No. 09-1380

IN THE

Supreme Court of the United States

THE NATIONAL FOOTBALL LEAGUE,

Petitioner,

v.

KEVIN WILLIAMS AND PAT WILLIAMS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF MAJOR LEAGUE BASEBALL, MAJOR LEAGUE SOCCER, L.L.C., THE NATIONAL BASKETBALL ASSOCIATION, AND THE NATIONAL HOCKEY LEAGUE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether, when the preemptive effect of Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185(a), serves as a substantive defense to a state law claim rather than as a basis for federal removal jurisdiction, defenses that require interpretation and application of a collective bargaining agreement should be considered in determining whether Section 301 preempts the state law claim?

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INTEREST OF *AMICI CURIAE*

Pursuant to Supreme Court Rule 37.2, Major League Baseball ("MLB"), Major League Soccer, L.L.C. ("MLS"), the National Basketball Association ("NBA"), and the National Hockey League ("NHL") (collectively, the "Amici" or "the Leagues") respectfully submit this brief in support of the Petition for a Writ of Certiorari filed by the National Football League ("NFL").[1] The Amici are professional sports leagues with league-wide, collectively-bargained drug testing programs designed to eliminate the use of performance-enhancing drugs by their athletes. These programs are uniformly designed and administered within the respective Leagues in order, among other things, to promote public confidence in the integrity of professional sports and to ensure that no player or team will obtain an unfair advantage over his or its competitors.

The Amici have a significant interest in this case because the Eighth Circuit's decision, which denied the application of federal labor law preemption principles to Respondents' state statutory claims challenging the administration of the NFL's drug testing program, likely will adversely impact the Amici's own collectively-

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[1] Counsel of record for all parties received notice at least 10 days prior to the due date of the Amici's intention to file this brief and have consented to its filing. The letters of consent have been filed with the Clerk. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the Amici, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

bargained drug testing programs and the important purposes those programs serve.

Specifically, the Eighth Circuit's ruling that Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185(a) ("LMRA"), does not preempt Respondents' state statutory claims subjects the Amici's drug testing programs to similar challenges under these statutes by players employed by teams based in Minnesota, and potentially exposes the Amici to claims under similar state statutes by players employed by teams based in other states. Moreover, because the Eighth Circuit's ruling — that defenses based on a collective bargaining agreement may not be considered as part of the Section 301 "ordinary preemption" inquiry — widens the Circuit split on this issue, the decision further threatens the uniform enforcement of the Amici's respective drug testing programs between and among member teams.

REASONS FOR GRANTING THE PETITION

The Amici urge the Court to grant certiorari in this case because the rule of Section 301 preemption adopted by the Eighth Circuit departs from established Supreme Court precedent, deepens a split within the Circuits, and potentially subjects the league-wide drug testing programs of the NFL and the Amici — which were carefully developed through years of collective bargaining to meet the unique problems presented by the use of performance-enhancing drugs in their respective Leagues — to piecemeal modification by the 26 jurisdictions in which the Leagues have member teams.

Although the Minnesota state law claims at issue below could not be resolved without the interpretation of the NFL's collectively-bargained testing program, the Eighth Circuit held that those claims were not preempted because defenses based on a collective bargaining agreement "[we]re not relevant to our Section 301 analysis." Pet. App. 26a; *Williams v. NFL*, 582 F.3d 863, 879 (8th Cir. 2009), *reh'g and reh'g en banc denied*, 598 F.3d 932 (8th Cir. 2009), *petition for cert. filed* (May 13, 2010) (09-1380). As a result of the decision, the NFL's drug testing program could not be applied uniformly to all NFL players as the collective bargaining parties had intended. Indeed, because of the Eighth Circuit's preemption ruling, the Minnesota state court on remand was permitted to apply Minnesota state law to enjoin the enforcement of an arbitrator's decision that was issued pursuant to the collective bargaining agreement, and which simply sought to enforce the terms of the drug testing program as had been negotiated and agreed upon by the NFL and the NFL Players Association ("NFLPA").

In order to prevent unfair competitive advantages and maintain public confidence in the integrity and competitive equality of their sports, the NFL and the Amici must be permitted to operate their collectively-bargained drug testing programs without state interference, regardless of whether the relationship between state law and the program is apparent in the elements of the cause of action, or in a defense to the cause of action. When federal removal is not at issue and, therefore, the principles of "ordinary preemption" and not "complete preemption" apply, a plaintiff should not be able to avoid the preemptive effect of Section 301 by "artful" pleading. As this Court has recognized (but the Eight Circuit did not), the federal policy

requiring the uniform interpretation of collective bargaining agreements is far too important to turn on how a state cause of action is pled. *See Lingle v. Norge Div. of Magic Chef*, 486 U.S. 399, 407-11 (1988). The need for uniformity is particularly compelling in the context of the enforcement of the Leagues' drug testing programs, which involves players in different states competing against each other in head-to-head competition.

Supreme Court review of the Eighth Circuit's decision is especially appropriate because the decision below further exacerbates the conflict between federal courts of appeals as to whether defenses based on a collective bargaining agreement should be considered in connection with the Section 301 preemption analysis outside of the context of removal. Nearly two decades ago, this Court declined to exercise its certiorari jurisdiction in a case involving the same question raised by the NFL's petition here: "whether . . . a state-law cause of action is pre-empted under § 301 of the Labor Management Relations Act by a defense based on a collective bargaining agreement." *Schacht v. Caterpillar*, 503 U.S. 926, 926 (1992). Dissenting from the denial of certiorari, Justices White and Blackmun urged the Court to hear the case and resolve the circuit court conflict as to whether defenses based on a collective bargaining agreement were to be considered when determining the preemptive effect of Section 301. *Id.* at 926-27.

Subsequent to the Court's denial of certiorari in *Schacht*, the divide among the lower federal courts has only widened, with the Seventh and Tenth Circuits

requiring consideration of defenses and the Third, Ninth, and, now, Eighth Circuits on the opposite side of the issue. *Compare Smith v. Colgate-Palmolive Co.*, 943 F.2d 764, 769-71 (7th Cir. 1991), *and Fry v. Airline Pilots Ass'n*, 88 F.3d 831, 838 n.8 (10th Cir. 1996), *with Berda v. CBS Inc.*, 881 F.2d 20, 25 (3d Cir. 1989), *Sprewell v. Golden State Warriors*, 266 F.3d 979, 991 (9th Cir. 2001), *and Williams*, 582 F.3d at 879. It is, accordingly, now clear that there is a Circuit-based, outcome-determinative conflict regarding the relevance to the ordinary preemption analysis of defenses to state law claims based on collective bargaining agreements. This conflict means that the preemptive scope of the LMRA — and the enforceability of the Leagues' drug testing programs — depends on the particular jurisdiction in which a dispute arises or in which the plaintiff chooses to file suit. This discord and its practical implications are antithetical to federal labor policy as mandated by Section 301 and the purposes of the preemption rule.

I. THE EIGHTH CIRCUIT'S DECISION, BY APPLYING AN INCORRECT PREEMPTION TEST, THREATENS THE AMICI'S ABILITY TO MAINTAIN AND ENFORCE LEAGUE-WIDE DRUG TESTING PROGRAMS THAT, THROUGH THE PROCESS OF COLLECTIVE BARGAINING, HAVE BEEN UNIQUELY DESIGNED TO ELIMINATE THE USE OF PERFORMANCE-ENHANCING DRUGS IN PROFESSIONAL SPORTS.

A. The Amici's Collectively-Bargained Drug Testing Programs Serve The Important Purpose Of Eliminating The Use Of Performance-Enhancing Drugs In Professional Sports And Require Uniform Application And Enforcement.

Congress has recognized that the use of performance-enhancing drugs by players in professional sports is an issue of considerable importance that requires league-wide solutions. Indeed, since only 2002, Congress has held hearings on this issue on *nine* separate occasions and has taken testimony from dozens of experts, including those closely involved in the League programs.[2] Having been requested to testify

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[2] *See Steroid Use in Professional Baseball and Anti-Doping Issues in Amateur Sports: Hearing Before the Subcomm. on Consumer Affairs, Foreign Commerce and Tourism of the S. Comm. on Commerce, Science and Transp.*, 107th Cong. (2002); *Restoring Faith in America's Pastime: Evaluating Major League Baseball's Efforts to Eradicate Steroid Use: Hearing Before the H. Comm. on Gov't Reform*, 109th Cong. (2005); *The* (Cont'd)

about their respective Leagues' efforts to combat the use of performance-enhancing substances, the Commissioners of MLB, MLS, the NBA, and the NHL each have confirmed that the issue is of critical importance and implicates the fundamental integrity of athletic competition.[3] Likewise, the Executive Directors

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Clean Sports Act of 2005, and S. 1334, The Professional Sports Integrity and Accountability Act: Hearing Before the Subcomm. on Commerce, Science, and Transp., 109th Cong. (2005); *The Drug Free Sports Act of 2005, Hearing Before the Subcomm. on Commerce, Trade, and Consumer Protection*, 109th Cong. (2005); *Steroids in Sports: Cheating the System and Gambling Your Health: Hearing Before the Subcomm. on Commerce, Trade, and Consumer Protection*, 109th Cong. (2005); *Steroid Use in Sports, Part II: Examining the National Football League's Policy on Anabolic Steroids and Related Substances: Hearing Before the H. Comm. on Gov't Reform*, 109th Cong. (2005); *Steroid Use in Sports Part III: Examining the National Basketball Association's Steroid Testing Program: Hearing Before the H. Comm. on Gov't Reform*, 109th Cong. (2005); *The Mitchell Report: The Illegal Use of Steroids in Major League Baseball: Hearing Before the H. Comm. on Oversight and Gov't. Reform*, 110th Cong. (2008); *Drugs in Sports: Compromising the Health of Athletes and Undermining the Integrity of Competition: Hearing Before the Subcomm. on Commerce, Trade, and Consumer Protection*, 110th Cong. (2008).

[3] *Drugs in Sports: Compromising the Health of Athletes and Undermining the Integrity of Competition: Hearing Before the Subcomm. on Commerce, Trade, and Consumer Protection*, 110th Cong. (2008) (statement of David J. Stern), *available at* http://energycommerce.house.gov/images/stories/Documents/Hearings/PDF/110-ctcp-hrg.022708.Stern-testimony.pdf; (statement of Allan H. Selig), *available at* http://energycommerce.house.gov/images/stories/Documents/
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of the Leagues' respective players associations also testified before Congress about the significance of this issue.[4]

Senator George Mitchell, in the "Report to the Commissioner of Baseball of An Independent Investigation Into the Illegal Use of Steroids and Other Performance-Enhancing Substances By Players In

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Hearings/PDF/110-ctcp-hrg.022708.Selig-testimony.pdf; (statement of Gary Bettman), *available at* http://energycommerce.house.gov/images/stories/Documents/Hearings/PDF/110-ctcp-hrg.022708.Bettman-testimony.pdf; *see also The Drug Free Sports Act of 2005, Hearing Before the Subcomm. on Commerce, Trade, and Consumer Protection*, 109th Cong. (2005) (statement of Donald P. Garber), *available at* http://archives.energycommerce.house.gov/reparchives/108/Hearings/05192005hearing1507/Garber.pdf.

[4] *Drugs in Sports: Compromising the Health of Athletes and Undermining the Integrity of Competition: Hearing Before the Subcomm. on Commerce, Trade, and Consumer Protection*, 110th Cong. (2008) (statement of Donald M. Fehr), *available at* http://energycommerce.house.gov/images/stories/Documents/Hearings/PDF/110-ctcp-hrg.022708.Fehr-testimony.pdf; (statement of G. William Hunter), *available at* http://energycommerce.house.gov/images/stories/Documents/Hearings/PDF/110-ctcp-hrg.022708.Hunter-testimony.pdf; (statement of Gene Upshaw), *available at* http://energycommerce.house.gov/images/stories/Documents/Hearings/PDF/110-ctcp-hrg.022708.GoodellUpshaw-testimony.pdf; (statement of Paul Kelly), *available at* http://energycommerce.house.gov/images/stories/Documents/Hearings/PDF/110-ctcp-hrg.022708.Kelly-tesitmony.pdf.

Major League Baseball" (the "Mitchell Report"),[5] explained why programs eliminating performance-enhancing drugs in professional sports are imperative:

> First, steroids, human growth hormone and similar substances pose significant risks to those who use them. . . . Second, beyond the dangerous effects on players themselves, the public perception that players in Major League Baseball use these substances contributes to their use by young athletes, who in turn cause themselves great physical harm. . . . Third, the illegal use of anabolic steroids, human growth hormone, and similar drugs poses a significant threat to the integrity of the game of baseball . . . Finally, . . . the illegal use of these substances by some players is unfair to the majority of players who do not use them.

Senator George Mitchell, Mitchell Report, at 4, *available at* http://files.mlb.com/mitchrpt.pdf.

As then–Senator Joseph Biden summarized in 2008, "Steroids and performance-enhancing drugs not only

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[5] The Mitchell Report was the result of Senator Mitchell's 20-month investigation, commissioned by MLB, into the use of performance-enhancing substances in baseball. As Rep. Henry Waxman and Rep. Tom Davis stated, the Mitchell Report is "an important step towards the goal of eliminating the use of performance-enhancing substances." "Waxman and Davis Joint Statement on Mitchell Report," *available at* http://oversight.house.gov/images/stories/documents/20071213160659.pdf.

pose great health risks, but they threaten the fundamental integrity of sports." Press Release, Joseph R. Biden, Jr., Senate's Approval of the International Convention Against Doping in Sport (July 22, 2008), *available at* http://www.votesmart.org/speech_detail.php?sc_id=393274&keyword=&phrase=&contain=.

Because of the importance of the issue of the use of performance-enhancing substances in professional sports, the Amici and their respective player associations, with the encouragement of Congress,[6] have each bargained over and adopted through the collective bargaining process league-wide drug testing programs. These comprehensive programs include extensive lists of banned substances, comprehensive testing mechanisms, stringent procedures (including safeguards and appeal rights), and robust enforcement mechanisms intended to reduce the use of performance-enhancing substances. Each of the programs is an intricate system of regulation designed to take into account and address each League's unique circumstances and needs. The parties to the respective collective bargaining relationships and their experts in the field of performance-enhancing substances have developed the details of these programs through multiple rounds of collective bargaining that have taken place over many years.[7]

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[6] *See, e.g, The Drug Free Sports Act of 2005, Hearing Before the Subcomm. on Commerce, Trade, and Consumer Protection*, 109th Cong. 4, 8, 11 (2005).

[7] *See* "Performance Enhancing Substances Program of the NHL," *available at* http://www.nhl.com/cba/2005-CBA.pdf; (Cont'd)

A critical element of each League's drug testing program is the uniform application and enforcement of that program across each League. Each League's program applies to every player within the League regardless of the player's team or its location, and regardless of the player's residence. This uniform application is essential to the Leagues' operations. Without it, sports leagues would be unable to maintain any semblance of competitive balance or integrity. But the Eighth Circuit's ruling opens the door for an imbalance, whereby players in one state can use performance-enhancing substances while players in other states cannot.

In this way, professional sports leagues, by their very nature, are fundamentally different from other industries (even when compared to other multi-state business organizations). Professional sports leagues require athletic competition between their member teams, yet also require a uniform set of standards and rules to ensure that no single player or team has an unfair advantage. In no other industry do the employees of different employers in different states physically

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"Major League Baseball's Joint Drug Prevention and Treatment Program," *available at* http://mlbplayers.mlb.com/pa/pdf/jda.pdf; "NBA and NBPA Anti-Drug Program," *available at* http://www.nbpa.org/sites/default/files/ARTICLE%20XXXIII.pdf; *see also The Drug Free Sports Act of 2005, Hearing Before the Subcomm. on Commerce, Trade, and Consumer Protection*, 109th Cong. (statement of Donald P. Garber), *available at* http://archives.energycommerce.house.gov/reparchives/108/Hearings/05192005hearing1507/Garber.pdf.

compete against each other and this circumstance requires that such employees be governed by rules that apply across the board to all participants. Indeed, the collective bargaining relationships between the Leagues and their respective players associations have carefully evolved over the decades to reflect the unique requirements of the professional sports industry and its "numerous problems with little or no precedent in standard industrial relations." *Wood v. Nat'l Basketball Ass'n*, 809 F.2d 954, 961 (2d Cir. 1987). The existing collectively-bargained drug programs in the Leagues, with their emphasis on uniform enforcement and application of often complicated rules and procedures, are the intricately constructed product of this evolution.

B. The Eighth Circuit's Ruling, By Departing From Supreme Court Precedent, Fosters State Law Interference With The Leagues' Collectively-Bargained Drug Testing Programs And Deepens The Conflict Between Circuit Courts.

This Court has emphasized that Section 301 preemption is necessary to ensure the "uniform interpretation of collective bargaining agreements" and to "promote the peaceable consistent resolution of labor-management disputes." *Lingle*, 486 U.S. at 404. Accordingly, "if the *resolution* of a state-law claim depends upon the meaning of a collective-bargaining agreement, the application of state law . . . is pre-empted *and* federal labor law principles . . . must be employed to resolve the dispute." *Id.* at 405-06 (emphasis added) (citations omitted); *see also Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 220 (1985) ("[W]hen resolution of a

state-law claim is substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract, that claim must either be treated as a § 301 claim, or dismissed as pre-empted by federal labor-contract law.") (internal citations omitted). Moreover, Section 301 preemption also prevents states from intruding into "[t]he ordering and adjusting of competing interests through a process of free and voluntary collective bargaining" which "is the keystone of the federal scheme to promote industrial peace." *Local 174, Teamsters, Chauffeurs, Warehousemen & Helpers of Am. v. Lucas Flour Co.*, 369 U.S. 95, 104 (1962).

If the Eighth Circuit had followed the logic and rationale of *Lingle* and other Supreme Court preemption precedent, the Minnesota state law claims would have been held preempted because the claims against the NFL cannot be resolved without interpreting the collective bargaining agreement.

Under the Minnesota Lawful Consumable Products Act ("LCPA"), Minn. Stat. § 181.938, employers generally are forbidden from prohibiting employees from using "lawful consumable products." *Id.* § 181.938(2). This provision of the statute is in conflict with the Leagues' drug testing programs because many of the performance-enhancing substances prohibited by the Amici's anti-drug programs are legal with a prescription and some are available without a prescription at stores such as GNC. *See, e.g.*, "Major League Baseball's Joint Drug Prevention and Treatment Program," *available at* http://mlbplayers.mlb.com/pa/pdf/jda.pdf. If the preemptive scope of Section 301 does not extend to

claims raised under the LCPA, then players on the Minnesota Twins (MLB), Wild (NHL), Timberwolves (NBA), or Vikings (NFL) could be permitted to use these "lawful" substances notwithstanding the prohibitions in their Leagues' respective programs — thereby providing them with an unfair competitive advantage over players on teams in other states, as to whom the applicable League drug testing program would apply in full measure.

Although the LCPA has an exception if the restriction "relates to a bona fide occupational requirement and is reasonably related to employment activities or responsibilities of a particular employee or group of employees," Minn. Stat. § 181.938(3)(a)(1), the application of this exception is clearly dependent upon the interpretation and application of the Leagues' collective bargaining agreements. Under the National Labor Relations Act, 29 U.S.C. § 151 *et seq.*, it is the Leagues' collective bargaining agreements — including their drug testing provisions — that set forth the terms and conditions of players' employment and therefore define the players' employment activities. *See NLRB v. Katz*, 369 U.S. 736 (1962). Accordingly, this provision of the LCPA *requires* the state court to interpret the Leagues' collective bargaining agreements to determine whether, if a substance prohibited by such agreements is a "lawful consumable product," the restriction imposed on the use of that "lawful consumable product" is a bona fide occupational requirement that is "reasonably related" to the "employment activities" of the employee. Indeed, there is no way to resolve the threshold question under the LCPA without interpreting and applying these collective bargaining agreements.

The Minnesota Drug and Alcohol Testing in the Workplace Act ("DATWA"), Minn. Stat. § 181.950 *et seq.*, also provides employees with certain protections that may not comport with the Amici's respective drug testing programs. For example, the DATWA restricts random drug testing. *Id.* § 181.951(4). While the DATWA purports to exempt "professional athletes" from that restriction, the statute's safe harbor provision applies only if that random testing is "consistent with the collective bargaining agreement." *Id.* Thus, in cases involving random testing, the DATWA itself actually requires the state court to interpret the parties' collective bargaining agreement at the threshold and to determine whether the employer acted consistently with the collective bargaining agreement's procedures and requirements. Accordingly, a suit under the DATWA effectively becomes "a suit in state court alleging a violation of a provision in a labor contract" and, therefore, "must be brought under § 301 and be resolved by reference to federal law." *Allis-Chalmers Corp.*, 471 U.S. at 210.

Further compounding the problem is that professional sports leagues also are unable to adhere to the confidentiality provisions of the DATWA, Minn. Stat. § 181.954, as the Leagues' drug testing programs — at the encouragement of Congress — make positive drug tests and players' suspensions public, both as a penalty and a deterrent.

In addition, the DATWA states that an employee can only bring a claim under the statute after first

exhausting all grievance procedures mandated by the applicable collective bargaining agreement. This provision makes interpretation and application of the parties' grievance procedure an element in the resolution of every DATWA claim. Here, Respondents' claims were adjudicated through the grievance procedure established under the labor contract precisely as the bargaining parties had intended. Instead of enforcing that result, the Minnesota state court, following remand, continually enjoined the enforcement of that arbitration award upholding the suspension of Respondents under the terms of the collective bargaining agreement, first, pending the trial of their state law claims and, more recently, during the pendency of their appeals.[8]

Indeed, even the threshold question of whether the NFL (or any of the Leagues) is an "employer" within the meaning of the DATWA is inherently intertwined with the interpretation and application of the parties' collective bargaining agreements, as the state court proceedings on remand unequivocally demonstrate. *See, e.g., Williams v. NFL*, No. 27-CV-08-29778, at 17 (Minn. 4th Dist. Ct., May 6, 2010) ("The NFL directly and indirectly controls many aspects of a player's life both on and off the field. This control emanates from a series of formal rules and regulations existing both separate from and *in conjunction with* the [collective bargaining agreement]."") (emphasis added); *see also id.*

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[8] *See Williams v. NFL*, No. 27-CV-08-29778, at 24-27 (Minn. 4th Dist. Ct., May 6, 2010).

at 3-4, 6, 15, 17-19, 21-22 (concluding that the NFL was a joint employer of Respondents for purposes of the DATWA based on, *inter alia*, interpretation of the NFL/NFLPA collective bargaining agreement).

Because the Eighth Circuit did not preempt state law claims brought pursuant to the DATWA, the Leagues will be forced either to treat players in Minnesota differently, to the disadvantage of players on teams in other states, or effectively abandon the enforcement of their collectively-bargained drug programs in order to avoid allowing such disadvantages. This is not a hypothetical consequence; in order to avoid unfairly advantaging the Vikings because of the application of state law in this case, the NFL found it necessary to delay the enforcement of its suspension of three New Orleans Saints players who were suspended at about the same time and for the same reasons as Respondents, but were unable to challenge those suspensions under Minnesota state law or a comparable Louisiana law. As a result of the Eighth Circuit's decision and the application of Minnesota state law, the NFL's collectively-bargained drug program has not functioned as the parties to the collective bargaining relationship intended.

Although — as the post-remand state court proceedings only confirm, *Williams*, No. 27-CV-08-29778, at 3-4, 6, 15, 17-19, 21-22 — interpretation of the collective bargaining agreement was required for resolution of Respondents' claims, the Eighth Circuit did not follow *Lingle* and instead adhered to a bright line rule that the NFL's defenses based on a collective bargaining agreement may not be considered in making

the preemption determination under Section 301. Pet. App. 26a; *Williams*, 582 F.3d at 879.

The Eighth Circuit conflated the complete preemption doctrine with ordinary preemption and therefore premised its decision on a legal principle — the well-pleaded complaint rule — that is wholly inapplicable to the ordinary preemption analysis. *Id.* The doctrine of complete preemption and its corollary, the well-pleaded complaint rule, apply when the question is whether a complaint that raises only state law claims may be removed to federal court. *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392-93 (1987). Under the complete preemption doctrine, if a complaint asserting only state law claims is well-pled, the case may not be removed based on the defense that interpretation of a collective bargaining agreement is required to resolve the claim. *Id.* Thus, complete preemption is a *jurisdictional doctrine* related to the removability of a case initially filed in state court. *Id.* In contrast, ordinary preemption is a *substantive defense* aimed at the merits of the asserted state claim and may be invoked in either federal or state court. *Id.* Ordinary preemption simply declares the primacy of federal law, regardless of the forum or the claim. *Id.* at 392.

The Eighth Circuit failed to recognize that complete preemption and ordinary preemption are distinct legal concepts that serve completely different functions.[9]

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[9] Although the Eighth Circuit declined rehearing en banc, four judges dissented and observed that the panel's decision was premised on a fundamental misunderstanding of "[t]he procedural distinction between cases involving complete preemption and ordinary preemption. . . ." Pet. App. 75a; *Williams v. NFL*, 598 F.3d 932, 936 (8th Cir. 2009).

As a result of this misapplication of complete preemption when removal was not at issue, the Eighth Circuit improperly confined its analysis to the allegations of Respondents' complaint and categorically ignored the numerous and significant relationships between the resolution of the state law claims and the NFL's collectively-bargained drug program discussed above, which were asserted as defenses by the NFL.

The Eighth Circuit has now joined the Ninth Circuit and Third Circuit in holding that an employer's defenses relying on a collective bargaining agreement are irrelevant even when the evaluation of those defenses is critical to resolving the plaintiff's purported state law claims and is unrelated to removal. *See Sprewell v. Golden State Warriors*, 266 F.3d 979, 991 (9th Cir. 2001); *Berda v. CBS Inc.*, 881 F.2d 20, 25 (3d Cir. 1989). In contrast, the Seventh and Tenth Circuits have recognized that defenses based on a collective bargaining agreement, while irrelevant to the jurisdictional question of whether a claim filed in state court may be removed to federal court (*i.e.*, "complete preemption"), must be considered when addressing the *substantive* defense of ordinary preemption. *See Fry v. Airline Pilots Ass'n*, 88 F.3d 831, 838 n.8 (10th Cir. 1996); *Smith v. Colgate-Palmolive Co.*, 943 F.2d 764, 769-71 (7th Cir. 1991).

The Eight Circuit's decision widens an already intolerable split among the Circuits. The rules of ordinary preemption under Section 301 continue to vary from Circuit to Circuit, and now even more so. As a result, the uniformity and predictability contemplated by the LMRA — and which is especially significant to the Amici here — cannot be maintained. The practical

implications for the Amici's drug testing programs are obvious and profound. State law regulation of the Amici's drug testing programs may be permissible in Minnesota against players on the Timberwolves, Wild, and the Twins but not in Colorado against players on the Nuggets, Avalanche, and the Rockies — as the Tenth Circuit holds that a state claim is preempted if the collective bargaining agreement must be interpreted and applied to resolve a defense to such a claim, but the Eighth Circuit holds that the employer's defenses based upon a collective bargaining agreement are irrelevant in that context. This disparity will ultimately plague sports leagues with inequity and disrupt the cornerstone of professional sports — competitive balance.

This Court's intervention is necessary to resolve the Circuit split and restore the uniformity and predictability that is essential to federal labor policy and the uniform administration of the Leagues' drug programs.

CONCLUSION

Based on the foregoing, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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