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## ***O'Bannon v. National Collegiate Athletic Association: Why the Ninth Circuit Should Not Block the Floodgates of Change in College Athletics***

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*O'Bannon v. National Collegiate  
Athletic Association: Why the Ninth  
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Floodgates of Change in College  
Athletics*

Michael A. Carrier\* & Christopher L. Sagers\*\*

*Abstract*

*In O'Bannon v. National Collegiate Athletic Ass'n, then-Chief Judge Claudia Wilken of the U.S. District Court for the Northern District of California issued a groundbreaking decision, potentially opening the floodgates for challenges to National Collegiate Athletic Association (NCAA) amateurism rules. The NCAA was finally put to a full evidentiary demonstration of its amateurism defense, and its proof was found emphatically wanting. We agree with Professor Edelman that O'Bannon could bring about significant changes, but only if the Ninth Circuit affirms. We write mainly to address the NCAA's vigorous pending appeal and the views of certain amici, and to explain our strong support for the result at trial. Reversal of Judge Wilken's comprehensive and thoughtful decision would thwart needed changes just as colleges are beginning to embrace them and would be mistaken as a matter of law. O'Bannon is a correct, justifiable, garden-variety rule-of-reason opinion and should be affirmed by the Ninth Circuit.*

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\*\* James A. Thomas Distinguished Professor of Law, Cleveland State University Cleveland-Marshall College of Law. Copyright © 2015 Michael A. Carrier & Christopher L. Sagers. Portions of this response are adapted from Brief for Professors of Antitrust and Sports Law as Amici Curiae in Support of Appellees, *O'Bannon v. NCAA*, Nos. 14-16601, 14-17068 (9th Cir. Jan. 28, 2015), which Sagers principally drafted and Carrier and Marc Edelman signed.

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*I. Introduction*

In *O'Bannon v. National Collegiate Athletic Ass'n*,<sup>1</sup> then-Chief Judge Claudia Wilken of the U.S. District Court for the Northern District of California issued a groundbreaking decision, potentially opening the floodgates for challenges to National Collegiate Athletic Association (NCAA) amateurism rules.<sup>2</sup> The NCAA was finally put to a full evidentiary demonstration of its amateurism defense, and its proof was found emphatically wanting. *O'Bannon* is significant as that rarest of antitrust cases: a rule-of-reason challenge that not only reached the merits, but also provided a victory for plaintiffs. In his article, Professor Marc Edelman explains how the decision can be a gateway to more far-reaching changes in college athletics, which could be attained through other lawsuits, unionization, or legislation.<sup>3</sup>

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1. 7 F. Supp. 3d 955 (N.D. Cal. 2014).

2. *See id.* at 985 (explaining that the plaintiffs challenged NCAA rules precluding “football players and Division I men’s basketball players from receiving any compensation, beyond the value of their athletic scholarships, for the use of their names, images, and likenesses in videogames, live game telecasts, re-broadcasts, and archival game footage”).

3. *See generally* Marc Edelman, *The District Court Decision in O'Bannon v. National Collegiate Athletic Association: A Small Step Forward for College-Athlete Rights, and a Gateway for Far Grander Change*, 71 WASH. & LEE L. REV.

We agree that *O'Bannon* could bring about those changes, but only if the Ninth Circuit affirms. We write mainly to address the NCAA's vigorous pending appeal and the views of certain amici, and to explain our strong support for the result at trial. Reversal of Judge Wilken's comprehensive and thoughtful decision would thwart needed changes just as colleges are beginning to embrace them and would be mistaken as a matter of law. One of us has conducted an empirical review of nearly every rule-of-reason case in the modern era,<sup>4</sup> and on the basis of such analysis, we can comfortably describe *O'Bannon* as a correct, justifiable, garden-variety rule-of-reason opinion. A reversal by the Ninth Circuit, depending on how the opinion is written, could result in even a robust, well-supported evidentiary presentation not being enough for plaintiffs to win a rule-of-reason case, even when the anticompetitive effects are significant, obvious, and not outweighed by any legitimate justification.

Part II of this response explains why antitrust law applies to the NCAA's conduct.<sup>5</sup> Part III contends that the Supreme Court's decision in *NCAA v. Board of Regents* does not immunize the NCAA's action.<sup>6</sup> Part IV shows why the district court was correct in finding an antitrust violation.<sup>7</sup> And Part V reveals how the

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2319, 2347–48 (2015).

4. See Michael A. Carrier, *The Rule of Reason: An Empirical Update for the 21st Century*, 16 GEO. MASON L. REV. 827, 829 (2009) [hereinafter Carrier, *Rule of Reason in 21st Century*] (reviewing 222 antitrust cases); Michael A. Carrier, *The Real Rule of Reason: Bridging the Disconnect*, 1999 BYU L. REV. 1265, 1272–73 (1999) [hereinafter Carrier, *Real Rule of Reason*] (reviewing 495 antitrust cases).

5. *Infra* Part II.

6. *Infra* Part III.

7. *Infra* Part IV. This Response does not address the NCAA's "antitrust injury" argument other than to note that, as plaintiffs have explained, "[t]he NCAA's current contracts with television and cable networks (under which it reaps hundreds of millions of dollars in revenue annually) contain express provisions assigning Plaintiffs' NIL [name, image, and likeness] rights." Plaintiffs-Appellees' Opposition Brief in Response to National Collegiate Athletic Ass'n's Opening Appellate Brief at 23, 40, Nat'l Collegiate Athletic Ass'n v. O'Bannon, Nos. 14-16601, 14-17068 (9th Cir. Jan. 21, 2015) [hereinafter Plaintiffs' Br.] (quoting, in addition, the statement of NCAA executive Oliver Luck that college athletes have a "fundamental right" to be compensated for use of their NILs); see also Brief for the National Collegiate Athletic Ass'n at 35–36, *O'Bannon*, Nos. 14-16601, 14-17068 (9th Cir. Nov. 14, 2014) [hereinafter NCAA Br.] (making the "antitrust injury" argument by maintaining that there could be

plaintiffs' framing of the *O'Bannon* case explains some of the criticisms of the district court's decision.<sup>8</sup>

## *II. Application of Antitrust Law*

On its appeal to the Ninth Circuit, the NCAA claims that the challenged restraints “do not regulate commercial activity and thus are not within the scope of the Sherman Act.”<sup>9</sup> It argues that the Act seeks to “prevent[] . . . restraints to free competition in business and commercial transactions”<sup>10</sup> and that “[t]he NCAA’s amateurism rules do not effect any such restraint.”<sup>11</sup>

But at the same time, the NCAA warns that if it cannot constrain “the commercial pressures of college sports,” then “an avocation [might] become a profession.”<sup>12</sup> In lamenting potential “commercial pressures,” the NCAA concedes that it is engaged in business and subject to antitrust law. In any event, antitrust courts are not permitted to entertain such claims about professions. As the Supreme Court explained a century ago: “[R]estraints of trade within the purview of the statute . . . [can]not be taken out of that category by indulging in general reasoning as to the expediency or non-expediency of having made the contracts . . . .”<sup>13</sup>

In the case on which the NCAA most directly relies, *NCAA v. Board of Regents of the University of Oklahoma*,<sup>14</sup> the Supreme Court made clear that “the NCAA and its member institutions are . . . organized to maximize revenues” and are “[no] less likely to restrict output [to maximize profit] . . . than would be a for-profit entity.”<sup>15</sup> With modern college athletics generating billions of dollars each year, this is even truer today than it was when the Court decided the case thirty years ago.<sup>16</sup>

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no application of the rules “that would deprive plaintiffs of NIL compensation”).

8. *Infra* Part V.

9. NCAA Br., *supra* note 7, at 32.

10. *Id.* (quoting *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 493 (1940)).

11. *Id.*

12. *Id.* at 2.

13. *Standard Oil Co. v. United States*, 221 U.S. 1, 65 (1911).

14. 468 U.S. 85 (1984).

15. *Id.* at 101 n.22.

16. *See Revenue*, NAT'L COLLEGIATE ATHLETIC ASS'N,

There is no good reason why antitrust law cannot apply to the NCAA. Antitrust applies without limitation to sports in general.<sup>17</sup> It applies to higher education.<sup>18</sup> And it applies to non-profit organizations.<sup>19</sup> Just as colleges that conspire on scholarships must face antitrust scrutiny,<sup>20</sup> so too must colleges that limit payment for student athletes.

### *III. No Antitrust Immunity*

The NCAA also attempts to evade antitrust scrutiny by claiming that *Board of Regents* gives it a special immunity, rendering its amateurism rules “procompetitive and therefore valid under the Sherman Act as a matter of law.”<sup>21</sup> And it maintains that “even if college sports has changed so dramatically since *Board of Regents* that the Supreme Court’s analysis no longer holds, the district court (and this Court) would still be bound by the decision.”<sup>22</sup>

We think such a precedent of immunity would be a peculiar role for *Board of Regents*. The Court there found an antitrust violation from an NCAA plan that limited the number of college football games that could be televised and the number of games in which a single team could appear.<sup>23</sup> The Court found that “[t]he anticompetitive consequences of th[e] arrangement [we]re apparent” because “[p]rice is higher and output lower than they would otherwise be[] and both are unresponsive to consumer

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<http://www.ncaa.org/about/resources/finances/revenue> (last visited Feb. 5, 2015) (explaining that “college athletics programs annually generate about \$6.1 billion from ticket sales, radio and television receipts, alumni contributions, guarantees, royalties and NCAA distributions”) (on file with the Washington and Lee Law Review).

17. See generally *Int’l Boxing Club of N.Y. v. United States*, 358 U.S. 242, 252 (1959).

18. See generally *United States v. Brown Univ.*, 5 F.3d 658, 665–66 (3d Cir. 1993).

19. *Board of Regents*, 468 U.S. at 101 n.22.

20. *Brown Univ.*, 5 F.3d at 679.

21. NCAA Br., *supra* note 7, at 14.

22. *Id.* at 28.

23. *Board of Regents*, 468 U.S. at 94.

preference.”<sup>24</sup> Moreover, the Court found a violation under an abbreviated analysis that relieved plaintiffs of the need to show market power, as “the absence of proof of market power does not justify a naked restriction on price or output.”<sup>25</sup> Nor would any “good motives . . . validate an otherwise anticompetitive practice.”<sup>26</sup>

Indeed, in *Board of Regents* itself, “the NCAA [did] not rely[] on amateurism as a procompetitive justification,” and its counsel admitted during oral argument that it “might be able to get more viewers . . . if it had semi-professional clubs rather than amateur clubs.”<sup>27</sup> Separately, even if there were anything to the purported immunity, Judge Wilken found “ample evidence . . . that the college sports industry has changed substantially in the thirty years since *Board of Regents* was decided.”<sup>28</sup>

But most fundamentally, *Board of Regents* analyzed—and invalidated—rules relating to television broadcast rights that had nothing to do with athlete pay. Its statements about amateurism were plainly, obviously, dicta. Such dicta cannot overcome the results of a fully litigated trial that exhaustively considered the amateurism defense. The district court largely rejected the NCAA’s amateurism claims “after hearing the testimony of 23 witnesses and considering 287 exhibits” in a “15-day bench trial that produced a transcript of 3,395 pages and a written decision of 99 pages.”<sup>29</sup>

The NCAA grasps for the reed of *Board of Regents*, but a sentence of dicta does not displace an entire trial on the very issue of amateurism in which the court unmistakably found that the defense did not justify the challenged restraints.<sup>30</sup>

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24. *Id.* at 106–07.

25. *Id.* at 109.

26. *Id.* at 101 n.23.

27. *O’Bannon v. Nat’l Collegiate Athletic Ass’n*, 7 F. Supp. 3d 955, 999 (N.D. Cal. 2014).

28. *Id.* at 999–1000; *see also* Plaintiffs Br., *supra* note 7, at 13 (quoting statement on NCAA’s website that “[a]s the scale of both revenue generation and spending has increased over the last few decades, there is a general sense that ‘big time’ athletics is in conflict with the principle of amateurism”).

29. Plaintiffs Br., *supra* note 7, at 2.

30. The NCAA’s reading of *Board of Regents* also is precluded by Ninth Circuit law. In *Hairston v. Pacific 10 Conference*, 101 F.3d 1315, 1319 (9th Cir. 1996), the Ninth Circuit applied a full rule-of-reason analysis to a factually

#### IV. Rule of Reason

##### A. Framework

The district court's opinion fits comfortably into hornbook rule-of-reason analysis. Courts relying on this framework engage in a burden-shifting analysis.<sup>31</sup> First, plaintiffs must show a significant anticompetitive effect.<sup>32</sup> Second, defendants must offer a procompetitive justification for the restraint.<sup>33</sup> Third, the plaintiff can show that the restraint is not reasonably necessary to attain the defendant's objectives or that there are less restrictive alternatives to achieving the goals.<sup>34</sup> The final stage of the analysis involves balancing anticompetitive and procompetitive effects.<sup>35</sup>

Of crucial importance, the effect of not making the showings at the various stages varies. If the plaintiff cannot show an anticompetitive effect, it loses because there is no harm to competition.<sup>36</sup> And if the defendant cannot show a procompetitive justification, it loses because it cannot offer a reason for the restraint.<sup>37</sup>

In the third stage, in contrast (and based on a review of nearly every rule-of-reason case in the modern era),<sup>38</sup> if the plaintiff does not show that the restraint is not reasonably necessary or that there are less restrictive alternatives, *it does not lose*. A plaintiff's showing at this stage typically allows it to win the case outright, avoiding a balancing analysis. After all, if the plaintiff could show that the

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indistinguishable restraint involving penalties for the violation of amateurism rules. It did so without discussing presumptions or special rules, and it cited *Board of Regents* as authority for its decision. *Id.* at 1318–19; *see also* *Tanaka v. Univ. of S. Cal.*, 252 F.3d 1059, 1062–63 (9th Cir. 2001) (applying rule of reason to restraint on student-athlete transfers among conference member schools).

31. *See generally* Carrier, *Real Rule of Reason*, *supra* note 4, at 1268–69.

32. *See, e.g.*, *Capital Imaging Assocs. v. Mohawk Valley Med. Assocs.*, 996 F.2d 537, 543 (2d Cir. 1993).

33. *See, e.g., id.*

34. *See, e.g., id.*

35. *See generally* Carrier, *Real Rule of Reason*, *supra* note 4, at 1268–69.

36. *Id.* at 1268.

37. *Id.*

38. *See generally* Carrier, *Rule of Reason in 21st Century*, *supra* note 4. The surveys included every rule-of-reason case that a court decided from June 23, 1977 to May 5, 2009. More recent cases do not alter the conclusions in the text. *See generally* Carrier, *Real Rule of Reason*, *supra* note 4.



restraint is not reasonably necessary to attain the defendant's objective, it could be struck down. And if there is a less restrictive alternative that would allow a defendant to achieve its objective, then that alternative should be used because it allows the defendant to obtain its goals while being less restrictive of competition.<sup>39</sup>

### *B. Anticompetitive Effect*

Judge Wilken first found that the plaintiffs demonstrated an anticompetitive effect. She found that NCAA Division I schools “compete to sell unique bundles of goods and services to elite football and basketball recruits” and that they “fixed the price of their product by agreeing not to offer any recruit a share of the licensing revenues derived from the use of his name, image, and likeness [(NIL)].”<sup>40</sup> The restraint caused anticompetitive harm sufficient to satisfy plaintiffs’ initial burden because, “in [its] absence . . . , certain schools would compete for recruits by offering them a lower price for the opportunity to play [elite sports] while they attend college.”<sup>41</sup> That injury is sufficient “even if [it did] not ultimately harm consumers,” as many courts have recognized such claims in the context of “market[s] for athletic services.”<sup>42</sup> On appeal, the NCAA quibbles with this conclusion on several grounds, focusing among other things on output reductions and claims that *de minimis* price-fixing effects are acceptable.<sup>43</sup> We think the court’s finding is well founded, and in any event not clearly erroneous.

### *C. Procompetitive Justification*

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39. See *Cnty. of Tuolumne v. Sonora Cmty. Hosp.*, 236 F.3d 1148, 1160 (9th Cir. 2001) (“Because plaintiffs have failed to meet their burden of advancing viable less restrictive alternatives, we reach the balancing stage.”); *Carrier, Real Rule of Reason*, *supra* note 4, at 1343–44.

40. *O’Bannon v. Nat’l Collegiate Athletic Ass’n*, 7 F. Supp. 3d 955, 986, 989 (N.D. Cal. 2014).

41. *Id.* at 988.

42. *Id.* at 991–92.

43. *NCAA Br.*, *supra* note 7, at 47 (arguing that challenged rules “would have a *de minimis* effect in the relevant market because they would limit only one minor (or non-existent) component of the bundle [of goods and services to athletic recruits], while competition in the overall relevant market remains robust”).

Once the plaintiffs made this showing, the burden shifted to the defendant to offer procompetitive justifications for its restraint. The district court rejected two of the NCAA's four justifications: preserving competitive balance and increasing "output."<sup>44</sup> It did not completely reject the other two—promoting amateurism and integrating student-athletes into their campus communities—but, crucially, found them too insignificant to justify the challenged restraint: a complete ban on NIL revenues.<sup>45</sup>

The most direct threat to the NCAA in future proceedings is the loss of the amateurism justification, a prized defense on which it has relied for decades. The district court found that its rules were "malleable" and had changed "numerous times."<sup>46</sup> And though the NCAA had the benefit of a full trial and substantial evidentiary demonstration, it failed to show that amateurism could "justify the rigid prohibition on compensating student-athletes . . . with any share of licensing revenue generated from the use of their [NILs]."<sup>47</sup>

Similarly, the NCAA's restrictions on NIL payments were not necessary to integrate student-athletes into their schools' academic communities.<sup>48</sup> The NCAA could not "use this goal to justify its sweeping prohibition on any student-athlete compensation . . . from licensing revenue generated from the use of student-athletes' [NILs]."<sup>49</sup>

In short, the court found that the NCAA (1) could not use two of its four proposed justifications and (2) could not rely on the other two to support the restrictions at issue in the case.<sup>50</sup> In other words, the plaintiffs demonstrated an anticompetitive effect, but the NCAA failed to offer justifications to explain its restriction.<sup>51</sup> As a result, the anticompetitive effects predominated and the plaintiffs proved a successful rule-of-reason case. At that point, the court's decision on liability was over.

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44. *O'Bannon*, 7 F. Supp. 3d at 1001–02, 1003–04. As for "increased output," the NCAA argued that its rules provided colleges and elite student athletes more opportunities to participate in sports. *Id.* at 1003–04.

45. *Id.* at 1000–01, 1003.

46. *Id.* at 1000.

47. *Id.* at 1001.

48. *Id.* at 1003.

49. *Id.*

50. *Id.* at 1000–04.

51. *Id.* at 1005.

*D. Less Restrictive Alternatives*

To be sure, the court did not stop there. It crafted a remedy to address the anticompetitive harm and, in doing so, considered several alternatives that were less restrictive of competition but still could have achieved the NCAA's objectives.<sup>52</sup> What is key, however, is that the plaintiffs did not *need* to show such alternatives to succeed under the rule of reason. Their ability to offer less restrictive alternatives would help them win under the rule of reason. But such an offering is not necessary. A plaintiff's showing of anticompetitive effects, together with a defendant's failure to offer procompetitive justifications that would outweigh these effects, is enough for a plaintiff to win.<sup>53</sup>

On this point, the amicus brief filed by Wilson Sonsini Goodrich & Rosati, P.C. on behalf of fifteen professors is not persuasive. The brief argues that "the Court should be able to conclude that the procompetitive benefits outweigh any alleged competitive harms without elaborate analysis" because promoting amateurism and integration of student athletes "are at the core of the NCAA's mission" and that the plaintiffs "failed to identify a substantially less restrictive alternative to capping payments to players for promoting those aims."<sup>54</sup> Regardless of what the NCAA views as the core of its mission, the district court found that these justifications were barely acceptable and certainly did not justify the restraints in this case.<sup>55</sup>

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52. *See id.* at 1005–06 (noting that "the NCAA could permit . . . schools to award stipends to student-athletes up to the full cost of attendance" and "permit its schools to hold in trust limited and equal shares of its licensing revenue to be distributed to its student-athletes after they leave college").

53. The NCAA and supporting amici spend a good deal of attention on the issue of less restrictive alternatives. *See* NCAA Br., *supra* note 7, at 54–60 (devoting six pages to the issue); Brief for Antitrust Scholars as Amici Curiae in Support of Appellant at 8–16, *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, Nos. 14-16601, 14-17068 (9th Cir. Nov. 21, 2014) [hereinafter *Wilson Sonsini Br.*] (devoting nine pages to the issue). But (1) district courts enjoy broad remedial discretion in antitrust, (2) the court adopted a remedy recommended by plaintiffs, and (3) the NCAA waived any challenge to the remedy. *See* Brief for Professors of Antitrust and Sports Law as Amici Curiae in Support of Appellees at 18, *O'Bannon*, Nos. 14-16601, 14-17068 (9th Cir. Jan. 28, 2015) [hereinafter *Robins Kaplan Br.*] (discussing these points).

54. *Wilson Sonsini Br.*, *supra* note 53, at 13–14.

55. *See O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 7 F. Supp. 3d 955, 986, 1000–04 (N.D. Cal. 2014).

In addition, even if plaintiffs were not able to demonstrate a less restrictive alternative, that is not grounds for a plaintiff loss. It merely requires the court to balance anticompetitive and procompetitive effects. And though it performed this balancing quickly, the *O'Bannon* court did just that in finding for the plaintiffs.<sup>56</sup>

### V. Framing of the *O'Bannon* Case

Finally, we take minor issue with one point in Professor Edelman's essay, which reflects a larger frustration with the *O'Bannon* litigation. While Professor Edelman supports Judge Wilken's analysis, he faults her remedy.<sup>57</sup> He is not alone, and other supporters of plaintiffs have made similar complaints.<sup>58</sup> Professor Edelman contends that the court should "simply [have] enjoined the NCAA's restraints outright," by which he means it could have "entirely enjoined [its] 'no pay' restraints," "simply recogniz[ing]

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56. While the court found that amateurism "play[s] a limited role in driving consumer demand" for college sports that "might justify a restriction on large payments," that rationale "[could] not justify the rigid prohibition on compensating student-athletes . . . with any share of licensing revenue." *O'Bannon*, 7 F. Supp. 3d at 1001. The court likewise found that integration of student-athletes into their campus communities could improve the education product they receive, but held that the NCAA's outright ban was "[not] necessary to achieve these benefits." *Id.* at 1003. For that reason, while "[l]imited restrictions on student-athlete compensation may help schools achieve this narrow procompetitive goal[,] . . . the NCAA may not use this goal . . . to justify its sweeping prohibition on any student-athlete compensation . . . from licensing revenue." *Id.* Finally, the NCAA's argument that the district court's "ill-conceived rule-of-reason analysis amounted to little more than asking whether college sports could still be commercially popular if it became something different from what it has long been," NCAA Br., *supra* note 7, at 60, is a red herring that ignores the court's crediting of anticompetitive effects and failure to find justifications that would outweigh these antitrust harms.

57. See Edelman, *supra* note 3, at 2343 (arguing that the court's injunction was "limited and weak, as it failed to ameliorate the NCAA's anticompetitive practices as effectively as possible").

58. See, e.g., Stephen F. Ross & Wayne S. DeSarbo, *A Rapid Reaction to O'Bannon: The Need for Analytics in Applying the Sherman Act to Overly Restrictive Joint Venture Schemes*, 119 PENN ST. L. REV. PENN STATIM 43, 50–59 (2015), <http://www.pennstatelawreview.org/wp-content/uploads/2015/02/A-Rapid-Reaction-to-O.pdf> ("Judge Wilken . . . invented a remedy of a \$5,000 annual cash payment to be held in trust" even though her "own antitrust analysis d[id] not support that decision.").

that . . . [its] long-standing restraints on college-athlete pay far exceeded any alleged procompetitive justifications.”<sup>59</sup>

We think that is unlikely. Antitrust courts have broad remedial discretion,<sup>60</sup> but they tend not to award relief without evidentiary support.<sup>61</sup> In this litigation, plaintiffs pled as their only injury the denial of revenue from NIL rights,<sup>62</sup> and they tried the case accordingly. Aside from whether courts can or commonly do enter remedies substantially larger than plaintiffs themselves request, the record may well have been insufficient to support Professor Edelman’s desired remedy. Reversal of *O’Bannon* would be regrettable on any ground, including that of reaching beyond the plaintiffs’ case to award a remedy unsupported in the record.

That said, we can understand Professor Edelman’s impatience. The emphasis in *O’Bannon* on NIL revenues explains the decision’s weaknesses. If the plaintiffs had litigated *O’Bannon* in broader terms, they could have won more significant relief, and could have simplified a complex case and a complex verdict. For example, pleading the case as a simple, labor-market monopsony<sup>63</sup> would have obviated the court’s complicated analysis of harm in “group licensing” markets<sup>64</sup> and would have deflected some of the NCAA’s red herrings, like its First Amendment defense and claims on antitrust injury.<sup>65</sup>

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59. Edelman, *supra* note 3, at 2343–44.

60. See 1 ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 801–02 (7th ed. 2012).

61. See *id.*

62. See Complaint at 62–68, *O’Bannon v. Nat’l Collegiate Athletic Ass’n*, 7 F. Supp. 3d 955 (N.D. Cal. 2014) (No. CV-09-3329).

63. Indeed, two subsequent lawsuits are already pending before Judge Wilken that more directly challenge the no-pay model. See Complaint at 2, *Jenkins v. NCAA*, 3:14-cv-01678-FLW-LHG (D.N.J. Mar. 17, 2014) (seeking to overturn NCAA rules “placing a ceiling on the compensation that may be paid to [college] athletes for their services”); Complaint at 1, 3, *Alston v. NCAA*, 3:14-cv-01011-CW (N.D. Cal. Mar. 5, 2014) (characterizing athletes as “essentially working full-time football jobs” and seeking to enjoin “the present NCAA Bylaw that limits financial aid to the presently-defined [limits]”). The *Alston* case was filed in the Northern District of California and initially assigned to Judge Wilken, and both *Jenkins* and *Alston* have been transferred to a multi-district litigation docket pending before her, styled *In re NCAA Athletic Grant-In-Aid Cap Antitrust Litig.*, 4:14-md-02541-CW (N.D. Cal. June 13, 2014).

64. See *O’Bannon*, 7 F. Supp. 3d at 993–99.

65. For critiques of these arguments, see *supra* note 7 and Robins Kaplan Br., *supra* note 53, at 3 n.4. We do not criticize plaintiffs’ counsel for taking the

But a larger point is that none of this is relevant to the matter at hand. Judge Wilken's decision was appropriate to the case as it was pled and tried and was supported by the record. While we can sympathize with Professor Edelman's desire for a more robust remedy, no one can doubt the significance of the liability finding and the role this can play in future developments that could result in more expansive remedies.

### VI. Conclusion

Professor Edelman is correct that *O'Bannon* can be a building block for future efforts to increase student-athletes' ability to recover revenues from their labors. But that will only come to pass if the district court's decision is upheld. If the Ninth Circuit overturns the fully supported ruling, that moment will be gone, and college athletes will have lost their opportunity to be compensated for the NCAA's antitrust violations.

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approach they took, which likely reflected the interests of named plaintiff Ed O'Bannon, who was frustrated when he saw his own likeness in a video game, see Transcript at 26–27, *O'Bannon*, 7 F. Supp. 3d 955 (No. CV-09-3329) (testimony of Edward O'Bannon, explaining his initial motivation to sue), as well as the views of long-time Nike executive and basketball organizer Sonny Vaccaro, who largely initiated the litigation. See Jon Solomon, *How Sonny Vaccaro Accidentally Created the Ed O'Bannon Case*, CBSSPORTS.COM, (June 6, 2014), <http://www.cbssports.com/collegefootball/writer/jon-solomon/24581965/how-sonny-vaccaro-accidentally-created-the-ed-obannon-case> (last visited Feb. 16, 2015) (explaining the evolution of the *O'Bannon* trial strategy) (on file with the Washington and Lee Law Review). Practical considerations may have counseled against the simpler, more aggressive strategy, as *O'Bannon* (even though it led to a series of amateurism challenges) had few predecessors at the time it was filed and litigated. See *id.* (asking whether courts were “ready for this suit”); *supra* note 63 and accompanying text (discussing pending subsequent lawsuits that more directly challenge the no-pay model).