were not preempted because a court would only need to compare the NFL's conduct with the requirements of state and federal laws governing the distribution of prescription drugs to establish causation from the NFL's breach).

Here, plaintiffs' statutory and common law claims, alleging that the NFL violated its duty in its administration of controlled substances, are not independent of the CBA because establishing the scope of the NFL's duty directly arises from the CBAs terms. In *Atwater*, the court held that any duty the NFL owed to plaintiffs, to conduct financial investigations with reasonable care, directly arose from the CBA because the NFL carried out its duty to perform background checks by virtue of the CBA mandated Career Planning Program. 626 F.3d at 1181-82. Similarly, here, plaintiffs' various common law negligence claims allege that the NFL violated its common law duty of care, based on the foreseeability of harm, to hire and retain qualified, medically competent, specifically trained professionals, and to disclose the dangers of medications. However, Article 39 of the 2011 NFL CBA contains various provisions regarding "Players' Rights to Medical Care and Treatment," that place obligations on the individual clubs. *2011 NFL CBA*, Art. 39. Among these provisions are requirements that "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 filed or medical expertise." *Id.*, § 1. It also states, "All club physicians are required to disclose to a player any and all information about the players' physical condition," and "[i]f a Club physician advises a coach or other Club representative of a players' serious injury which significantly affects the players' performance or health, the physician will advise the player in writing." *Id.* These provisions set forth the obligations that the individual clubs must adhere to, establishing a clear standard of care when treating its players. Just as the *Atwater* court held that the NFL's duty of care arose directly from the CBA, this Court should similarly hold that the NFL's

duty of care to hire and retain qualified, medically competent, professionally objective and specifically trained professionals, as well as a duty to disclose the dangers of medications directly arises dfrom the rules prescribed in Article 39.

Determining the scope of the NFL's duty cannot possibly be ascertained without examining the relationship between the NFL, the Clubs, and the players as established by Article 39 of the CBA. In *Williams*, the court held that determining whether or not the NFL owed the players a duty, to provide a warning of a banned substance, could not be ascertained without "examining the parties' legal relationship and expectations as established by the CBA," which incorporates the Policy on "Anabolic Steroids and Related Substances." 582 F.3d at 881. Similarly, here, Article 39, which describes the qualifications of team doctors, the players right to a second medical opinion, and explicitly contains a policy regarding "Substance Abuse," that reads, "...it is the responsibility of the parties to deter and detect substance abuse." 2011 NFL CBA, Art. 39, § 1-2, 7. In addition, it establishes the formation of a "Care Committee" that shall "develop an educational protocol about the role of the players and the team medical staff in preventing and treating illness and injury." *Id.* § 3. Just as the *Williams* court held that determining the scope of the NFL's duty could not be ascertained without examining the parties' legal relationships outlined in the CBA, this Court should similarly hold that the duty owed by the NFL directly arises from the CBA because determining the scope of the NFL's duty is contingent upon examining relationship between the NFL, the Clubs, and the players as established by Article 39 of the CBA.

The opposition's argument from *Williams* and *Dent*, that there is no need to look at the CBA because comparing the facts and procedures of the NFL's administration of controlled substances with the state and federal statutes determines whether or not the NFL violated its duty of care, is without merit. In *Williams* and *Dent*, the courts ruled that the violation of the statutes

showed that the breaches of the alleged duties, were the proximate causes for the plaintiffs' injuries. 582 F.3d at 876; *see also* 902 F.3d at 1120. However, here, because it is established that the duty owed by the NFL *directly arises from the CBA*, this Court would need to interpret the CBA to determine whether or not the minimum standards of the statutes align with the minimum standards imposed on the NFL. (emphasis added). Because the scope of the NFL's duty can only be determined from interpreting the CBA, minimum standards must be established from the terms of the agreement, and not from the statutes alleged herein. Therefore, plaintiffs' negligence per se claims are preempted because resolving its merits does not exist independent from the CBA, but rather directly arises from the CBA's terms.

C. Plaintiffs' Negligence Claims Are Inextricably Intertwined With Several Provisions In The CBA Because Determining The Scope NFL's Duty Of Care Requires Interpretation Of Its Terms.

The second part a Section 301 preemption inquiry asks this Court to determine whether a state law claims' resolution requires "interpretation" of the CBA. *Burnside*, 491 F.3d at 1061. Paramount to establishing the proper degree of care owed by the NFL with respect to medical care and treatment of NFL players, and what was reasonable under the circumstances, is considering the pre-existing contractual duties imposed by the CBA on the individual NFL clubs concerning the general health and safety of NFL players. *Stringer v. Nat'l Football League*, 474 F. Supp. 2d 894, 910 (S.D. Ohio 2007). In *Stringer*, plaintiff brought negligence-based claims against the NFL for breaching its common law duty to exercise reasonable care in making sure that the NFL published "Hot Weather Guidelines" were complete and in accordance with the best practices established for minimizing the risk of heat related illness. *Id.* The court pointed towards two CBA provisions that implicated this duty of care as pleaded by the plaintiff. *Id.* The first implication was a provision that requires that "full time head trainers and assistance trainers be certified by the

National Athletic Trainers Association"; the second being a CBA provision which requires the team physician to inform a player in writing if he has a physical condition that will be "significantly aggravated by continued performance." *Id.* The court held that the resolution of plaintiff's claims was "inextricably intertwined" with the CBA because these provisions placed primary responsibility for identifying such conditions on the qualified team physicians and must be interpreted to determine the requisite degree of care owed by the NFL, and what was "reasonable under the circumstances." *Id.* at 911; *see also Smith v. Nat'l Football League Players Ass'n*, No. 4:14 CV01559, 2014 WL 6776306 at *8 (E.D. Mo. Dec. 2, 2014) (holding that plaintiffs' common law claims, alleging that the NFL violated its duty in the treatment of concussions, were preempted because various provisions of the CBA, regarding health and safety issues, revealed that the NFLPA has a duty to establish a committee that will advise and guide the provision of health care for players, and thus the justification for reliance on these advisory decisions is substantially dependent on interpretation of the CBA).

Similarly, in *Duerson v. Nat'l Football League, Inc.*, plaintiff brought suit on behalf of a former player, alleging that the NFL was liable for negligently causing his brain damage and subsequent death by failing to fulfil its duty to ensure safety. No. 12 C 2513, 2012 WL 1658353 at *4 (N.D. Ill. May 11, 2012). The court stated that evaluating the reasonableness of the defendant's conduct was vital in order to determine the standard of care that the defendant's conduct must meet. *Id.* at *3-4. (holding plaintiff's negligence claims were preempted because interpreting various CBA provisions implicated duties on the clubs to notice, and diagnose, player health problems and thus, revealed that the NFL may exercise a lower standard of care in that area); *but see Brown v. Nat'l Football League*, 219 F. Supp. 2d 372 (S.D.N.Y. 2002) (holding that plaintiffs' state law negligence claims against the NFL, for violating its duty of care regarding a

referee's in game tort, were not inextricably intertwined with the terms of the CBA because the documents that required interpretation to establish the guidelines for officiating were not incorporated into the CBA).

Petitioners' common law negligence claims are inextricably intertwined with various provisions in Article 39 of the 2011 NFL CBA regarding "Players' Rights to Medical Care and Treatment," because determining the reasonableness of the NFL's conduct requires interpretation of these terms. The *Stringer* and *Duerson* courts held that the resolution of plaintiff's claims was inextricably intertwined with the CBA, because various provisions placed primary responsibilities, to notice and diagnose player health problems arising from playing in the NFL, on the qualified team physicians, and ultimately required interpretation to determine the requisite degree of care owed by the NFL, and what was "reasonable under the circumstances." 474 F. Supp. 2d at 911; *see also Duerson*, No. 12 C 2513, 2012 WL 1658353 at *3-4. Similarly, here, Article 39 places various duties and obligations on the individual clubs to hire qualified personnel, to disclose the dangers of certain injuries to the players before returning to the field, and also implements a policy designed to prevent substance abuse. *2011 NFL CBA*, Art. 39, §1-4, 7. Additionally, Article 39 explicitly states that "Each Club shall use its best efforts to ensure that its players are provided with medical care consistent with professional standards for the industry," and also that "[a] player shall have the right to follow the reasonable medical advice given to him," but only after "consulting with the club physician and giving due consideration to his recommendations." *Id.* § 4. Here, just as the *Stringer* and *Duerson* courts held that plaintiffs' negligence claims were dependent on interpretation of the CBA because various provisions placed primary responsibility on the team physicians, and was needed to determine if the inaction by the NFL was "reasonable under the circumstances," this Court should hold that the 2011 NFL CBA is inextricably

intertwined with petitioners' negligence claims because Article 39 is necessary for interpretation to determine that the NFL's failure to curb the administration of controlled substances was reasonable.

CONCLUSION

Respondents respectfully request this Court affirm the Fourteenth Circuit's order on both issues. First, NCAA Bylaw 12.5.2.1 is an eligibility rule granted exemption from Section 1 of the Sherman because it is non-commercial, and even if this Court deemed the rule to be commercial Bylaw 12.5.2.1 would survive a Rule of Reason analysis. Second, Petitioners' negligence claims are preempted by the CBA because the scope of the NFL's duty of care arises directly from its terms, and ultimately requires interpretation of various provisions in order to resolve the merits of the claims.

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Respectfully submitted,

Team 18
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