No. 09-214

IN THE

SUPREME COURT OF THE

UNITED STATES OF AMERICA

JON SNOW,

And other similarly situated individuals;

Petitioner,

v.

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

Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES

COURT OF APPEALS FOR THE FOURTEENTH CIRCUIT

BRIEF FOR THE PETITIONER

Team 13

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QUESTIONS PRESENTED

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

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

STANDARD OF REVIEW

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

STATEMENT OF FACTS

John Snow is an NFL quarterback for the New Orleans Saints and former quarterback for Tulania University. After three years at Tulania, Snow was nominated for multiple awards for his athletic performance. Based on his success, Snow, and other successful college football players, were approached by Apple Inc. to participate in a trial for their new Apple Emoji Keyboard. This keyboard would use the players' names, images, and likeness (Hereinafter "NIL") to promote both college football as well as updated Apple products.

Snow and other college athletes entered into compensation agreements with Apple, paying the athletes $1,000.00 for the use of their likeness and an additional $1.00 royalty for each consumer download. By the end of the first trial term, Snow received approximately $3,500.00 for his participation. Cersei Lannister, the head of Tulania compliance, received numerous complaints from other student-athletes regarding Snow and Apple's compensation agreement. This agreement was reported to the NCAA, who in turn suspended Snow indefinitely claiming this agreement violates NCAA bylaw 12.5.2.1. Snow, joined by other student-athletes, sued the NCAA, alleging 12.5.2.1 violates Section 1 of the Sherman Act.

Snow entered the NFL draft and was selected by the New Orleans Saints, a professional football franchise. Snow performed well in his rookie season but did sustain small head collisions and minor ankle injuries. Snow was prescribed painkillers by doctors and trainers. In his second season, Snow was diagnosed with an enlarged heart and sustained permanent nerve damage in his ankle. Additionally, Snow developed an addiction to painkillers. Snow contends the NFL doctors never discussed the side effects and risks associated with this medication. Snow, joined by other NFL players, filed suit against the NFL, alleging they were prescribed these medications by the NFL, without being notified of the risks and side effects associated with

these medications, resulting in injury. Plaintiff's drafted three complaints against the NFL: Negligence Per Se, Negligent Hiring and Retention, and Negligent Misrepresentation.

Both of Snow's claims were consolidated in the interest of the judicial efficiency and were heard in the Tulania District Court. The District Court ruled that the NCAA's compensation can be brought to suit under the Sherman Act. Further, the District Court concluded that plaintiffs had shown they were injured in fact as a result of the NCAA 12.5.2.1, which foreclosed the market for their name, image and likeness. The NCAA appealed this decision, which was heard in the Fourteenth Circuit Court of Appeals. The Court of Appeals reversed the District Court's ruling regarding NCAA 12.5.2.1, holding that the NCAA's amateurism standards and bylaws are not in violation of the Sherman Act. In regard to the negligence claims against the NFL, the District Court held the plaintiffs' claims were not subject to preemption under LMRA §301. The NFL appealed the District Courts decision arguing that resolution of these claims would require interpretation of the CBA. The Fourteenth Circuit reversed the District Court's decision and held the plaintiffs' claims are preempted because resolution would require interpretation of the CBA.

ARGUMENT

I. THE NCAA AMATEURISM AND ELIGIBILITY BYLAWS ARE NOT PROTECTED AS A MATTER OF LAW, THEREFORE, SUBJECTING THEM TO SCRUTINY UNDER SECTION 1 OF THE SHERMAN ACT.

Section 1 of the Sherman Act states that "[e]very combination in the form of a trust or otherwise, or conspiracy, in the restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal." *15 U.S.C. §1 (2006)*. The question presented in this case is whether, the NCAA, who has long been sheltered from the Sherman Act by way of their amateurism principles and eligibility bylaws, specifically in this case NCAA Bylaw 12.5.2.1, is subject to antitrust scrutiny. The bylaw at issue, NCAA bylaw 12.5.2.1 states in relevant part "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 remunerations for endorsing a commercial product or service through the individual's use of such product or service." It is the position of the Petitioner that they are. The Petitioner asks this court to invalidate the ruling of the United States Court of Appeals for the Fourteenth Circuit and rule in favor of the District Court, finding that under Nat'l Collegiate Athletic Ass'n v. Bd. Of Regents, the NCAA bylaws are not valid as a matter of law and must be examined under a rule of reason analysis. 468 U.S. 85 (1984). In section I of this brief, the Petitioner will explore three arguments that refute the Respondent's appellate argument and present why the NCAA, is in fact, subject to antitrust scrutiny.

a. NCAA bylaw 12.5.2.1 is not valid as a matter of law because it has been previously misinterpreted by lower courts and is subject to the Sherman Act using a rule of reason analysis.

Although the NCAA argued that the ruling in Board of Regents shielded their eligibility and bylaws from antitrust scrutiny, in actuality, the ruling laid out what type of scrutiny should be applied when attempting to invalidate a bylaw under §1 of the Sherman Act. While a different bylaw was at issue in Board of Regents, the reasoning behind the court's decision should be decisive for the case at hand. In Board of Regents, the NCAA enacted rules that limited the exposure schools could face regarding national television airtime. 468 U.S. at 91-92. The rule stated, "All forms of television of the football games of NCAA member institutions during the Plan control periods shall be in accordance with this Plan." Id. The agreement gave complete controlling power to the NCAA with respect to negotiating and contracting with television stations. Id. The court found that those restraints had indisputable characteristics that had previously been held unreasonable. Id. at 99. "By participating in an association which prevents member institutions from competing against each other on the basis of price . . . the NCAA member institutions have created a horizontal restraint – an agreement among competitors on the way in which they will compete with one another. A restraint of this type has often been held to be unreasonable as a matter of law." Id.

While horizontal price fixing is usually condemned as a matter of law and held to be illegal *per se*, the court reasoned that some restraints by the NCAA are valid as it is "reasonable to assume that most of the regulatory controls of the NCAA are justifiable means of fostering competition among amateur athletic teams." Id. at 119. However, this does not mean that all rules promulgated by the NCAA are valid as a matter of law, simply because they are masked as rules attempted to "foster competition." The court implies quite the opposite. The court opined

that while horizontal agreements are usually per se illegal, rules by the NCAA with clear horizontal agreements should not be condemned in the same manner. Instead, they should be subject to Section 1 of the Sherman Act and scrutinized using a rule of reason analysis. In the Board of Regents opinion, the court writes "despite the fact that this case involves restrains on the ability of member institutions to compete in terms of price and output, a fair evaluation of their competitive character requires consideration of the NCAA's justification for the restraints." Id. at 103. This is the rule of reason simplified. Nothing in the above language or the opinion in Board of Regents leads one to believe that an exception exists to the NCAA eligibility bylaws. The only apparent exception is that the horizontal restraints the NCAA enacts are not automatically deemed illegal per se but must survive a rule of reason balancing test.

In Banks v. Nat'l Collegiate Athletic Ass'n, Braxton Banks was a star football player for the University of Notre Dame and decided to enter the NFL draft in 1990. 746 F. Supp. 850, 856 (N.D. Ind. 1990). After declaring for the NFL Draft and going undrafted, Banks attempted to return to Notre Dame to complete his final season of college. Id. However, according to NCAA bylaw 12.2.4 and 12.3, Banks was now ineligible to play at the collegiate level as he had lost his status as an amateur by entering the NFL draft. Id. at 855. The reason this case is of great significance to the current issue comes from the analysis the court used in deciding whether or not these bylaws are subject to antitrust scrutiny. The NCAA here would like this court to believe that the holding in Board of Regents shields all NCAA bylaws, as they are valid as a matter of law. However, the court in Banks reasoned that this was not the intended consequence of Board of Regents. After quoting heavily from Board of Regents, the Banks court stated "[i]t does not appear, however, that this language was intended to mean that such activities are not subject to the Sherman Act. Instead, it appears that the Court was explaining its decision to apply

the Rule of Reason to the television plan rather than finding it to be a *per se* violation of the Sherman Act." Id. at 857.

When this court ruled in favor of the NCAA in Board of Regents, only the specific television rules were deemed reasonable. Their opinion did not provide a blanket exception for all other NCAA bylaws. To the contrary, each bylaw must be individually examined to determine its legitimacy under traditional antitrust scrutiny. The NCAA asks the court to create a sweeping new exception to antitrust law that, if adopted, would progressively swallow antitrust law entirely. There is no such thing as "valid as a matter of law," nor should there be. NCAA bylaw 12.5.2.1 must be analyzed under a rule of reason analysis and is not exempt from antitrust scrutiny under Section 1 of the Sherman Act.

b. The NCAA's status as a nonprofit organization is of no consequence when deciding if their bylaws should be subject to antitrust scrutiny under Section 1 of the Sherman Act as the NCAA engage in commercial activities.

For decades, the NCAA has long held the position that they are immune from antitrust litigation because they are a nonprofit organization conducting non-commercial activities for the purpose of promoting and preserving their brand of amateur athletics. In support, the NCAA has consistently relied on cases that have been misinterpreted to buttress their position that they are immune from the Sherman Act.

In Coll. Ath. Placement Serv. v. NCAA, the plaintiff brought suit against the NCAA in an attempt to enjoin the NCAA from enforcing an amateurism bylaw that prevented student athletes from paying companies that assisted with the finding of scholarship opportunities. Civil Action 74-1144., 1974 U.S. Dist. LEXIS 7050 (D.N.J. Aug. 22, 1974). In its holding, the court reasoned that the plaintiff's challenge did not fall within the "purview of the Sherman Act" as the bylaws served the purpose of "preserving educational standards in its member institutions." Id. at 10.

Following the decision in College Athletic Placement, in the NCAA again attempted to shelter its bylaws from the "purview" of the Sherman Act. Jones v. NCAA, 392 F. Supp. 295 (D. Mass. 1975). There, the dispute centered around whether the NCAA could deem a college hockey player ineligible based on the player's previous acquisition of an athletic stipend. Jones, 392 F. Supp. at 296. The court concluded that the plaintiff could not bring suit under the guise of the Sherman Act because the NCAA's rule banning the plaintiff was an eligibility guideline and was not shown to have "any nexus to commercial or business activities in which the defendant might engage." Id. at 303. Therefore, since the rule was deemed noncommercial, no Sherman violation existed.

The NCAA's position was again erroneously fortified in the holding from Gaines v. Nat'l Collegiate Athletic Ass'n, 746 F. Supp. 738 (M.D. Tenn. 1990). In Gaines, the court found for the NCAA, holding that a player who had entered the NFL Draft, but now wished to return to the collegiate level, could not bring a Sherman Act challenge. In its analysis, the court created an imaginary bifurcated test to use when determining the commercial scope of NCAA bylaws. The court divided NCAA bylaws into "business rules" and "eligibility rules", differentiating the television restrictions from "most of the regulatory controls of the NCAA [which] are justifiable means of fostering competition among amateur teams and therefore procompetitive because they enhance public interest in intercollegiate athletics." Id. at 747 (quoting Board of Regents, 468 U.S. at 117). However, there seems to be little evidence that this bifurcated test has produced any meaningful or thoughtful analysis on the matter. As District Judge Lannin states in his opinion, "[t]he mere fact that a rule can be characterized as an 'eligibility rule,' however, does not mean the rule is not a restraint of trade, were the law otherwise, the NCAA could insulate its member schools' relationships with student-athletes from antitrust scrutiny by renaming every rule . . . an

'eligibility rule.'" (R. at 18). Unfortunately, the NCAA has insulated itself, its member schools, and their bylaws from antitrust scrutiny by engaging in exactly what Judge Lannin eluded too.

Standing alone, these cases seemingly provide a strong foundation in support of the NCAA's longstanding history of being excluded from antitrust scrutiny. However, they all suffer from incorrect analysis, misapplication and faulty reasoning.

In Goldfarb v. Va. State Bar, 421 U.S. 773 (1975), this Court implicitly overruled College Athletic Placement Service confirming "the exchange of . . . a service for money is 'commerce' in the most common usage of that word." In Goldfarb, a challenge was brought against the Virginia Bar Association's minimum fee schedules for certain legal services. This Court rejected the bar association's argument that its conduct was exempt from antitrust scrutiny because of its nonprofit status or because of its focus on the noncommercial goal of regulating the ethics of the legal profession. Id. at 787. In finding that the bar association was subject to the Sherman Act, this Court stated "[t]he nature of an occupation, standing alone, does not provide sanctuary from the Sherman Act, nor is the public service aspect of professional practice controlling in determining whether §1 includes professions." Id.

Another common misconception from the aforementioned cases centers on the scope of the court's analysis regarding whether the NCAA bylaws regulate commercial activity. Courts have continuously limited their scope to the specific bylaw when determining if the conduct is a regulation of commercial activity. For example, in Jones, the court held that the bylaw at issue had no "nexus to commercial or business activities in which the defendant might engage." Jones, 392 F. Supp. at 303. However, this Court held in McLain v. Real Estate Board of New Orleans, Inc., that "[p]etitioner's need not make the more particularized showing of an effect on interstate commerce caused by the alleged conspiracy," only that there has been a "substantial effect on

interstate commerce." 444 U.S. 232, 242 (1980). In sum, courts must look at the totality of the NCAA's dealings and be wary of tunnel vision when assessing the NCAA's bylaws.

Furthermore, many of the decisions previously noted seem to misconstrue, or fail to understand, the magnitude of the NCAA and its commercial outreach. Previous decisions have been predicated on the belief that the NCAA offers extracurricular activities similar to a chess club or a debate team would. This belief flies in the face of reason as the NCAA's sheer size and economic power is all too often ignored. Contrary to these relatively small programs, "intercollegiate athletics in its management is clearly business, and [a] big business at that." Hennessey v. NCAA, 564 F.2d 1136, 1150 (5th Cir. 1977).

The eligibility rules prevent student-athletes from realizing their full market potential when entering college as their economic value is rigidly set at zero. Even worse, the eligibility rules prevent student-athletes from realizing their full market potential while in school as they are prohibited from profiting off of their "NIL." The eligibility rules clearly regulate commercial activity. Student-athletes promise to use their respective skills in a sport for NCAA member institutions in return for a scholarship, room and board, consequently, "the transactions between NCAA schools and student-athletes are . . . commercial in nature, and therefore take place in a relevant market with respect to the Sherman Act." Agnew v. NCAA, 683 F.3d 328, 341 (7th Cir. 2012).

Finally, the NCAA recruits nationally, televises games nationally, and charges ticket prices for admission into multi-million-dollar stadiums. Additionally, student-athletes exchange his or her labor for scholarship compensation. It is evident the NCAA is a commercial entity and while they attempt to veil their rules as "eligibility rules," they are nevertheless subject to antitrust scrutiny. The NCAA claims that it is a nonprofit organization engaging in

noncommercial activities and their bylaws are not business related, however, the revenue it generates, its prohibition against students from profiting off their talents and its commercial outreach nationally starkly contrasts that notion.

c. NCAA Bylaw 12.5.2.1 is a restraint on trade constituting illegal wage fixing, despite student-athletes not being considered traditional employees.

Tenth Circuit precedent illuminates our path when assessing whether NCAA Bylaw 12.5.2.1 is an illegal restraint on trade, more specifically wage fixing. Wage fixing involves any agreement by two or more employers to set the compensation rate of workers at a pre-specified amount. John H. Johnson, Jess David & Paul A. Torelli, Empirical Evidence and Class Certification in Labor Market Antitrust Cases, 25 ANTITRUST 60, 63 (2010). Courts have found wage fixing to be illegal as it harms workers in their search for greater economic opportunities and can stifle competition within a market. The D.C. Circuit analogizes wage fixing as it relates to athletes stating, "[a]thletic prowess is, of course, a unique and highly specialized resource, of precisely the genre vulnerable to monopsony manipulation." Brown v. Pro Football, 50 F.3d 1041, 1061 (D.C. Cir. 1995).

Applying these principles, the Tenth Circuit held in Law v. NCAA, that the NCAA's attempts to put a cap on assistant coaches salaries constituted illegal wage fixing as the cap did not enhance competition or the product of college football, but was seemingly done as a "cost-cutting measure." 134 F. 3d 1010, 1024 (10th Cir. 1998). However, the NCAA has long held that, unlike coaches at NCAA member institutions, student-athletes are not employees, therefore, cannot bring a challenge against the NCAA on the grounds of illegal wage fixing. This previously long-standing principle must be refuted as inconsistent with the reality of a student-athlete. Student-athletes devote on average 43.3 hours per week to their respected sport, which is more time than the average worker in the United States devotes to their respected profession.

Michael H. LeRoy, An Invisible Union for an Invisible Labor Market: College Football and the Union Substitution Effect, 2012 WIS. L. REV. 1077, 1099 (2012). Additionally, "student-athletes seem to meet the Internal Revenue Service's multifactor test for employment because NCAA coaching staffs exercise year-round behavioral controls over student-athletes and impose strict limits on their outside financial activities." Id. at 1094-95.

The NCAA has been able to engage in horizontal price fixing under the notion that student-athletes are not employees for far too long. Alarmingly, there is precedent to suggest that the NCAA coined the term "student-athlete" in a direct attempt to avoid antitrust litigation: "[b]y creating and fostering the myth that . . . players at Division I universities are something other than employees, the NCAA and its member institutions obtain the astonishing pecuniary gain and related benefits of the athletes' talents, time, and energy . . . [t]he advantages to these institutions from fixing and suppressing labor costs . . . have enabled them to reap a fantastic surfeit of riches." Robert A. McCormick & Amy Christian McCormick, The Myth of the Student-Athlete: The College Athlete As Employee, 81 WASH. L. REV. 71, 74 (2006). These factors, coupled with the obvious horizontal restraint on trade that takes place among member institutions expressly rebuts the presumption that the student-athletes cannot bring a claim under the guise of the Sherman Act as they are not employees.

d. NCAA Bylaw 12.5.2.1 does not promote the product of college sports and the ideals of amateurism.

On numerous occasions throughout its opinion, the Appellate Court incorrectly accords too much significance to the idea that the NCAA bylaws that have been challenged throughout the years are necessary "to promote amateurism in college sports and to integrate intercollegiate athletics into the educational programs of its member institutions. (R. at 6) (quoting Jones, 392 F. Supp. at 304). NCAA's amateurism bylaw, as codified in the official NCAA manual states that,

"student-athletes shall be amateurs in intercollegiate sport, and their participation shall be motivated primarily by education and by the physical, mental and social benefits to be derived." 2018–19 NCAA Division I Manual § 2.9, at 4 (2018). Furthermore, the Appellate Court incorrectly quotes case precedent which states bylaws promulgated by the NCAA are "primarily procompetitive . . . and preserve the distinct 'product' of major college football as an amateur sport." (Id.) (quoting Gaines,746 F. Supp. at 746-47). An empirical study of these commonly held notions refutes the idea NCAA bylaws, specifically Bylaw 12.5.2.1, are in place to promote amateurism and the brand of college football.

A former NCAA executive director admitted that no compensation bylaws were rejected, in the effort to further the product of college sports on the field, but "that financial concerns are the primary reason for rejecting proposals to pay college-athletes a stipend." Lee Goldman, Sports and Antitrust: Should College Students Be Paid to Play, 65 NOTRE DAME L. REV. 206 (1990). Promoting the brand of college sports or furthering the principle of amateurism seems to take a backseat to the NCAA's financial aspirations. These rules cannot be primarily tailored to promote collegiate athletics among the viewing audience, because numerous schools have violated NCAA bylaws, yet continue to thrive in terms of revenue and exposure. Sherman Act Invalidation of the NCAA Amateurism Rules, 105 HARV. L. REV. 1299, 1312 (1992). "The public knows these violations occur, but the product of college sports in the economic marketplace continues to increase in popularity. As one commentator has noted, '[i]t would be naïve to suppose that simply the *pretense* of maintaining the amateur ideal is essential to continuing the current system.'" Id. Despite 57% of the 106 NCAA Division I-A football teams over the past 10 years violating the limited compensation rule, the NCAA continues to dominate financially and continues to expose itself to almost every household in America. Id. at 1313. In

fact, at least two instances have been found where demand went up after violations had been found to take place. Id.

It would seem evident that the principle of amateurism and the idea that NCAA bylaws are promulgated in order to benefit the student-athletes must be flatly rejected. When schools do comply with the no compensation bylaws, their student-athletes are exploited and used as a commodity and not as a human being. Instead of "under-the-table" dealings, which have increasingly become prevalent throughout the years, allowing compensation to students would provide a secure avenue, where student-athletes could market their "NIL," and would also provide for an equitable return of financial resources to the student athletes. In order to promote amateurism and fairness, student-athletes must be viewed as equal members in what is an ever-growing and ever-expanding collegiate athletic market and not as a pawn in the NCAA's robust financial mechanism.

II. THE UNITED STATES COURT OF APPEALS FOR THE FOURTEENTH CIRCUIT COURT IMPROPERLY FOUND THAT THE STATE COURT CLAIMS OF NEGLIGENCE PER SE, NEGLIGENT HIRING AND RETENTION, AND NEGLIGENT MISREPRESENTATION BROUGHT AGAINST THE NFL ARE PREEMPTED BY THE LABOR MANAGEMENT RELATIONS ACT.

Section 301 of the Labor Management Relations Act (LMRA) governs "suits for the violation of contracts between an employer and a labor organization." *29 U.S.C. 185(a).* The legislative intent of §301 is to safeguard that primacy of grievance and arbitration as the forum for resolving disputes arising out of Collective Bargaining Agreements (CBA) and to impose substantive federal law within that forum. Alaska Airlines Inc. v. Schurke, 898 F.3d 904, 920 (9th Cir. 2018)(en banc). Thus, rights and duties created through the CBA will typically supersede remedies provided by state law due to inconsistencies in local rules. Teamsters v. Lucas Flour Co., 369 U.S. 95, 104 (1962). However, §301 preemption only extends as far as

necessary to protect the role of arbitration in the resolution of CBA disputes. Schurke, 898 F.3d at 913-14. Thus, state-claims and preemption under §301 must be analyzed under a two-step inquiry. The Appellate Court's holding that Petitioners' negligence-based claims are preempted must be reversed for two reasons. First, the Appellate Court misapplied §301 precedent as they held that "if there is any need to look into the CBA at all" state law claims are preempted. (R. at 11). Second, Supreme Court precedent states the contents of a plaintiff's claim is the "touchstone" for preemption analysis under §301. Cramer v. Consol. Freightways, Inc., 255 F.3d 683, 691 (9th Cir. 2001). Here, the Appellate Court fails to adjudicate the claims brought by the Petitioners' and transforms the content of these claims to the benefit of the Respondents.

a. The Appellate Court erred as a matter of law in its application of Labor Management Relations Act §301, as the need to "look into the CBA at all" does not necessitate preemption.

Although the Appellate Court correctly applied the first prong of this test, they failed to apply the proper law regarding the second prong of the test. Thus, the Appellate Court's decision must be reversed, and the holding of the District Court must be affirmed as a matter of law.

The first prong of this test is to determine the legal nature and source of the right being asserted. State law claims based directly on rights created by a CBA, will be preempted under §301. Caterpillar, Inc. v. Williams, 482 U.S. 386, 394 (1987). When this occurs, the claim must be resolved subject to the terms of the CBA. Burnside v. Kiewit Pc. Corp., 491 F.3d 1053, 1059 (9th Cir. 2007). Conversely, claims where rights exist independent of the CBA, may escape preemption but only if the second prong of the test is satisfied.

The second prong requires that the claim must be resolved without interpretation of the CBA. If interpretation of the CBA is required, preemption will result under §301. Schurke, 898

F.3d at 924. The court in Schurke states "interpretation" is narrowly construed to mean more than "consider," "refer to," or "apply to." Id. at 921. Thus, there must be more than a potentially relevant or hypothetical connection between the state claim and the CBA to result in preemption. Id.

The question of preemption is an inquiry into the legal character, not the merits, of the claim to ensure that the dispute will be decided in the appropriate forum. Id. at 924. Preemption will not result in claims where the rights at issue are "conferred by state law, independent of the CBAs" and "the matter at hand can be resolved without interpreting the CBAs." Burnside, 91 F.3d at 1058. Therefore, the Appellate Court erred as a matter of law when it held that any need to "look into" the CBA at all, will preempt state law claims under §301. (R. at 11).

b. The Appellate Court failed as a matter of fact to adjudicate the Petitioners' Negligence-Based claims as originally pled, resulting in the misapplication of §301 analysis.

The Appellate Court incorrectly asserts the essence of the Petitioners' claims are that individual clubs mistreated their players and the NFL was negligent in failing to stop this mistreatment. (R. at 8). Petitioners' negligence claims are not based on the premise that individual clubs mistreated their players. Rather, Petitioners' assert the NFL is directly liable for its own doctors, not individual club doctors, for negligent distribution and encouragement of excessive pain killers and prescriptions. (R. at 22-23). Further, Petitioners' claim that the NFL is liable for the negligent hiring and retention of their employee doctors and responsible for the negligent misrepresentations made during the dispensation of these painkillers. **(**R. at 24). Petitioners' allege their injuries were caused by the NFL's "provision and administration" of controlled substances, which failed to comply with the regulations set forth in the Controlled

Substances Act, *21 U.S.C. §801 et. seq.;* and the Food, Drugs, and Cosmetics Act, *21 U.S.C. §301 et. seq.* (R. at 22).

Petitioners' claims are aimed directly against the NFL, not against individual clubs. The character of a claim is of paramount importance in the preemption analysis. The Appellate Court impermissibly deconstructed Petitioners' well pled complaints and converted them into something more favorable to the NFL. Although the Petitioners' could have organized their complaint to allege individual clubs and their doctors were negligent, they were not required to, nor did they. The claims are directly against the NFL and those are the claims the Appellate Court should have adjudicated. In conclusion, had the Appellate Court analyzed the Petitioners' claims as they were drafted, these claims would not be subject to preemption under §301.

c. LMRA §301 does not preempt any of the Petitioners' Negligence-Based claims because the rights asserted are independent of the CBA, they are not inextricably intertwined with the CBA, nor do they require interpretation of the CBA.

The Appellate Court improperly held that the negligence-based claims surrounding the NFL's practice in the prescription of pain killers was preempted by the CBA. There were no issues raised in the opinion regarding the rights asserted by the Petitioners being independent of the CBA as the duty was derived from federal and state statutes to establish a minimum standard for the duty of care owed under the common law theory of negligence. (R. at 9). The primary issue addressed by the Appellate Court was whether the resolution of this claim would require interpretation of the CBA. The Appellate Court incorrectly determined that these claims are preempted because they cannot be resolved without looking to the CBA. (R. at 11). As previously stated, the need to look to the CBA alone does not result in preemption. Precedent expressly states, "the need for a purely factual inquiry" that "does not turn on the meaning of any provision of a CBA…is not cause for preemption." Burnside, 491 F.3d at 1072. For preemption

to be triggered there must be interpretation of the terms of the CBA. Here, the only need to refer to the CBA is to determine whether these issues are addressed, which they are not. This Court has held that merely consulting a CBA for a factual inquiry does not constitute "interpretation." Livadas v. Bradshaw, 512 U.S. 104, 125 (1994).

For a plaintiff to state a claim for negligence, the plaintiff must establish for elements: duty; a breach of that duty; causation and damages. R. at 21. The merits of the claim are not before the Court today, as this is a question for the fact finder. Rather, the issue before this Court is whether the NFL had a legal duty to maintain the standard of care in prescribing medication. Establishing a duty may arise through statute or by contract. J'Aire Corp. v. Gregory, 24 Cal.3d 799, 801 (1979). The CBA only imposes a duty on individual team doctors, not doctors employed by the NFL, thus, Petitioners' do not contend that the NFL's duty arose from contract. (R. at 22). Based on both state and federal regulations, which establish a minimum standard of care in the practice of prescribing medication, the NFL has a duty to conduct this activity consistent with these regulations. Therefore, the duty is independent of the CBA, thus satisfying the first prong of the preemption test. The second prong requires the claims be resolved without interpretation of the CBA. Here, since the standard of care is established by federal and state law, and there is no provision of the CBA concerning the NFL and prescriptions, there is no need for interpretation. (R. at 23). Due to the fact the Petitioners' Negligence Per Se claim is independent of the CBA and because a minimum standard is established by both federal and state law, there is no need to interpret the CBA. Therefore, as a matter of law, Petitioners' Negligence Per Se claim is not subject to preemption under §301.

The Appellate Court erred in finding the Petitioners' claim for negligent hiring and retention against the NFL is preempted by §301. To bring this claim, a plaintiff must establish

the same elements of negligence: duty, breach, causation and damages. However, for purposes of a negligent hiring, in order to satisfy that a duty exists, a plaintiff must show the existence of an employer/employee relationship and foreseeability of injury. Phillips v. TLC Plumbing, Inc., 172 Cal.App.4th 1133, 1137 (2009).

Both the Respondents and Appellate Court cite provisions of the CBA that provide each 'independent club' is required to retain a board-certified surgeon as well as a full-time athletic trainer certified by the National Athletic Trainers Association. (R. at 8-9). The Appellate Court concludes preemption is necessary because interpretation of the CBA is necessary to resolve this claim. This again is unfounded because Appellate Court misconstrues the essence of the claim. Petitioners' do not argue that the NFL is negligent for the hiring and retention of "individual club" doctors, which is addressed in the CBA. Rather, the argument is that doctors hired by the NFL, and not by the independent clubs, caused Petitioners' injuries. (R. at 22).

There is no provision of the CBA requiring the NFL to hire and retain doctors. The NFL voluntarily assumed this duty and therefore no interpretation of the CBA is necessary. Nowhere in the Petitioners' claim does it allege that the NFL is negligent for the hiring and retention of surgeons and trainers of individual clubs. The claim alleges the doctors who caused injuries are NFL employees. Petitioners' do not allege that an employee/employer relationship exists between the NFL and individual club medical staff caused their injuries. On the contrary, Petitioners' contend the NFL hired the medical staff, which is not part of the CBA, and any incompetence of these NFL employees resulting in the injuries to the Petitioners' was foreseeable based on their conduct of negligently prescribing medication, a duty created by both federal and state regulations. *21 USC §801(2).* Supreme Court precedent clearly provides that

negligence from a "voluntary undertaking," not contract, is not preempted. United Steel Workers of Am. v. Rawson, 495 U.S. 362, 377 (1990).

The Appellate Court held that whether the NFL was negligent cannot be fairly determined without ascertaining the full scope of the player benefits contained in the CBA. (R. at 9). Although it is true the CBA must be looked at in order to determine the scope of player benefits, this is merely a factual examination of the CBA to determine whether a right exists under the CBA. Since there is no provision indicating such a right comes from the CBA, this claim is not preempted. No interpretation of the CBA is necessary because the right is not referenced in the CBA, nor does it require interpretation of the CBA because the right can be adjudicated without reference to the CBA. Thus, §301 does not apply to the negligent hiring and retention claims brought against the NFL.

Petitioners' claim for negligent misrepresentation of prescription drugs is a question of legal duty. For a plaintiff to state a claim for negligent misrepresentation, the allegations must include: "misrepresentation of a past or existing material fact, without reasonable ground for believing it to be true, and the 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, 979 (2003).

The Appellate Court correctly states that the Petitioners' claims allege the NFL had a duty to protect 'Class Members,' and to disclose the dangers of the medications to them. The Appellate Court also correctly states that Petitioners' claim the NFL had a duty to follow state and federal law regarding medications and to "act with reasonable care toward the class members." (R. at 11). However, the Appellate Court erroneously reaches its decision on this

issue by failing to properly address the Petitioners' claim as it was drafted. The Petitioners' do not claim that the individual clubs should be liable under negligent misrepresentation, but rather that the NFL is liable for Petitioners' injury under a negligent misrepresentation. (R. at 9-10).

Due to the Appellate Court's misinterpretation of the Petitioners' claims, it falsely appeared that the resolution of the Petitioners' claims would be inextricably intertwined with provisions of the CBA, requiring interpretation of the CBA, resulting in preemption. However, the Petitioners' claims clearly state the NFL itself, not individual clubs, caused their injuries and therefore, is liable for those injuries under a theory of negligent misrepresentation. (R. at 9-10). The Petitioners' negligent misrepresentation claim does not allege any violation of the CBA to establish the NFL owed a duty. The claim establishes the NFL's duty by alleging that the NFL had a duty to comply with federal and state regulations, which sets forth the requirements for distributing prescriptions, including disclosure of side effects and risks. (R. at 23). Since the NFL's legal duty under the theory of negligent misrepresentation in distributing prescription drugs is not imposed by the CBA, but rather is imposed by state and federal laws, this right is clearly outside the scope of the rights and duties listed in the CBA. (R. at 23-24). Again, the examination to determine whether this duty exists under the CBA is a question of mere fact that requires no interpretation of the CBA to resolve the Petitioners' negligent misrepresentation claim.

d. The Appellate Court failed to apply the Petitioners' actual claims to prevailing case law, and when the claims are properly applied, prevailing case law does not favor preemption under §301.

The issue of preemption and professional football players' medical care is one of first impression, so the Appellate Court looks to several out-of-circuit decisions for guidance on this issue. (R. at 10). Although the cases cited in their opinion share some similarities to the case at issue, the Appellate Court failed to differentiate the facts at issue in this case from those cases

cited. Due to the fact the Petitioners' claims were transformed and rewritten by the Appellate Court, it resulted in the flawed comparison of those inapplicable cases to the case at bar. Proper application of those cases to the Petitioners' actual complaint, clearly illustrates that these claims are not preempted under §301.

The Appellate Court first references Williams v. NFL, an Eighth Circuit case in which the court found that plaintiffs' negligence claims were preempted due to the fact they could not be resolved without reference to the CBA. The plaintiff's drafted their complaint on the theory NFL owed a common duty independent of the CBA to provide players with ingredient-specific warnings for banned supplements. However, the Eight Circuit found the claims to be preempted due to the fact the claims related to what the parties bargained for under the CBA. Thus, resolution of the claims was "inextricably intertwined" with the terms of the policy, making it impossible to determine the duty of care owed by the NFL, without interpretation of the CBA. R. at 10. This is clearly different from the case at bar because once the NFL started prescribing drugs, a minimum standard of care was imposed by both federal and state law. The NFL's practice and conduct in prescribing these drugs is not inextricably intertwined with the terms of the CBA. As a result, Petitioners' claims can be resolved without any interpretation of the CBA and instead by determining whether the NFL breached the duty of care imposed by law. Even if this Court were to find that resolution of these claims would require it to look to the CBA, parties to a CBA cannot bargain for what is illegal. Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 212 (1985). As a matter of both established law and public policy, the NFL cannot shield itself against Petitioners' negligence claims involving prescription drugs by invoking LMRA §301 as defense.

The Appellate Court also states Stringer v. NFL favors preemption in this case. However, when comparing the facts in Stringer to the case at issue, there is nothing that favors preemption. In Stringer, there were specific provisions of the CBA relating to certifications of doctors and athletic trainers which would dramatically impact the determination of the NFL's standard of care. As a result, the court correctly determined the plaintiff's claim that the NFL was negligent for publishing "Hot Weather Guidelines" was preempted. (R. at 10). The Appellate Court concluded, due to the fact that there are terms and conditions in the CBA relating to medical care provided by team doctors, which would include procedures regarding heat related illness, the NFL's standard of care in publishing the "Hot Weather Guidelines" could not be adjudicated without interpretation of the CBA. This clearly differs from the case at bar because once the NFL started prescribing and distributing medication, they became bound by federal and state law, which impose both a duty and a standard of care. There is no need to look at the CBA to determine the standard of care as it is imposed by statute. Therefore, unlike Stringer, Petitioners' claims are independent of the terms of the CBA and require no interpretation for the purposes of preemption under §301.

The Appellate Court also references both Duerson v. NFL, which involved a player's estate suing the NFL, and Smith v. NFLPA, involving a putative class of retired players suing the union. The essence of the claims in both Duerson and Smith revolved around the duty to inform players of consequences of concussions. (R. at 10-11). Preemption resulted in both cases because the standard of care could not be determined without referencing the terms of the CBA. Again, this is clearly different from the case at issue as the standard of care is established by federal and state, and as a result, no interpretation of the CBA is necessary.

In each out-of-circuit opinion cited to by the Appellate Court, the standard of care owed to the players by the NFL could not be determined without referencing the CBA, as specific provisions provided by the CBA could be found to diminish the standard of care owed by the NFL. (R. at 10-11). The standard of care at issue in this case is established by statute and neither the NFL, the individual clubs, nor players, have the authority to bargain for terms that violate binding law. The essence of the Petitioners' actual claims, not the Appellate Court's misconstrued version of the claims, do not require an investigation of the conduct of individual clubs. The claims clearly assert liability against the NFL. The only need to look to the CBA would be if the Petitioners and the NFL bargained for a provision relating to prescription medication; which there is no evidence of. Therefore, by applying the Petitioners' claims as they were originally pled, the negligence-based claims are not preempted by LMRA §301 as a matter of law.

CONCLUSION

In conclusion, the NCAA Amateurism and Eligibility bylaws are not protected as a matter of law and are therefore subject to attack under Section 1 of the Sherman Act. Additionally, the Appellate Court improperly analyzed the negligence-based claims as plead, resulting in the flawed application to §301 resulting in its ruling that the Petitioners' claims are preempted. For the foregoing reasons, we respectfully ask this Honorable Court to reverse the decision of the Fourteenth Circuit Court of Appeals and find for the Petitioners.