# O'Bannon v. NCAA

802 F.3d 1049 (9th Cir. 2015)

BYBEE, Circuit Judge:

Section 1 of the Sherman Antitrust Act of 1890, 15 U.S.C. § 1, prohibits "[e]very contract, combination . . . , or conspiracy, in restraint of trade or commerce." For more than a century, the National Collegiate Athletic Association (NCAA) has prescribed rules governing the eligibility of athletes at its more than 1,000 member colleges and universities. Those rules prohibit student-athletes from being paid for the use of their names, images, and likenesses (NILs). The question presented in this momentous case is whether the NCAA's rules are subject to the antitrust laws and, if so, whether they are an unlawful restraint of trade.

After a bench trial and in a thorough opinion, the district court concluded that the NCAA's compensation rules were an unlawful restraint of trade. It then enjoined the NCAA from prohibiting its member schools from giving student-athletes scholarships up to the full cost of attendance at their respective schools and up to $5,000 per year in deferred compensation, to be held in trust for student-athletes until after they leave college. As far as we are aware, the district court's decision is the first by any federal court to hold that any aspect of the NCAA's amateurism rules violate the antitrust laws, let alone to mandate by injunction that the NCAA change its practices.

We conclude that the district court's decision was largely correct. Although we agree with the Supreme Court and our sister circuits that many of the NCAA's amateurism rules are likely to be procompetitive, we hold that those rules are not exempt from antitrust scrutiny; rather, they must be analyzed under the Rule of Reason. Applying the Rule of Reason, we conclude that the district court correctly identified one proper alternative to the current NCAA compensation rules—*i.e.*, allowing NCAA members to give scholarships up to the full cost of attendance—but that the district court's other remedy, allowing students to be paid cash compensation of up to $5,000 per year, was erroneous. We therefore affirm in part and reverse in part.

I

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B. *The Amateurism Rules*

One of the NCAA's earliest reforms of intercollegiate sports was a requirement that the participants be amateurs. President C.A. Richmond of Union College commented in 1921 that the competition among colleges to acquire the best players had come to resemble "the contest in dreadnoughts" that had led to World War I,[[1]](#footnote-1)1 and the NCAA sought to curb this problem by restricting eligibility for college sports to athletes who received no compensation whatsoever. But the NCAA, still a voluntary organization, lacked the ability to enforce this requirement effectively, and schools continued to pay their athletes under the table in a variety of creative ways; a 1929 study found that 81 out of 112 schools surveyed provided some sort of improper inducement to their athletes.

[Next, the NCAA enacted a “Sanity Code” in 1948 that prohibited schools from giving athletes financial aid that was based on athletic ability and not available to ordinary students. The, in 1956, the NCAA changed its rules again to permit scholarships, capped at the cost of tuition, fees, room, board, and required books, based on athletic ability. Student-athletes could seek additional financial aid not related to their athletic skills; if they chose to do this, the total amount of athletic and nonathletic financial aid they received could not exceed the "cost of attendance" at their respective schools. More recently, in 2014 the NCAA permitted individual athletic conferences to allow scholarships up to the full cost of attendance.]

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III

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[First, the court rejected the NCAA’s argument that language in the Supreme Court’s *Board of Regents* decision constituted a holding that amateurism rules were “valid as a matter of law.”]

B. *The Compensation Rules Regulate "Commercial Activity"*

The NCAA next argues that we cannot reach the merits of the plaintiffs' Sherman Act claim because the compensation rules are not subject to the Sherman Act at all. The NCAA points out that Section 1 of the Sherman Act applies only to "restraint[s] of trade or commerce," 15 U.S.C. § 1, and claims that its compensation rules are mere "eligibility rules" that do not regulate any "commercial activity."

This argument is not credible. Although restraints that have no effect on commerce are indeed exempt from Section 1, the modern legal understanding of "commerce" is broad, "including almost every activity from which the actor anticipates economic gain." Phillip Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust [\*\*42]  Principles and Their Application*, ¶ 260b (4th ed. 2013). That definition surely encompasses the transaction in which an athletic recruit exchanges his labor and NIL rights for a scholarship at a Division I school because it is undeniable that both parties to that exchange anticipate economic gain from it. *See, e.g., Agnew*, 683 F.3d at 340 ("No knowledgeable observer could earnestly assert that big-time college football programs competing for highly sought-after high school football players do not anticipate economic gain from a successful recruiting program.").

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In other words, the substance of the compensation rules matters far more than how they are styled. And in substance, the rules clearly regulate the terms of commercial transactions between athletic recruits and their chosen schools: a school may not give a recruit compensation beyond a grant-in-aid, and the recruit may not accept compensation beyond that limit, lest the recruit be disqualified and the transaction vitiated. The NCAA's argument that its compensation rules are "eligibility" restrictions, rather than substantive restrictions on the price terms of recruiting agreements, is but a sleight of hand. There is real money at issue here.

As the NCAA points out, two circuits have held that certain NCAA rules are noncommercial in nature. In *Smith* *v. NCAA*, the Third Circuit dismissed a student-athlete's challenge to the NCAA's "Postbaccalaureate Bylaw," which prohibited athletes from participating in athletics at postgraduate schools other than their undergraduate schools, on the grounds that the Sherman Act did not apply to that Bylaw. The *Smith* court held that eligibility rules such as the Postbaccalaureate Bylaw "are not related to the NCAA's commercial or business activities. Rather than intending to provide the NCAA with a commercial advantage, the eligibility rules primarily seek to ensure fair competition in intercollegiate athletics." *Smith*, 139 F.3d at 185.

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... The Postbaccalaureate Bylaw challenged in *Smith* was a true "eligibility" rule, akin to the rules limiting the number of years that student-athletes may play collegiate sports or requiring student-athletes to complete a certain number of credit hours each semester. As the *Smith* court expressly noted, the Postbaccalaureate Bylaw was "not related to the NCAA's commercial or business activities." *Smith*, 139 F.3d at 185. By contrast, the rules here—which regulate what compensation NCAA schools may give student-athletes, and how much—*do* relate to the NCAA's business activities: the labor of student-athletes is an integral and essential component of the NCAA's "product," and a rule setting the price of that labor goes to the heart of the NCAA's business. Thus, the rules at issue here are more like rules affecting the NCAA's dealings with its coaches or with corporate business partners—which courts have held to be commercial—than they are like the Bylaw challenged in *Smith. See Bd. of Regents*, 468 U.S. at 104-13 (applying Sherman Act to rules governing NCAA members' contracts with television networks); *Law v. NCAA*, 134 F.3d 1010, 1024 (10th Cir. 1998) (applying Sherman Act to NCAA rules limiting compensation of basketball coaches).

[The court rejected the reasoning in *Bassett v. NCAA*, 528 F.3d 426, 430, 433 (6th Cir. 2008), which held that rules limiting “illegal inducements” to athletes were non-commercial.]

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C. *The Plaintiffs Demonstrated that the Compensation Rules Cause Them Injury in Fact*

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We conclude that the plaintiffs have shown that they are injured in fact as a result of the NCAA's rules having foreclosed the market for their NILs in video games. We therefore do not reach the thornier questions of whether participants in live TV broadcasts of college sporting events have enforceable rights of publicity or whether the plaintiffs are injured by the NCAA's current licensing arrangement for archival footage.

[The court of appeals upheld the district court’s conclusion that, if permitted to do so, video game makers such as EA would negotiate with college athletes for the right to use their NILs in video games because these companies want to make games that are as realistic as possible. *O'Bannon*, 7 F. Supp. 3d at 970. It rejected the NCAA’s claims that various copyright issues might preclude full exploitation of NIL rights by student-athletes.]

IV

[The Court followed *Board of Regents* in applying the Rule of Reason.]

Like the district court, we follow the three-step framework of the Rule of Reason: "[1] The plaintiff bears the initial burden of showing that the restraint produces significant anticompetitive effects within a relevant market. [2] If the plaintiff meets this burden, the defendant must come forward with evidence of the restraint's procompetitive effects. [3] The plaintiff must then show that any legitimate objectives can be achieved in a substantially less restrictive manner." *Tanaka v. Univ. of S. Cal.*, 252 F.3d 1059, 1063 (9th Cir. 2001) (citations and internal quotation marks omitted).

A. *Significant Anticompetitive Effects Within a Relevant Market*

As we have recounted, the district court made the following factual findings: (1) that a cognizable "college education market" exists, wherein colleges compete for the services of athletic recruits by offering them scholarships and various amenities, such as coaching and facilities; (2) that if the NCAA's compensation rules did not exist, member schools would compete to offer recruits compensation for their NILs; and (3) that the compensation rules therefore have a significant anticompetitive effect on the college education market, in that they fix an aspect of the "price" that recruits pay to attend college (or, alternatively, an aspect of the price that schools pay to secure recruits' services). These findings have substantial support in the record.

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Finally, we reject the NCAA's contention that any NIL compensation that student-athletes might receive in the absence of its compensation rules would be de minimis and that the rules therefore do not significantly affect competition in the college education market. This "too small to matter" argument is incompatible with the Supreme Court's holding in *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 100 S. Ct. 1925, 64 L. Ed. 2d 580 (1980) (per curiam). In *Catalano*, a group of beer retailers sued a group of beer wholesalers, alleging that the wholesalers had secretly agreed to end their customary practice of extending the retailers interest-free credit for roughly a month after the delivery of beer. *Id.* at 644. The Court unanimously held that this agreement was unlawful per se. It reasoned that the agreement was clearly a means of "extinguishing one form of [price] competition among the sellers," given that credit terms were part of the price of the beer, and that the agreement was therefore tantamount to price-fixing. *Id.* at 649. The Court was not concerned with whether the agreement affected the market adversely: "It is no excuse that the prices fixed are themselves reasonable." *Id.* at 647.

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B. *Procompetitive Effects*

As discussed above, the NCAA offered the district court four procompetitive justifications for the compensation rules: (1) promoting amateurism, (2) promoting competitive balance among NCAA schools, (3) integrating student-athletes with their schools' academic community, and (4) increasing output in the college education market. The district court accepted the first and third and rejected the other two.

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The NCAA is correct that a restraint that broadens choices can be procompetitive. The Court in *Board of Regents* observed that the difference between college and professional sports "widen[s]" the choices "available to athletes." *Bd. of Regents*, 468 U.S. at 102. But we fail to see how the restraint at issue in this particular case—*i.e.*, the NCAA's limits on student-athlete compensation—makes college sports more attractive to recruits, or widens recruits' spectrum of choices in the sense that *Board of Regents* suggested. As the district court found, it is primarily "the opportunity to earn a higher education" that attracts athletes to college sports rather than professional sports, *O'Bannon*, 7 F. Supp. 3d at 986, and that opportunity would still be available to student-athletes if they were paid some compensation in addition to their athletic scholarships. Nothing in the plaintiffs' prayer for compensation would make student-athletes something other than students and thereby impair their ability to become student-athletes.

Indeed, if anything, loosening or abandoning the compensation rules might be the best way to "widen" recruits' range of choices; athletes might well be more likely to attend college, and stay there longer,  if they knew that they were earning some amount of NIL income while they were in school. *See* Jeffrey L. Harrison & Casey C. Harrison, *The Law and Economics of the NCAA's Claim to Monopsony Rights*, 54 Antitrust Bull. 923, 948 (2009). We therefore reject the NCAA's claim that, by denying student-athletes compensation apart from scholarships, the NCAA increases the "choices" available to them.[[2]](#footnote-2)16

... Nevertheless, the district court found, and the record supports that there is a concrete procompetitive effect in the NCAA's commitment to amateurism: namely, that the amateur nature of collegiate sports increases their appeal to consumers. We therefore conclude that the NCAA's compensation rules serve the two procompetitive purposes identified by the district court: integrating academics with athletics, and "preserving the popularity of the NCAA's product by promoting its current understanding of amateurism." *O'Bannon*, 7 F. Supp. 3d at 1005.[[3]](#footnote-3)17

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C. *Substantially Less Restrictive Alternatives*

The third step in the Rule of Reason analysis is whether there are substantially less restrictive alternatives to the NCAA's current rules. We bear in mind that—to be viable under the Rule of Reason—an alternative must be "virtually as effective" in serving the procompetitive purposes of the NCAA's current rules, and "without significantly increased cost." *Cnty. of Tuolumne v. Sonora Cmty. Hosp.*, 236 F.3d 1148, 1159 (9th Cir. 2001) (internal quotation marks omitted). We think that plaintiffs must make a strong evidentiary showing that its alternatives are viable here. Not only do plaintiffs bear the burden at this step, but the Supreme Court has admonished that we must generally afford the NCAA "ample latitude" to superintend college athletics. *Bd. of Regents*, 468 U.S. at 120; *see also Law v. NCAA*, 134 F.3d 1010, 1022 (10th Cir. 1998) ("[C]ourts should afford the NCAA plenty of room under the antitrust laws to preserve the amateur [\*\*69]  character of intercollegiate athletics."); *Race Tires Am., Inc. v. Hoosier Racing Tire Corp.*, 614 F.3d 57, 83 (3d Cir. 2010) (noting that, generally, "sports-related organizations should have the right to determine for themselves the set of rules that they believe best advance their respective sport").

The district court identified two substantially less restrictive alternatives: (1) allowing NCAA member schools to give student-athletes grants-in-aid that cover the full cost of attendance; and (2) allowing member schools to pay student-athletes small amounts of deferred cash compensation for use of their NILs. *O'Bannon*, 7 F. Supp. 3d at 1005-07. We hold that the district court did not clearly err in finding that raising the grant-in-aid cap would be a substantially less restrictive alternative, but that it clearly erred when it found that allowing students to be paid compensation for their NILs is virtually as effective as the NCAA's current amateur-status rule.

1. Capping the permissible amount of scholarships at the cost of attendance

The district court did not clearly err in finding that allowing NCAA member schools to award grants-in-aid up to their full cost of attendance would be a substantially less restrictive alternative to the current compensation rules. All of the evidence  before the district court indicated that raising the grant-in-aid cap to the cost of attendance would have virtually no impact on amateurism...

We agree with the NCAA and the *amici* that, as a general matter, courts should not use antitrust law to make marginal adjustments to broadly reasonable market restraints. *See, e.g., Bruce Drug, Inc. v. Hollister, Inc.*, 688 F.2d 853, 860 (1st Cir. 1982) (noting that defendants are "not required to adopt the least restrictive" alternative); *Am. Motor Inns, Inc. v. Holiday Inns, Inc.*, 521 F.2d 1230, 1249 (3d Cir. 1975) (denying that "the availability of an alternative means of achieving the asserted business purpose renders the existing arrangement unlawful if that alternative would be less restrictive of competition no matter to how small a degree"). The particular restraint at issue here, however—the grant-in-aid cap that the NCAA set below the cost of attendance—is not such a restraint. To the contrary, the evidence at trial showed that the grant-in-aid cap has no relation whatsoever to the procompetitive purposes of the NCAA: by the NCAA's own standards, student-athletes remain amateurs as long as any money paid to them goes to cover legitimate educational expenses.

Thus, in holding that setting the grant-in-aid cap at student-athletes' full cost of attendance is a substantially less restrictive alternative under the Rule of Reason, we are not declaring that courts are free to micromanage organizational rules or to strike down largely beneficial market restraints with impunity. Rather, our affirmance of this aspect of the district court's decision should be taken to establish only that where, as here, a restraint is *patently and inexplicably* stricter than is necessary to accomplish all of its procompetitive objectives, an antitrust court can and should invalidate it and order it replaced with a less restrictive alternative.

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2. Allowing students to receive cash compensation for their NILs

In our judgment, however, the district court clearly erred in finding it a viable alterative to allow students to receive NIL cash payments untethered to their education expenses. ... The question is whether the alternative of allowing students to be paid NIL compensation unrelated to their education expenses, is "virtually as effective" in preserving amateurism as *not* allowing compensation. *Cnty. of Tuolumne*, 236 F.3d at 1159 (internal quotation marks omitted).

We cannot agree that a rule permitting schools to pay students pure cash compensation and a rule forbidding them from paying NIL compensation are both *equally* effective in promoting amateurism and preserving consumer demand. Both we and the district court agree that the NCAA's amateurism rule has procompetitive benefits. But in finding that paying students cash compensation would promote amateurism as effectively as not paying them, the district court ignored that not paying student-athletes is *precisely what makes them amateurs*.[[4]](#footnote-4)20

Having found that amateurism is integral to the NCAA's market, the district court cannot plausibly conclude that being a poorly-paid professional collegiate athlete is "virtually as effective" for that market as being as amateur. Or, to borrow the Supreme Court's analogy, the market for college football is distinct from other sports markets and must be "differentiate[d]" from professional sports lest it become "minor league [football]." *Bd. of Regents*, 468 U.S. at 102.

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The other evidence cited by the district court is even less probative of whether paying these student-athletes will preserve amateurism and consumer demand. The district court adverted to testimony from a sports management expert, Daniel Rascher, who explained that although opinion surveys had shown the public was opposed to rising baseball salaries during the 1970s, and to the decision of the International Olympic Committee to allow professional athletes to compete in the Olympics, the public had continued to watch baseball and the Olympics at the same rate after those changes. *Id.* at 976-77. But professional baseball and the Olympics are not fit analogues to college sports. The Olympics have not been nearly as transformed by the introduction of professionalism as college sports would be.

Finally, the district court, and the dissent, place particular weight on a brief interchange during plaintiffs' cross-examination of one of the NCAA's witnesses, Neal Pilson, a television sports consultant formerly employed at CBS. Pilson testified that "if you're paid for your performance, you're not an amateur," and explained at length why paying students would harm the student-athlete market. Plaintiffs then asked Pilson whether his opinions about amateurism "depend on the level of the money" paid to players, and he acknowledged  that his opinion was "impacted by the level." When asked whether there was a line that "should not be crossed" in paying players, Pilson responded "that's a difficult question. I haven't thought about the line. And I haven't been asked to render an opinion on that." When pressed to come up with a figure, Pilson repeated that he was "not sure." He eventually commented that "I tell you that a million dollars would trouble me and $5,000 wouldn't, but that's a pretty good range." When asked whether deferred compensation to students would concern him, Pilson said that while he would not be as concerned by deferred payments, he would still be "troubled by it."

So far as we can determine, Pilson's offhand comment under cross-examination is the sole support for the district court's $5,000 figure. But even taking Pilson's comments at face value, as the dissent urges, his testimony cannot support the finding that paying student-athletes small sums will be virtually as effective in preserving amateurism as not paying them. Pilson made clear that he was not prepared to opine on whether pure cash compensation, of any amount, would affect amateurism. Indeed, he was never asked about the impact of giving student-athletes small cash payments; instead, like other witnesses, he was asked only whether big payments would be worse than small payments. ...

The difference between offering student-athletes education-related compensation and offering them cash sums untethered to educational expenses is not minor; it is a quantum leap. Once that line is crossed, we see no basis for returning to a rule of amateurism and no defined stopping point;  we have little doubt that plaintiffs will continue to challenge the arbitrary limit imposed by the district court until they have captured the full value of their NIL. At that point the NCAA will have surrendered its amateurism principles entirely and transitioned from its "particular brand of football" to minor league status. *Bd. of Regents*, 468 U.S. at 101-02. In light of that, the meager evidence in the record, and the Supreme Court's admonition that we must afford the NCAA "ample latitude" to superintend college athletics, *Bd. of Regents*, 468 U.S. at 120, we think it is clear the district court erred in concluding that small payments in deferred compensation are a substantially less restrictive alternative restraint.[[5]](#footnote-5)25 We thus vacate that portion of the district court's decision and the portion of its injunction requiring the NCAA to allow its member schools to pay this deferred compensation.

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THOMAS, Chief Judge, concurring in part and dissenting in part:

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I

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There was sufficient evidence in the record to support the award. The district court's conclusion that the proposed alternative restraint satisfied the Rule of Reason was based on testimony from at least four experts—including three experts presented by the NCAA—that providing student-athletes with small amounts of compensation above their cost of attendance most likely would not have a significant impact on consumer interest in college sports. *O'Bannon*, 7 F. Supp. 3d at 976-77, 983-84, 1000-01. It was also based on the fact that FBS football players are currently permitted to accept Pell grants in excess of their cost of attendance, and the fact that Division I tennis recruits are permitted to earn up to $10,000 per year in prize money from athletic events before they enroll in college. *Id.* at 974, 1000. The majority characterizes the weight of this evidence as "threadbare." Op. at 58. I respectfully disagree.

The NCAA's own expert witness, Neal Pilson, testified that the level of deferred compensation would have an effect on consumer demand for college athletics, but that paying student-athletes $5,000 per year in trust most likely would not have a significant impact on such demand. He also testified that any negative impact that paying student-athletes might have on consumer demand could be partially mitigated by placing the compensation in a trust fund to be paid out after graduation.

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The majority also dismisses the testimony given by expert witness Dr. Daniel Rascher demonstrating that consumer interest in major league baseball and the Olympics increased after baseball players' salaries rose and professional athletes were allowed to compete in the Olympics. The majority reasons that major league baseball and the Olympics are "not fit analogues to college sports," speculating that college sports would be more significantly transformed by professionalism than have the Olympics. Op. at 59. However, the majority does not offer any evidentiary support for the distinction, nor explain how or why the district court clearly erred in crediting this testimony.

Moreover, Rascher also testified that consumer demand in sports such as tennis and rugby increased after the sports' governing boards permitted athletes to receive payment. *O'Bannon*, 7 F. Supp. 3d at 977. In my view, the majority errs in dismissing this testimony. The import of Rascher's testimony was that consumer demand typically does not decrease when athletes are permitted to receive payment, and that this general principle holds true across a wide variety of sports and competitive formats. The district court did not clearly err in crediting it.

The district court accepted the testimony of multiple experts that small amounts of compensation would not affect consumer demand, and then used the lowest amount suggested by one of the NCAA's experts. The district court was within its right to do so.[[6]](#footnote-6)3

II

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The disagreement between my view and the majority view largely boils down to a difference in opinion as to the procompetitive interests at stake. The majority characterizes our task at step three of the Rule of Reason as determining "whether the alternative of allowing students to be paid NIL compensation unrelated to their education expenses is 'virtually as effective' in preserving *amateurism* as not allowing compensation." Op. at 56 (emphasis added). This conclusion misstates our inquiry. Rather, we must determine whether allowing student-athletes to be compensated for their NILs is 'virtually as effective' in preserving *popular demand for college sports* as not allowing compensation. In terms of antitrust analysis, the concept of amateurism is relevant only insofar as it relates to consumer interest.

...

The district court determined that "the evidence presented at trial suggests that consumer demand for FBS football and Division I basketball-related products is not driven by the restrictions on student-athlete compensation but instead by other factors, such as school loyalty and geography." *Id.* The court therefore concluded that:

the NCAA's restrictions on student-athlete compensation play a limited role in driving consumer demand for FBS football and Division I basketball-related products. Although they might justify a restriction on large payments to student-athletes while in school, they do not justify the rigid prohibition on compensating student-athletes, in the present or in the future, with any share of licensing revenue generated from the use of their names, images, and likenesses.

*Id.*

The district court's findings of fact provide that one procompetitive benefit of the current rule is that restricting large payments to student-athletes plays a limited role in preserving the popularity of the NCAA's products. In the context of this antitrust suit, the concept of "amateurism" is useful only to the extent that it furthers this goal. In terms of antitrust analysis, amateurism is relevant only insofar as popular demand for college sports is increased by *consumer* perceptions of and desire for amateurism. Viewed through the antitrust lens, it is consumer desire that we must credit; not the NCAA's preferred articulation of the term.[[7]](#footnote-7)4

Plaintiffs are not required, as the majority suggests, to show that the proposed alternatives are "virtually as effective" at preserving the concept of amateurism as the NCAA chooses to define it. Indeed, this would be a difficult task, given that "amateurism" has proven a nebulous concept prone to ever-changing definition. ... [[8]](#footnote-8)5

The NCAA insists that consumers will flee if student-athletes are paid even a small sum of money for colleges' use of their NILs. This assertion is contradicted by the district court record and by the NCAA's own rules regarding amateurism. The district court was well within its right to reject it. Division I schools have spent $5 billion on athletic facilities over the past 15 years. The NCAA sold the television rights to broadcast the NCAA men's basketball championship tournament for 12 years to CBS for $10.8 billion dollars. The NCAA insists that this multi-billion dollar industry would be lost if the teenagers and young adults who play for these college teams earn one dollar above their cost of school attendance. That is a difficult argument to swallow. Given the trial evidence, the district court was well within its rights to reject it.

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1. 1 The *Dreadnought* was a British battleship that featured large, long-range guns. The term came to refer to a class of super battleship. In drawing this comparison, Mr. Richmond showed himself to be a historian ahead of his time. *See generally* Robert K. Massie, Dreadnought: Britain, Germany, and the Coming of the Great War (1991) (explaining how the naval arms race between Britain and Germany contributed to the outbreak of World War I). [↑](#footnote-ref-1)
2. 16It may be that what the NCAA means by this argument is that its compensation rules make it possible for schools to fund more scholarships than they otherwise could and thereby increase the number of opportunities that recruits have to play college sports. To the extent the NCAA is making that argument, it is the functional equivalent of the NCAA's argument that the rules increase output in the college education market. The district court found that argument unproved, and we have affirmed that finding. [↑](#footnote-ref-2)
3. 17The dissent suggests that during the second step the district court defined the procompetitive benefits as "limits on large amounts of student-athlete compensation preserve the popularity of the NCAA's product." Dissent at 69, 70. But this cannot be right. During the second step, the district court could only consider the benefits of the NCAA's existing [\*\*67]  rule prohibiting NIL payments—it could not consider the potential benefits of an alternative rule (such as capping large payments). The correct inquiry under the Rule of Reason is: What procompetitive benefits are served by the NCAA's existing rule banning NIL payments? The district court found that the NCAA's existing ban provides the procompetitive benefit of preserving amateurism, and thus consumer demand. It is only in the third step, where the burden is on the plaintiffs, when the court could consider whether alternative rules provide a procompetitive benefit. And even then, the courts' analysis is cabined to considering whether the alternative serves the same procompetitive interests identified in second step. [↑](#footnote-ref-3)
4. 20The dissent suggests that the district court found amateurism itself has no procompetitive value, and that "[a]mateurism is relevant only insofar as popular demand for college sports is increased by *consumer* perceptions of and desire for amateurism." Dissent at 70. But this ignores that the district court found that the NCAA's "current understanding of amateurism" helps "preserv[e] the popularity of the NCAA's product." Amateurism is not divorced from the procompetitive benefit identified by the court; it is its core element.

Elsewhere the dissent argues that "we are not tasked with deciding what makes an amateur an amateur," Dissent at 72 n.5, and that "the distinction between amateur and professional sports is not for the court to delineate. It is a line for consumers to draw," *id.* at 71 n.4. However, if we do not have some shared conception of what makes an amateur an amateur—or, more precisely, the difference between amateurs and professionals—then the district court's findings on the role of amateurism in college sports make no sense. We may not agree on all the particulars, but the basic difference was spelled out by Neal Pilson, a witness the district court relied on when determining that small cash payments to students was a viable alternative: "if you're paid for performance, you're not an amateur." [↑](#footnote-ref-4)
5. 25The dissent criticizes us for citing "no record evidence to support [our] conclusion that paying student-athletes $5,000 in deferred compensation will significantly reduce consumer demand." Dissent at 68 n.3. But we do not decide, and the NCAA need not prove, whether paying student athletes $5,000 payments will necessarily *reduce* consumer demand. The proper inquiry in the Rule of Reason's third step is whether the plaintiffs have shown these payments will *not reduce* consumer demand (relative to the existing rules). And we conclude they have not. [↑](#footnote-ref-5)
6. 3The majority states that it "cannot agree that a rule permitting schools to pay students pure cash compensation and a rule forbidding them from paying NIL compensation are both *equally* effective in promoting amateurism and preserving consumer demand." Op. at 56-57. And yet the majority cites no record evidence to support [\*\*90]  its conclusion that paying student-athletes $5,000 in deferred compensation will significantly reduce consumer demand. Rather, the majority declares that it is a "self-evident fact" that "[t]he difference between offering student-athletes education-related compensation and offering them cash sums untethered to educational expenses is not minor; it is a quantum leap." Op. at 58, 61. To the contrary, the district court concluded after a full bench trial that the distinction between offering student-athletes no compensation and offering them a small amount of compensation is so minor that it most likely will not impact consumer demand in any meaningful way. *See O'Bannon*, 7 F. Supp. 3d at 976-77, 983-84, 1000-01. [↑](#footnote-ref-6)
7. 4The majority argues that "[h]aving found amateurism is integral to the NCAA's market, the district court cannot plausibly conclude that being a poorly-paid professional athlete is 'virtually as effective' for that market as being an amateur. Or, to borrow the Supreme Court's analogy, the market for college football is distinct from other sports markets and must be 'differentiate[d]' from professional sports lest it become 'minor league [football].'" Op. at 58. The district court found that amateurism played a limited role in preserving the popularity of college sports, and that other factors, such as school loyalty, served as the primary force driving interest in college athletics. *O'Bannon*, 7 F. Supp. 3d at 1000. But I agree that an antitrust court should not eliminate the distinction between professional and college sports; to do so would undermine competition. However, in terms of antitrust analysis, the distinction between amateur and professional sports is not for the court to delineate. It is a line for consumers to draw. If consumers believe that paying college football players $5,000 to be held in trust for use of their NILs will convert college football into professional football, and as a consequence they stop watching college football, then the proposed alternative will not be virtually as effective as the current rule. But, taken to its literal extreme to prohibit even small, deferred payments, the idea that "if you're paid for performance, you're not an amateur," Op. at 57 n.20, does not reflect consumer behavior. The district court made factual findings that modest payments, including those held [\*\*95]  in trust, would not significantly affect consumer demand. *See O'Bannon*, 7 F. Supp. 3d at 976-77, 983-84, 1000-01. Therefore, I cannot conclude that the district court clearly erred. [↑](#footnote-ref-7)
8. 5The majority states that "in finding that paying students cash compensation would promote amateurism as effectively as not paying them, the district court ignored that not paying student-athletes is *precisely what makes them amateurs*." Op. [\*\*96]  at 57. This is not true even under the NCAA's current definition of the term. But more importantly, we are not tasked with deciding what makes an amateur an amateur. We are tasked with determining whether a proposed less-restrictive alternative restraint will affect consumer demand. [↑](#footnote-ref-8)