Edward C. O'BANNON, Jr., On Behalf of Himself and All Others Similarly Situated, Plaintiff–Appellee,
v.
NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, aka The NCAA, Defendant–Appellant.

9th Cir. Sept. 30, 2015.

BYBEE, Circuit Judge:

***1** 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] and the NCAA sought to curb this problem by restricting eligibility for college sports to athletes who received no compensation whatsoever.[2] 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.

The NCAA began to strengthen its enforcement capabilities in 1948, when it adopted what became known as the "Sanity Code"—a set of rules that prohibited schools from giving athletes financial aid that was based on athletic ability and not available to ordinary students. *See* Daniel E. Lazaroff, *The NCAA in Its Second Century: Defender of Amateurism or Antitrust Recidivist?*, 86 Or. L.Rev. 329, 333 (2007). The Sanity Code also created a new "compliance mechanism" to enforce the NCAA's rules—"a Compliance Committee that could terminate an institution's NCAA membership." *Id.*

In 1956, the NCAA departed from the Sanity Code's approach to financial aid by changing its rules to permit its members, for the first time, to give student-athletes scholarships based on athletic ability. These scholarships were capped at the amount of a full "grant in aid," defined as the total cost of "tuition and fees, room and board, and required course-related books." Student-athletes were prohibited from receiving any "financial aid based on athletics ability" in excess of the value of a grant-in-aid, on pain of losing their eligibility for collegiate athletics. 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.[3]

***3** In August 2014, the NCAA announced it would allow athletic conferences to authorize their member schools to increase scholarships up to the full cost of attendance. The 80 member schools of the five largest athletic conferences in the country voted in January 2015 to take that step, and the scholarship cap at those schools is now at the full cost of attendance. Marc Tracy, *Top Conferences to Allow Aid for Athletes' Full Bills,* N.Y. Times, Jan. 18, 2015, at SP8.

In addition to its financial aid rules, the NCAA has adopted numerous other amateurism rules that limit student-athletes' compensation and their interactions with professional sports leagues. An athlete can lose his amateur status, for example, if he signs a contract with a professional team, enters a professional league's player draft, or hires an agent. And, most importantly, an athlete is prohibited—with few exceptions—from receiving *any* "pay" based on his athletic ability, whether from boosters, companies seeking endorsements, or would-be licensors of the athlete's name, image, and likeness (NIL).

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III

On appeal, the NCAA contends that the plaintiffs' Sherman Act claim fails on the merits, but it also argues that we are precluded altogether from reaching the merits, for three independent reasons: (1) The Supreme Court held in *NCAA v. Board of Regents of the University of Oklahoma,* 468 U.S. 85, 104 S.Ct. 2948, 82 L.Ed.2d 70 (1984), that the NCAA's amateurism rules are "valid as a matter of law"; (2) the compensation rules at issue here are not covered by the Sherman Act at all because they do not regulate commercial activity; and (3) the plaintiffs have no standing to sue under the Sherman Act because they have not suffered "antitrust injury." We find none of these three arguments persuasive.

A. Board of Regents *Did Not Declare the NCAA's Amateurism Rules "Valid as a Matter of Law"*

***10** We consider, first, the NCAA's claim that, under *Board of Regents,* all NCAA amateurism rules are "valid as a matter of law."

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… [T]he NCAA contends that any Section 1 challenge to its amateurism rules must fail as a matter of law because the *Board of Regents* Court held that those rules are presumptively valid. We disagree.

The *Board of Regents* Court certainly discussed the NCAA's amateurism rules at great length, but it did not do so in order to pass upon the rules' merits, given that they were not before the Court. Rather, the Court discussed the amateurism rules for a different and particular purpose: to explain why NCAA rules should be analyzed under the Rule of Reason, rather than held to be illegal per se. The point was a significant one. Naked horizontal agreements among competitors to fix the price of a good or service, or to restrict their output, are usually condemned as per se unlawful. *See, e.g., United States v. Trenton Potteries Co.,* 273 U.S. 392, 398, 47 S.Ct. 377, 71 L.Ed. 700 (1927); *see also, e.g., Broad. Music, Inc. v. CBS, Inc.,* 441 U.S. 1, 19–20, 99 S.Ct. 1551, 60 L.Ed.2d 1 (1979) (arrangements that "almost always tend to restrict competition and decrease output" are usually per se illegal). The *Board of Regents* Court decided, however, that because college sports could not exist without certain horizontal agreements, NCAA rules should not be held per se unlawful even when—like the television rules in *Board of Regents*—they appear to be pure "restraints on the ability of member institutions to compete in terms of price and output." *Bd. of Regents,* 468 U.S. at 103.

Board of Regents, in other words, did not approve the NCAA's amateurism rules as categorically consistent with the Sherman Act. Rather, it held that, because many NCAA rules (among them, the amateurism rules)[9] are part of the "character and quality of the [NCAA's] 'product,' " *id.* at 102, no NCAA rule should be invalidated without a Rule of Reason analysis. The Court's long encomium to amateurism, though impressive-sounding, was therefore dicta….

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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."

[4] 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 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."). Moreover, *Board of Regents* ' discussion of the procompetitive justifications for NCAA amateurism rules shows that the Court "presume[d] the applicability of the Sherman Act to NCAA bylaws, since no procompetitive justifications would be necessary for noncommercial activity to which the Sherman Act does not apply." *Id.* at 339.

It is no answer to these observations to say, as the NCAA does in its briefs, that the compensation rules are "eligibility rules" rather than direct restraints on the terms of agreements between schools and recruits. True enough, the compensation rules are written in the form of eligibility rules; they provide that an athlete who receives compensation other than the scholarships specifically permitted by the NCAA loses his eligibility for collegiate sports. The mere fact that a rule can be characterized as an "eligibility rule," however, does not mean the rule is not a restraint of trade; were the law otherwise, the NCAA could insulate its member schools' relationships with student-athletes from antitrust scrutiny by renaming every rule governing student-athletes an "eligibility rule." The antitrust laws are not to be avoided by such "clever manipulation of words." *Simpson v. Union Oil Co. of Cal.,* 377 U.S. 13, 21–22, 84 S.Ct. 1051, 12 L.Ed.2d 98 (1964).

***14** 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…. We therefore conclude that the NCAA's

compensation rules are within the ambit of the Sherman Act.

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IV

Having rejected all of the NCAA's preliminary legal arguments, we proceed to review the plaintiffs' Section 1 claim on the merits. Although in another context the NCAA's decision to value student-athletes' NIL at zero might be per se illegal price fixing, we are persuaded—as was the Supreme Court in *Board of Regents* and the district court here—that the appropriate rule is the Rule of Reason. As the Supreme Court observed, the NCAA "market[s] a particular brand ... [that] makes it more popular than professional sports to which it might otherwise be comparable." *Board of Regents*, 468 U.S. at 101–02. Because the "integrity of the 'product' cannot be preserved except by mutual agreement," "restraints on competition are essential if the product is to be available at all." *Id.* at 101, 102; *see also id.* at 117 ("Our decision not to apply a per se rule to this case rests in large part on our recognition that a certain degree of cooperation is necessary if the type of competition that [the NCAA] and its member institutions seek to market is to be preserved." (footnote omitted)).

[9] 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*

[10] 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.

By and large, the NCAA does not challenge the district court's findings. It does not take issue with the way that the district court defined the college education market. Nor does it appear to dispute the district court's conclusion that the compensation rules restrain the NCAA's member schools from competing with each other within that market, at least to a certain degree. Instead, the NCAA makes three modest arguments about why the compensation rules do not have a significant anticompetitive effect. First, it argues that

because the plaintiffs never showed that the rules reduce output in the college education market, the plaintiffs did not meet their burden of showing a significant anticompetitive effect. Second, it argues that the rules have no anticompetitive effect because schools would not pay student-athletes anything for their NIL rights in any event, given that those rights are worth nothing. And finally, the NCAA argues that even if the district court was right that schools would pay student-athletes for their NIL rights, any such payments would be small, which means that the compensation rules' anticompetitive effects cannot be considered significant.

***19** We can dispose of the first two arguments quickly. First, the NCAA's contention that the plaintiffs' claim fails because they did not show a decrease in output in the college education market is simply incorrect. Here, the NCAA argues that output in the college education market "consists of opportunities for student-athletes to participate in FBS football or Division I men's basketball," and it quotes the district court's finding that these opportunities have "increased steadily over time." *See* *O'Bannon,* 7 F.Supp.3d at 981. But this argument misses the mark. Although output reductions are one common kind of anticompetitive effect in antitrust cases, a "reduction in output is not the *only* measure of anticompetitive effect." Areeda & Hovenkamp ¶ 1503b(1) (emphasis added).

[11] The "combination[s] condemned by the [Sherman] Act" also include "price-fixing ... by purchasers" even though "the persons specially injured ... are sellers, not customers or consumers." *Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co. ,* 334 U.S. 219, 235, 68 S.Ct. 996, 92 L.Ed. 1328 (1948). At trial, the plaintiffs demonstrated that the NCAA's compensation rules have just this kind of anticompetitive effect: they fix the price of one component of the exchange between school and recruit, thereby precluding competition among schools with respect to that component. The district court found that although consumers of NCAA football and basketball may not be harmed directly by this price-fixing, the "student-athletes themselves are harmed by the price-fixing agreement among FBS football and Division I basketball schools." *O'Bannon,* 7 F.Supp.3d at 972–73. The athletes accept grants-in-aid, and no more, in exchange for their athletic performance, because the NCAA schools have agreed to value the athletes' NILs at zero, "an anticompetitive effect."[14] *Id.* at 973. This anticompetitive effect satisfied the plaintiffs' initial burden under the Rule of Reason. *Cf.* *Cal. Dental Ass'n v. FTC,* 526 U.S. 756, 777, 119 S.Ct. 1604, 143 L.Ed.2d 935 (1999) ("[R]aising price, reducing output, and dividing markets have the same anticompetitive effects." (quoting *Gen. Leaseways, Inc. v. Nat'l Truck Leasing Ass'n,* 744 F.2d 588, 594–95 (7th Cir.1984))).

Second, the NCAA's argument that student-athletes' NILs are, in fact, worth nothing is simply a repackaged version of its arguments about injury in fact, which we have rejected.

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***20** The NCAA's compensation rules function in much the same way as the agreement at issue in *Catalano:* they "extinguish[ ] one form of competition" among schools seeking to land recruits. We acknowledge that *Catalano* was a per se case in which the Court did

not analyze the anticompetitive effect of the wholesalers' agreement in detail,[15] but the decision nonetheless indicates that an antitrust court should not dismiss an anticompetitive price-fixing agreement as benign simply because the agreement relates only to one component of an overall price. That proposition finds further support in *Board of Regents:* in *Board of Regents,* a Rule of Reason case, the Court held that the NCAA's television plan had "a significant potential for anticompetitive effects" without delving into the details of exactly how much the plan restricted output of televised games or how much it fixed the price of TV contracts. 468 U.S. at 104–05. While the precise value of NIL compensation is uncertain, at this point in the analysis and in light of *Catalano* and *Board of Regents,* we conclude that the plaintiffs have met their burden at the first step of the Rule of Reason by showing that the NCAA's compensation rules fix the price of one component (NIL rights) of the bundle that schools provide to recruits.

Because we agree with the district court that the compensation rules have a significant anticompetitive effect on the college education market, we proceed to consider the procompetitive justifications the NCAA proffers for those rules.

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.

Although the NCAA's briefs state in passing that the district court erred in failing to "credit all four justifications fully," the NCAA focuses its arguments to this court entirely on the first proffered justification—the promotion of amateurism. We therefore accept the district court's factual findings that the compensation rules do not promote competitive balance, that they do not increase output in the college education market, and that they play a limited role in integrating student-athletes with their schools' academic communities, since we have been offered no meaningful argument that those findings were clearly erroneous. *See, e.g., Md. Cas. Co. v. Knight,* 96 F.3d 1284, 1291 (9th Cir.1996).

The district court acknowledged that the NCAA's current rules promote amateurism, which in turn plays a role in increasing consumer demand for college sports. *O'Bannon,* 7 F.Supp.3d at 978. The NCAA does not challenge that specific determination, but it argues to us that the district court gave the amateurism justification short shrift, in two respects. First, it claims that the district court erred by focusing solely on the question of whether amateurism increases consumers' (*i.e.,* fans') demand for college sports and ignoring the fact that amateurism also increases choice for student-athletes by giving them "the only opportunity [they will] have to obtain a college education while playing competitive sports *as students.*" Second, it faults the district court for being inappropriately skeptical of the NCAA's historical commitment to amateurism. Although we might have credited the depth of the NCAA's devotion to amateurism differently,

these arguments do not persuade us that the district court clearly erred.

***21** 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.[16]

The NCAA's second point has more force—the district court probably underestimated the NCAA's commitment to amateurism. *See Bd. of Regents,* 468 U.S. at 120 (referring to the NCAA's "revered tradition of amateurism in college sports"). But the point is ultimately irrelevant. Even if the NCAA's concept of amateurism had been perfectly coherent and consistent, the NCAA would still need to show that amateurism brings about some procompetitive *effect* in order to justify it under the antitrust laws. *See id.* at 101–02 & n. 23. The NCAA cannot fully answer the district court's finding that the compensation rules have significant anticompetitive effects simply by pointing out that it has adhered to those rules for a long time. 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.[17]

***22** We note that the district court's findings are largely consistent with the Supreme Court's own description of the college football market as "a particular brand of football" that draws from "an academic tradition [that] differentiates [it] from and makes it more popular than professional sports to which it might otherwise be comparable, such as, for example, minor league baseball." *Bd. of Regents,* 468 U.S. at 101–02. "Thus, the NCAA plays a vital role in enabling college football to preserve its character, and as a result

enables a product to be marketed which might otherwise be unavailable." *Id.* at 102. But, as *Board of Regents* demonstrates, not every rule adopted by the NCAA that restricts the market is necessary to preserving the "character" of college sports. We thus turn to the final inquiry—whether there are reasonable alternatives to the NCAA's current compensation restrictions.

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. Nat'l Collegiate Athletic Ass'n,* 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 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.[18] *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

***23** [12] 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: Dr. Mark Emmert, the president of the NCAA, testified at trial that giving student-athletes scholarships up to their full costs of attendance would not violate the NCAA's principles of amateurism because all the money given to students would be going to cover their "legitimate costs" to attend school. Other NCAA witnesses agreed with that assessment. *Id.* at 983. Nothing in the record, moreover, suggested that consumers of college sports would become less

interested in those sports if athletes' scholarships covered their full cost of attendance, or that an increase in the grant-in-aid cap would impede the integration of student-athletes into their academic communities. *Id.*

The NCAA, along with fifteen scholars of antitrust law appearing as *amici curiae,* warns us that if we affirm even this more modest of the two less restrictive alternative restraints identified by the district court, we will open the floodgates to new lawsuits demanding all manner of incremental changes in the NCAA's and other organizations' rules. The NCAA and these *amici* admonish us that as long as a restraint (such as a price cap) is "reasonably necessary to a valid business purpose," it should be upheld; it is not an antitrust court's function to tweak every market restraint that the court believes could be improved.

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.

***24** A compensation cap set at student-athletes' full cost of attendance is a substantially less restrictive alternative means of accomplishing the NCAA's legitimate procompetitive purposes. And there is no evidence that this cap will significantly increase costs; indeed, the NCAA already permits schools to fund student-athletes' full cost of attendance. The district court's determination that the existing compensation rules violate Section 1 of the Sherman Act was correct and its injunction requiring the NCAA to permit schools to provide compensation up to the full cost of attendance was proper.

2. Allowing students to receive cash compensation for their NILs

[13] 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. Again, the district court identified two procompetitive purposes served by the NCAA's current rules: "preserving the popularity of the NCAA's product by promoting its current understanding of amateurism" and "integrating academics and athletics." *O'Bannon,* 7 F.Supp.3d at 1005; *see also Board of Regents,* 468 U.S. 117 ("It is reasonable to assume that most of the regulatory controls of the NCAA are justifiable means of fostering competition among amateur athletic teams and therefore procompetitive because they enhance public interest in intercollegiate athletics."). 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.[19] 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.*[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.

Aside from the self-evident fact that paying students for their NIL rights will vitiate their amateur status as collegiate athletes, the court relied on threadbare evidence in finding that small payments of cash compensation will preserve amateurism as well the NCAA's rule forbidding such payments. Most of the evidence elicited merely indicates that paying students large compensation payments would harm consumer demand more than smaller payments would—not that small cash payments will preserve amateurism. Thus, the evidence was addressed to the wrong question. Instead of asking whether making small payments to student-athletes served the same procompetitive purposes as making no payments, the evidence before the district court went to a different question: Would the collegiate sports market be better off if the NCAA made small payments or big payments? For example, the district court noted that a witness called by the NCAA, Bernard Muir, the athletic director at Stanford University, testified that paying student-athletes modest sums raises less concern than paying them large sums. The district court also relied on Dr. Dennis's opinion survey, which the court read to indicate that in the absence of the NCAA's compensation rules, "the popularity of college sports would likely depend on the size of payments awarded to student-athletes." *O'Bannon,* 7 F.Supp.3d at 983. Dr. Dennis had found that payments of $200,000 per year to each

athlete would alienate the public more than would payments of $20,000 per year. *Id.* at 975–76, 983. At best, these pieces of evidence indicate that small payments to players will impact consumer demand less than larger payments. But there is a stark difference between finding that small payments are less harmful to the market than large payments—and finding that paying students small sums is virtually as effective in promoting amateurism as not paying them.

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***26** 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.[24] 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.[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.

V

By way of summation, we wish to emphasize the limited scope of the decision we have reached and the remedy we have approved. Today, we reaffirm that NCAA regulations are subject to antitrust scrutiny and must be tested in the crucible of the Rule of Reason. When those regulations truly serve procompetitive purposes, courts should not hesitate to uphold them. But the NCAA is not above the antitrust laws, and courts cannot and must not shy away from requiring the NCAA to play by the Sherman Act's rules. In this case, the NCAA's rules have been more restrictive than necessary to maintain its tradition of amateurism in support of the college sports market. The Rule of Reason requires that the NCAA permit its schools to provide up to the cost of attendance to their student athletes. It does not require more.

We vacate the district court's judgment and permanent injunction insofar as they require the NCAA to allow its member schools to pay student-athletes up to $5,000 per year in deferred compensation. We otherwise affirm. The parties shall bear their own costs on appeal.

AFFIRMED IN PART and **VACATED IN PART.**