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A CONGRESSIONAL CARVE OUT: THE  
NECESSITY FOR UNIFORM  
APPLICATION OF PROFESSIONAL  
SPORTS LEAGUES’ PERFORMANCE-  
ENHANCING DRUG POLICIES

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## I. INTRODUCTION

“The use of steroids [in sports] has become a public health crisis. Half a million kids a year in the U.S. are taking steroids . . . and many of them do this because they are emulating their sports heroes.”<sup>1</sup> In the past several years, performance-enhancing drug (“PED” or “steroid”) use in major professional sports has captured the attention of not only average fans, but also lawmakers in Congress.<sup>2</sup> Rampant steroid abuse in Major League Baseball (“MLB”) catalyzed a 2005 congressional hearing at which famous ballplayers like Mark McGwire testified.<sup>3</sup> In 2009, two National Football League (“NFL”) players challenged their suspensions for using substances banned by the NFL collective bargaining agreement (“CBA”) in court.<sup>4</sup> This suggests sports leagues may lack the legal authority to conclusively bargain for and uniformly apply certain aspects of a CBA such as the PED policy—a fact that compelled NFL Commissioner Roger Goodell to seek congressional intervention in the steroids arena.<sup>5</sup>

During this so-called steroids era, sports radio and television shows have shifted in focus from the magic of record-breaking performances to the possibility that PED use tainted those achievements. Cynics have cast the entire 1990s as a statistical lie, claiming there is no way to tell who was taking PEDs and who was not; as a result, many commentators have recommended adding asterisks to individual or team records that indicate

1. *Baseball Under the Microscope*, CBC SPORTS ONLINE (Mar. 17, 2005), [http://www.cbc.ca/sports/indepth/drugs/stories/baseball\\_congress.html](http://www.cbc.ca/sports/indepth/drugs/stories/baseball_congress.html) (quoting Robert White, a spokesman for Congressman Tom Davis) (internal quotation marks omitted).

2. See, e.g., Dave Sheinin, *Baseball Has a Day of Reckoning in Congress*, WASH. POST, Mar. 18, 2005, at A01 (noting that house committee members “threaten[ed] to legislate tougher [steroid] testing policies”).

3. *Id.*

4. John R. Parkinson, *NFL Commish Asks Congress for Help Enforcing Drug Testing Policies*, ABC NEWS (Nov. 3, 2009), <http://abcnews.go.com/Politics/nfl-commissioner-roger-goodell-asks-congress-enforcing-drug/story?id=8986110>.

5. *Id.*

those records might have been tainted by PED abuse.<sup>6</sup> Scholars from a variety of fields have explored how PED use has negatively affected the integrity of professional sports,<sup>7</sup> the medical dangers of taking PEDs,<sup>8</sup> and how professional athletes' use of PEDs has adversely affected youth athletes.<sup>9</sup> In response to this outburst of PED use in professional sports and the subsequent explosion of literature decrying it, leagues such as the NFL and MLB have significantly increased the penalties for players caught using PEDs in an attempt to cleanse the leagues' images.

For example, on March 8, 2006, the NFL Players Association ("NFLPA") and the NFL Management Council ("NFLMC") entered into the 2006–2012 NFL CBA, which included a section that discussed PEDs.<sup>10</sup>

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6. See, e.g., Sheinin, *supra* note 2 ("[Kentucky Senator and Hall-of-Fame former pitcher Jim] Bunning went a step beyond those who say the records of steroid-users should be marked by an asterisk, arguing that the records should be thrown out of the book."); Michael Wilbon, *Tarnished Records Deserve an Asterisk*, WASH. POST, Dec. 4, 2004, at D10 (arguing that MLB should put asterisks by Barry Bonds's and Mark McGuire's records).

7. For a discussion of why PED use destroys the integrity of professional sports both from a competitive-advantage standpoint and a personal PED user's standpoint, see, for example, GEORGE F. WILL, *MEN AT WORK: THE CRAFT OF BASEBALL* xxvi (1990) ("[A]thletes who are chemically propelled to victory do not merely overvalue winning, they misunderstand why winning is properly valued.").

8. For sources that provide general and specific information about the adverse effects of PED use on long-term health, see, for example, Shalender Bhasin et al., *The Effects of Supraphysiologic Doses of Testosterone on Muscle Size and Strength in Normal Men*, 335 NEW ENG. J. MED. 1, 1–7 (1996) (providing a comprehensive review of the effects of PEDs on a sample population); Fred Hartgens & Harm Kuipers, *Effects of Androgenic-Anabolic Steroids in Athletes*, 34 SPORTS MED. 513, 543 (2004) ("Summarising the literature, it can be concluded that [PEDs] may exert profound effects on mental state and behaviour, although only a small number of abusers may be affected."); Alvin M. Matsumoto, *Clinical Use and Abuse of Androgens and Antiandrogens*, in PRINCIPLES AND PRACTICE OF ENDOCRINOLOGY AND METABOLISM 1181, 1181 (Kenneth L. Becker et al. eds., 3d ed. 2001) ("Whether androgens improve athletic performance is uncertain, and the high dosages are often associated with severe side effects."); Jay R. Hoffman & Nicholas A. Ratamess, *Medical Issues Associated with Anabolic Steroid Use: Are They Exaggerated?*, 5 J. SPORTS SCI. & MED. 182, 189 (2006) (questioning the conventional wisdom regarding the adverse health effects of PEDs).

9. For sources that provide comprehensive data about drug use among men and women of all ages, with a particular focus on youth PED use, see, for example, DIV. OF ADOLESCENT AND SCH. HEALTH, DEP'T OF HEALTH AND HUMAN SERVS., *TRENDS IN THE PREVALENCE OF MARIJUANA, COCAINE, AND OTHER ILLEGAL DRUG USE NATIONAL YOUTH RISK BEHAVIOR SURVEY: 1991–2009* (2010) (demonstrating an increase in youth PED usage from 1991 to 2003 and a decrease from 2003 to 2009); THE NAT'L CTR. ON ADDICTION AND SUBSTANCE ABUSE AT COLUMBIA UNIV., *WINNING AT ANY COST: DOPING IN OLYMPIC SPORTS* 13 (2000) ("[Doping] sends messages to our children that contradict the values we hope sports participation will evoke."); Anita Manning, *Kids, Steroids Don't Mix*, USA TODAY, July 9, 2002, at 1C ("Teenagers, looking up to . . . elite athletes whose muscles ripple with steroid-enhanced power, are picking up some dangerous training tips . . . . Several national youth surveys estimate steroid use by high school boys at 4%–6% . . .").

10. NFL COLLECTIVE BARGAINING AGREEMENT 2006–2012 art. XLIV, § 6(a)–(b) (2006)

The collective bargaining agents subsequently implemented the Policy on Anabolic Steroids and Related Substances (“Policy”)<sup>11</sup> to define testing procedures and punishments, as well as list all banned substances and known brand-name products that contain them.<sup>12</sup> The Policy adopts a rule of strict liability under which all “[p]layers are responsible for what is in their bodies, and a positive test result will not be excused because a player was unaware that he was taking a Prohibited Substance.”<sup>13</sup> It reiterates that stance several times, emphasizing that “[p]layers are responsible for what is in their bodies”<sup>14</sup> and warning that even if a product is purchased at a reputable establishment, “if you take these products, you do so AT YOUR OWN RISK!”<sup>15</sup> The Policy states that the very first time a player tests positive for a banned substance, “he will be suspended without pay for a minimum of four regular and/or postseason games.”<sup>16</sup> As former Congressional Committee Chairman Tom Davis noted, professional football’s drug-testing program has long been viewed as “the top of the heap in professional sports,” and is a “policy with tough penalties, and that’s getting tougher all the time.”<sup>17</sup>

Despite the success of these strict punishments in curbing PED use,<sup>18</sup> a recent Eighth Circuit ruling<sup>19</sup> against the NFL’s collectively bargained

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[hereinafter NFL CBA], available at <http://images.nflplayers.com/mediaResources/files/PDFs/General/NFL%20COLLECTIVE%20BARGAINING%20AGREEMENT%202006%20-%202012.pdf>. There has been some form of steroids testing in the NFL since 1987. Mark Maske & Leonard Shapiro, *NFL’s Steroid Policy Gets Kudos on Capital Hill*, WASH. POST, Apr. 28, 2005, at D01.

11. NAT’L FOOTBALL LEAGUE, POLICY ON ANABOLIC STEROIDS AND RELATED SUBSTANCES (2010) [hereinafter NFL PED POLICY], available at <http://images.nflplayers.com/mediaResources/files/PDFs/PlayerDevelopment/2010%20Steroid%20Policy.pdf>.

12. See *id.* at 5–9, 14–18.

13. *Id.* at 6.

14. *Id.* at 10.

15. *Id.* app. F at 24.

16. *Id.* at 8. The NFL season is only sixteen games long, meaning a four-game suspension is quite severe.

17. *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. 2 (2005) (statement of Rep. Tom Davis, Chairman, H. Comm. on Gov’t Reform).

18. As alluded to above, the NFL is not the only league to recently implement stricter PED-testing rules. MLB and the MLB Players Association entered into a Joint Drug Agreement in 2006 that bans performance-enhancing substances, includes provisions allowing random drug testing both during the season and the offseason, and imposes significant penalties—such as a fifty-game suspension without pay for the first positive PED test, a one-hundred-game suspension without pay for the second positive PED test, and a lifetime ban for a third positive test—for players who violate the program. MAJOR LEAGUE BASEBALL, MAJOR LEAGUE BASEBALL’S JOINT DRUG PREVENTION AND TREATMENT PROGRAM 5, 8, 17 (2006), available at <http://mlb.mlb.com/pa/pdf/jda.pdf>.

19. *Williams v. Nat’l Football League*, 582 F.3d 863 (8th Cir. 2009).

drug-testing procedures may lead to a potentially disastrous new problem for the enforcement of CBAs for the leagues. The court in *Williams v. National Football League* held that Section 301 of the 1947 Labor Management Relations Act (“LMRA”)<sup>20</sup> did not preempt two NFL players’ state law claims because their claims could rest solely on Minnesota labor statutes.<sup>21</sup> In order for Section 301 to preempt a state claim, determination of that claim must be “inextricably intertwined”<sup>22</sup> with the terms of a CBA, which the Eighth Circuit held was not the case.<sup>23</sup>

*Williams* suggests that the NFL’s strict liability policy may violate privacy laws or labor rights recognized by some states, with the consequence that disuniformity among state laws may lead to the inequitable application of CBAs. In so ruling, the Eighth Circuit implicitly recognized that often there are reasons to favor disuniformity among state laws; for example, a wide variety of state laws promotes and facilitates innovation in future legislation, which encourages adaptability and evolution among the states.<sup>24</sup> In the context of professional sports leagues’ CBAs generally—and their PED policies specifically—this disuniformity could prove to be fatal to the success of those policies, which in turn could affect the integrity of the underlying sports.

Thus, by allowing the players to adjudicate their disputes in state court, the Eighth Circuit has opened the door for any player to challenge any league action notwithstanding the applicable CBA, provided there is an independent state statutory or common law claim available. Critically, because labor statutes vary widely among the states, a player in Louisiana could not bring the same claim against the NFL that a player in Minnesota could bring.<sup>25</sup> In other words, if a player in Minnesota and a player in Louisiana commit the same breach of the CBA, the former player may have

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20. Labor Management Relations (Taft-Hartley) Act, 1947, Pub. L. No. 80-101, § 301, 61 Stat. 136, 156 (codified at 29 U.S.C. § 185(a) (2006)).

21. *Williams*, 582 F.3d at 878.

22. *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 213 (1985).

23. *Williams*, 582 F.3d at 878.

24. *See New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”).

25. Phil Breaux, *Do Some State Laws Prevent Pro Teams from Fining Players?*, SPORTS LITIGATION ALERT (July 2, 2010), <http://www.hackneypublications.com/sla/archive/001083.php> (“Louisiana, like Minnesota, has laws that pertain to drug testing of employees. Unlike the Minnesota law, however, Louisiana Revised Statute 40:1002 (F) specifically exempts the NFL and the [National Collegiate Athletic Association (“NCAA”)] from the law.”).

an avenue to avoid suspension while the latter player may not. *Williams*, which I argue was correctly decided under Supreme Court precedent, has thus revealed a loophole that may cause provisions of a CBA to be applied nonuniformly among a league's players if a particular state provides statutory or common law redress for claims that are not "inextricably intertwined" with the terms of a CBA.

The central question at issue in this Note is how Section 301 of the LMRA should be applied to professional sports leagues in light of the policy reasons for uniformly applying strict PED-testing rules. I argue that Congress should grant these leagues an exception to the judicial interpretation of Section 301 preemption in the area of PED-testing procedures because the reasons supporting strict, uniform PED testing justify a limited exception to the longstanding federalism principle that states can enact and enforce their own labor laws.<sup>26</sup> My stance is based on research supporting the need for uniform drug testing in sports, and that such a legislative carve out is proper in light of the negative consequences of PED use, the unique nature of professional sports, and Congress's desire not to legislate substantive PED-testing policy. I recognize at the outset that any congressionally granted exception for professional sports leagues relating to Section 301 preemption jurisprudence could have broader implications that are felt outside the professional sports arena. There are federalism concerns on the constitutional end and concerns for multistate employers on the business-law end. These concerns will be touched on throughout this Note, but an in-depth discussion of those broader implications is beyond the breadth of my present argument, which focuses primarily on how the carve out would apply to professional sports leagues.

In Part II, I examine Supreme Court precedent and how the reach of Section 301 preemption has been explicitly and continually limited over the years. Part III discusses how the circuit courts have endeavored to comply with the altered Supreme Court view, and Part IV discusses how *Williams* was decided correctly under that precedent—making a judicial remedy untenable. In Part V, I examine why strict, uniform PED testing is needed in professional sports based on the health risks of steroids, the risk of PED use on the integrity of professional sports, the increased dangers posed to youth athletes because of professional-athlete PED use, and the unique

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26. This longstanding principle has manifested itself through, for example, states that impose higher or lower income tax; or different minimum wage standards; or, at issue in this Note, drug-testing procedures and protections for employees. *See, e.g., id.*

nature of professional sports. Part VI analyzes congressional intent and concludes that a congressional carve out against the judicial interpretations of Section 301 can achieve that goal.

## II. THE LIMITS OF SECTION 301 PREEMPTION OVER STATE LAW CLAIMS<sup>27</sup>

In 1947, Congress passed the Labor Management Relations Act<sup>28</sup> to protect “employees, employers, and the general public from the dislocations of commerce which might be engendered by the commission of unfair labor practices.”<sup>29</sup> Because the LMRA does not contain an express preemption provision, the extent to which federal labor law preempts state law resides with courts’ determination of congressional intent.<sup>30</sup> Courts have used Section 301 as the clause allowing federal preemption over state law claims.<sup>31</sup>

The Supreme Court initially construed the power of Section 301 broadly by authorizing federal courts to use it to “fashion a body of [substantive] federal law” for the enforcement of any collectively bargained agreement.<sup>32</sup> In *Local 174, Teamsters v. Lucas Flour Co.*, the Court explained the rationale behind allowing this type of uniform substantive federal law when it noted that “[t]he possibility that individual contract terms might have different meanings under state and federal law would inevitably exert a disruptive influence upon both the negotiation and

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27. It is a well-established rule that Congress’s power to preempt state law derives from the Supremacy Clause of Article VI of the U.S. Constitution. *See Gibbons v. Ogden*, 22 U.S. 1, 41–42 (1824). The Supreme Court, in 1937, held that Congress is constitutionally permitted to regulate labor relations, making labor law an area subject to federal preemption under the Supremacy Clause. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30–31 (1937).

28. The LMRA came twelve years after Congress passed the National Labor Relations Act, Pub. L. No. 74-198, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151–169 (2006)). This Note primarily concerns Section 301 of the LMRA, 29 U.S.C. § 185(a) (2006), and will throughout refer to it as “Section 301” or “LMRA.” The two terms should be viewed as parallels.

29. *Hoffman v. Beer Drivers & Salesmen’s Local Union No. 888*, 536 F.2d 1268, 1276 (9th Cir. 1976). *See also Nat’l Union of Hosp. & Health Care Emps. v. Carey*, 557 F.2d 278, 282 (2d Cir. 1977) (citations omitted) (explaining that the “announced purposes” of the LMRA are to “prescribe the legitimate rights of employees and employers, to prevent the interference by either with the legitimate rights of the other, and to define and proscribe practices on the part of labor and management which are inimical to the general welfare”).

30. *See Williams v. Nat’l Football League*, 582 F.3d 863, 873–74 (8th Cir. 2009) (discussing cases that have explored the preemption issue).

31. *Id.*

32. *Textile Workers Union v. Lincoln Mills of Ala.*, 353 U.S. 448, 451 (1957).

administration of collective agreements.”<sup>33</sup> It was clear the Court intended for parties to be able to bargain for a set of rules that would be applied uniformly across each individual subject to the CBA, and thus give Section 301 broad preemption powers.

Twenty-three years later, however, the Court shifted gears and began to contract the reach of Section 301 by insisting state law claims must be given precedence over federal preemption in certain circumstances. The beginning of that shift came with *Allis-Chalmers Corp. v. Lueck*, in which the Supreme Court more clearly defined the reach of Section 301.<sup>34</sup> The Court wrote, “Clearly, § 301 does not grant the parties to a collective-bargaining agreement the ability to contract for what is illegal under state law.”<sup>35</sup> After suffering a nonoccupational injury, plaintiff Roderick Lueck brought a tort suit against Allis-Chalmers in Wisconsin state court instead of adhering to the collectively bargained grievance procedures.<sup>36</sup> His suit sought damages for the alleged bad faith handling of his insurance claim.<sup>37</sup> In holding that Section 301 did not preempt Lueck’s state claims, the Court deferred to Congress’s intent in passing the LMRA by concluding that there was no “suggestion that Congress, in adopting § 301, wished to give the substantive provisions of private agreements the force of federal law, ousting any inconsistent state regulation.”<sup>38</sup> The Court handed down a fluid test for lower courts to apply in Section 301 cases that remains the standard today: Section 301 preempts a state claim if resolution of the claim is “inextricably intertwined”<sup>39</sup> with a provision of the applicable CBA.

This standard was not uniformly applied. Some circuit court decisions cut in favor of federal labor law while others deferred to states’ rights.<sup>40</sup>

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33. *Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 103 (1962).

34. *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 212 (1985). Plaintiff Roderick Lueck’s union and defendant Allis-Chalmers were parties to a CBA that incorporated a self-funded disability plan administered by an insurance company that included providing redress for nonoccupational injuries to union employees. The CBA included grievance procedures to address disputes culminating in a binding arbitration ruling. *Id.* at 204.

35. *Id.* at 212.

36. *Id.* at 205–06.

37. *Id.*

38. *Id.* at 211–12.

39. *Id.* at 213.

40. *Compare Johnson v. Hussmann Corp.*, 805 F.2d 795, 797 (8th Cir. 1986) (holding that an employee covered by a CBA did not have a state law claim for termination in retaliation for making a workers’ compensation claim), *overruled by Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399 (1988), *with Herring v. Prince Macaroni of N.J., Inc.*, 799 F.2d 120, 124 (3d Cir. 1986) (holding that an employee covered by a CBA had a state law claim for termination in retaliation for making a workers’

The Supreme Court, sensing the uncertainty in applying the standard, handed down a unanimous decision four years after *Allis-Chalmers* that clarified what it meant for a claim to be “inextricably intertwined” with the terms of a CBA. *Lingle v. Norge Division of Magic Chef, Inc.*<sup>41</sup> further restricted Section 301’s preemptive reach, defying *Lucas Flour* and limiting federal preemption.

The plaintiff in *Lingle* brought a wrongful termination suit under the Illinois Workers’ Compensation Act that did not directly implicate the bargained-for CBA, but the Court’s analysis was parallel to how a breach-of-contract claim would have been performed.<sup>42</sup> The Court wrote, “as long as the state-law claim can be resolved without interpreting the agreement itself, the claim is ‘independent’ of the agreement for § 301 pre-emption purposes.”<sup>43</sup> The Court so held despite acknowledging that “the application of state law . . . might lead to inconsistent results since there could be as many state-law principles as there are States.”<sup>44</sup> Importantly, even if the analysis of a state law claim were directly parallel to a clearly preempted claim such as breach of a CBA provision, such parallelism does not mean the claim is preempted by Section 301.<sup>45</sup>

The Court had thus shifted its federalism principles dramatically since *Lucas Flour* by limiting Section 301 preemption to only cases in which the CBA is either directly at issue or directly implicated.<sup>46</sup> Despite previously stressing the importance of uniformly applying CBAs because to do otherwise would “inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements,”<sup>47</sup> the Court

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compensation claim).

41. *Lingle*, 486 U.S. 399.

42. *Id.* at 401–02.

43. *Id.* at 410.

44. *Id.* at 406.

45. *Id.* at 408–09.

46. Interestingly, although the Supreme Court has limited the preemptive reach of Section 301, it has gone in the opposite direction when analyzing collectively bargained arbitration procedures. In the 1970s and 1980s, the Court sweepingly declared that a union could not bargain away an individual’s federal forum rights, but it has dramatically shifted course over the past twenty-five years to enforce arbitration proceedings as binding. *See 14 Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456, 1474 (2009) (holding that a provision in a CBA that clearly and unmistakably requires union members to arbitrate claims arising under the Age Discrimination in Employment Act is enforceable). *See generally* Robert M. Smith, Note, *Union-Negotiated Waivers of an Employee’s Federal Forum Rights to Statutory Claims: Are They an Effective Means to Exclusivity?*, 65 MO. L. REV. 229 (2000) (discussing whether unions can collectively bargain for arbitration as the only means to resolve individual federal statutory claims).

47. *Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 103 (1962).

changed its tune following *Lingle* by insisting that “[p]re-emption of employment standards ‘within the traditional police power of the State . . . should not be lightly inferred.’”<sup>48</sup> *Lingle* represents a significant shift in the development of labor law; it marked a reversal in federalism principles to champion states’ rights in an area that previously minimized state involvement.<sup>49</sup>

This paradigm shift continued in *Livadas v. Bradshaw*, in which the Supreme Court wrote that when the meaning of a contract term is not in dispute, “the bare fact that a [CBA] will be consulted in the course of state-law litigation plainly does not require the claim to be extinguished.”<sup>50</sup> The Court hammered home its point by stating the same proposition another way: “§ 301 does not disable state courts from interpreting the terms of [CBAs] in resolving non-pre-empted claims.”<sup>51</sup> This is especially problematic for a league like the NFL because even if the league and NFLPA created comprehensive and detailed contractual obligations for every player, Section 301 still would not preempt a purely state law claim under *Livadas*, even if the CBA needed to be referenced during adjudication.

### III. A CIRCUITOUS SHIFT

In the mid-1990s, as the circuit courts slowly adapted to the refined stance on Section 301 preemption set forth by the Supreme Court in *Lingle* and *Livadas*, the ugly truth of widespread PED use in professional sports became a national frenzy.<sup>52</sup> The number of cases narrowly construing Section 301 swelled while Roger Clemens’s and Mark McGwire’s muscles did likewise. The renewed emphasis on enforcing strict PED testing in professional sports in the early twenty-first century subtly suggested the

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48. *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 252 (1994) (quoting *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 21 (1987)). Although *Norris* concerns the Railway Labor Act and not the LMRA, it provides evidence that the Court wants all statutes similar to the LMRA to be interpreted consistent with one another. The *Norris* decision quotes *Lingle* in noting again that “purely factual questions” that do not depend on the interpretation of a CBA do not “requir[e] a court to interpret any term of a collective-bargaining agreement” and are thus not preempted by statute. *Id.* at 261–62 (alteration in original) (quoting *Lingle*, 486 U.S. at 407).

49. Michael J. Fortunato, Note, *Lingle v. Norge Division of Magic Chef, Inc.: Revolutionizing the Application of Substantive State Labor Law to Unionized Employees*, 38 CATH. U. L. REV. 769, 793–94 (1989).

50. *Livadas v. Bradshaw*, 512 U.S. 107, 124 (1994) (citing *Lingle*, 486 U.S. at 413 n.12).

51. *Id.* at 123 n.17 (citing *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502 (1962)).

52. See *supra* note 6 and accompanying text.

possibility that Section 301 jurisprudence and strict PED-testing policies could one day collide. They finally did in 2009.<sup>53</sup> Two cases in particular are notable in how they analyzed Section 301 preemption prior to *Williams*.

In 2003, the Tenth Circuit—analyzing a claim that would closely resemble the situation presented in *Williams*—constricted the preemptive reach of Section 301.<sup>54</sup> The relevant Oklahoma statute required that “[n]o disciplinary action, except for a temporary suspension or a temporary transfer to another position, may be taken by an employer against an employee based on a positive test result unless the test result has been confirmed by a second test.”<sup>55</sup> The court noted that in order to establish a violation of the statute, plaintiff “Karnes must show that [defendant] Boeing (1) discharged him based on his drug test, and (2) failed to confirm the result through a second test.”<sup>56</sup> This, the court concluded, would not require the court to “interpret, or even refer to, the terms of a CBA.”<sup>57</sup> Therefore, the state statutory claim was “clearly independent of the CBA and . . . not subject to § 301 preemption.”<sup>58</sup> The mere fact that the parties had agreed to collectively bargained drug-testing procedures “is irrelevant because ‘§ 301 does not grant the parties to a [CBA] the ability to contract for what is illegal under state law.’”<sup>59</sup>

Similarly, two years prior to *Williams*, the Eighth Circuit explicitly adopted a much narrower interpretation of Section 301 preemption than it had in the past when it ruled that state common law claims (for example, intentional infliction of emotional distress, libel, and so forth) were protected from Section 301 preemption in the same way as state statutory

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53. *Williams v. Nat’l Football League*, 582 F.3d 863 (8th Cir. 2009). For a complete discussion of *Williams*, see *infra* Part IV.

54. *Karnes v. Boeing Co.*, 335 F.3d 1189 (10th Cir. 2003). Plaintiff Donald Karnes was caught on video smoking marijuana at his Boeing factory job site. *Id.* at 1191. His supervisors asked him to submit to a drug test that came back positive for marijuana, amphetamines, and methamphetamines. *Id.* Following the positive test, Karnes was fired for violating Boeing’s policy against using illegal drugs on company-owned land. *Id.* In response, Karnes sued Boeing in state court for violations of Oklahoma’s Standards for Workplace Drug and Alcohol Testing Act and Oklahoma’s Employment Security Act. *Id.* at 1192. The district court held that Section 301 preempted the former employee’s claims, but the Tenth Circuit reversed. *Id.* at 1192, 1194–95.

55. OKLA. STAT. tit. 40, § 562(A) (2001).

56. *Karnes*, 335 F.3d at 1193.

57. *Id.*

58. *Id.* at 1194 (citing *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 407 (1988)).

59. *Id.* (alteration in original) (quoting *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 212 (1985)).

claims.<sup>60</sup> In *Bogan v. General Motors Corp.*, the district court granted summary judgment for General Motors (“GM”) as to plaintiff Carolyn Bogan’s emotional-distress claim, determining it was preempted by Section 301 of the LMRA.<sup>61</sup> The court cited a management rights provision in the applicable CBA that granted GM the “right to hire; promote; [and] discharge or discipline for cause” and concluded that the clause required interpretation to evaluate Bogan’s tort claim.<sup>62</sup> The Eighth Circuit reversed:

To evaluate Bogan’s intentional infliction of emotional distress claim, a trier of fact will have to determine whether [GM-hired private investigator] Harrell intentionally or recklessly falsely accused Bogan of selling drugs . . . , whether Harrell’s conduct in doing so was extreme and outrageous, whether the conduct caused Bogan to suffer severe emotional distress, and whether Harrell’s actions were taken in his capacity as an employee . . . .

[These] elements . . . are not “inextricably intertwined with [the CBA].” . . . A jury will not have to concern itself with [the CBA] in order to resolve the alleged emotional distress claim.<sup>63</sup>

GM, relying on Eighth Circuit precedent, stressed that the above reasoning does not take into account GM’s potential defenses to the charge, and that Section 301 still preempts state-based claims if CBA-based defenses are considered when determining the merits of a claim.<sup>64</sup> The court acknowledged that *Johnson v. Anheuser Bush, Inc.*—and other Eighth Circuit precedent—was somewhat discordant with the *Bogan* opinion as it related to the reach of Section 301. It noted that in “*Johnson*[, the] court reasoned [that] the plaintiff’s alleged plant rule violations and the CBA’s grievance procedure were relevant because the employer’s ‘defenses, as well as [the employee’s] claims, *must be considered*’” in determining whether a state law claim is inextricably intertwined with the applicable CBA.<sup>65</sup>

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60. *Bogan v. Gen. Motors Corp.*, 500 F.3d 828 (8th Cir. 2007). Plaintiff Carolyn Bogan, a General Motors (“GM”) employee, was terminated for selling marijuana at work. *Id.* at 829. Her name was listed in the St. Louis Post-Dispatch as one of eight employees let go by GM for distributing narcotics. *Id.* After it came to light that Bogan was erroneously implicated in the crime, GM rehired her as a partial settlement for a grievance she brought challenging her termination. *Id.* She then brought suit in state court against GM alleging, in part, intentional infliction of emotional distress. *Id.*

61. *Bogan v. Gen. Motors Corp.*, 437 F. Supp. 2d 1040, 1050–51 (E.D. Mo. 2006), *rev’d*, 500 F.3d 828 (8th Cir. 2007).

62. *Id.* at 1050 (citations omitted) (internal quotation marks omitted).

63. *Bogan*, 500 F.3d at 832–33 (citations omitted).

64. *Johnson v. Anheuser Busch, Inc.*, 876 F.2d 620, 623 (8th Cir. 1989).

65. *Bogan*, 500 F.3d at 833 (emphasis added) (quoting *Johnson*, 876 F.2d at 623). Other circuits

In other cases, however, the Eighth Circuit had rejected the broader reading of Section 301 preemption embraced in *Johnson*.<sup>66</sup> The court noted in *Bogan*, “[w]hen faced with conflicting precedents of this kind, we are free to choose which line of cases to follow.”<sup>67</sup> The court concluded that “the narrower approach to LMRA preemption . . . is more faithful to [Supreme Court precedent]” and thus rejected GM’s argument.<sup>68</sup>

While the narrower reading of the LMRA was a victory for those who promote states’ rights, for leagues like the NFL it had the potential to undermine a vital goal: the uniform application of PED-testing procedures.

#### IV. THE CASE AT ISSUE: *WILLIAMS V. NATIONAL FOOTBALL LEAGUE*

Prior to the 2008 NFL season, two Minnesota Vikings players, Pat Williams and Kevin Williams (“the Williamses”),<sup>69</sup> tested positive for bumetanide,<sup>70</sup> a prescription diuretic and masking agent banned under the NFL PED Policy.<sup>71</sup> Bumetanide itself is not a steroid but is known to mask

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have also previously held that potential defenses are a part of Section 301 analysis. *See, e.g.*, *Newberry v. Pac. Racing Ass’n*, 854 F.2d 1142, 1146 (9th Cir. 1988) (holding that a court should evaluate whether the claim can be resolved without interpreting a CBA and not merely examine how the claim is framed in deciding Section 301 preemption questions).

66. *See, e.g.*, *Meyer v. Schnucks Mkts., Inc.*, 163 F.3d 1048, 1051 (8th Cir. 1998) (suggesting that defendants’ potential defenses are irrelevant to a Section 301 preemption analysis); *Humphrey v. Sequentia, Inc.*, 58 F.3d 1238, 1243–44 (8th Cir. 1995) (same).

67. *Bogan*, 500 F.3d at 833 (alteration in original) (quoting *Meyer*, 163 F.3d at 1051) (internal quotation marks omitted).

68. *Id.* (alteration in original) (quoting *Meyer*, 163 F.3d at 1051) (internal quotation marks omitted). *See also* *Cramer v. Consol. Freightways Inc.*, 255 F.3d 683, 696 (9th Cir. 2001) (en banc) (narrowing the Ninth Circuit’s interpretation of the scope of Section 301 preemption by rejecting the defendant’s reliance on the “expansive language” of previous Ninth Circuit decisions because those decisions were “today disavowed”).

69. *Jamar Nesbit Sues NFL over StarCaps*, ASSOCIATED PRESS, Aug. 11, 2010, available at [http://www.usatoday.com/sports/football/nfl/2010-08-11-jamar-nesbit-lawsuit\\_N.htm?csp=34sports](http://www.usatoday.com/sports/football/nfl/2010-08-11-jamar-nesbit-lawsuit_N.htm?csp=34sports).

Along with the two Vikings players, New Orleans Saints players Charles Grant, Deuce McAllister, and Will Smith also tested positive for bumetanide as a result of taking StarCaps around the same time as the Williamses. *Id.* They were not parties to this litigation, but their positive tests are important for other reasons, discussed later.

70. “Bumetanide” is defined as a “loop diuretic used in treatment of edema associated with congestive heart failure or hepatic or renal disease, treatment of hypertension, usually in combination with other drugs, and as an adjunct in treatment of acute pulmonary edema” that is “administered orally, intramuscularly, or intravenously.” DORLAND’S ILLUSTRATED MEDICAL DICTIONARY 263 (31st ed. 2007).

71. NFL PED POLICY, *supra* note 11, at 17.

steroid use on drug tests.<sup>72</sup> The Williamses, both of whom had weight clauses in their respective contracts, had ingested an over-the-counter weight-loss supplement known as StarCaps that contained bumetanide.<sup>73</sup> Although the diuretic was not listed on the ingredient list, Dr. John Lombardo<sup>74</sup> and the NFL knew since November 14, 2006, that some StarCaps capsules contained bumetanide.<sup>75</sup> The league informed the players' union, which then informed all NFL agents, of their discovery and the Williamses were later given immediate four-game suspensions as a result of the positive tests.<sup>76</sup> On appeal to an NFL arbitrator, the players argued that their positive results should be excused because the NFL knew StarCaps contained bumetanide and did not specifically advise NFL players to avoid the pills.<sup>77</sup> The arbitrator adhered to the strict liability theory in the Policy and ruled on December 2, 2008, that the language of the Policy required that the suspensions be upheld.<sup>78</sup> Rather than accept that penalty, however, the players filed suit in Minnesota state court—the NFL later removed the case to federal court—claiming that Minnesota labor laws guaranteed certain avenues for relief not proscribed by the NFL and urging the court to block their suspensions.<sup>79</sup> This Note is concerned with the two statutory claims: specifically, the players asserted a violation of Minnesota's Drug and Alcohol Testing in the Workplace Act<sup>80</sup> ("DATWA") and a violation of Minnesota's Consumable Products Act<sup>81</sup> ("CPA").

DATWA expressly addresses CBAs, indicating that it shall not limit parties from collectively bargaining for a drug-and-alcohol testing policy, so long as that policy "meets or exceeds, and does not otherwise conflict with, the minimum standards and requirements for employee protection

72. Michael S. Schmidt & Judy Battista, *Drug Tests Could Lead to 8 Suspensions in N.F.L.*, N.Y. TIMES, Oct. 25, 2008, at D1.

73. See Steve Aschburner, *Vikings' Diet Policies Help Produce Amazing Results: A Loss of 628 Pounds!*, MINNPOST.COM (Dec. 4, 2008, 10:20 AM), [http://www.minnpost.com/steveaschburner/2008/12/04/5009/vikings\\_diet\\_policies\\_help\\_produce\\_amazing\\_results\\_a\\_loss\\_of\\_628\\_pounds](http://www.minnpost.com/steveaschburner/2008/12/04/5009/vikings_diet_policies_help_produce_amazing_results_a_loss_of_628_pounds).

74. Lombardo is the "Independent Administrator" of the drug-testing policy. Judy Battista, *Six Players Suspended Four Games for Using Diuretics*, N.Y. TIMES, Dec. 3, 2008, at B13.

75. *Williams v. Nat'l Football League*, 582 F.3d 863, 869 (8th Cir. 2009).

76. See *id.* at 870.

77. *Id.* at 871–72.

78. *Id.*

79. See *id.* at 872.

80. MINN. STAT. §§ 181.950–957 (2010).

81. *Id.* § 181.938.

provided in [DATWA].”<sup>82</sup> It does not state that employees who are parties to a CBA cannot bring a claim under DATWA. Among the minimum requirements imposed by DATWA, employees have “the right . . . to explain a positive test result on a confirmatory test or request and pay for a confirmatory retest.”<sup>83</sup> The employee who tests positive for drugs “must be given written notice of the right to explain the positive test.”<sup>84</sup> Critically, an employer is barred from “disciplin[ing] . . . an employee on the basis of a positive test result . . . that has not been verified by a confirmatory test.”<sup>85</sup> Moreover, all drug tests must be conducted at a laboratory that meets specific criteria for drug testing, such as being certified by the National Institute on Drug Abuse, accredited by the College of American Pathologists, or licensed by the State of New York, Department of Health.<sup>86</sup> The NFL PED Policy, which includes its own testing procedures and an emphasis on strict liability, does not “meet or exceed” DATWA’s requirements.<sup>87</sup> Thus, the question was whether Section 301 of the LMRA preempted the players’ claim. The answer hinged on whether resolution of the DATWA claim was “inextricably intertwined” with a provision in the CBA.<sup>88</sup>

The NFL first argued that in order for a court to determine whether its Policy met or exceeded DATWA’s minimum requirements, it would necessarily have to interpret the CBA.<sup>89</sup> In so arguing, the NFL implied that no party to a CBA could ever bring a DATWA claim because a court would be required to interpret the CBA to determine whether the minimum requirements of DATWA were met—in which case Section 301 would preempt the claim. The NFL next contended that a court would be required to interpret its CBA to determine whether the NFL qualified as an employer under DATWA.<sup>90</sup> These arguments seemed inapposite to the intent behind DATWA, which aimed at achieving heightened protection of Minnesota employees, including those subject to a CBA.<sup>91</sup>

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82. *Id.* § 181.955 subdiv. 1.

83. *Id.* § 181.952 subdiv. 1(5).

84. *Id.* § 181.953 subdiv. 6.

85. *Id.* § 181.953 subdiv. 10(a).

86. *Id.* § 181.953 subdiv. 1(a).

87. The NFL conceded that it did not use properly certified laboratories. *Williams v. Nat’l Football League*, 582 F.3d 863, 875 n.9 (8th Cir. 2009). *See also* NFL PED POLICY, *supra* note 11, at 6.

88. *Williams*, 582 F.3d at 881 (citing *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 213 (1985)).

89. *Id.* at 873.

90. *Id.*

91. MINN. STAT. § 181.955 subdiv. 1.

The district court rejected the NFL's arguments on the basis that the DATWA claim was not inextricably intertwined with the CBA.<sup>92</sup> On appeal, the Eighth Circuit was charged with deciding the preemptive reach of Section 301 of the LMRA. In affirming the district court's decision, the court continued the judicial trend of limiting the preemptive reach of Section 301 when it explained,

a court would have no need to consult the Policy [or CBA] in order to resolve the Players' DATWA claim. Rather, it would compare the facts and the procedure that the NFL actually followed with respect to its drug testing of the Players with DATWA's requirements for determining if the Players are entitled to prevail.<sup>93</sup>

The procedure followed by the NFL, the court reasoned, is a purely factual question about the employer's conduct that requires no interpretation of the CBA.<sup>94</sup> The court pointed out that the NFL could not identify a specific provision of the CBA that required interpretation.<sup>95</sup> As such, Section 301 preemption would not apply because the claim is not "inextricably intertwined" with the provisions of a CBA.<sup>96</sup>

The NFL's final argument for preempting the DATWA claim was that allowing the Williamses to pursue relief in a Minnesota court "would render the uniform enforcement of its drug-testing policy, on which it relies as a national organization for the integrity of its business, nearly impossible."<sup>97</sup> The Ninth Circuit rejected a similar argument about the necessity of the uniform application of a CBA in *Cramer v. Consolidated Freightways Inc.*<sup>98</sup> In *Cramer*, employees of a large trucking company brought a state statute-based claim against their employer for invasion of privacy arising from the alleged secret videotaping of employee restrooms through two-way mirrors in violation of California law.<sup>99</sup> The district court dismissed the action on the grounds that the employees' claim was preempted by Section 301 of the LMRA, but the Ninth Circuit reversed.<sup>100</sup>

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92. See Nat'l Football League Players Ass'n v. Nat'l Football League, 654 F. Supp. 2d 960, 967 (D. Minn.), *aff'd sub nom.* Williams v. Nat'l Football League, 582 F.3d 863 (8th Cir. 2009).

93. *Williams*, 582 F.3d at 876.

94. *Id.* (citing *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 261–62 (1994); *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 407 (1988)).

95. *Id.* at 877.

96. See *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 213 (1985).

97. *Williams*, 582 F.3d at 877.

98. *Cramer v. Consol. Freightways Inc.*, 255 F.3d 683 (9th Cir. 2001) (en banc).

99. *Id.* at 688.

100. *Id.* at 688–89.

The trucking company, which employed people from many states, argued that the terms of a CBA affecting employees across multiple states must be applied uniformly to satisfy the purposes of entering into such an agreement in the first place.<sup>101</sup> The Ninth Circuit disagreed that a CBA should be able to supersede state laws: “[The trucking company’s] contention overreaches, however, because the LMRA certainly did not give employers and unions the power to displace any state regulatory law they found inconvenient.”<sup>102</sup> The Eighth Circuit adopted similar reasoning in rejecting the NFL’s claim of disuniformity as a reason for preempting the state claims.<sup>103</sup>

The NFL also argued that Section 301 should preempt the Williamses’ CPA claim.<sup>104</sup> The CPA provides employers the right to discipline employees for consuming lawful products only if the prohibition of the use of such products “relates to a bona fide occupational requirement and is reasonably related to employment activities or responsibilities of a particular employee or group of employees.”<sup>105</sup> The Eighth Circuit disagreed with the NFL’s argument that an examination of the CBA was required to determine whether the NFL was protected by the exception quoted above, however, based on the aforementioned limitation on Section 301 preemption that disavows taking into account defendants’ potential defenses.<sup>106</sup>

The Eighth Circuit also rejected the NFL’s contention that preemption is necessary because the CPA applies only to the use of substances “off the premises of the employer during nonworking hours”<sup>107</sup> and that a court could not determine whether the CPA applied without interpreting the CBA to resolve questions about employers’ premises and work hours. The NFL contended that during training camp, at which the Williamses tested positive for bumetanide, players are never off the premises and have no nonworking hours.<sup>108</sup> After examining the entire NFL CBA, the Eighth Circuit found “nothing relevant to the question of what constitutes ‘off the

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101. *See id.* at 695 n.9.

102. *Id.* (citing *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 211–12 (1985)).

103. *Williams v. Nat’l Football League*, 582 F.3d 863, 878 (8th Cir. 2009).

104. *Id.*

105. MINN. STAT. § 181.938 subdiv. 3(a)(1) (2010). There are other exceptions to the CPA that are not relevant to this Note.

106. *Williams*, 582 F.3d at 879. *See also supra* notes 64–68 and accompanying text.

107. *Williams*, 582 F.3d at 880 (quoting MINN. STAT. § 181.938 subdiv. 2) (internal quotation marks omitted).

108. *Id.* at 879–80.

premises of the employer' and 'during nonworking hours' while an NFL player is attending training camp" and consequently held that the claim was not preempted.<sup>109</sup>

Finally, the court rejected the NFL's argument that the Williamses had waived their rights under the CPA because the NFLPA agreed to drug-testing procedures and discipline with the NFL, explaining that "[b]ecause the CPA undisputedly creates rights independent of the CBA or the Policy, they cannot be waived or altered by the Union's agreement to the CBA and the Policy."<sup>110</sup>

By holding that Section 301 preempted neither the DATWA nor the CPA claims, the Eighth Circuit followed the prevailing judicial trend of constricting the LMRA's preemptive reach. Yet the ruling simultaneously conflicted with the national movement for strict, uniform drug testing in professional sports.

Although there are several "quick fixes" to the potential problem posed in *Williams* that are discussed briefly below, this Note is more concerned with the broader implications of the ruling. *Williams* undermines the goal of uniformity in CBAs and creates the potential for ever-changing standards, especially in the area of PED testing. For example, the Williamses of the Vikings were not alone in testing positive for bumetanide before the 2008 season. New Orleans Saints players Charles Grant, Deuce McAllister, and Will Smith also tested positive for the banned substance.<sup>111</sup> Unlike Minnesota, however, Louisiana's legislature has provided an explicit exception for National Collegiate Athletic Association ("NCAA") and NFL drug-testing procedures.<sup>112</sup> Therefore, it was well within NFL Commissioner Roger Goodell's province to suspend the Saints players for the same infraction for which the Eighth Circuit ruled the Williamses could not be suspended.<sup>113</sup> This type of uneven application could give the

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109. *Id.* at 880.

110. *Id.*

111. *See supra* note 69.

112. The Louisiana statute states that the provided drug-testing standards "shall not apply to drug testing conducted by the National Collegiate Athletic Association (NCAA) or the National Football League (NFL)." LA. REV. STAT. ANN. § 49:1002(F) (2003).

113. "Of the 23 states home to an NFL team, only 5 (Arizona, Louisiana, Maryland, Minnesota, and North Carolina) have any form of mandatory workplace drug regulations, and only 3 of those (Minnesota, Maryland, and North Carolina) have possible conflicts with the NFL Policy." *The NFL StarCaps Case: Are Sports' Anti-Doping Programs at a Legal Crossroads?: Hearing Before the Subcomm. on Commerce, Trade, and Consumer Prot. of the H. Comm. on Energy and Commerce*, 111th Cong. (2009) [hereinafter *The NFL StarCaps Case*] (testimony of Gabriel A. Feldman, Associate

Vikings a competitive advantage over the Saints on the football field, which could jeopardize the league's desire for fair play.

Furthermore, the value of collective bargaining may be diminished for professional sports leagues because the leagues may not be able to rely on those portions of the CBA affecting subject matters which themselves are the subject of state law. In this case state labor law—and drug regulations specifically—were at issue, but it is possible to envision disputes arising under any number of state laws.

Some scholars, such as Michael Dorf, have argued that allowing *Williams* to stand is the preferable result for federalism reasons.<sup>114</sup> Dorf argues that any unfairness resulting from the disuniform application of the NFL PED Policy would be minor, and that “[w]hat would have been truly unfair, in contrast, would have been a decision to treat the NFL—or sports leagues more generally—differently from other multi-state enterprises.”<sup>115</sup> While in the abstract Dorf's argument is persuasive based on federalism principles, in the context of professional sports there are several countervailing reasons that trump the federalism argument. These reasons, which include empirical evidence condemning PED use, the unique nature of professional sports participants as both competitors and coventurers, and Congress's clear desire for the leagues to bargain for strict PED-testing procedures, are discussed in more detail in Part V.D and Part VI.

As mentioned above, there are a number of quick-fix solutions for the NFL in the *Williams* case that warrant mentioning. First, and easiest, the NFL could litigate and win the remanded case in Minnesota state court.<sup>116</sup> Then the NFL could suspend the Williamses under the current Policy. This, however, does not foreclose a similar situation from undermining the Policy in the future since the Eighth Circuit allowed the suit to be adjudicated in the first place. Alternatively, the NFL and NFLPA could collectively bargain for a PED policy that meets or exceeds the state standards that most protect employees. This poses two potential problems: on one hand, state law varies widely and is changeable, and on the other hand, certain state laws may not be responsive to NFL needs. A third

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Professor of Law and Director of Tulane Sports Law Program, Tulane University School of Law).

114. See Michael C. Dorf, *Football and Federalism: A Case Centers on NFL Drug Testing*, FINDLAW (Sept. 23, 2009), <http://writ.news.findlaw.com/dorf/20090923.html> (arguing that it is often wise for Congress to not exercise its Constitutional preemption power).

115. *Id.*

116. This is what the NFL actually did. Judy Battista, *Judge Rules for League in Case Involving 2 Vikings*, N.Y. TIMES, May 7, 2010, at B13.

option for the NFL is to seek a legislative exemption from the Minnesota legislature like it did with the Louisiana legislature.<sup>117</sup> Similar to the NFL winning at trial, however, this solution would not foreclose a similar problem from arising elsewhere in the future. Finally, there is an interesting argument following the recent Supreme Court case *14 Penn Plaza LLC v. Pyett*<sup>118</sup> that the NFL and NFLPA could preclude a challenge to the CBA in court if they bargained to a clear and explicit waiver of federal and state forum rights. Whether this solution would be tenable is beyond the breadth of this Note.

Because none of these quick fixes are sufficient to foreclose a similar problem from occurring in the future, there must be a more useful solution: namely, a narrowly drafted congressional carve out for professional sports leagues against the judicial interpretations of Section 301 following *Allis-Chalmers*. First, however, it is important to note why professional sports leagues need strict, uniform PED testing before discussing how such procedures should be upheld. The following part examines the dangers of steroid use by professional athletes, how using PEDs undermines the values of sports, how the use of PEDs by professional athletes affects youth athletes, and why the unique nature of professional sports augments the empirical justifications.

#### V. STRICT, UNIFORM PED TESTING SHOULD BE IMPLEMENTED AND UNIFORMLY APPLIED IN PROFESSIONAL SPORTS

At their very core, sports are based on values such as teamwork, competition, and fair play. Longstanding principles like lining up to shake hands after each game are still practiced throughout elementary-school and high-school sports.<sup>119</sup> Some professional athletes are revered for their accomplishments and thrust into the international spotlight as icons and heroes, especially for youth athletes who strive to emulate their success and achievements.<sup>120</sup> There are four overarching reasons why the use of PEDs in professional sports must be curbed with strict punishments and swift judgments that apply uniformly to all athletes in a given league. The first three deal with empirical evidence about the dangers and negative

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117. LA. REV. STAT. ANN. § 49:1002(F) (2003).

118. *14 Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456 (2009). See *supra* note 46 for a discussion of *14 Penn Plaza*.

119. E.g., IOWA CITY GIRLS SOFTBALL, SENIOR (GRADES 8–12) DIVISION RULES 2 (2010), [http://www.leaguelineup.com/icgs/files/ICGS\\_Senior\\_Division\\_Rules\\_2-08-2011.pdf](http://www.leaguelineup.com/icgs/files/ICGS_Senior_Division_Rules_2-08-2011.pdf).

120. *Baseball Under the Microscope*, *supra* note 1.

consequences of steroids, and the fourth analyzes why the unique nature of professional sports requires uniform application of PED-testing policies. Each reason will be discussed in turn. I will then discuss why Congress should carve out an exception to the judicial interpretation of Section 301 preemption for professional sports leagues rather than passing actual substantive PED legislation.

A. MANY PEDS POSE SIGNIFICANT HEALTH RISKS TO THOSE WHO USE THEM

It must first be noted that the StarCaps supplement taken by the players in *Williams* was a legal over-the-counter pill that happened to contain a masking agent and not an actual steroid.<sup>121</sup> The reason diuretics like bumetanide have been banned by leagues like the NFL is because they have the capacity to “rapidly dilute urine by increasing renal flow.”<sup>122</sup> When used as a masking agent, a diuretic can severely dilute the amount of a banned substance being excreted, which makes it difficult for laboratories to detect performance-enhancing substances.<sup>123</sup> While there are negative side effects of diuretics like bumetanide—including “profound diuresis with water and electrolyte depletion”<sup>124</sup>—the real reason for banning such substances is because of their masking capabilities. Masking agents such as StarCaps are treated the same as actual anabolic steroids precisely because the former is proven to mask the latter, so to treat the two differently would not make sense.

Most PEDs taken by professional athletes, such as human growth hormone and other anabolic steroids, pose much more significant health risks to users than masking agents. Anabolic PEDs contain natural or synthetic testosterone, which allows the user to both increase muscle mass during a strenuous workout and recover more quickly with less soreness from those workouts.<sup>125</sup>

121. See *supra* note 72 and accompanying text.

122. See, e.g., Graham J. Trout & Rymantas Kazlauskas, *Sports Drug Testing—An Analyst’s Perspective*, 33 CHEMICAL SOC’Y REV. 1, 7 (2004), available at [http://www.rsc.org/delivery/\\_ArticleLinking/DisplayArticleForFree.cfm?doi=b201476a&JournalCode=CS](http://www.rsc.org/delivery/_ArticleLinking/DisplayArticleForFree.cfm?doi=b201476a&JournalCode=CS).

123. *Id.*

124. VALIDUS PHARM. LLC, NEW DRUG APPLICATION 018225/S-024, BUMEX: BRAND OF BUMETANIDE TABLETS 3 (2009), [http://www.accessdata.fda.gov/drugsatfda\\_docs/label/2010/018225s024lbl.pdf](http://www.accessdata.fda.gov/drugsatfda_docs/label/2010/018225s024lbl.pdf).

125. See, e.g., Matsumoto, *supra* note 8, at 1181, 1192; Thomas D. Fahey, *Anabolic-Androgenic Steroids: Mechanism of Action and Effects on Performance*, ENCYCLOPEDIA OF SPORTS MEDICINE AND SCIENCE (Mar. 7, 1998), <http://www.sportsci.org/encyc/anabster/anabster.html>.

The health risks of steroid use are abundant. The National Institute on Drug Abuse, a subdivision of the U.S. Department of Health and Human Services, has pointed to links between anabolic steroids and psychiatric effects such as severe depression and rage;<sup>126</sup> cardiovascular effects such as a higher risk of heart attack and raised cholesterol levels;<sup>127</sup> liver damage resulting in life-threatening blood-filled cysts or cancers;<sup>128</sup> harm to the male reproductive system based on a disruption of the natural production of testosterone;<sup>129</sup> musculoskeletal effects including stunted growth;<sup>130</sup> increased probability of severe acne and excess body hair in women;<sup>131</sup> and a risk of addiction-induced behavior such as withdrawal symptoms absent steroids.<sup>132</sup> Similar side effects result from taking human growth hormone and other PEDs.<sup>133</sup>

Sports leagues have an obvious interest in preventing their athletes from severely damaging their own bodies through PED use. Leagues do not want their players—stars or otherwise—destroying their own bodies because such actions would bring negative publicity to the sport and force teams to deal with losing players to unnatural injuries. Strict, uniform drug testing has the necessary deterrent effect to curb PED use—any other non-strict liability testing procedures could lessen that deterrence.

Damage to the user, however, is but one reason sports leagues need strict PED testing. It is arguably more important to protect the integrity of the sport and impressionable youths from the taint of PED use. The following sections discuss both in turn.

#### B. THE USE OF PEDS SERIOUSLY UNDERMINES THE INTEGRITY OF PROFESSIONAL SPORTS

The widespread use of PEDs in professional sports has posed a serious risk to the integrity of athletes' achievements, especially since the mid-

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126. See NAT'L INST. ON DRUG ABUSE, U.S. DEP'T OF HEALTH AND HUMAN SERVS., NIH PUB. NO. 00-3721, ANABOLIC STEROID ABUSE 5-6 (2006).

127. *Id.* at 4.

128. *Id.* at 5.

129. *Id.* at 4.

130. *Id.*

131. *Id.* at 4-5.

132. *Id.* at 6.

133. See, e.g., George Fan, Comment, *Anabolic Steroid and Human Growth Hormone Abuse: Creating an Effective and Equitable Ergogenic Drug Policy*, 1994 U. CHI. LEGAL F. 439, 455-56 (1994) (discussing adverse side effects of human growth hormone such as impotence, cardiomyopathy, hypothyroidism, and arthritis).

1990s. Simply put, PED use is cheating. Ex-Commissioner of MLB Bart Giamatti contrasted acts of violence with cheaters:

Unlike acts of impulse or violence, intended at the moment to vent frustration or [to] abuse another, acts of cheating are intended to alter the very conditions of play to favor one person. [These acts] . . . seek to undermine the basic foundation of any contest declaring the winner—that all participants play under identical rules and conditions. Acts of cheating destroy that necessary foundation and thus strike at the essence of a contest. They destroy faith in the games' integrity and fairness; if participants and spectators alike cannot assume integrity and fairness, the contest cannot in its essence exist.<sup>134</sup>

Under Giamatti's view, the increased use of PEDs in professional sports over the past two decades has caused the MLB, NFL, and National Basketball Association ("NBA") to become hollow shells of their yesteryear counterparts, meaning fans cannot or should not accept any individual record or achievement. While this may be a bit drastic of a conclusion, statisticians and fans alike have begun to question whether records—such as the single season or career homerun records in MLB—should be considered legitimate. Is Barry Bonds the deserved homerun king with 762 career bombs, or does that title remain with Hank Aaron with his (untainted) 755?<sup>135</sup> Should Roger Maris still be considered the single-season homerun record holder with 61 despite the fact that several players, such as Sammy Sosa, Mark McGwire, and Bonds—all PED users<sup>136</sup>—have broken his record since 1998?<sup>137</sup> Merely questioning the legitimacy of individual or team achievements because some athletes had a competitive advantage by taking PEDs already undermines the integrity of a given sport.

Unfortunately, there will always be an incentive to cheat in sports, especially professional sports. For professional athletes, any competitive advantage may lead to bigger paychecks, more endorsements, and heightened fame. A star could become a superstar, and at the other end of the spectrum, a borderline pro could get over the proverbial hump and

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134. A. Bartlett Giamatti, *Decision in the Appeal of Kevin Gross*, in *A GREAT AND GLORIOUS GAME: BASEBALL WRITINGS OF A. BARTLETT GIAMATTI* 67, 72–73 (Kenneth Robson ed., 1998).

135. *Career Leaders & Records for Home Runs*, [BASEBALL-REFERENCE.COM](http://www.baseball-reference.com/leaders/HR_career.shtml), [http://www.baseball-reference.com/leaders/HR\\_career.shtml](http://www.baseball-reference.com/leaders/HR_career.shtml) (last visited Feb. 26, 2011).

136. See Sheinin, *supra* note 2.

137. *Single-Season Leaders & Records for Home Runs*, [BASEBALL-REFERENCE.COM](http://www.baseball-reference.com/leaders/HR_season.shtml), [http://www.baseball-reference.com/leaders/HR\\_season.shtml](http://www.baseball-reference.com/leaders/HR_season.shtml) (last visited Feb. 26, 2011).

make a professional squad instead of an amateur one. In order to combat such temptations, professional sports leagues must be able to implement and enforce strict, uniform PED-testing rules to maintain their sports' integrity. Should an athlete know that there are procedural safeguards that may protect him from punishment—in other words, anything but strict liability—that athlete may be too tempted to take PEDs.

C. THE PUBLIC PERCEPTION THAT PROFESSIONAL ATHLETES USE PEDS  
LEADS TO INCREASED USE IN YOUTH ATHLETES

Adolescents that use steroids may be at a greater risk than their professional athlete counterparts because the hormonal changes in youths exacerbate the negative side effects of PEDs.<sup>138</sup> In 2000, the National Center on Addiction and Substance Abuse at Columbia University released a report on PED use in Olympic sports and noted that “[a]thletes are second only to parents in the extent to which they are admired by children.”<sup>139</sup> Athletes came ahead of groups such as teachers, friends, TV stars, movie stars, and musicians.<sup>140</sup>

The report explained that “[c]hildren mimic athletes” by taking PEDs, which may be implicitly endorsed by parents and coaches who “often join the rush for gold, passively by turning the other way.”<sup>141</sup> Unsurprisingly, the study found that 73 percent of surveyed youths idolize and want to be like a famous athlete; strikingly, however, 52 percent of those youths believe it is common for famous athletes to use PEDs in order to gain a competitive advantage.<sup>142</sup> If 73 percent of youths want to emulate their favorite athletes, and 52 percent of them believe it is common for athletes to take PEDs, it follows that a significant percentage of youths might try to increase their own athletic success by ingesting PEDs.<sup>143</sup> Eliminating PED

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138. See *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. 145 (2005) [hereinafter *Restoring Faith in America's Pastime*] (statement of Dr. Kirk J. Brower); Jeffrey A. Potteiger & Vincent G. Stilger, *Anabolic Steroid Use in the Adolescent Athlete*, 29 J. ATHLETIC TRAINING 60, 61–62 (1994); Patrick Zickler, *NIDA Initiative Targets Increasing Teen Use of Anabolic Steroids*, NIDA NOTES (Aug. 2000), [http://archives.drugabuse.gov/NIDA\\_Notes/NNVol15N3/Initiative.html](http://archives.drugabuse.gov/NIDA_Notes/NNVol15N3/Initiative.html).

139. THE NAT'L CTR. ON ADDICTION AND SUBSTANCE ABUSE AT COLUMBIA UNIV., *supra* note 9, at 2.

140. *Id.* at 15.

141. *Id.* at 2.

142. *Id.*

143. Some studies have suggested that youth PED use has declined in recent years. As Senator

use in professional sports would have a clear, positive effect on impressionable youth athletes. If children believed their sports heroes played without steroids, they would be less apt to meddle with illegal substances themselves.

The empirical evidence above explains why professional sports leagues must be able to bargain for and uniformly apply strict PED rules. But the dangers and negative consequences of PED use are not the only reasons leagues need strict, uniform PED testing. Indeed, the unique nature of professional sports as a business demand that result; otherwise, the leagues risk losing the core tenets of cooperation and competition that drive their success.

#### D. SPORTS LEAGUES ARE UNIQUE IN THAT THEY ARE COMPRISED OF COMPETITORS AND COVENTURERS

Although there are several types of unionized industries with similarities to professional sports leagues in that they bargain for a collective agreement and conduct business in several states, such as multinational shipping or trucking companies, professional sports leagues are unique in that they are competitors on the field but coventurers off the field. As this section will show, the atypicality of professional sports leagues further supplements the reasons provided in the previous sections that justify a congressional carve out against the judicial interpretations of Section 301 preemption for professional sports leagues.

Leagues such as the NFL, MLB, and NBA encourage local ownership and prohibit any individual from owning more than one franchise in any particular sport.<sup>144</sup> This fosters a sense of competition in that owners are incentivized to utilize local markets to encourage local sponsorship, sell tickets to local fans, and create interest in team-specific merchandise. Diversified ownership also provides incentives for owners to pursue and retain top coaches and personnel to create a successful on-field product. Along the same lines, teams often vie for coveted free agents or players in

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George Mitchell pointed out in his seminal investigation into PED use in MLB, however, those figures still indicate that “hundreds of thousands of high school-aged young people are still illegally using steroids.” GEORGE J. MITCHELL, DLA PIPER US LLP, REPORT TO THE COMMISSIONER OF BASEBALL OF AN INDEPENDENT INVESTIGATION INTO THE ILLEGAL USE OF STEROIDS AND OTHER PERFORMANCE ENHANCING SUBSTANCES BY PLAYERS IN MAJOR LEAGUE BASEBALL 16 (2007).

144. See MICHAEL N. DANIELSON, HOME TEAM: PROFESSIONAL SPORTS AND THE AMERICAN METROPOLIS 88–89 (1997).

the draft to build their team's success. Obviously, teams are also competitors in that they compete head to head in single games and for division titles and championships.

On the flip side, there is a large degree of cooperation among franchises in both apparent and unapparent ways. Teams cooperate to create a uniform set of policies and regulations. They decide on the length of the season, each team's schedule, and all the rules of the actual game, such as scoring rules, what constitutes a penalty, how many men can be on each team, and so forth. The cooperation extends off the field in the form of selling broadcast rights, national sponsorships, and digital media. This type of cooperation is fruitful for the leagues; to wit, the broadcast contracts for NFL games alone cost upwards of \$20 billion through 2011.<sup>145</sup>

But not as obviously, these teams are not competitors in the traditional business sense. Teams do not wish to drive their competitors out of business, like McDonald's might want to do to Burger King. In many ways teams are coventurers that depend on one another off the field.<sup>146</sup> When one team suffers economically, it negatively affects the entire league. Because of this, some leagues have agreed to share revenues among the franchises to ensure there is a modicum of balance.<sup>147</sup> Leagues take other steps to ensure competitive fairness on the field, including the imposition of salary caps, luxury taxes, wage scales, and awarding the top draft picks to the worst teams from the previous year.<sup>148</sup> They do this not out of a

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145. *NFL Media Rights Deals for '07 Season*, SPORTS BUS. DAILY (Sept. 6, 2007), <http://www.sportsbusinessdaily.com/article/114714>.

146. *United States v. Nat'l Football League*, 116 F. Supp. 319, 323–24 (E.D. Pa. 1953) (discussing, in dicta, the unique nature of professional football and how teams are both competitors and coventurers), *superseded by statute*, Sports Broadcasting Act of 1961, Pub. L. No. 87-331, 75 Stat. 732, *as recognized in* *Shaw v. Dall. Cowboys Football Club, Ltd.*, 172 F.3d 299, 301 n.6 (3d Cir. 1999).

147. For example, the NFL has entered into a revenue sharing program through which teams that generate the most money must distribute excess funds to those teams that generate less revenue. *See* NFL CBA, *supra* note 10, at 143–44.

Courts have recognized the importance of competitive balance in professional sports. *See, e.g.*, *Major League Baseball Props., Inc. v. Salvino, Inc.*, 542 F.3d 290, 331–32 (2d Cir. 2008) (observing that teams are not “independent but interdependent” and that “competitive balance among the teams is essential to both the viability of the [teams] and public interest in the sport, and profit sharing is a legitimate means” to achieve those goals).

148. *See generally* Carol Daugherty Rasnic & Reinhard Resch, *Limiting High Earning of Professional Athletes: Would the American Concept of Salary Caps Be Compatible with Austrian and German Labor Laws?*, 7 WILLAMETTE SPORTS L.J. 57 (2010) (discussing salary caps and related issues in many different professional leagues). Consider that it is impractical if not impossible to suggest professional franchises might one day be on entirely equal footing, and this Note does not suggest such

deeply held moral belief that fairness is just; rather, the teams understand that year-to-year parity keeps the product fresh and drives up revenue nationally.<sup>149</sup> Leagues have gone so far as to bail out floundering franchises, as the National Hockey League did when it took over the ailing Phoenix Coyotes.<sup>150</sup> Regardless of the sport, the league is the entity responsible for establishing uniform competition rules in conjunction with its role in negotiating the CBA. Thus, there is an undeniable codependency among the teams to achieve league-wide success.

This uniqueness of professional sports leagues has not gone unnoticed by the courts. In the late 1980s, a player challenged the NBA's collectively bargained rules regarding the salary cap and college draft on antitrust grounds. In dicta, the Second Circuit explained how the NBA's CBA was a "unique bundle of compromises."<sup>151</sup> The court opined that "[f]reedom of contract is particularly important in the context of collective bargaining between professional athletes and their leagues."<sup>152</sup> Because of the unique relationship that has "little or no precedent in standard industrial relations," any court intrusion would force the leagues to "arrange their affairs in a less efficient way."<sup>153</sup> A similar observation was made in *Mackey v. National Football League*, in which the court noted that "the unique nature

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a result is plausible or even preferable. There are always going to be imbalances among the cities that have a professional sports franchise. For instance, an NFL free agent may be more inclined to sign with a team from New York over a team from Missouri simply because of the more lucrative marketing and sponsorship opportunities in a "big market" like New York's. Similarly, an NBA player may choose to sign with a warm-weather team like Miami so he does not have to suffer through a cold winter in Minnesota or Wisconsin.

Apart from these "innate" differences, however, there are legal differences between states that could be more attractive to a free agent, such as states that do not tax income. All things equal, free agents may choose to sign with a team in Texas, Florida, Washington, or Tennessee over teams from another state because those states do not have an income tax. *States Without a State Income Tax*, IRS, <http://www.irs.gov/efile/article/0,,id=130684,00.html> (last updated Feb. 23, 2010). I recognize these imbalances are inevitable, but I suggest other rules, specifically PED-testing rules, need to be uniformly enforced as to not unravel the nuclei of the very leagues themselves.

149. Note that in a league like MLB there is less "parity" than the NFL because there is no salary cap. Rasnic & Resch, *supra* note 148, at 66. Cooperative measures such as the luxury tax, however, still exist. *Id.* This Note does not seek to delineate each discrepancy among the major sports leagues' CBAs, but rather to discuss their unique natures generally as evidence of why PED-testing procedures must be uniformly applicable.

150. Joel Rosenblatt, *Phoenix Coyotes Owner Moyes Will Sell Bankrupt Team to NHL*, BLOOMBERG (Oct. 27, 2009), <http://www.bloomberg.com/apps/news?pid=20601082&sid=acyvdjqYldWI>.

151. *Wood v. Nat'l Basketball Ass'n*, 809 F.2d 954, 961 (2d Cir. 1987).

152. *Id.*

153. *Id.*

of the business of professional football renders it inappropriate to mechanically apply per se illegality rules [of antitrust law] here.”<sup>154</sup>

Indeed, the success of a particular league depends in large part on the uniform application of collectively bargained rules—and, of course, a critical part of any league’s CBA is its PED-testing rules. This is especially true in light of the relatively recent increase in PED use among athletes trying to gain a competitive advantage. Obviously professional sports leagues cannot be exempt from any and all state laws.<sup>155</sup> But when state labor laws contravene the compelling reasons for strict, uniform PED testing in professional sports, the unique cooperative and competitive nature of professional sports is unable to endure.

For the foregoing reasons, state law should not be able to preclude the uniform application of collectively bargained PED-testing procedures as was the case in *Williams*. Congress instead should exempt the leagues from the judicial interpretation of Section 301 preemption doctrine as it applies to PED-testing rules. Given that the limitations on Section 301 preemption from the “inextricably intertwined” test handed down by *Allis-Chalmers*<sup>156</sup> and its progeny<sup>157</sup> were judicially created, a legislative exception that overcomes *Allis-Chalmers*’s fundamental limitation on preemption would have the advantage of solving the problem presented in *Williams* without allowing Congress to legislate substantive policy. The following part explores why a congressional carve out would represent the best solution.

#### VI. STATE LAW SHOULD NOT PRECLUDE NATIONALLY UNIFORM APPLICATION OF PROFESSIONAL SPORTS LEAGUES’ PED-TESTING PROCEDURES

Despite the apparent correctness of the *Williams* decision under Supreme Court precedent, the previous sections have suggested nonjudicial reasons for why its result—which potentially undermines the uniform enforcement of PED policies—is incorrect. One seemingly obvious

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154. *Mackey v. Nat’l Football League*, 543 F.2d 606, 619 (8th Cir. 1976). *See also* *Clarett v. Nat’l Football League*, 369 F.3d 124, 140 (2d Cir. 2004) (discussing how problems with collective bargaining in professional sports have “little or no precedent” in case law under standard industrial relations).

155. This Note does not contend that professional sports leagues should be exempt from, for example, state income tax laws or wage laws. It merely suggests that in the arena of PED testing, there are persuasive justifications for a congressional carve out to Section 301 preemption for professional sports leagues.

156. *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 213 (1985).

157. *See supra* Parts II–III.

solution would be for Congress to intervene and pass substantive PED legislation that would apply to professional sports leagues. But as the following section shows, this type of legislation runs contrary to congressional intent, and a narrow carve out against the judicial interpretations of Section 301 preemption would achieve the better result.<sup>158</sup>

Congress intends<sup>159</sup> for professional sports leagues to maintain and enforce uniform PED-testing rules. Since 2004, Congress has held hearings on the use of PEDs in professional sports on nine separate occasions and has procured testimony from dozens of experts regarding the subject.<sup>160</sup> Perhaps the most well-known of these hearings occurred on March 17, 2005, when the House Government Reform Committee conducted a formal investigative hearing into MLB's drug-testing program.<sup>161</sup> At that hearing famous professional ball players such as Mark McGwire testified in order to give Congress

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158. Apart from the Legislative branch, the Executive branch has also shown an interest in implementing strict, uniform PED rules to eradicate steroid use in sports. In President George W. Bush's 2004 State of the Union address, he explicitly addressed the problem of PED use in sports:

Athletics play such an important role in our society, but unfortunately, some in professional sports are not setting much of an example. The use of performance-enhancing drugs like steroids in baseball, football, and other sports is dangerous, and it sends the wrong message . . . [T]onight I call on team owners, union representatives, coaches, and players to take the lead, to send the right signal, to get tough, and to get rid of steroids now.

President George W. Bush, Address Before a Joint Session of the Congress on the State of the Union (Jan. 20, 2004), available at <http://usgovinfo.about.com/library/weekly/aasou2004.htm>.

159. There seems to have been no discussion or even thought of how Section 301 would apply to a situation like *Williams* when Congress was debating and passing the LMRA in 1947. See, e.g., H.R. REP. NO. 80-245, at 45-46 (1947), reprinted in 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 292, 336-37 (1985) (failing to mention the preemption issues). Almost all of the discussion revolved around the superfluous nature of the LMRA's Title III (which includes Section 301). Occasionally there was discussion about how pre-LMRA unions had to personally serve each member in order to bring a lawsuit and how Title III would change that by allowing service on only one individual, and how it would be easier for plaintiffs suing unions to collect their judgments under the new law. E.g., S. REP. NO. 80-105, at 15 (1947), reprinted in 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, supra, at 407, 421. There was, however, little to no talk about the interplay between federal law and state law when debating Section 301. Thus, it is nearly impossible to glean any congressional intent as it relates to the application of Section 301 to clashes of federal and state law like in *Williams*.

160. Brief of Major League Baseball, the National Basketball Association and the National Hockey League as Amici Curiae in Support of Appellant/Cross-Appellee National Football League and for Reversal of the Portion of the May 22, 2009 Decision that Denied Preemption and Remanded Plaintiffs-Appellees' State Statutory Claims at 15, *Williams v. Nat'l Football League*, 582 F.3d 863 (8th Cir. 2009) (Nos. 09-2247, 09-2462), 2009 WL 2443982.

161. *Restoring Faith in America's Pastime*, supra note 138, at 9 (statement of Rep. Henry A. Waxman).

a chance to shine some light on what it thinks is an important public health issue.

The use of steroids has become a public health crisis. Half a million kids a year in the U.S. are taking steroids . . . and many of them do this because they are emulating their sports heroes . . . [Congress] thought this was an opportunity to look at [Major League Baseball's] policy, compare it to some other league's [sic] policies and see if it's adequate and get a sense of what steps baseball is taking or has taken to eradicate steroids from the game.<sup>162</sup>

Beginning with the MLB hearings and continuing for the next four years, Congress repeatedly threatened professional sports leagues with congressional intervention in the PED-testing arena in order to enact stricter rules and harsher punishments. At one hearing Representative Henry Waxman said, "I am intrigued with the idea of one Federal policy that applies to all sports and all levels of competition from high school to the pros and that provides a strong disincentive to using steroids,"<sup>163</sup> and "Major League Baseball and the Players Association say that this is the subject that should be left to the bargaining table. They are wrong."<sup>164</sup> Later, in judging the NBA's collectively bargained PED-testing rules, he insisted that "the NBA policy on steroids and other performance-enhancing drugs is simply inadequate,"<sup>165</sup> and "Congress stands ready to act. I will soon join Chairman Davis and Senator John McCain in introducing bipartisan legislation that will ensure that all major professional sports have strong performance-enhancing drug policies that are consistent with the Olympic standard."<sup>166</sup> Indeed, Representative Waxman proclaimed that "we are long past the point where we can rely on Major League Baseball to fix its own problems."<sup>167</sup> Rather than act on those warnings, however, Congress has thus far used them as an instrument to catalyze change in the leagues' drug-testing procedures.

Congress's remonstrative stance regarding its potential intervention

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162. *Baseball Under the Microscope*, *supra* note 1 (internal quotation marks omitted).

163. *Restoring Faith in America's Pastime*, *supra* note 138, at 11 (statement of Rep. Henry A. Waxman).

164. *Id.* at 9.

165. *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. 9 (2005) (statement of Rep. Henry A. Waxman).

166. *Id.* at 10.

167. *Restoring Faith in America's Pastime*, *supra* note 138, at 11 (statement of Rep. Henry A. Waxman).

into PED testing in professional sports disguises its true goal of having the leagues autonomously implement stricter PED-testing rules. In fact, despite maintaining a keen eye on the evolution of PED-testing rules in professional sports for twenty years, Congress has yet to pass any PED legislation that applies to the leagues.<sup>168</sup> As former MLB pitcher and

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168. Although this Note is not interested in proposing substantive policy that Congress could adopt, should Congress feel compelled to legislate substantive PED policy that would apply to professional sports leagues, the United States Anti-Doping Agency's ("USADA's") Olympic, Paralympic, and Pan American Games PED-testing procedures may provide a basis for implementing similar rules in professional sports leagues. The USADA, which is in charge of testing Olympic athletes for banned substances, adopted the USADA Protocol for Olympic and Paralympic Movement Testing ("USADA Protocol") in full compliance with the World Anti-Doping Code. *See generally* U.S. ANTI-DOPING AGENCY, PROTOCOL FOR OLYMPIC AND PARALYMPIC MOVEMENT TESTING (2009) [hereinafter USADA PROTOCOL], available at [http://usantidoping.org/files/active/policies\\_procedures/USADA\\_protocol.pdf](http://usantidoping.org/files/active/policies_procedures/USADA_protocol.pdf) (announcing PED-testing policies); WORLD ANTI-DOPING AGENCY, WORLD ANTI-DOPING CODE (2003) [hereinafter WORLD ANTI-DOPING CODE], available at [http://www.wada-ama.org/rtecontent/document/code\\_v3.pdf](http://www.wada-ama.org/rtecontent/document/code_v3.pdf) (same).

It is worth noting that the U.S. government has been concerned with doping in the Olympics for years in a similar vein to Congress's interest in eliminating PED use in American sports leagues. In 2007, for example, the United States, along with 192 other governments, signed the 2003 Copenhagen Declaration on Anti-Doping in Sport, a pact designed to promote the World Anti-Doping Code and conform each country's PED rules to the Code. *See Copenhagen Declaration on Anti-Doping in Sport*, WORLD ANTI-DOPING AGENCY, <http://www.wada-ama.org/en/World-Anti-Doping-Program/Governments/Copenhagen-Declaration-on-Anti-Doping-in-Sport/> (last updated Oct. 2009); *List of Signatories*, WORLD ANTI-DOPING AGENCY, <http://www.wada-ama.org/en/World-Anti-Doping-Program/Governments/Copenhagen-Declaration-on-Anti-Doping-in-Sport/List-of-signatories/> (last updated Oct. 2009).

In 2008, following approval by the Senate, President Bush formally ratified the United Nations Educational, Scientific and Cultural Organization's International Convention Against Doping in Sport ("UNESCO Convention"). *See United States Ratifies International Convention Against Doping in Sports*, UNESCO (Aug. 8, 2008), [http://portal.unesco.org/en/ev.php-URL\\_ID=43227&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=43227&URL_DO=DO_TOPIC&URL_SECTION=201.html). The UNESCO Convention overtly recognized that "the elimination of doping in sport is dependent in part upon progressive harmonization of anti-doping standards and practices in sport and cooperation at the national and global levels." *See International Convention Against Doping in Sport*, Aug. 4, 2008, S. TREATY DOC. NO. 110-14. Countries have unified in response to the increase of PED use in the Olympics by agreeing to adhere to a set of strict, uniform drug-testing policies. *See id.* (highlighting the importance of adopting and implementing the World Anti-Doping Code on a multinational level).

Furthermore, much of the USADA Protocol comports with, for example, the NFL CBA and NFL PED Policy. *See* sources cited *supra* notes 10–11. For example, both prohibit taking bumetanide regardless of how it was ingested or whether it was legal to take. WORLD ANTI-DOPING AGENCY, WORLD ANTI-DOPING CODE: THE 2009 PROHIBITED LIST: INTERNATIONAL STANDARD 5 (2010). Both impose a strict liability theory of responsibility. *See* USADA PROTOCOL, *supra*, at 17–18. Both warn individuals of mislabeled products or contaminated products and explain that athletes take all products at their own risk. *See* WORLD ANTI-DOPING CODE, *supra*, at 29–30. And both policies (in theory) apply to athletes uniformly across the nation. *See id.* at 6.

current U.S. Senator Jim Bunning put it, “I have said that baseball should get the chance to clean up its own mess and government should stay out of the way. With the new steroid testing policy, it looks like baseball has taken a first baby step toward restoring honesty to the game.”<sup>169</sup> In 2009, Representative Bobby Rush revealed that the “institution of strong anti-doping policies is what Congress has been bargaining for with the professional sports community and industry over the past five years,”<sup>170</sup> despite admitting Congress’s reluctance to get involved with professional sports leagues because “[i]t is in all of our interests for these parties to reach an agreement [on their own].”<sup>171</sup> In fact, Representative Rush noted that it “certainly is within the realm of our responsibilities to come up with legislation to address [the implementation and uniform application of PED-testing procedures,]” but that such legislation “would be something that we would do only as a last resort.”<sup>172</sup> He continued:

You don’t want to have 435 Members of Congress writing a law that will have in any way some immediate conduct [sic] and effect on your players. Because you never can tell. We might come up with some laws that might . . . put a ceiling on salaries. You don’t want us to get involved in this. You can’t tell what Members of Congress will ultimately do once you open up this Pandora’s box.<sup>173</sup>

The above legislative history clearly indicates Congress’s intent for professional sports leagues to figure out a way to implement strict, uniform PED-testing rules for their athletes.<sup>174</sup> In so doing, Congress naturally assumed that professional sports leagues and their players could collectively bargain for these PED-testing procedures that would apply across the board. During the MLB hearings, for example, Congress applauded baseball’s investigation into stricter PED testing as “a step in the

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Regardless of the discussion of the USADA Protocol, this Note continues to support a congressional carve out to Section 301 preemption for professional sports leagues rather than substantive legislation for the reasons discussed in this part.

169. *Restoring Faith in America’s Pastime*, *supra* note 138, at 55 (statement of Sen. Jim Bunning).

170. *The NFL StarCaps Case*, *supra* note 113 (statement of Rep. Bobby L. Rush).

171. *Id.*

172. *Id.*

173. *Id.*

174. Courts have observed the importance of strict, uniform PED testing in nonprofessional sports, such as in the NCAA. *See Hill v. Nat’l Collegiate Athletic Ass’n*, 865 P.2d 633, 661 (Cal. 1994) (explaining that college sports are “a business founded upon offering for public entertainment athletic contests conducted under a rule of fair and rigorous competition,” and that a “well announced and vigorously pursued drug testing program” would serve those goals).

right direction [that] demonstrated the League's authority to act on its own to respond to allegations of steroid use."<sup>175</sup> Congress viewed the only roadblock to the implementation of proper PED-testing procedures as the ability of the leagues and unions to reach agreeable terms for stricter PED testing than they had implemented in the past.<sup>176</sup> Ironically, the Eighth Circuit's interpretation in *Williams* of Section 301 of the LMRA—a congressional statute—has the potential to undermine Congress's goals; it now appears evident post-*Williams* that leagues may lack means to enforce the provisions players have bargained for under the LMRA.

Had the *Williams*es not challenged the NFL CBA in court, Congress's desire for stricter PED-testing procedures in professional sports seemed destined to be fulfilled. Ever since Congress began publicly advocating for stricter PED-testing standards at the 2005 MLB hearings, the MLB, NBA, and NFL have all implemented more rigorous testing and more severe punishments for violations.<sup>177</sup> These steps have greatly reduced the number of PED-using athletes. Congress has not needed to intervene, because these “[strict, uniform PED] policies are restoring integrity to the legacy of many sports that were severely tainted over the last 2 decades.”<sup>178</sup> At the same time Congress succeeded in its goal for implementing strict, uniform PED testing in professional sports, the courts were interpreting Section 301 of the LMRA in a way that would indirectly undercut that restored integrity.

After the *Williams* decision was rendered, but before the Eighth Circuit denied a rehearing en banc or the state court reached an outcome on remand, Congress showed hope that the courts would “ultimately rule that the strong collectively bargained drug policies can stand against State law[s].”<sup>179</sup> That begs the question: If Congress has yet to intervene in the hope that the courts will rule definitively that collectively bargained PED-testing procedures trump state laws, what vehicle did Congress expect the courts to use to reach that ruling? It seems unlikely that Congress had anything other than Section 301 of the LMRA in mind when making such assertions. Thus, there is no way to square the result in *Williams* with the expectations of Congress. This does not mean that other cases decided under Section 301 went afoul of Congress's wishes; it only suggests that

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175. *Restoring Faith in America's Pastime*, *supra* note 138, at 10 (statement of Rep. Henry A. Waxman).

176. *See supra* note 167 and accompanying text.

177. *See supra* notes 10–17 and accompanying text.

178. *The NFL StarCaps Case*, *supra* note 113 (statement of Rep. George Radanovich).

179. *Id.* (statement of Rep. Henry A. Waxman).

professional sports leagues, because of their unique standing in our society and the goals underlying uniform application of PED-testing procedures, ought to be granted a narrow congressional exemption from the judicial interpretation of Section 301 preemption in the PED-testing arena. The apparent correctness of *Williams* therefore belies its ironic effect. And while *Williams* might ultimately compel congressional intervention in the form of sweeping PED legislation, Congress surely prefers to craft a narrow exception to Section 301 as applied to professional sports leagues, lest robust legislation open “Pandora’s box.”<sup>180</sup>

## VII. CONCLUSION

Just as professional sports leagues like the NFL and MLB were ramping up their PED-testing procedures to comply with Congress’s wishes, the Eighth Circuit was applying a straight reading of Section 301 preemption in *Williams* to potentially undercut those goals. As this Note has shown, however, there are several strong justifications for a congressional carve out against that interpretation to allow for the uniform application of strict PED testing in professional sports.

Federalism principles should be no bar to uniformity in this context. In light of the empirical evidence decrying PED use, the unique nature of professional sports as both competitors and coventurers, and Congress’s clear intent for the leagues to bargain for strict PED-testing procedures, a narrowly crafted exemption for professional sports leagues against the judicial interpretation of Section 301 preemption as it relates to collectively bargained PED-testing procedures is not only the logical solution, it is the required one.

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180. *Id.* (statement of Rep. Bobby L. Rush).