No. 09-214

In the

SUPREME COURT OF THE UNITED STATES OF AMERICA

MAJOR LEAGUE BASEBALL,
Petitioner,

v.

KEVIN WILSON;
MAJOR LEAGUE BASEBALL PLAYERS ASSOCIATION
Respondents.

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

BRIEF FOR THE RESPONDENTS

Team 37
Counsel for Respondents

QUESTIONS PRESENTED

I. Whether an arbitrator's award allowing the drug-policy administrator for Major League Baseball to keep secret from players the knowledge that an over-the-counter energy supplement contained a banned substance should be set aside because such an award violates public policy.

II. Whether a Major League Baseball player's independent claims under Minnesota's Drug and Alcohol Testing in the Workplace Act, challenging a suspension under a collectively bargained for drug policy, are preempted by Section 301 of the Labor Management Relations Act when they do not require a court's interpretation of any terms in a collective bargaining agreement.

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BRIEF FOR THE RESPONDENTS

SUMMARY OF THE FACTS

In 2007, Major League Baseball ("MLB") and the Major League Baseball Players Association ("MLBPA") executed a Collective Bargaining Agreement ("CBA") that includes the League's drug-testing policy. Wilson v. Major League Baseball (Wilson I), No. 09-AC-0213, slip op. at 1 (S.D.T.) rev'd, No. 09-2108 (14th Cir.). The policy created an "Independent Administrator" tasked with educating the players about the drug policy, creating and overseeing the drug-testing procedures, and reporting any positive test results to the MLB Commissioner. Id. at 2. Dr. John Larson, a licensed physician, serves as the Administrator. Id. The policy directed players to contact Dr. Larson directly if they had any questions or concerns about a

specific supplement or product, and it explicitly provided Dr. Larson with the authority to respond to the player's questions. Wilson v. Major League Baseball (Wilson II), No. 09-2108, slip op. at 12 (14th Cir.). The policy also created a position for a "Consulting Toxicologist" tasked with assisting in the policy's implementation. Wilson I at 2. Dr. Ray Finkle serves as the Toxicologist. Id. Because the policy holds the players strictly liable for a positive test for a banned substance, it also created a "MLB Supplement Hotline" ("Hotline"). Id. The Hotline protects players by enabling them to seek "confidential and accurate information" about health supplements, including "their ingredients, effects, and adverse reactions." Id. The policy also stated that its administrators would "make a 'special effort to educate and warn players about the risks involved in the use of supplements.'" Wilson II at 13. However, given the strict enforcement of the policy, the Hotline cannot be used by players to excuse a positive test result. Wilson I at 2. While steroid prevention is the focal point for the program, the policy prohibits other known substances closely linked with steroid use. Wilson I at 3. For example, Clomiphene, an estrogen-blocking hormone, is also banned because of its popularity among steroid abusers who rely on it to prevent any loss of newly acquired muscle during the end of a steroid cycle. Id. at n.1. Clomiphene is one of many substances in addition to steroids that are banned by the policy and may be present in over-the-counter supplements that are otherwise not linked to steroid abuse.

Despite the presence of banned substances in over-the-counter supplements, any positive test result carries severe consequences. The first positive result carries a mandatory, minimum suspension for approximately 10-15% of the entire season (based on the current 162 game regular season). See Wilson I at 2. If a player appeals a positive test, the policy provides the right to binding arbitration with an arbitrator who is either the MLB Commissioner or his

designee. Id. The player has no role in selecting the arbitrator, nor is the player given any other option of appeal; the Commissioner or his designee's decision is final. Id.

As early as September 2007, Dr. Larson and MLB became aware that an over-the-counter energy-boosting supplement known as "Speedshot," secretly contained a banned substance—Clomiphene. Wilson I at 4. The Speedshot label merely claimed that users would enjoy at least five hours worth of energy with its use, and failed to include Clomiphene in the ingredients. Wilson I at 3. With knowledge of this secret ingredient, Dr. Larson and Dr. Finkle had Speedshot analyzed to definitively determine whether Clomiphene was present in the supplement. Id. On November 14, 2007, Drs. Larson and Finkle received written confirmation that Speedshot contained Clomiphene. Id. Dr. Finkle informed Dr. Larson that "there should be some concern about the potential adverse effects on the health of players who may be taking this drug without proper medical supervision." Wilson II at 13. Next, Andrew Birch, MLB's Vice President of Law and Labor Policy, was informed of the secret presence of this banned substance in the over-the-counter SpeedShot. Wilson I at 3.

Against advisement to do otherwise, both Dr. Larson and Mr. Birch refused to notify the Food and Drug Administration of their findings. Id. Instead, both MLB and the policy's chief education officer kept their knowledge of Speedshot's secret ingredient to themselves. Further, neither party informed the players of the presence of this banned substance in the widely-available supplement. Wilson I at 4. Mr. Birch asked the Hotline how many calls it received pertaining to Speedshot, and instructed the Hotline to explicitly inform callers that Speedshot was not a banned product, but to remind callers against generally taking energy supplements because there is no guarantee that they list all of their ingredients. Wilson I at 17. Similarly, Dr. Larson sent out a generic warning to the players reminding them of the inherent dangers in

taking energy supplements and that players would be held strictly liable for testing positive for a banned substance. Wilson I at 3-4. The warning also noted that Dr. Larson promised to "continue to provide MLB Players with information on the subject throughout the year." Wilson II at 12. While Dr. Larson maintains that had a player contacted him, he would have informed them about the presence of Clomiphene, Wilson I at 16; Dr. Larson specified that despite his educational responsibilities, he did not provide specific notice about Speedshot because he feared that the players would expect additional warnings about other substances contained in energy supplements in the future, and he feared potential, personal liability. Wilson II at 14.

Separately, MLB notified the MLBPA that teams and players would be prohibited from doing business with "Mega Energy Products, which distributes Speedshot." Wilson I at 3. The notification did not mention the impetus, nor did it state that Speedshot contained a secret ingredient that would cause players to fail upcoming drug tests. Id. Because the notification was framed as a prohibition against conducting business with a distributor, and not a warning to refrain from ingesting the company's products, the MLBPA notified players' agents instead of the players themselves. At no time were the players ever informed either directly or indirectly that Speedshot contained a banned secret ingredient. Wilson I at 4.

Not surprisingly, a number of players consuming Speedshot began to test positive for ingesting a banned substance. Well after MLB and Drs. Larson and Finkle knew of Speedshot's tainted ingredient list, Respondent Kevin Wilson, a player for the Minnesota Twins, tested positive for Clomiphene after taking Speedshot before a spring-training scrimmage. Id. Mr. Wilson received an immediate, fifteen-game suspension. Id. Four other players also tested positive for Clomiphene from different MLB Clubs and received the same suspension. Id. Prior to using Speedshot, but after MLB and Drs. Finkle and Larson knew that Speedshot contained

Clomiphene, one of the players contacted the Hotline specifically about SpeedShot and was advised that the product was not on the banned substances list. Wilson II at 14.

Pursuant to the policy's narrow grounds for appeal, all five players and the MLBPA were forced to appeal the suspensions to an arbitrator selected by the Commissioner. In their appeal, the players and the MLBPA argued that although the drug policy holds players strictly liable for positive test results, the policy also created a fiduciary duty upon MLB to educate and provide accurate information to players requiring MLB and/or Dr. Larson to issue a warning regarding Speedshot's secret ingredient Clomiphene. Wilson I at 4. The arbitrator upheld the suspensions because the players were to be held strictly liable and there "was no genuine dispute regarding the positive test." Wilson I at 5. Further, the arbitrator found that because there was not an explicit requirement within the drug policy forcing MLB or Dr. Larson to issue warnings about specific products, there was no error or fault on MLB or Dr. Larson's part for the positive test results. Id.

Kevin Wilson subsequently filed suit against MLB, Dr. Larson, Dr. Finkle, and Mr. Birch in Minnesota state court. That court blocked Mr. Wilson's suspension through a preliminary injunction because the League's behavior potentially violated the Minnesota Drug and Alcohol Testing in the Workplace Act (DATWA). Wilson II at 2. The injunction only applied to Mr. Wilson because he was the only player employed in Minnesota and subject to that court's jurisdiction. Id. MLB removed the case to federal court and consolidated it with a separate case brought by the MLBPA on behalf of the five players seeking to have the arbitration award upholding their suspensions vacated due to its violation of public policy. Id. MLBPA amended their complaint to also allege that the League's behavior directly violated Minnesota's DATWA. Id. at 3.

The District Court granted MLB's motion for summary judgment holding that (1) § 301 of the Labor Management Relations Act (LMRA) preempted Wilson's state DATWA claim, and (2) the arbitrator's award did not violate public policy because Dr. Larson provided a general warning against energy supplements and had a player asked about Speedshot specifically, he would have told them about its secret ingredient. Wilson I at 14. The Fourteenth Circuit reversed, holding that § 301 of the LMRA cannot preempt Wilson's DATWA claim because the state-law DATWA claim is independent of the League's drug policy within the CBA, therefore a court only needs to determine whether MLB's conduct leading to Wilson's suspension complied with DATWA. Wilson II at 10. The Fourteenth Circuit determined that there was no preemption over this state law claim because it is not necessary to interpret any of the CBA's terms to adjudicate the DATWA claim. Id. at 9. The Fourteenth Circuit also vacated the arbitrator's decision affecting all five players despite deference for arbitration awards because the arbitrator's award violated public policy. Id. at 10. Specifically, the Fourteenth Circuit found that MLB owed a duty to the players to inform them of Speedshot's secret ingredient. Id. at 11-13. This failure not only jeopardized the players' livelihoods, but also was potentially harmful to their health. Wilson II at 14. Because of the relationships between MLB, Dr. Larson and the players, their refusal to warn the players constituted misconduct and violates public policy. Id. Therefore, the court held that the Commissioner's arbitration award should be vacated. Id.

SUMMARY OF THE ARGUMENT

The decision of the Fourteenth Circuit Court of Appeals to vacate the arbitrator's award should be affirmed because it violates public policy. The arbitrator's award directly condones illegal and unsafe behavior on the part of Dr. Larson, and was properly vacated by the lower court.

If an arbitrator's award violates public policy, a court must vacate the award. The public policy of a state is ascertained by looking to clear principles of law. But public policy is not limited solely to positive law. Because the CBA is, by its terms, interpreted by the laws of New York, the public policy of New York governs. In New York, there is a duty to disclose for parties in a relationship like the one MLB players have with MLB and Dr. Larson. Moreover, a number of courts have held that as a subset of public policy, an arbitrator's award condoning dangerous behavior should also be vacated for being contrary to public policy.

The arbitrator's award violates New York's clear public policy and the federal public policy for the safety of others. Dr. Larson's role as administrator of the policy created a relationship of trust with the players. Dr. Larson was responsible for testing and informing players, and under New York law, a party in a relationship of trust with superior knowledge has a duty to disclose. Dr. Larson was aware that SpeedShot contained Clomiphene, a banned substance, but he willfully failed to disclose this. Moreover, Dr. Larson was told by a toxicologist that because SpeedShot contained Clomiphene, there were safety concerns, and that players should be notified to avoid the substance. Again, Dr. Larson failed to alert the Hotline or the players of the dangers. Dr. Larson's conscious decision not to notify the players constitutes both constructive fraud and a serious risk to the safety of players. The arbitrator's award condones Dr. Larson's behavior by penalizing players despite Dr. Larson's misconduct and does nothing to address this misconduct in the future. As such, the arbitrator's award violates public policy and should be vacated.

Additionally, this Court should affirm the Fourteenth Circuit's holding that § 301 cannot preempt DATWA under the facts of this case. Seeking to create a uniform body of federal law, § 301 preempts state-law claims that require an interpretation of a CBA. However, in order to

allow states to continue to grant individual rights and protect workers, Congress and this Court have limited preemption to exclude state law claims that are independent and do not require the interpretation of a CBA. DATWA falls into this category of laws because it gives Minnesota workers, who are subject to drug testing, independent and nonnegotiable rights. Resolution of the DATWA claim does not require interpretation of any term in the collective bargaining agreement. Indeed, a court must only measure Major League Baseball's actual conduct toward Wilson against the requirements of DATWA. To hold otherwise would allow unions and employers the ability to contract around illegal conduct, diminishing state protections of employees' rights. Therefore, this Court should uphold the ruling of the Fourteenth Circuit Court of Appeals.

ARGUMENT

I. The Fourteenth Circuit's holding vacating the arbitrator's award should be affirmed because the award violates public policy.

The arbitrator's decision to suspend the players was properly vacated by the Fourteenth Circuit because enforcement of the award violates public policy. An arbitrator's award that violates public policy must be vacated. New York's public policy requires disclosure of information in a relationship of confidence or trust like the one that existed between Dr. Larson and MLB players. Dr. Larson violated this duty when he knew that SpeedShot contained a banned substance and chose not to alert the Hotline or the players. Moreover, it is also against public policy for an arbitrator's award to permit or condone behavior that endangers the safety of others. Dr. Larson had clear knowledge of Clompihene's secret presence in an over-the-counter supplement that posed a threat to the health and safety of the players. Yet, the arbitrator's award condones Dr. Larson's unsafe silence. Accordingly, the Fourteenth Circuit's holding should be affirmed, and the arbitrator's award should be vacated.

A. An arbitrator's award that violates public policy must be vacated.

Although parties to a CBA negotiate for the ability to resolve disputes through arbitration, an arbitrator's award under the parties' agreement must be vacated if it is contrary to public policy. A court is obligated to refuse to enforce any contract that violates law or public policy. W.R. Grace & Co. v. Int'l Union of the United Rubber, Cork, Linoleum and Plastic Workers, 461 U.S. 757, 766 (1983) (citing Hurd v. Hodge, 334 U.S. 24, 34–35 (1948)). Thus, in addition to the grounds for vacatur found in the Federal Arbitration Act, 9 U.S.C. § 10(a), courts must determine whether the enforcement of an arbitrator's award violates public policy, and if so, the award remains unenforceable. W.R. Grace & Co., 461 U.S. at 766. The public policy must be determined by looking to "laws and legal precedents." United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 42 (1987) (citing W.R. Grace & Co., 461 U.S. at 766). But a court's determination of public policy does not need to rely on a violation of a particular, codified law. Eastern Associated Coal Corp. v. United Mine Workers, District 17, 531 U.S. 57, 63 (2000). The question is not whether the actions of the parties violate public policy, but whether enforcement of the arbitrator's award would violate public policy. Eastern Associated Coal Corp., 531 U.S. at 62–63. Because the parties have agreed that the CBA is interpreted by the laws of New York, if the arbitrator's award violates New York's public policy, the award must be vacated. Additionally, because the award violates a defined federal public policy, it must also be vacated.

B. New York has a public policy for the fulfillment of fiduciary duties, and there is a federal public policy in the interest of public safety. The arbitrator's award should be vacated because it violates both of these public policy interests.

The Fourteenth Circuit correctly held that the arbitrator's award should be vacated because Dr. Larson committed constructive fraud under New York law when he chose not to

notify the players about the contents of SpeedShot's secret ingredients. Moreover, the arbitrator's award violates a general public policy interest in the safety of others.

1. The arbitrator's award violates New York public policy.

New York law recognizes a tort for constructive fraud in the absence of scienter even if the misled party is not aware of the misrepresentation, so long as there is a fiduciary, confidential, or trust relationship. Callahan v. Callahan, 127 A.D.2d 298, 301 (N.Y. App. Div. 1987); see also Grandon v. Merrill Lynch & Co., 147 F.3d 184, 189 (2d Cir. 1998) (holding that generally under federal law there is a duty to disclose between parties whenever one has superior knowledge and is in a position of trust). A relationship that can lead to a duty to disclose is interpreted broadly. One possible relationship creating a duty to disclose is a fiduciary relationship, which exists when one party has a duty to give advice for the benefit of another person due to the scope of the relationship. Lumbermens Mutual Casualty Co. v. Franey Muha Alliant Ins. Servs., 388 F. Supp. 2d 292, 305 (S.D.N.Y. 2005). Or, as in Callahan, the court found that the plaintiff had sufficiently pled constructive fraud when her ex-husband's attorney failed to disclose the proper value of marital assets. Id. The attorney did not represent the ex-wife, but the two had been mere friends. Id. Nonetheless, the court found that this social relationship alone created a duty to disclose. Id. When a party in one of these relationships fails to disclose, he commits constructive fraud.

Measured by this standard, the award was correctly vacated. When Dr. Larson failed to alert the players and the Hotline, Dr. Larson committed constructive fraud and violated a clear public policy. The players and Dr. Larson were in a relationship of trust that created a duty disclose, and Dr. Larson violated that duty. Dr. Larson, as administrator of the drug plan, was personally responsible for keeping the Hotline informed, for testing players, and for reporting

positive tests. The players relied upon Dr. Larson's expertise and qualification in carrying out his duties in a responsible manner. There was a high level of trust between Dr. Larson and the players, and this created a duty to disclose on Dr. Larson. Callahan, 127 A.D.2d at 301. Dr. Larson became aware of the Clomiphene in SpeedShot well before any of the suspended players tested positive for the substance, and he knew that Clomiphene was not listed on the label for SpeedShot. Despite this knowledge, Dr. Larson did not disclose the discovered substance, and he did so to the detriment of individuals he was in a relationship of trust with–violating his duty under New York law. His omission is more egregious because one of the suspended players began using SpeedShot only after speaking with the Hotline. Rather than informing the player that the supplement contained a banned substance, the Hotline advised that the supplement was not banned. Although players were warned not to rely on the Hotline in order to excuse a positive test, the players reasonably expected full-and-frank disclosure from the Hotline. The Hotline disclaimer prevented abuse of the Hotline: it prevented players from using the Hotline to sneak past the league's drug policy. Here, Dr. Larson willfully kept information from the Hotline and players, and violated his duty under New York law. The arbitrator's award that fully condoned this behavior violates New York's public policy.

The issue is not whether Dr. Larson committed constructive fraud, but whether enforcement of the arbitration award violates public policy. Eastern Associated Coal Corp., 531 U.S. at 62–63. In Eastern Associated Coal Corp., an employee was fired for smoking marijuana while at work, and an arbitrator reinstated the employee. Id. This Court held that the mere fact that smoking marijuana violates public policy is not sufficient grounds for vacating the arbitrator's award because there is no public policy against an employer having an employee who had smoked marijuana in the past. Id. this Court specifically noted that the reinstatement

was acceptable because it came with several caveats including required drug treatment and other penalties. Id. In contrast, here the arbitrator's award provides no caveats to deter future constructive fraud by Dr. Larson, nor does it make any attempt to address and prevent future misconduct. Instead, the arbitrator's award fully condones Dr. Larson's conduct, and should be vacated.

2. The arbitrator's award violates federal public policy.

The courts have repeatedly recognized a public policy interest in the general safety and well-being of the public. As an additional public-policy ground for vacatur, a court must vacate arbitrators' awards that would condone behavior that endangers others or endangers the public safety. See e.g., Iowa Elec. Light & Power Co. v. Local Union 204, 834 F.2d 1424, 1428 (8th Cir. 1987) (holding that an arbitrator's award violated public policy when the award reinstated an employee who was fired for engaging in activity that risked the safety of others and referencing other federal cases holding the same.); Delta Air Lines, Inc. v. Air Line Pilots Ass'n Int'l, 861 F.2d 665, 674 (11th Cir. 1988) (vacating an arbitrator's award due to public policy that reinstated a pilot who was fired for flying while intoxicated).

Dr. Larson was aware that Clomiphene was in SpeedShot and he had been explicitly told that this created a safety issue for the players. Despite the warning of the dangers of Clomiphene by the toxicologist, and knowledge that players were and could be using Speedshot, Dr. Larson failed to tell any player of the content. The arbitrator's award condones this conduct and if allowed to stand would permit Dr. Larson to continue endangering the safety of players in the future.

C. Arguments by Petitioner that the Fourteenth Circuit's holding will impose significant burdens on Dr. Larson and that the holding does not provide sufficient deference to the arbitrator's award are unavailing.

Petitioner contends that the Fourteenth Circuit erred when it vacated the arbitrator's award because the holding burdens the CBA's drug-policy administrators in the future by creating an additional responsibility not bargained for, and because the holding does not provide sufficient deference to arbitrators. But, if this Court affirms the Fourteenth Circuit, Dr. Larson will only be required to disclose information that is reasonably available to him, and, although arbitrators' awards are afforded great deference, this arbitrator's award violates a clearly established public policy, requiring it to be vacated.

Dr. Larson and Petitioner argue that if the Fourteenth Circuit is affirmed, there will be an unreasonable burden placed on plan administrators to proactively identify incorrectly-labeled substances. However, the Fourteenth Circuit's holding does not reach this result. Rather, affirming that decision will only require the plan administrators, such as Dr. Larson, to disclose information that they have. The reason Dr. Larson's actions violated public policy is because, in his relationship of trust, he failed to provide information that he had and the other (inferior) party did not. If MLB had no knowledge of SpeedShot's additional contents, the arbitrator's award would not violate public policy. Respondents concede that there is no requirement in the CBA or drug-testing policy for Dr. Larson or any other administrators to test every supplement on the market. But in the present situation, Dr. Larson had information, and actively chose not to disclose it. Requiring a party to disclose what they already know is not the same as creating an additional duty to learn new information. By affirming the Fourteenth Circuit, no additional duty will be created.

Additionally, Petitioner argues that players would become overly reliant on Dr. Larson if he was required to disclose information. This also exaggerates the consequences. If this Court affirms the Fourteenth Circuit and vacates the arbitrator's award, the players will still be strictly

responsible for what is in their bodies and players will still be informed that the Hotline is not an excuse for a positive test. Yet, players will be assured that they will receive the accurate, full-and-frank information they were promised to receive from the Hotline as a result of the policy's administrators providing full disclosure to the Hotline. Otherwise, the Hotline becomes meaningless if the plan's administrators are actively keeping critical information from the Hotline.

The Fourteenth Circuit's holding should be affirmed by this Court. The arbitrator's award should be vacated because it violates clear public policy by allowing plan administrator's to commit constructive fraud and because the award endangers MLB players' health. For these reasons, this Court should affirm the decision of the Fourteenth Circuit Court of Appeals and should hold that the arbitrator's award was properly vacated.

II. Wilson's DATWA claim is not preempted by Section 301 of the Labor Management Relations Act because his claim is an independent state-law claim that does not require a court to interpret any terms of the collective-bargaining agreement and preemption of DATWA would prohibit states from protecting their employees.

This Court should affirm the decision of the Fourteenth Circuit, and hold that Section 301 of the Labor Management Relations Act does not preempt Wilson's DATWA claim. Section 301 preempts state-law claims that require an interpretation of a collective-bargaining agreement. However, Congress and this Court have recognized that it is still important to allow states to create individual rights to protect workers, and have not preempted a state-law claim founded on rights that do not require interpretation of a CBA. Minnesota's DATWA is exactly this type of claim because it creates individual protection for Minnesota workers who are subject to drug testing. Resolution of a DATWA claim only requires a court to examine the employer's conduct measured against the requirements of DATWA. There is no need to interpret or even consult the CBA in this case. This is sensible, because otherwise unions and employers could simply

contract around conduct that is illegal under state law. The Fourteenth Circuit's holding also does not inhibit § 301's goal to create a uniform body of federal law for the interpretation of CBAs, because the CBA is irrelevant to the state-law claims raised in this case.

A. Section 301 of the Labor Management Relations Act does not preempt a claim under Minnesota's workplace drug testing law because the claim is independent and resolution of this independent claim does not require interpretation of the collective bargaining agreement.

Congress, in the Labor Management Relation Act of 1947, granted federal courts jurisdiction for lawsuits involving a violation of a labor contract or collective bargaining agreement. Section 301(a) provides that

> Suits for ***violation of contracts*** between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

61 Stat. 156, 29 U.S.C. § 185(a) (2009) (emphasis added). This grant of federal jurisdiction ensures that federal courts are able to "fashion a body of federal law for the enforcement of … collective bargaining agreements." Lingle v. Norge Division of Magic Chef, Inc., 486 U.S. 399, 403 (1988) (citing Textile Workers v. Lincoln Mills, 353 U.S. 448 (1957)). Section 301 acts to ensure that the terms in CBAs have uniform meaning in all jurisdictions, reducing labor strife by making it easier to reach consensus in the CBA and decreasing the likelihood of disputes over the terms of the CBA. Local 174, Teamsters, Chaukfeurs, Warehousemen & Helpers v. Lucas Flour Co., 369 U.S. 95, 103-04 (1962). In the present case, § 301 does not preempt DATWA.

1. Section 301 preemption can only apply to DATWA if resolution of the DATWA claim requires a court to interpret a term of the CBA because the claim is not founded upon a breach of the CBA.

The present state-law claim is not preempted because it is an independent, statutory right which requires no interpretation of the CBA. In order to ensure a uniform interpretation across

jurisdictions of terms in CBAs, this Court has held that § 301 preempts a state-law claim whenever a court interprets the meaning of a term in a CBA. Livadas v. Bradshaw, 512 U.S. 107, 122-123 (1994). However, this Court considers the state-law claim independent of the collective bargaining agreement and not preempted if "resolution of the state-law claim does not require construing the collective-bargaining agreement." Lingle, 486 U.S. at 407. Likewise, the fact that the CBA might be referenced during the course of litigation does not mean the claim is preempted. Livadas, 512 U.S. at 124. Important here is that this Court wants to ensure that § 301 is not used to allow employers to contract around illegal behavior. Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 211-212 (1985) ("Clearly, § 301 does not grant the ability to contract for what is illegal under state law."). While § 301 ensures uniform meaning of CBA terms in all jurisdictions, it does not make all terms of a CBA valid in every jurisdiction. Thus, a state law claim is only preempted under § 301 in two instances: first, when the claim is for breach a term in the CBA, United Steel Workers v. Rawson, 495 U.S. 362, 368 (1990), and; second, when the outcome of the claim depends on an interpretation of the collective bargaining agreement. Lingle, 486 U.S. at 407.

A DATWA claim is not based on any terms in the CBA, but is an independent, statutory right granted to all Minnesota employees. The statute imposes "minimum standards and requirements for employee protection" regarding drug testing and discipline of employees. MINN. STAT. § 181.955 (1). The statute requires, among other requirements, that Minnesota employers provide certain information about their drug policies to employees, create criteria for testing laboratories, and provide a set of procedures that employers must follow for employees who test positive and are subject to discipline and/or termination. MINN. STAT. §§ 181.952 (1)-(6); 181.953 (1); 181.953 (6)(a)-(c), 10 (a), 10 (b)(1)-(2). The statute explicitly provides that a

CBA may not limit these rights. MINN. STAT. § 181.953 (10)(b)(1)-(2). Thus, if an employer fails to abide by DATWA, the affected employee may bring a claim in state court.

This means that Wilson's claim is not in the first category of preemption, because Wilson's DATWA claim does not allege a breach of the CBA. Instead, Wilson's claim alleges his rights under DATWA were violated. Therefore, Petitioner's preemption argument must fall in the second category, that the analysis of the CBA is required to adjudicate the DATWA claim. Wilson II at 4. However, resolution of the DATWA claims presented in this case do not require any interpretation of the CBA and therefore do not implicate § 301.

2. Under the Supreme Court's precedent, a DATWA claim is independent and not preempted because it does not require interpretation of the collective bargaining agreement.

The DATWA claim is an independent state-law claim that is not preempted, because it is in no way dependent on an interpretation of the CBA for adjudication. When the state-law claim requires a factual inquiry and does not turn on the meaning of any provision in the CBA, this Court considers the claim to be "independent" of the collective bargaining agreement and not preempted under § 301. Lingle, 486 U.S. at 407; see also, Livadas, 512 U.S. at 123-24 (stressing "that it is the legal character of a claim, as 'independent' of rights under the collective-bargaining agreement, and not whether a grievance arising from 'precisely the same set of facts' could be pursued, that decides whether a state cause of action may go forward.") (internal citations omitted).

The present case is distinguishable from the body of cases in which this Court has found preemption under § 301 because of a need to interpret a CBA. Those cases have two consistent themes. First, they involve state common-law tort actions that the Court determined mimic a claim for breach of the CBA. Second, the theory of the claim itself is inextricably tied to an interpretation of the CBA. For instance, in Lueck, this Court analyzed a Wisconsin tort action

for breach of the duty of good faith. 471 U.S. at 206. The employee alleged that his employer did not act in good faith when the employer rejected disability claims that the employee argued should have been awarded under the CBA. Id. The analysis turned on "whether the Wisconsin tort action … confers nonnegotiable state-law rights on employers or employees independent of any right established by contract, or, instead, whether the evaluation of the tort claim is inexplicably intertwined with consideration of the terms of the labor contract." Id. at 213. This Court held that the state-law claim could not be independent because interpretation of the CBA was necessary to determine what duties the employer had assumed, the scope of those duties, and whether there were any implied rights in the CBA. Id. at 214-215.

Similarly, in Rawson, this Court held that tort claims for fraud and negligence were preempted under § 301. 495 U.S. at 368. There, the employees alleged that the union had assumed a role in accident prevention in the CBA and that the union's actions in that role were negligent and fraudulent. Id. at 364-365. This Court determined that the state tort claim could not be independent of the CBA because understanding the duty owed by the union, such as inspecting the mine, required interpreting the duty assumed by the union in the CBA. Id. at 370-71.

Two themes develop in those cases where this Court has not found preemption. First, the state-law claim is based on a nonnegotiable statutory right that is independent of the CBA. Second, the resolution of the claim turns on a factual analysis of the employer's conduct rather than on an analysis of the CBA. In Lingle, this Court considered whether an Illinois statutory claim for retaliatory discharge for filing a worker's compensation claim was preempted by § 301 when the CBA also contained a contractual remedy for discharge without just cause. 486 U.S. at 401. This Court acknowledged that the state-law claim and a claim under the CBA were similar

and would implicate the same analysis of the same facts, but held that this did not make the state-law analysis dependent on a contractual analysis of the CBA. Id. at 408-09; see also, Hawaiian Airlines, Inc. v. Norris, 512 U.S. 246, 261 (1994) (noting that factual inquiries about an employer's conduct toward an employee do not require courts to interpret a CBA).

This Court similarly held that the State Labor Commissioner improperly concluded that § 301 preempted state law in Livadas. 512 U.S. at 107. In that case, the California statute penalized employers if the employer, upon terminating an employee, did not promptly pay wages. Id. at 125. The employee in the case was also subject to a CBA that provided the terms by which the employee was entitled to wages and how to compute damages. Id. Holding that the California statue was not preempted, this Court noted that despite the need to refer to the CBA to determine a calculation of wages, the CBA was otherwise irrelevant to the state-law claim because there were no questions of interpretation about what the parties agreed to in the CBA. Id.

Measured by the Lingle and Livadas precedents, § 301 does not preempt DATWA. The facts of Lingle are particularly analogous to the present case. As in Lingle, Wilson sought recourse in a statutory claim even though recourse existed under the CBA. DATWA, like the state law in Lingle, creates substantive rights for Minnesota employees, and, as in Lingle, the resolution of a claim for the violation of those rights is a factual inquiry of the employer's conduct. The employee's rights and the employer's obligations exist independent of the CBA. This distinguishes this case from Rawson and Lueck. To resolve the DATWA claim, the court must simply analyze whether the testing protocols and enforcement, as they were applied to Wilson, met the requirements created by DATWA. For example, DATWA requires that an initial screening test must be verified by a confirmatory test before an employer discharges or

disciplines an employee. MINN. STAT. § 181.953 (10)(a). To confirm a violation in Wilson's case, a court would need to only determine whether Wilson was *actually* disciplined without a confirmatory test. Whether the CBA policy met this requirement is irrelevant to the court's analysis. Likewise, to determine if Wilson was given adequate opportunity to "explain the positive test," a court would only have to look at the actual opportunity afforded to Wilson and measure that against what Minnesota considers an opportunity to explain the positive test. MINN. STAT. § 181.953 (6). Indeed, Major League Baseball has not pointed to a particular provision in the CBA or drug testing policy that a court would need to interpret in this case. Wilson II, at 9. Resolution of the DATWA claim requires no interpretation of the CBA.

Although DATWA authorizes parties to agree to a CBA testing policy that meets or exceeds DATWA's standards, MINN. STAT. § 181.955(1), the statutory reference to the CBA does not change the independence of the claim because a court does not have to *interpret* the CBA in any way. Livadas, 512 U.S. at 124 ("[T]he bare fact that a collective-bargaining agreement will be consulted in the course of state-law litigation plainly does not require the claim to be extinguished."). Because a court would only examine Petitioner's conduct, it would not have to consult the CBA in the course of litigation.

Wilson's rights under DATWA are nonnegotiable, independent rights granted to all Minnesota employees. Under this DATWA claim, a court needs to only analyze the employer's conduct and whether the conduct violated Wilson's rights under DATWA. There is no need for a court to interpret the CBA, or even refer to its terms. Because the DATWA claim is independent of the CBA, it should not be preempted under § 301. Lingle, 486 U.S. at 407.

B. Section 301 preemption of a DATWA claim would prohibit states from protecting their employees with independent rights.

A holding that the state of Minnesota cannot create rights for its employees who are subject to drug testing would curb the ability of a state to make laws that protect workers and create substantive rights. Aware of this concern, this Court has limited § 301 preemption so states are still able to create rights for their employees that unions and employers cannot simply contract away. Livadas, 512 U.S. at 125 ("§ 301 cannot be read broadly to pre-empt nonnegotiable rights conferred on individual employees as a matter of state law."); Lingle, 486 U.S. at 410. Furthermore, this Court has also noted that extending preemption in this manner would essentially "delegate to unions and unionized employers the power to exempt themselves from whatever state labor standards they disfavored" which would be "inconsistent with congressional intent." Lueck, 471 U.S. at 211-12 n. 7 (noting also that the NLRA still allows States to regulate issues, such as working conditions, that are subject to collective bargaining).

There are two underlying rationales in this Court's limitation of § 301. First, it allows the state to continue legislating labor and workplace standards. Second, it protects employees from having their substantive rights contracted away in a CBA. DATWA is exactly the type of legislation envisioned by this limitation. Through DATWA, Minnesota has determined that it is important to give its employees certain rights when subjected to drug testing. Preempting DATWA would take away that power in this and many other realms whenever a CBA contains a provision that parallels a state-law provision. Furthermore, preempting DATWA would mean that employers and unions could contract around state protections and rights leaving employees potentially unprotected. An analogous example would be a state minimum-wage law. Preempting DATWA would be akin to allowing a union and employer to contract through a CBA to pay employees below minimum wage. The protection of an employee's wage in this respect is no different than the employee's protections from disciplinary action or termination.

DATWA should not be preempted because preemption would inhibit states from providing their employees with substantive rights and would enable unions and employers to contract around rights granted by the state.

C. Allowing a DATWA claim would not undermine the goals of § 301 because it would not require interpretation of any terms of the CBA and would not affect the federal body of uniform law.

The goal of § 301 preemption, ensuring that CBAs are interpreted according to a uniform body of federal law, would not be affected if the DATWA claim is allowed to proceed because a court would not have to interpret any terms of the CBA. Early on, this Court noted why Congress used § 301 preemption to create a uniform federal body of law for CBAs. Allowing contract terms to have different meanings in different jurisdictions would disrupt the negotiation and administration of CBAs. Lucas Flour Co., 369 U.S. at 103-04. Neither party could be certain about the rights it obtained or conceded in the agreement, and differences in interpretation in competing legal systems would prolong disputes. Id. Because of these concerns, this Court has held that "questions relating to what the parties to a labor agreement agreed, and what legal consequences were intended to flow from the breaches of that agreement, must be resolved by reference to uniform federal law" regardless of the context. Lueck, 471 U.S. at 211.

Allowing the DATWA claim to go forward will not undermine these policy goals because the court is not required to interpret any terms of the CBA in order to resolve the claim. This would not be the case if, for example, an individual was able to file a DATWA claim that the drug testing policy in the CBA would violate his rights because the court would need to inquire into the framework of the CBA's drug testing policy, possibly interpreting terms of the agreement, rather than simply analyzing the employer's conduct. Instead, the DATWA claim is founded upon the employer's conduct and the federal body of uniform law is left unaffected by

the DATWA claim. Additionally, this case is at the summary judgment stage and there is no harm in allowing the litigation to go forward with a caution that Wilson may press his claims as long they do not rest on the CBA. If during the trial it appears that the court will have to interpret a term of the CBA, then a court can preempt that claim. Rawson, 495 U.S. at 379-80 (Kennedy, J. dissenting). This preserves the federal interest while curbing the severe consequences of preemption, particularly when Petitioner has not pointed to a single term that a court would have to interpret. Wilson II, at 9.

It is possible that the rights granted to Minnesota employees who are subjected to drug testing might affect Major League Baseball's drug testing policy in some undesirable way. Even if this is true, enabling unions and employers to contract around such rights in order to create uniform CBAs is not the intent of § 301. Lueck, 471 U.S. at 212. Section 301 does not seek to ensure that *all* terms of a CBA are valid in *every* state, but rather to ensure that the interpretation of terms of CBAs is uniform throughout the country. If the parties to the CBA desire uniform policies across all jurisdictions, they must ensure that their policies do not infringe on the rights of any of their employees or seek exemptions from the states. Thus, none of the policy goals of § 301 are undermined because the resolution of the DATWA claim does not require interpretation of the CBA. Therefore, this Court should affirm the Fourteenth Circuit Court of Appeals.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the United States Court of Appeals for the Fourteenth Circuit.

Respectfully submitted,

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