Texas Entertainment and Sports Law Journal

State Bar of Texas
Entertainment & Sports Law Section

Fall 2019 — Volume 28 • No. 2

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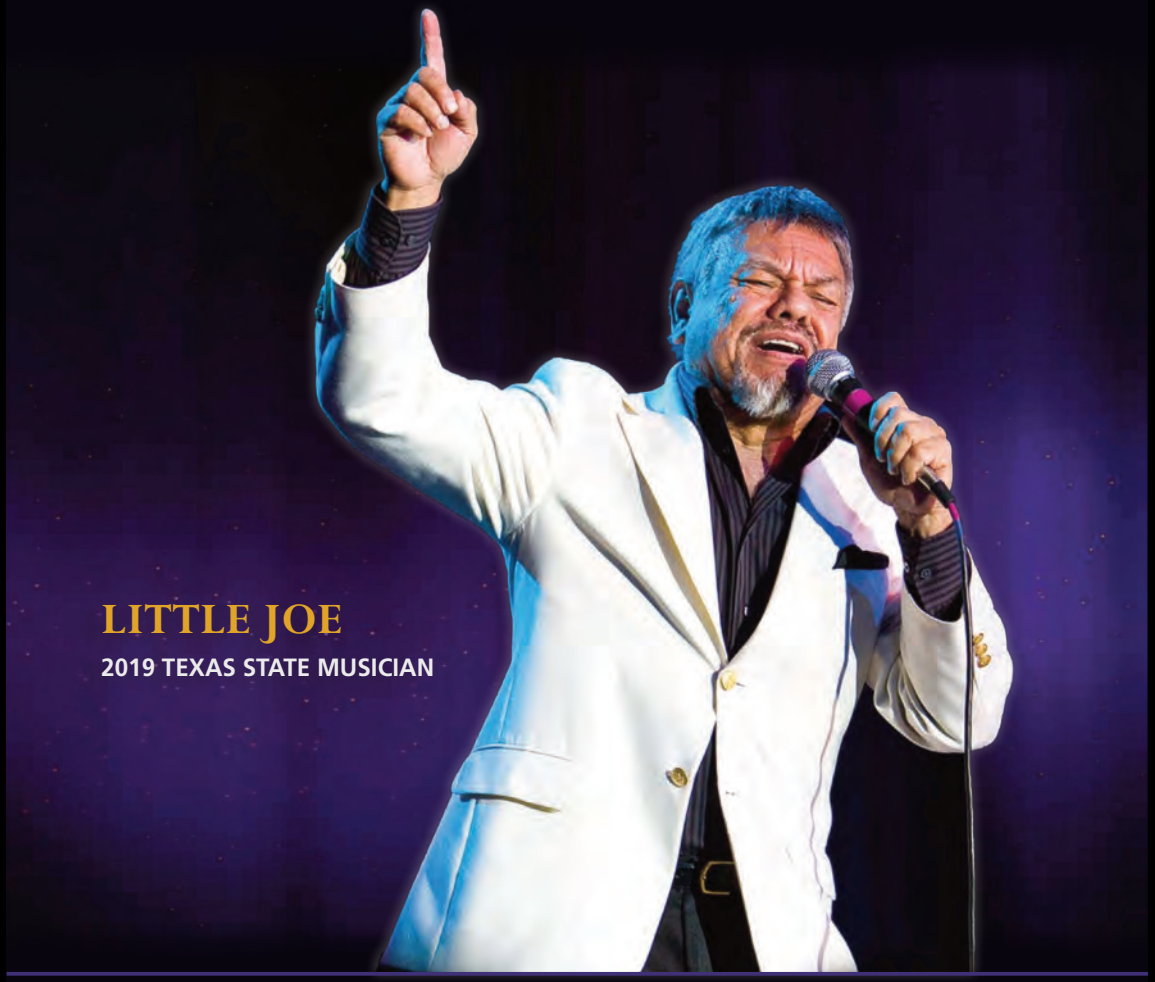

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The Texas Entertainment and Sports Law section of the State Bar of Texas is comprised of more than 950 Texas-licensed attorneys practicing in the areas of film, music, art, collegiate and professional sports. The TESLAW website at ***www.teslaw.org*** *offers attorneys a chance to be listed with their focus area of practice in a publically searchable database. The TESLAW Journal is a recognized publication providing scholarly and insightful articles on the law and practice of entertainment law. Join today to be part of a collegial organization growing the practice of entertainment law in Texas.*
For new bar members the first year's dues are free.

CHAIR'S REPORT

Dear TESLAW Members,

Fall is upon us. The weather is slowly changing, and the leaves are falling off the trees. I truly enjoy this time of year as it signals that the holidays are quickly approaching. Change is coming to our section as well.

After many years of service, Joel Timmer and Stephen Aguller are stepping down from their positions with the TESLAW Journal. Erin Rodgers will be the new editor.

Dena Weaver
Chair 2019-2020

We are always looking for submissions, and I encourage you to send any submissions to Erin Rodgers at **erin@rodgersselvera.com**. It is an excellent opportunity to raise your visibility within the TESLAW section.

Several opportunities to network, learn and accumulate CLE hours are near as the yearly Entertainment Law Institute (ELI) is scheduled for **November 21-22, 2019** at the InterContinental Stephen F. Austin Hotel.

On the afternoon of **November 20, 2019**, please register for always informative Entertainment Law 101 and stay for the Cindi Lazzari Artist Advocate Award Presentation.

Watch for announcements and information related to the popular reception at SXSW in the Spring.

I am honored to be the Chair of the Section and would like to meet as many of you as possible. You can always contact me at **dgweaver@arlingtonlawfirm.com.**

Dena Weaver
Chair 2019-2020
Entertainment & Sports Law Section
State Bar of Texas

Introducing our new section logo!

Editor's Letter

Joel Timmer
Editor
Texas Entertainment and Sports Law Journal

This is my last issue as Editor of the *TESLAW Journal*. It has been my pleasure, for the past five years and ten issues, to bring you articles and other content that I hope you found useful and informative. However, I did not by any means do this alone, and there are many people for whom I am grateful.

First, I appreciate all of those who have contributed content to the Journal during my tenure. Quite clearly, the past ten issues could not have been published without your contributions. I also want to thank Associate Editor Stephen Aguilar, who among other things, has assisted with proofreading, editing, and producing content for the Journal for the past five years. I also appreciate the efforts of former law students—now law school graduates—Kory Rady and Ali Ghaza, for their work on multiple issues of the Journal. Finally, I'd like to thank Patsy Malia and Becky Klier at the Texas State Bar for their hard work in assembling each issue's contents and making the finished product look as good as it does.

Erin Rodgers will be taking over as Editor of the Journal going forward. I encourage you to think about contributing content to the Journal. If you have any questions about that process, or have an article you'd like to submit to the Journal, please reach out to Erin at **erin@rodgersselvera.com**. I wish Erin and her team the best of luck with future issues of the Journal.

I hope you enjoy this issue.

Dr. Joel Timmer

TESLAW Journal Editor 2015-2019

Submissions

The Texas Entertainment and Sports Law Journal publishes articles written by practitioners, law students, and others on a variety entertainment and sports law topics. Articles should be practical and scholarly to an audience of Texas lawyers practicing sports or entertainment law. Articles of varying lengths are considered, from one-to-two-page case summaries and other brief articles, to lengthier articles engaged in in-depth analysis of entertainment and sports law issues. Endnotes must be concise, placed at the end of the article, and in Harvard "Blue Book" or Texas Law Review "Green Book" form. Please submit articles for consideration in Word or similar format, or direct any questions about potential article topics, to Journal Editor Erin Rodgers at erin@rodgersselvera.com.

Once an article is submitted, the Journal does not request any additional authorization from the author to publish the article. Due to the number of submissions and the number of potential publications in the marketplace, it is nearly impossible to monitor publication of submissions in other publications. It is up to the author to assure that we are notified should there be any restrictions on our use of the article. This policy has been implemented to assure that our Journal does not violate any other publication's limitation on republication. The Journal does not restrict republication, and in fact encourages submission of an author's article to other publications prior to or after our election to publish. Obviously, the Journal will make the appropriate attribution where an article is published with the permission of another publication, and request such attribution to the Journal, if we are the first to publish an article.

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VisitAustin.com, Dan Herron

Thursday

7.5 hours including 1.25 ethics

8:00 **Registration**
Coffee & Pastries Provided

8:40 **Welcoming Remarks**
Course Director
Mike Tolleson, *Austin*
Mike Tolleson & Associates

8:45 **Attorney/Client Engagement Agreements: Doing Business with Clients, Avoiding Conflicts, and Staying Ethical** *1 hr ethics*
John P. 'Jack' Sahl, *Akron, OH*
Joseph G. Miller Professor of Law
Director, Miller Becker Center for Professional Responsibility
University of Akron School of Law

9:45 **Annual Roundup of Notable Entertainment Industry Court Rulings** *1 hr (.25 ethics)*
Stan Soocher, Esq., *Denver, CO*
Editor-in-Chief, "Entertainment Law & Finance"
Professor, Music & Entertainment Industry Studies
University of Colorado Denver

10:45 **Break**

11:00 **Termination of Sound Recording Transfers: Litigation and Settlement Issues** *1 hr*
Lisa A. Alter, *New York, NY*
Founding Partner
Alter, Kendrick & Baron, LLP

12:00 **Break - Lunch Provided**

12:20 **Texas Star Award Presentation**

12:30 **Luncheon Presentation: Thinking Ahead - Emerging Issues from the Copyright Office** *.5 hr*
Regan Smith, *Washington, DC*
General Counsel and Associate Register of Copyrights
U.S. Copyright Office

1:00 **Break**

1:15 **How Major Record Labels Remade Themselves in the Streaming Era** *1 hr*
Larry S. Miller, *New York, NY*
Clinical Music Associate Professor and Director, Music Business Program
NYU Steinhardt

2:15 **The Music Modernization Act: One Year Later** *1 hr*
Regan Smith, *Washington, DC*
General Counsel and Associate Register of Copyrights
U.S. Copyright Office

3:15 **Networking Break**

3:30 **Demystifying Global Mechanical Royalties: Making Sense of the MMA, the CRB, and International Mechanical Rights Management** *1 hr*
Teri Nelson Carpenter, *El Segundo, CA*
President & CEO
Reel Muzik Werks, LLC

4:30 **Performance Rights Revenue Collection: Performing Rights Organizations, the Impact of the MMA, and Licensing for New Digital Business Models** *1 hr*
David Levin, *New York, NY*
Senior Vice President of Licensing
BMI

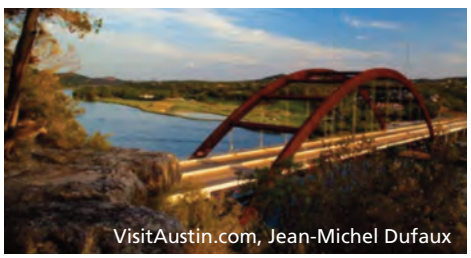
Stuart Rosen, *New York, NY*
Senior Vice President and General Counsel
BMI

5:30 **Adjourn to Networking Happy Hour**
(unhosted event)

TEXAS STAR Award Recipient

Regan Smith

Regan Smith is the General Counsel and Associate Register of Copyrights for the United States Copyright Office, appointed May 27, 2018. In her position as General Counsel, Smith provides legal guidance to the various divisions and programs of the Office as well as Congress, the DOJ, and other federal agencies. She also has primary responsibility for the formation and promulgation of regulations, and the adoption of legal positions governing policy matters and practices of the Copyright Office. Smith has been involved in music copyright issues, including advising congressional offices with respect to the Music Modernization Act, and she now leads the Office's efforts to implement this historic law on behalf of the Register. Smith earned her JD from Harvard Law School and her BA in philosophy and political science from the University of Michigan. Prior to attending law school, Smith worked at a start-up enterprise on various film, theatrical, music, and emerging media projects.


VisitAustin.com, Jean-Michel Dufaux

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Friday
5 hours

8:15 **Coffee & Pastries Provided**

8:40 **Announcements**

8:45 **Artful Lawyering: Advising Visual Artists, Dealers, and Collectors on Legal Aspects of the Art Trade** *1 hr*
Susan Benton, *Austin/BCS Mexico*
SGBenton Law Firm

9:45 **Digital Distribution for the Indie Artist/Label: A Review of Services and Terms of Agreements Provided by CD Baby and TuneCore** *1 hr*
Gwendolyn Seale, *Austin*
Mike Tolleson and Associates

10:45 **Break**

11:00 **Tax Issues for Entertainment Lawyers After the Tax Cuts and Jobs Act of 2017** *1 hr*
Chris Adams, CPA, CGMA, *Austin*
Maxwell, Locke & Ritter

Blaine Martin, CPA, *Austin*
Maxwell, Locke & Ritter

12:00 **Lunch on Your Own**

1:15 **Avoiding, Understanding, and Responding to Office Actions/ Refusals Before the U.S. Trademark Office** *1 hr*
Lydia Belzer, *Dallas*
Managing Attorney, Trademarks
U.S. Patent and Trademark Office

Tamera H. Bennett, *Lewisville*
Bennett Law Office, PC

2:15 **Representing Writers in TV and Episodic Series Negotiations** *1 hr*
Karen Robson, *Los Angeles, CA*
Pryor Cashman LLP

3:15 **Adjourn**

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Purpose & Scope

Please join us for the third installment of Entertainment Law 101! This 3-hour "boot camp" features an overview of introductory legal issues for clients in music, film, and other creative industries. Participants will learn about the various roles and paths to becoming an entertainment lawyer. The course will also provide practical advice for counseling music clients and take a look at the current opportunities (and pitfalls) of self-publishing literary works.

Wednesday
3 hours including .25 ethics

1:30 **Registration**

1:55 **Welcoming Remarks**
Course Director
Amy E. Mitchell, *Austin*
Amy E. Mitchell, PLLC

2:00 **The Variable Role of the Entertainment Lawyer** *1 hr*
Moderator
Erin Rodgers, *Houston*
Rodgers Selvera PLLC

Gretchen McCord, *Rockdale*
Law Offices of Gretchen McCord, PLLC

Michael Norman Saleman, *Austin*
Law Offices of Michael Norman Saleman

3:00 **Break**

3:05 **Opportunities and Pitfalls of Self-Publishing Literary Works** *1 hr*
Stevie M. Fitzgerald, *Austin*
Law Offices of Stevie M. Fitzgerald

4:05 **Break**

4:10 **Practical Legal Advice for Musician Clients** *1 hr (.25 ethics)*
Christian Castle, *Austin*
Christian L. Castle, Attorneys

Amy E. Mitchell, *Austin*
Amy E. Mitchell, PLLC

5:10 **Adjourn to Networking Happy Hour** *(unhosted event)*

Special Event

Make plans to join us in the evening for a special event including the **Cindi Lazzari Artist Advocate Award Presentation**. Event location and time to be announced.

MCLE CREDIT

3 Hours (.25 Ethics)

MCLE Course No: 174056683
Applies to the Texas Bar College and the Texas Board of Legal Specialization in Civil Appellate and Civil Trial Law.

Guitar Statue Photo: www.VisitAustin.com

The First Amendment and Content Restrictions in State Film Incentive Programs*

By Dr. Joel Timmer

*A version of this article was originally published in 38 Loy. L.A. Ent. L. Rev. 37 (2018).

Abstract: In recent years, many states have offered film incentive programs to attract film production and its associated economic benefits—such as increased spending, jobs, and even tourism—to their states. Several of these incentive programs have restrictions that allow incentives to be denied based on a film's content. Texas, for example, allows film incentives to be denied to projects that have "inappropriate content" or that portray "Texas or Texans in a negative way." Do restrictions like these, which deny government assistance based on content, violate the First Amendment? This article examines that issue, concluding that they do not. Key considerations for that conclusion are that the government may use criteria in the granting of subsidies that would be impermissible in a regulatory context, and that the denial of a subsidy is not the equivalent of the infringement of a right.

Joel Timmer is an Associate Professor in the Department of Film, Television and Digital Media at Texas Christian University in Fort Worth, where he teaches classes on media law, entertainment law, and the film and television business.

I. Controversy over Machete and the Texas State Film Incentive Program

Beginning as a nothing more than a fake trailer, the film *Machete* and its sequel *Machete Kills* stirred up controversy over the use of Texas state film incentive funds to support projects which portray the state in a negative light. This controversy resulted in two court cases dealing with a state's ability to deny state support to a film because of a film's content. The two quotes below illustrate the principal conflict in the 2010 film *Machete*, which formed the basis for the controversy:

> Texas State Senator McLaughlin (speaking about immigrants at a campaign rally): … The aliens, the infiltrators, the outsiders, they come right across by light of day or dark of night. They'll bleed us, they're parasites. They'll bleed us until we as a city, a county, a state, a nation are all bled out. Make no mistake: we are at war. Every time an illegal dances across our border it is an act of aggression against this sovereign state, an overt act of terrorism.[1]
>
> *Machete* (later, in a text to an associate of Senator McLaughlin's, who's tried to set up *Machete* in a plot to stir up anti-immigration sentiment amongst voters): You just fucked with the wrong Mexican.

The fake *Machete* trailer originally appeared in the 2007 double feature *Grindhouse*, consisting of the films *Planet Terror*, written and directed by Robert Rodriguez, and *Death Proof*, written and directed by Quentin Tarantino. Accompanying the two films are trailers for fake films and commercials, all meant to simulate and "heighten the experience of exploitation double features of decades past."[2] Kicking off the double feature is the *Machete trailer*, directed by Rodriguez, about a "Mexican day laborer [who] is set up, double-crossed, and left for dead—(then starts everyone's worst nightmare)."[3] Considered by some to be "the single best thing about" *Grindhouse*, the trailer would go on to rack up 1.4 million views on YouTube within a couple of years.[4] The trailer would also end up spawning two actual films,[5] as well as controversy over support for the film through the Texas state film incentive program.

Rodriguez conceived of the trailer and films as the story of a Mexican national police officer (a Federale) "who gets hired to do hatchet jobs in the U.S."[6] Seeking to create a "'70s-style B-movie"[7] with a Mexican action hero in the vein of Charles Bronson or Jean-Claude Van Damme,[8] Rodriguez packed the *Machete* trailer and films with "a relentless onslaught of over-the-top violence, extreme gore, gratuitous nudity and cheap laughs."[9] It's an "example of the genre cheekily labeled "Mexploitation""[10] and

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The First Amendment and Content Restrictions in State Film Incentive Programs

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"a relentless series of action set pieces in which Machete dispatches his opponents using any and all sharp objects available—from surgical instruments to the fearsome titular blade"[11]

With plans to shoot the first *Machete* film in Texas, the film's production company, Chop Shop, applied for a grant to help finance the film's production under the state of Texas' Film Incentive Program ("Incentive Program" or "Program"), receiving preliminary approval for a grant from the Texas Film Commission ("Commission").[12] Prior to the film's release, and in response to a controversial anti-immigration law enacted in Arizona,[13] Rodriguez recut the *Machete* trailer from *Grindhouse* to take aim at Arizona and its anti-immigration law. The trailer featured an introduction by the title character saying, "'This is Machete with a special Cinco de Mayo message ... to Arizona.'" Mayhem, including shots of angry illegal immigrants rising up in rebellion, followed."[14] In response to the recut trailer, conservative radio talk show host and "conspiracy theorist" Alex Jones[15] began a campaign against the film, asserting that the film was likely "to trigger racial riots and racial killings in the United States"[16] and denouncing the film as the "equivalent of a Hispanic Birth of a Nation" for inciting "racial jihad."[17] When it came to light that the Texas Film Commission had given its preliminary approval to a grant application for the film and assisted filmmakers with location access,[18] Jones also began a campaign to eliminate state funding of the film.[19] This resulted in "a wave of letters to the Governor's Office and the Texas Film Commission, savaging [the film] as a call to race war."[20]

In the film, Danny Trejo plays the Federale "Machete," so named "for his deadly skill" with the device.[21] In the beginning of the film, Machete attempts to free a kidnapping victim from a drug lord against the direct order of his superior, only to learn that his superior is working with the drug lord. Disappointed that Machete won't take bribe money to look the other way, the superior has Machete's wife killed in front of him, and informs him that his daughter has suffered a similar fate.[22] Machete is left to die,[23] but survives, ending up as "a day laborer and vigilante in Texas."[24] There, he is hired by a businessman to assassinate a Texas senator campaigning against illegal immigrants with inflammatory rhetoric like that quoted in the speech above.[25] Before carrying out the plot, Machete learns he's been set up and is shot and wounded by one of the businessman's aides.[26] The job, it turns out, is in actuality an attempt by the businessman—who's working with the senator—to stir "anti-immigrant sympathies among Texas voters"[27] when the assassination fails and Machete is blamed with the attempt.[28] Here's where the tagline for the film—"They just fucked with the wrong Mexican"[29]—comes into play. Seeking revenge, Machete "initiates an out-and-out killing spree, recruiting an angry mob along the way, whose leader decries 'We didn't cross the border, the border crossed us' in downtown Austin."[30] With the assistance of "an army of illegal immigrants" he has gathered, Machete seeks revenge against the men who double-crossed him.[31] Ultimately, Machete becomes a hero for oppressed immigrants. Criticizing the film for its potential to incite "violence" and "riots,"[32] Alex Jones described the film's ending this way:

> By the end, the vicious revenge killer [Machete] is cast in the holy light of a martyr; his likeness is placed on religious candles as the Virgin Mary or Jesus Christ would be... Vulnerable illegal immigrants, seeking to evade crude Militia Men characters as they cross the border, pray to Machete for protection, in the hopes they he will wipe out their enemies. Machete becomes a folk hero of sorts, like a Father Hidalgo figure,[33] and his iconography carries over into the traditional use of the machete as a symbol of peasant uprisings.[34]

Following the political controversy, the Texas Film Commission departed from its favorable preliminary determination and instead "denied ChopShop's application for a grant due to 'inappropriate content or content that portrays Texas or Texans in a negative fashion' as provided by [Commission regulations]."[35] However, the script had not undergone any significant changes from the time of the preliminary approval of the script by the Commission to the completion of the film.[36] As a result, Chop Shop filed suit to challenge the denial as being beyond the authority of the Commission and as a denial of its Fourteenth Amendment due process rights.[37]

This case raises the question of whether it is permissible for a state to deny a filmmaker incentives because of some objection to the content of the filmmaker's production. After all, the Supreme Court has stated that "the government offends the First Amendment when it imposes financial burdens on certain speakers based on the content of their expression."[38] The question this article focuses on then is whether a denial of film incentives because of some objection to a film's content violates a filmmaker's First Amendment free speech rights. To do this, the standards of the Texas Film Incentive Program will be focused on, for that program has been characterized as having some of the most restrictive standards among all state film incentive pro-

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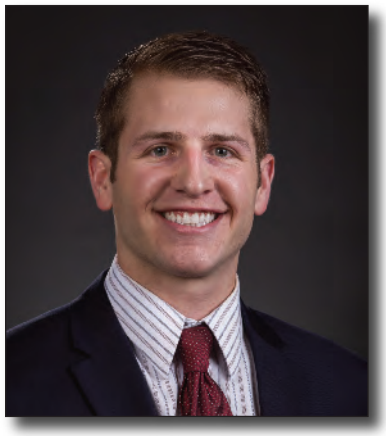
NCAA Bribery Scandal: A Full Court Press

by Jackson Long



Jackson Long

Jackson Long is an associate at Sidley Austin LLP (Dallas) and a May 2019 graduate from the SMU Dedman School of Law. His practice focuses on corporate transactions matters. His interests center on sports and entertainment deals.

I. Introduction

This article uses the recent NCAA Bribery Scandal, involving agents, universities, players and apparel companies, to highlight issues within the NCAA and its structure and to propose a viable financial solution moving forward. After a brief primer into current NCAA legislation, the American Athletic Union (AAU) basketball shoe culture, and the facts surrounding the fraudulent bribery scheme, this hybrid article focuses its analysis on the strength of the prosecution's case, based in Second Circuit law and other similar factual scenarios, before transitioning to suggest the needed shift away from the NCAA's outdated pure amateurism model. Indeed, case law lends particular force to a finding that the defrauding scheme members harmed universities by exposing them to the liabilities of recruiting and playing ineligible athletes, as well as depriving them of material information when making these recruiting selections. As property of the university, the scholarships have tremendous value, and thus the university has a property interest in basing scholarship decisions on material, true representations.

This article closes by observing the unmaintainable state of NCAA amateurism and what alternatives are being presented. Across the world, alternatives to a student-athlete's choice of going unpaid for their talents are developing, and the recruiting war has truly gone global. The NCAA can, and should, make the financially and socially responsible decision to open up restrictions for student-athlete compensation for "off-the-field" marketability.

The hope of this article is to enlighten the more casual reader with an in-depth analysis of the NCAA Bribery Scandal, one that is very much rooted in the legal basis of "fraud" law principles. Further, while there is considerable scholarship on the suggested direction of the NCAA (though it varies significantly by proposal), its rapidly evolving nature and current timeliness requires a refresher with reasonable frequency.

A. The NCAA and its Rules

The National Collegiate Athletics Association (NCAA) is an unincorporated, non-profit organization that serves as the umbrella for which its member-institutions compete in intercollegiate athletic competitions.[1] It has evolved from humble beginnings to now serve essentially all of intercollegiate athletic competition.[2] [3] It functions as a highly prevalent entity in society: affecting our culture, bringing together communities, and being a major economic driver, accounting for nearly $1 billion in annual revenues.[4]

The NCAA has been recognized as an industry subject to unique regulation by the Supreme Court in *NCAA v. Board of Regents*.[5] *Board of Regents* recognized that while the NCAA and its member-institutions had been applying restraints of competition,[6] the distinctive nature of the industry needs these restraints in order to exist at all.[7] Stemming from this 1984 antitrust case, it is still relevant to note that the "NCAA plays a critical role in the maintenance of a revered tradition of amateurism in college sports."[8] In order preserve this amateurism model, the NCAA annually publishes comprehensive legislation, the NCAA Division I Manual, that serves as guidance to its member-institutions.[9]

There are several relevant principles and bylaws which are critical to the NCAA Bribery Scandal. First, "student-athletes should be protected from exploitation by professional and commercial enterprises."[10] Those who are found to have violated the bylaws are subject to discipline from the NCAA.[11] Indeed, it is key to note that there is no reference to criminal action or outside jurisdiction for such violations. Second, student-athletes are prohibited to accept benefits either directly or indirectly from outside sources such as agents or financial advisors.[12] Further, coaches are prohibited from facilitating contact between student-athletes

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Continued from page 8.

and agents or financial advisors, and also from receiving compensation directly or indirectly from outside sources in any manner regarding student-athletes.[13]

B. The AAU Shoe Culture

The Amateur Athletic Union (AAU) is an amateur sports organization comprising many sports, most prominently men's basketball.[14] It provides tournament opportunities for young (high school and below) athletes to showcase their skills in front of college coaches and scouts with the hopes of getting that athlete recruited to play in college.[15] Seeing the financial opportunity from the exposure, basketball sneaker corporations jumped into exploding industry to maximize their bottom line.[16] The result: national companies such as Nike, Under Armour, and, in this scandal, Adidas, sponsor many of the large national tournaments and the best AAU teams with free apparel, shoes, travel expenses, and they sometimes even provide the coach with a salary.[17] The best AAU teams, of course, are typically comprised of the top basketball players, many of whom have aspirations to play professionally in the NBA. While the obvious benefits of the marketing exposure is clear, it is also a competition by which the companies seek to earn the favor of these budding stars and be their sneaker of choice. When these companies land an NBA superstar, their AAU investments move into the black.[18]

Basketball has long romanticized the type of footwear the player is wearing, much more so than other sports. Nike Basketball's 1989 "It's Gotta Be The Shoes" commercial featuring Michael Jordan and Spike Lee is the iconic illustration of this attribute unique to basketball.[19] In an article posted by Dennis Green of *Business Insider*, his interview with NBA superstar Kevin Durant provides color on the effectiveness of this marketing, while also highlighting the dominance of Nike (and Adidas) compared to other brands competing for shoe deals:

> "Nobody wants to play in Under Armours, I'm sorry. The top kids don't because they all play Nike," Durant told (Bill) Simmons … "Everybody knows that. They just don't want to say nothing." Durant said that because Under Armour has shoe deals with certain schools, like the University of Maryland, some college-bound athletes will choose to go to other schools that instead provide gear from brands like Nike. Alternatively, if the kids grew up in a school system that has a relationship with a particular brand, Durant says they may stay with that brand when they go to college. "Shoe companies have a real, real big influence on where these kids go."[20]

Where do NCAA member-institutions fit into the mix? Durant's statement paints the picture: AAU basketball players will often favor continuing to use the same brand when they attend college. It is now an arms race for both sneaker companies and member-institutions to secure lucrative and exclusive apparel deals, enticing the best players to play at their institution. Just a month prior to the NCAA Bribery Scandal indictment, Louisville announced a new $160 million deal with Adidas,[21] in which the company would outfit all of the university's athletic programs with its gear for the next ten years.[22] The member-institution and apparel company are now tied-in on the school's success. If Louisville plays in the Final Four, it is Adidas who is playing in the Final Four, too.

This topic is critical because it affects the NCAA's billion-dollar industry. And while the AAU issue is primarily limited to basketball,[23] any change in the amateurism model would spell doom for the NCAA as a whole. Indeed, nearly all of the NCAA's revenue comes from its television rights to broadcast the annual March Madness tournament.[24] The NCAA vehemently protects its amateurism model because it is critical in protecting its entire business from imploding.

C. The NCAA Bribery Scandal

Since 2015, the FBI and United States Attorney's Office have been investigating what they deem a "criminal influence" of money distributed to coaches and athletes who participate under the NCAA umbrella.[25] On September 25, 2017, Joon H. Kim, the Acting United States Attorney for Southern District of New York, announced the arrest of the ten individuals related to the fraud scheme.[26] The complaint highlights multiple occasions of agents and financial advisors, including Jim Gatto, the Director of Global Sports Marketing-Basketball at Adidas, paying bribes—sometimes facilitated by college coaches in an effort to recruit prospective student-athletes—to student-athletes and their families.[27] The purpose, as highlighted above, was to per-

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grams.[39] The holding of the court in the *Machete* challenge will be discussed in Part VII of this article. Before that, Part II provides an overview of film incentive programs, with particular attention on the provisions of the Texas Film Incentive Program. Part III provides details on the standards and operation of the Texas Film Incentive Program. Part IV examines First Amendment protections for film generally. Part V looks at forum doctrine and its applicability to restrictions in state film incentive programs, then Part VI examines the unconstitutional conditions doctrine and its applicability here. Part VII builds on Parts V and VI to analyze the First Amendment principles applicable to government subsidies, like film incentives. Part VIII examines two cases in which denials of government funding for art because of government objections to the art were found to violate the First Amendment. Part IX then returns to the court's decision in the *Machete* case just discussed, followed by analysis of a similar case involving the sequel to *Machete*, *Machete Kills*. In Part X, the article concludes that given the wide leeway provided by courts to the government to set standards in the context of subsidies—particularly when the purpose of those subsidies is something other than to encourage a diversity of views from private speakers—state film incentive provisions which take into consideration the content of a film in determining whether a subsidy should be granted to that film are unlikely to violate the First Amendment.

II. State Film Incentive Programs

States have been offering incentives to try to attract film and television production to their states since 1992, when Louisiana became "the first state to adopt state tax incentives for film and television production. . . ."[40] Once Louisiana's program began to result in strong growth in film and television production in the state, other states responded by offering their own incentives[41] and as a result, "[b]y 2009, 44 U.S. states, Puerto Rico and Washington D.C. offered some form of film and television production incentives."[42] The basic theory behind these incentive programs is that states will benefit economically from luring productions to their state with subsidies and other benefits. In other words, "film production will create new jobs and boost sales at area businesses, as companies rush to fill positions, purchase equipment and acquire other resources to keep filming on schedule. Benefits will then spread, as spillover effects of the initial 'shock' multiply through the local economy."[43]

A report from the Council of State Governments describes the most common types of film and television production subsidies offered by states:

- "Tax credits [which] reduce income tax liability. To qualify, companies must generally commit to some minimum amount of in-state production expenditures. The credit is usually offered as a percentage of these dollars."[44]
- "Cash rebates provide reimbursements for qualified production expenses. . ."[45]
- "Grants are another type of cash assistance, generally awarded to offset either a) a percentage of the dollar value of qualified production expenditures, or b) all the associated sales and use tax."[46]
- "Other assistance includes lodging exemptions, free access to filming locations, and low cost use of government services (such as police officers to direct traffic around an outdoor set)."[47]

The primary attraction of these incentive programs for film and television producers should be obvious then: these incentives can provide a producer with significant cost savings in its production budget.

For states, there can be at least four significant benefits to attracting production to their locales. First is the attraction of "out-of-state investment" to a state: Film production requires filmmakers to purchase "many goods and services, such as hardware, lumber, catering, and security, which are provided by state vendors and suppliers," the purchases of which are then taxed by the state."[48] In addition, production personnel also boost economic activity in a locale by spending money on lodging, dining, and entertainment while on location. Second is the creation of jobs for state residents: "The majority of film production work is performed by a wide array of employees such as technicians, truck drivers, caterers, construction crews, architects, and attorneys. 70 to 80 percent of those film production workers are hired locally."[49] Third, is the stimulation of "film-related state tourism,"

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which occurs when tourists travel to visit locations featured in a film.[50] Fourth, filmmakers may "invest significant resources to develop communities in order to create the right look for a film. In that process, they make many improvements, including building repair, road pavement, and garden planting. The improvements remain long after the filming ends."[51]

One study on the impact of Texas Incentive Program found the following benefits for the State of Texas resulting from its Program:

> Based on the $58.1 million paid and encumbered as of December 31, 2010, total economic benefits from the moving image industry incentive program were approximately $1.1 billion in direct, indirect, and induced economic activity in Texas from 2007 through 2010. This can be interpreted another way: for every dollar of the $58.1 million the Texas Film Commission had paid or encumbered as of December 31, 2010, $18.72 in private sector economic activity had been generated within the State of Texas.[52]

Numbers provided by the State of Texas seem to confirm the benefits of the Program:

> [T]he [Texas] comptroller's office reported that in 2005, before the incentives took effect, there were 51 film and TV projects in Texas, spending a total of $155 million. By 2009 [after the incentives took effect in 2007[53]], there were 244 projects worth $249.7 million. In total, projects approved for incentives created 27,057 jobs, including 3,790 full-time positions.[54]

The comptroller's report went on to estimate "that eligible projects have brought $600 million in economic activity to Texas."[55]

While there are studies touting the benefits of incentive programs, there are also studies that come to a contrary conclusion: that incentive programs do not provide meaningful economic benefits to the states that offer them.[56] There are also a number of criticisms of incentive programs. For example, it is argued that subsidies and credits are expensive for states and "reward producers for projects they might have undertaken anyway."[57] In addition, many production-related jobs "are temporary and part-time," and it's been argued that a "large portion of [these] jobs . . . especially those with the highest pay, are filled by non-residents."[58] Critics assert that "[f]ilm subsidies don't pay for themselves, so state taxpayers bear the burden."[59] Furthermore, it is also argued that given the competition among states to attracting productions, "states will have to give movie-makers generous subsidies indefinitely in order to 'stay in the game.'"[60]

In recent years, the popularity of and state support for the program has declined: "In 2016, only 37 states continue to maintain film incentive programs [compared to 44 in 2009], and several of these states are tightening the requirements for qualifying expenses and reeling-in per-project and annual program caps."[61] Joe Henchman, vice president of legal and state projects at the Tax Foundation in Washington, D.C., offers a few reasons for the decline state film incentive programs since their peak in 2010: "First, the evidence suggests (tax incentives) do not produce sought-after effects; second, they have been deemed a lower priority by policymakers, who are trying to allocate scarce resources in a time of fiscal stress; and third, they must be extremely generous given the fierce competition among states for production industry business."[62]

In addition to fiscal concerns involving state film incentive programs, policymakers have also had concerns about the content of some films provided state support. The *Machete* example (discussed infra) illustrates that, but that's not the only film shot in Texas that has troubled state lawmakers. Prior to *Machete*, *Glory Road*, a Texas-filmed 2006 sports drama telling "the inspirational tale of the [1966] Texas Western Miners, the first all-black college basketball team to win a national championship,"[63] raised concern among Texas legislators and led to content-based considerations being added to Texas' Film Incentive Program.

Glory Road was based on actual events but took some license in portraying those events. The scene that caused the most concern involved "a racially charged incident" during a college basketball game.[64] In the film, the game was depicted as being between the University of Texas at El Paso (UTEP) (formerly Texas Western University) and Texas A&M Commerce (formerly East Texas State University), when in actuality Texas Western had played a school from Kentucky and Texas A&M was not involved in the incident. In the scene, which is portrayed "as a factual event," the white A&M [Aggies] team is depicted as "throwing epitaphs disparaging the black players"[65] on the UTEP team and Aggie fans are depicted as being "racist."[66] Having not been involved in the incident, Texas A&M objected to its being "disparaged" in this manner.[67] It was around this time that the Texas Legis-

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lature was considering the creation of a state film incentive program. Initially, the proposal for the film incentive program "had no content provision, except for [a prohibition on state funding of] pornography."[68] Following the *Glory Road* controversy, State Senate Finance Committee Chairman Steve Ogden (R-Bryan)—in whose district Texas A&M Commerce is located[69]—added a provision to the bill allowing incentives to be denied to films that are inappropriate or depict Texas or Texans in a negative light.[70]

The film industry opposed this provision on First Amendment grounds. The Motion Picture Association of America (MPAA) urged Texas Governor Rick Perry to veto the bill containing the provision, arguing:

> This provision is a direct indictment of the creative process and American values of free expression that are fundamental to our democracy . . . Motion pictures made in the United States are the most popular form of entertainment worldwide because filmmakers are free to tell stories on film without fear of government censorship . . . Such restrictions . . . burden protected speech and constitute prior restraint and government intervention, which the U.S. Supreme Court has ruled many times is impermissible.[71]

Nevertheless, the provision became law.[72]

Concern about the content of film and television projects seeking state funding are not limited to Texas. In Wisconsin, productions do not qualify for incentives if they "will hurt the reputation of the state."[73] Similarly, a production that "portrays West Virginia in a 'significantly derogatory manner' is ineligible" for that state's film credits.[74] Wyoming only provides support for productions "that would likely encourage members of the public to visit the state of Wyoming,"[75] and Kentucky only provides support to productions that "will not negatively impact the tourism industry" of the state.[76] These are only a sample of some of the state film incentive program content restrictions; other states have similar restrictions as well.[77]

III. Texas Film Incentive Program

Under the Texas Film Incentive Program, formally called the Moving Image Industry Incentive Program, the Texas Music, Film, Television and Multimedia Office ("Office")—is directed—through the Texas Film Commission[78]—to "promote the development of the film, television, and multimedia industries in [Texas] by informing members of those industries and the public of the resources available in [Texas] for film, television, and multimedia production."[79] Among the assistance provided filmmakers under the Program are financial grants funded by the state.[80] Minimum considerations for the Commission in determining whether to approve a grant application are "(1) the current and likely future effect a moving image project will have on employment, tourism, and economic activity in this state; and (2) the amount of a production company's in-state spending for a moving image project."[81] The Commission's rules provide that "[n]ot every project will qualify for a grant."[82] In fact, the statute does not require the Commission "to act on any grant application."[83] In reviewing applications, the Commission is directed to "review the [content of the production and] advise the potential Applicant on whether the content will preclude the project from receiving a grant."[84] The statute provides that the Commission "may deny an application because of inappropriate content or content that portrays Texas or Texans in a negative fashion, as determined by the [Commission], in a moving image project."[85] Furthermore, "[i]n determining whether to act on or deny a grant application, the [Commission] shall consider general standards of decency and respect for the diverse beliefs and values of the citizens of Texas."[86]

Finally, before awarding any grant, the Commission is required to review the final script for the production and "determine if any substantial changes occurred during production on a moving image project to include [inappropriate content or content that portrays Texas or Texans in a negative fashion]."[87] If the Commission decides to deny an application, it notifies the applicant of that decision as well as "whether the denial is based on failure to meet the minimum program requirements, insufficient economic impact or inappropriate content."[88] The statute provides that "[a]ll funding decisions made by the Commission are final and are not subject to appeal."[89] Further, the statute provides that "[n]either the approval of the [preliminary] Application nor any award of funds shall obligate the Commission in any way to make any additional award of funds."[90]

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With provisions such as these, Texas' program has been labeled as one of the most restrictive among all state programs.[91] Texas's statute requires a project's script to be reviewed twice: a preliminary review before production begins[92] and a final review once the production is completed.[93] Furthermore, "Texas has the strongest script-review component because it is the only state with the requirement in statute."[94] Texas also differs from many other states, which typically pay incentives to filmmakers upfront, in requiring that the Commission undertake the second, final review when the project has been completed before paying incentives.[95] Furthermore, the Texas Film Incentive Program seems to be the only one to have been challenged in court by filmmakers denied incentives under the program.[96] For these reasons, the constitutionality of the provisions of Texas' program—which allow the state to deny incentives to filmmakers based on the content of their films—will be focused on, although the reasoning and conclusions below should also apply to other states' programs as well. Before analyzing whether such provisions violate the First Amendment, this article next turns to a discussion of relevant First Amendment doctrines and precedents.

IV. First Amendment Protection for Film

Generally speaking, the First Amendment to the U.S. Constitution prohibits the government from censoring or restricting speech because of objections to what a speaker says;[97] "[a]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."[98] This protection extends to artistic expression, which includes film.[99] In the case which held that the First Amendment does indeed protect motion pictures, the Supreme Court observed:

> It cannot be doubted that motion pictures are a significant medium for the communication of ideas. They may affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all artistic expression. The importance of motion pictures as an organ of public opinion is not lessened by the fact that they are designed to entertain as well as to inform. . . The line between the informing and the entertaining is too elusive for the protection of that basic right [a free press]. Everyone is familiar with instances of propaganda through fiction. What is one man's amusement, teaches another's doctrine.[100]

Due to the First Amendment, then, the government generally "may not regulate speech based on its substantive content or the message it conveys."[101] As a result, "[d]iscrimination against speech because of its message is presumed to be unconstitutional."[102] The Court has provided the rationale for this:

> Government action that stifles speech on account of its message, or that requires the utterance of a particular message favored by the Government, contravenes [the First Amendment]. Laws of this sort pose the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion. These restrictions 'raise the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace.'[103]

The First Amendment, then, prohibits the government from censoring or restricting speech because of some opposition to the views of the speaker.[104] Does this protection extend to state denials of incentives to filmmakers because of some objection to the content of a film? To help answer that question, the principles of both public forum and unconstitutional conditions doctrines are examined.

V. Public Forum Law

Forum analysis often applies when the government provides facilities or resources for the public to engage in speech. There are four types of forums, and different standards apply when the government seeks to exclude certain topics or speakers from those forums. The traditional public forum involves properties like streets or parks, which either "by long tradition or government fiat" have been "devoted to assembly and debate."[105] Strict scrutiny is applied when the government seeks to exclude a speaker

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from a traditional public forum, requiring the government to show that the restriction is necessary to serve a compelling government interest and is narrowly tailored to serve that interest.[106]

A designated public forum can be created when the government "intentionally open[s] a nontraditional public forum for public discourse."[107] Here, the government may allow "for expressive activity by all or part of the public,"[108] and it may limit use of the forum to a particular class of speakers, rather than allowing all classes of speakers to use the property.[109] However, if the government seeks to exclude a "speaker who falls within the class to which a designated public forum is made generally available," strict scrutiny applies, just as in a traditional public forum.[110]

In contrast to the designated public forum, a limited public forum is created when the government opens property that is "limited to use by certain groups or dedicated solely to the discussion of certain subjects."[111] Here, the government may "make distinctions in access on the basis of... speaker identity," and thus may exclude a speaker from the limited public forum "if he is not a member of the class of speakers for whose especial benefit the forum was created."[112] In the limited public forum, there are still limits on the government's ability to exclude speakers: such an exclusion "must not discriminate against speech on the basis of viewpoint, and the restriction must be 'reasonable in light of the purpose served by the forum.'"[113] Speech restrictions in a limited public forum are valid, then, so long as they are "reasonable and viewpoint-neutral."[114]

Finally, a nonpublic forum is created if the government allows only "selective access for individual speakers" to a property.[115] Here, the government may "reserve eligibility for access to the forum to a particular class of speakers, whose members must then, as individuals, 'obtain permission' to use it."[116] Just as in the limited public forum, a government restriction on speech in a nonpublic forum must be reasonable and viewpoint-neutral.[117]

Although forums are often physical spaces where speakers may gather to address others, not all forums consist of actual physical spaces. For example, instead of seeking to access physical property, speakers may instead "seek access to some government-controlled 'channel of communication.'"[118] As a result, to determine the scope of a forum, the Court has held that the "focus [is] on the precise 'access sought by the speaker.'"[119] Because of this, "any government-controlled means of communication can qualify" as a forum.[120] For example, things such as "a charity drive, a candidate debate, an internal mail system, and even the expenditure of money to support private speech" have been held to constitute public forums.[121] The significance of this for state film incentive programs is that "[a] public forum can be created by money, not just real estate."[122]

Rosenberger v. Rector and Visitors of the University of Virginia[123] provides an example of the government's disbursement of funds to certain groups resulting in the creation of a public forum. In the case, the University of Virginia provided funds to reimburse certain student groups for the printing costs of their publications.[124] The purpose of these payments was "to support a broad range of extracurricular student activities that 'are related to the educational purposes of the University.'"[125] Excluded from eligibility for the payments were student groups engaged in religious activities,[126] and it was the constitutionality of this exclusion of religious groups from eligibility for fund payments that was at issue in this case.[127] Focusing on the government's purpose in providing these payments, the Supreme Court found that purpose was "to encourage a diversity of views from private speakers."[128] As a result, a public forum was created.[129] Even though the fund from which the payments were made was "a forum more in a metaphysical than in a spatial or geographic sense... the same principles [were] applicable."[130] As a result, the government was prohibited from engaging in viewpoint discrimination,[131] which the Court found to be present here:[132]

> By the very terms of the [Student Activities Fund] prohibition, the University does not exclude religion as a subject matter but selects for disfavored treatment those student journalistic efforts with religious editorial viewpoints. Religion may be a vast area of inquiry, but, it also provides, as it did here, a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered. The prohibited perspective, not the general subject matter, resulted in the refusal to make third-party payments, for the subjects discussed were otherwise within the approved category of publications.[133]

The denial of funding for religious groups constituted impermissible viewpoint discrimination by the university, and thus, the Court held, a violation of the First Amendment.[134]

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The Court's holding in *Rosenberger* was later characterized by Justice Kleinfeld of the 9th Circuit Court of Appeals in this way:

> *Rosenberger* holds that a university which makes money generally available for student groups' expenses, to encourage a diversity of views rather than to express its own, cannot discriminate against an applicant based on that applicant's viewpoint. Rosenberger teaches that when government makes a benefit generally available to all within a diverse class, it cannot make an exception based on what a particular applicant wishes to say.[135]

However, not all government funding of private speech creates a forum. Where the purpose of a government program funding speech is something other than encouraging a diversity of views from private speakers, as was the government's purpose in *Rosenberger*, courts have declined to apply forum doctrine. For example, at issue in *National Endowment of the Arts v. Finley*[136] was a standard used to award government grants supporting the arts by the National Endowment for the Arts ("NEA"), which provided that "artistic excellence and artistic merit are the criteria by which [grant] applications are judged, taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public."[137] This provision was enacted by Congress in response to public concern that arose in 1989 as a result of NEA funding of two controversial works.[138] The first involved a $30,000 grant to the Institute of Contemporary Art at the University of Pennsylvania used "to fund a 1989 retrospective of photographer Robert Mapplethorpe's work. The exhibit, entitled The Perfect Moment, included homoerotic photographs that several Members of Congress condemned as pornographic."[139] The second controversial piece of art was Andres Serrano's "Piss Christ," "a photograph of a crucifix immersed in urine," which was [also] the subject of a grant by an NEA-supported organization.[140]

To address the concerns these controversies raised, in 1990 Congress amended NEA standards to provide that "no NEA funds 'may be used to promote, disseminate, or produce materials which in the judgment of [the NEA] may be considered obscene… .'"[141] Congress also adopted "§ 954(d)(1), which directs the [NEA] Chairperson, in establishing procedures to judge the artistic merit of grant applications, to 'take into consideration general standards of decency and respect for the diverse beliefs and values of the American public.'"[142] Four artists afterwards denied NEA grants, joined by the National Association of Artists' Organizations, made a facial challenge to § 954(d)(1) as being "void for vagueness and impermissibly viewpoint based."[143] On appeal to the Supreme Court after both the District Court and Court of Appeals found the provision to violate the First Amendment,[144] challengers argued that the provision amounted to "viewpoint discrimination because it rejects any artistic speech that either fails to respect mainstream values or offends standards of decency."[145]

As Justice Souter saw it:

> *Rosenberger* controls here. The NEA, like the student activities fund in Rosenberger, is a subsidy scheme created to encourage expression of a diversity of views from private speakers. . . Given this congressional choice to sustain freedom of expression, *Rosenberger* teaches that the First Amendment forbids decisions based on viewpoint popularity. So long as Congress chooses to subsidize expressive endeavors at large, it has no business requiring the NEA to turn down funding applications of artists and exhibitors who devote their "freedom of thought, imagination, and inquiry" to defying our tastes, our beliefs, or our values. It may not use the NEA's purse to "suppress . . . dangerous ideas."[146]

The *Finley* majority, however, disagreed with Souter on this point and determined the Court's holding in *Rosenberger* to be inapplicable here.[147] For the majority, the NEA in disbursing funding was required to make "aesthetic judgments" in applying its "inherently content-based 'excellence' threshold for NEA support…."[148] This factor distinguished "the subsidy at issue in *Rosenberger*—which was available to all student organizations that were related to the educational purpose of the University—and from comparably objective decisions on allocating public benefits, such as access to a school auditorium or a municipal theater, or the second class mailing privileges available to all newspapers and other periodical publications."[149] This was thus a "key difference" for the majority: "Whereas the University in *Rosenberger* made the funds generally available to groups meeting certain specified criteria, the NEA disburses its funds using the additional standard of artistic excellence."[150] Furthermore, NEA grants are "a limited resource," requiring that "the NEA must limit itself to funding the worthiest projects submitted for

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grants."[151] The Court made clear, however, that it wasn't this "scarcity of NEA funding" that distinguished the case from *Rosenberger*.[152] Instead, it was "the competitive process according to which the grants are allocated" that distinguished the case.[153] This required NEA panelists to make subjective decisions about which projects "deserve funding compared to the proposals of other grant seekers."[154] Thus, as the Court saw it, "[i]n the context of arts funding, in contrast to many other subsidies, the Government does not indiscriminately 'encourage a diversity of views from private speakers.'"[155]

In his dissent in the Court of Appeals decision on *Finley*, Justice Kleinfeld made the following observation which expands on the Supreme Court majority's reasoning on this point:

> The case at bar would be analogous to *Rosenberger* (and I would join the [Court of Appeals] majority in rejecting the "decency and respect" clause as unconstitutional), if the NEA gave out grants to virtually all artists except for those whose work violated "general standards of decency and respect for the diverse beliefs and values of the American public." Arts grants would then be the financial equivalent of a tax credit for all artists, and under *Rosenberger* . . . the financial benefit could not be conditioned on a vague and content- or viewpoint-based criterion like the "decency and respect" formula. Much as parade permits may be allocated on a first come first served principle, but not to favor particular viewpoints, arts grants would have to be allocated on some neutral principle, such as first come first served, or random selection.[156]

It was also significant to the Court that the NEA interpreted the "decency and respect" provision "not as an absolute restriction," but rather as "merely hortatory."[157] As the NEA saw it, the provision "adds 'considerations' to the grant-making process; it does not preclude awards to projects that might be deemed 'indecent' or 'disrespectful,' nor place conditions on grants, or even specify that those factors must be given any particular weight in reviewing an application. . ."[158] The Court agreed with the NEA on this, observing that "the text of § 954(d)(1) imposes no categorical requirement," but instead operated as "advisory language"[159] that "admonishes the NEA merely to take 'decency and respect' into consideration. . . ."[160] This "advisory language," observed the Court, "stands in sharp contrast to congressional efforts to prohibit the funding of certain classes of speech. When Congress has in fact intended to affirmatively constrain the NEA's grant-making authority, it has done so in no uncertain terms."[161] As of an example of this, the Court pointed to the Congress' prohibition on the NEA's funding of obscenity, which clearly stated that obscenity "shall not be funded."[162] All this led the Court to conclude that "the 'decency and respect' criteria do not silence speakers by expressly 'threatening censorship of ideas.'"[163]

Later, the Court characterized its decision this way:

> [I]n *National Endowment for Arts v. Finley*, we upheld an art funding program that required the National Endowment for the Arts (NEA) to use content-based criteria in making funding decisions. We explained that "any content-based considerations that may be taken into account in the grant-making process are a consequence of the nature of arts funding." In particular, "the very assumption of the NEA is that grants will be awarded according to the 'artistic worth of competing applicants,' and absolute neutrality is simply inconceivable." We expressly declined to apply forum analysis, reasoning that it would conflict with "NEA's mandate . . . to make esthetic judgments, and the inherently content-based 'excellence' threshold for NEA support."[164]

Finley, then, indicates that forum analysis is inappropriate for film incentive program restrictions. The purpose of these incentive programs is not to encourage a diversity of views from private speakers, which was the characteristic of the program that created a forum *Rosenberger*. The purpose of state film incentive programs generally is to encourage economic activity in the state, not only by attracting producers to make their films within the state, but also by supporting films that can help attract tourism and other economic activity to the state.[165] This is different than the "artistic merit" standard upheld in *Finley*, but it nevertheless would seem to allow for a consideration of the content of films to be supported to determine what productions might be preferable to fund to better achieve these goals. Such a consideration can be even more important due to the fact that incentive program funds are often limited,[166] again requiring film commissions to exercise discretion about how the funds might best be spent to achieve the program's purposes. Because film incentive programs, then, resemble the NEA funding guidelines at issue

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in Finley more than the payments to student groups in Rosenberger, forum doctrine and its prohibitions against discrimination would seem inapplicable in challenges to incentive program restrictions. However, there is another doctrine might result in the government restrictions being found unconstitutional here, that being the unconstitutional conditions doctrine, which is examined next.

VI. Unconstitutional Conditions

Incentive programs can be viewed as a form of government benefit, which suggests that the unconstitutional conditions doctrine may be more appropriate to apply here than forum doctrine. Under the unconstitutional conditions doctrine, "the government 'may not deny a benefit to a person on a basis that infringes his constitutionally protected... freedom of speech' even if he has no entitlement to that benefit."[167] The Supreme Court has "made [it] clear that even though a person has no 'right' to a valuable government benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely."[168] In particular, the basis for a denial of government benefits may not one that infringes on a person's constitutionally protected free speech rights.[169] The rationale for this is that if the government were able to deny a person benefits because of that person's speech, that person's "exercise of those freedoms would in effect be penalized and inhibited... [which] would allow the government to 'produce a result which [it] could not command directly.'"[170]

Rust v. Sullivan[171] is a significant case illustrating the Court's application of the unconstitutional conditions doctrine. That case involved a challenge to a prohibition on government funding of family planning clinics that advocated, counseled about, or made referrals for abortions.[172] Specifically, Title X of the Public Health Services Act provided federal funding for family-planning services, but prohibited that funding from being used in programs that included abortion as a method of family planning. Further, fund recipients were expressly prohibited from referring clients to an abortion provider, even if the client specifically requested such a referral.[173] Title X fund recipients were also prohibited:

> [F]rom engaging in activities that "encourage, promote or advocate abortion as a method of family planning." Forbidden activities include lobbying for legislation that would increase the availability of abortion as a method of family planning, developing or disseminating materials advocating abortion as a method of family planning, providing speakers to promote abortion as a method of family planning, using legal action to make abortion available in any way as a method of family planning, and paying dues to any group that advocates abortion as a method of family planning as a substantial part of its activities.[174]

Title X grantees and doctors who supervised Title X funded projects challenged these restrictions on the use of Title X funding on abortion-related speech, arguing they were unconstitutional "because they condition the receipt of a benefit, in [this case government] funding, on the relinquishment of a constitutional right, the right to engage in abortion advocacy and counseling."[175] The restrictions, challengers argued, constituted impermissible viewpoint discrimination, as "all discussion about abortion as a lawful option" was prohibited in the Title X program.[176]

The Supreme Court held the Title X restrictions on abortion-related speech to be constitutional, observing that "when the Government appropriates public funds to establish a program it is entitled to define the limits of that program."[177] The Court elaborated:

> The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way. In so doing, the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other.[178]

Consequently, the "condition that federal funds will be used only to further the purposes of a grant does not violate constitutional rights."[179]

It was significant to the *Rust* Court that the restriction applied only to speech within the government-funded program, but did not apply to speech by program participants outside of that program.[180] Finding the unconstitutional conditions doctrine inap-

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plicable here, the Court observed that "the Government is not denying a benefit to anyone, but is instead simply insisting that public funds be spent for the purposes for which they were authorized."[181] The Court explained that "'unconstitutional conditions' cases involve situations in which the Government has placed a condition on the recipient of the subsidy rather than on a particular program or service, thus effectively prohibiting the recipient from engaging in the protected conduct outside the scope of the federally funded program."[182] Here, the Court observed, "employees' freedom of expression is limited during the time that they actually work for the [government-funded] project; but this limitation is a consequence of their decision to accept employment in a project, the scope of which is permissibly restricted by the funding authority."[183] Thus, the implication of the Court's holding in *Rust* was that "while family planning counselors may have a constitutional right to talk about abortion, they have no constitutional right to do so while being funded by the government."[184]

Rust establishes then, that when the government subsidizes speech, it may favor one viewpoint over another, so long as recipients of the subsidy are not restricted in espousing the disfavored viewpoint outside of the subsidized program. As the Court has observed, "A refusal to fund protected activity, without more, cannot be equated with the imposition of a 'penalty' on that activity,"[185] and "a legislature's decision not to subsidize the exercise of a fundamental right does not, infringe the right."[186] For the Court, "The reasoning of these decisions is simple: 'although government may not place obstacles in the path of a [person's] exercise of ... freedom of [speech], it need not remove those not of its own creation."[187] Therefore, it is "well established that the government can make content-based distinctions when it subsidizes speech,"[188] as "subsidies, by definition ... do not restrict any speech."[189]

Applying this reasoning to film incentive program restrictions suggests that the restrictions would be found valid under the First Amendment. The programs were created for specific purposes—to spur employment and economic activity, to build and strengthen the production industry within a state, and to attract tourism—rather than to support private speakers generally.[190] The Texas statute, for example, provides that the Texas Film Commission's method for determining grants must, at a minimum, consider "(1) the current and likely future effect a moving image project will have on employment, tourism, and economic activity in this state; and (2) the amount of a production company's in-state spending for a moving image project."[191] The statute also provides that the office "may deny an application because of inappropriate content or content that portrays Texas or Texans in a negative fashion, as determined by the office, in a moving image project."[192] Much of this standard focuses on economic criteria, such as the amount of money a production will spend in the state, how many people will be employed, and the types of jobs that will be created.[193] But a production's impact on "tourism" and "economic activity" are also factors to be considered, in which the manner in which the state and its residents are depicted—either positively or negatively, for example—would seem to be relevant factors in the determination.

As *Rust* illustrates, "[t]he government may impose a viewpoint-based restriction on the granting of subsidies so long as speakers remain free to say what they wish outside the confines of the program,"[194] which is the case here. Filmmakers remain free to make their films even if denied an Incentive Program grant. Viewpoint discrimination in the granting of Texas film incentives exercised to carry out the purposes of the program would not necessarily violate the First Amendment then. This is not to say that any viewpoint discrimination would be permissible within film incentive programs. In his dissenting opinion in *Finley*, Justice Souter criticized the Court's application of *Rust* to the facts before it in *Finley*. There, Souter observed that in *Rust*, the Court "recognized that when the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes.'"[195] Souter went on, however, to point out an important qualification the Court made in *Rust*:

> But we added the important qualifying language that "this is not to suggest that funding by the Government, even when coupled with the freedom of the fund recipients to speak outside the scope of the Government-funded project, is invariably sufficient to justify Government control over the content of expression." Indeed, outside of the contexts of government-as-buyer and government-as-speaker, we have held time and time again that Congress may not "discriminate invidiously in its subsidies in such a way as to aim at the suppression of . . . ideas."[196]

Thus, the government has considerable leeway to restrict who will receive subsidies. As Souter and *Rust* indicate, however, that leeway in not unlimited. Just where is this limit then? That question is considered next.

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VII. Subsidies

In his dissent in the Court of Appeals decision in *Finley*, Justice Kleinfeld discussed two cases that can help provide some guidance here.[197] In one of those cases, *Bullfrog Films, Inc. v. Wick*,[198] the Ninth Circuit Court of Appeals "held that customs duties exemptions for any educational or cultural materials could not exclude propaganda films based on their content and viewpoint."[199] In the other case, *Big Mama Rag, Inc. v. United States*,[200] "the D.C. Circuit held that a tax exemption generally available to educational organizations could not be denied based on a regulation requiring full and fair exposition of facts enabling a reader to draw an independent conclusion."[201] According to Kleinfeld, the reason that the denial of benefits in these cases were found to be unconstitutional was because "[u]nder these cases, all applicants in the class were entitled to the financial benefit from the government, unless the content of their speech was contrary to government standards."[202] Kleinfeld contrasted this with the arts subsidies in *Finley*, in which "no applicant is entitled to the financial benefit."[203] Thus, being denied a government benefit due to the content of one's speech, when that benefit is otherwise available to all those in the class or category for which the benefit is provided, may be unconstitutional. This is consistent with the holding in *Rosenberger*. However, when only a limited number of speakers in the class for which the benefit is provided will actually be granted the benefit, then denial of that benefit based on content will not necessarily be unconstitutional. This is consistent with *Finley*.

The opinion in *Advocates for the Arts v. Thomson*,[204] provides some elaboration on this point. At issue in that case was the denial of "an NEA grant to a literary magazine because the governor and state arts commission thought a poem it published was indecent."[205] In its rejection of the First Amendment challenge to the denial, the First Circuit "explained that denial of a grant was not suppression of speech, and the grant selection process necessarily discriminated based on content"[206]:

> Public funding of the arts seeks "not to abridge, restrict, or censor speech, but rather to use public money to facilitate and enlarge" artistic expression. A disappointed grant applicant cannot complain that his work has been suppressed, but only that another's has been promoted in its stead. The decision to withhold support is unavoidably based in some part on the "subject matter" or "content" of expression, for the very assumption of public funding of the arts is that decisions will be made according to the literary or artistic worth of competing applicants."[207]

Justice Kleinfeld summarized the significance of the decision: "*Advocates* suggests that every disappointed grant applicant has the same First Amendment right of self-expression, but that does not mean that every disappointed grant applicant has a First Amendment claim."[208]

Thus, "there is no similar tradition of absolute neutrality in public subsidization of activities involving speech [as there is in a public forum]."[209] The Supreme Court had this to say on this point:

> [W]hile it may be feasible to allocate space in an auditorium without consideration of the expressive content of competing applicants' productions, such neutrality in a program for public funding of the arts is inconceivable. The purpose of such a program is to promote "art," the very definition of which requires an exercise of judgment from case to case . . . Solutions that may work for an auditorium, such as scheduling on a first-come-first-served basis or upon a prescribed showing of likely box-office success (if that is a solution), are simply not available to a program for funding the arts. If such a program is to fulfill its purpose, the exercise of editorial judgment by those administering it is inescapable.[210]

Different constitutional standards, then, are applied to subsidies for speech than are applied to the regulation of speech. The justification for this is that "[r]egulations directly restrict speech; subsidies do not. Subsidies, it is true, may indirectly abridge speech, but only if the funding scheme is 'manipulated' to have a 'coercive effect' on those who do not hold the subsidized position."[211] Proving this "coercive effect" when dealing with a limited spending program that does not constitute a public forum "is virtually impossible, because simply denying a subsidy 'does not "coerce" belief,' and because the criterion of unconstitutionality is whether denial of the subsidy threatens 'to drive certain ideas or viewpoints from the marketplace.' Absent such a threat, 'the Government may allocate . . . funding according to criteria that would be impermissible were direct regulation of speech or a criminal penalty at stake.'"[212]

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This same leniency allowing for the use of criteria for subsidies that would violate the First Amendment if used in the regulation of speech, also applies to potential vagueness concerns with the standards used to award subsidies. Generally speaking, vague laws—those that do not make sufficiently clear the standards to be used in their application or the speech to be restricted—are "held void for vagueness."[213] There are a number of problems with vague laws. A vague law "may 'trap the innocent by not providing fair warning'"[214] about what is permissible under the law. In addition, vague laws often allow for subjective interpretation by law enforcement, allowing for "arbitrary and discriminatory application" of the law.[215] Vague laws can also result in a chilling effect, in that people may refrain from engaging in speech because it is unclear from the law whether that speech is permissible or not: "Uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked."[216]

However, a greater level of vagueness may be permitted when subsidies are involved than when the vagueness is found in a regulation. For example, the "decency and respect" provision in *Finley* was challenged as being vague.[217] In his dissent in the Court of Appeals decision in *Finley*, Justice Kleinfeld, who would have upheld the constitutionality of the provision, observed, "Of course the statutory criteria are vague. 'Decency and respect for the diverse beliefs and values of the American people' is vague. 'Artistic excellence' and 'artistic merit' are also vague, and could not be proper criteria for censorship or discrimination in an entitlement program."[218] Justice Kleinfeld continued:

> Artists seeking grants have no property right to them, and their liberty to express themselves as they choose is not regulated by the grants. Vagueness law has been developed under the Fifth Amendment to protect people from the taking of liberty or property without fair notice of what they may not do, and without protection against arbitrary enforcement. First Amendment vagueness doctrine applies to government action relating to speech if the government regulates speech or conditions a generally available benefit upon the content of speech. An artist applying for an NEA grant has no formula, and is not entitled to one, for the painting or performance which will produce a grant. None of the purposes of vagueness law apply to prizes.[219]

The Supreme Court in *Finley* also came to the conclusion that the provision was not unconstitutionally vague,[220] observing that "[t]he terms of the provision are undeniably opaque, and if they appeared in a criminal statute or regulatory scheme, they could raise substantial vagueness concerns. It is unlikely, however, that speakers will be compelled to steer too far clear of any 'forbidden area' in the context of grants of this nature."[221] The Court did "recognize, as a practical matter, that artists may conform their speech to what they believe to be the decision-making criteria in order to acquire funding. But when the Government is acting as patron rather than as sovereign, the consequences of imprecision are not constitutionally severe."[222]

Thus, "although the First Amendment certainly has application in the subsidy context . . . the Government may allocate competitive funding according to criteria that would be impermissible were direct regulation of speech or a criminal penalty at stake."[223] This can apply to both viewpoint discrimination and vagueness. In *Finley*, however, there was no allegation of "discrimination in any particular funding decision."[224] As a result, the Court in *Finley* had "no occasion . . . to address an as-applied challenge in a situation where the denial of a grant may be shown to be the product of invidious viewpoint discrimination."[225] The Court thus upheld the constitutionality of the provision "[u]nless and until § 954(d)(1) [the "decency and respect provision] is applied in a manner that raises concern about the suppression of disfavored viewpoints."[226] The Court pointed out, "If the NEA were to leverage its power to award subsidies on the basis of subjective criteria into a penalty on disfavored viewpoints, then we would confront a different case. We have stated that, even in the provision of subsidies, the Government may not 'aim at the suppression of dangerous ideas,' and if a subsidy were 'manipulated' to have a 'coercive effect,' then relief could be appropriate."[227] The question arises then, in what situations does the denial of a subsidy "aim at the suppression of dangerous ideas," such that it is "manipulated" to have a "coercive effect"? Two cases where this was found to have occurred are discussed next.

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VIII. First Amendment Violations in Arts Funding Cases

Brooklyn Institute of Arts and Sciences v. City of New York[228] involved an art exhibit that had generated some controversy when it was first shown in London.[229] The exhibit, titled "Sensation: Young British Artists from the Saatchi Collection," featured "90 works from the collection of British advertising magnate Charles Saatchi."[230] The works included:

> Damien Hirst's "A Thousand Years" composed of flies, maggots, a cow's head, sugar, and water, another Hirst work, "This Little Piggy went to Market, This Little Piggy Stayed Home" a split pig carcass floating in formaldehyde; Marc Quinn's, "Self," a bust of the artist made from nine pints of his frozen blood; and, most controversial, artist Chris Ofili's work titled "The Holy Virgin Mary;" … —a depiction of a black Madonna adorned with elephant dung and sexually-explicit photos….[231]

Controversy followed the exhibit to the U.S. when, in 1999, the Brooklyn Museum prepared to offer the exhibit on a temporary basis.

The City of New York provided funding to the Museum for operational purposes,[232] but generally not "for direct curatorial or artistic services,'"[233] nor for the exhibit at issue.[234] Nevertheless, the City threatened the Museum with the termination of all City funding "unless it canceled the Exhibit."[235] Cited by the City as being particularly objectionable was Chris Ofili's "The Holy Virgin Mary," which was made of elephant dung along with other materials, and also contained "small photographs of buttocks and female genitalia scattered on the background."[236] New York City Mayor Rudy Giuliani, speaking publicly, called the exhibit "sick" and "disgusting."[237] Giuliani also singled out "The Holy Virgin Mary" as being "offensive to Catholics" and "an attack on religion."[238] Explaining the City's threat to terminate funding to the Museum, the Mayor stated:

> You don't have a right to a government subsidy to desecrate someone else's religion. And therefore we will do everything that we can to remove funding from the [Museum] until the [Museum] director comes to his senses. And realizes that if you are a government subsidized enterprise then you can't do things that desecrate the most personal and deeply held views of the people in society.[239]

The Museum refused to cancel the exhibit, leading the City to withhold "funds already appropriated to the Museum for operating expenses and maintenance and [file suit seeking] to eject the Museum from the City-owned land and building in which the Museum's collections have been housed for over one hundred years."[240] In response, the Museum filed suit against the City and Mayor "seeking declaratory and injunctive relief, to prevent the defendants from punishing or retaliating against the Museum for displaying the Exhibit, in violation of the Museum's rights under the First and Fourteenth Amendments…."[241]

Reviewing the case, the court found that "the facts establish an ongoing effort by the Mayor and the City to coerce the Museum into relinquishing its First Amendment rights."[242] In doing so, the court cited the following "unconstitutional conditions" principle:

> For at least a quarter-century, this Court has made clear that even though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to "produce a result which (it) could not command directly." Such interference with constitutional rights is impermissible.[243]

Here, the court found that the City put the Museum in the position of having to choose "between exercising First Amendment rights and obtaining the benefit."[244] The court saw the City's action this way:

> The decision to withhold an already appropriated general operating subsidy from an institution which has

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> been supported by the City for over one hundred years, and to eject it from its City-owned building, because of the Mayor's objection to certain works in a current exhibit, is, in its own way, to "discriminate invidiously in its subsidies in such a way as to 'aim [] at the suppression of dangerous ideas.'"[245]

The court observed that "the controlling consideration in determining whether a restriction on speech is viewpoint discriminatory" is the government's purpose.[246] That purpose was clear here, as the City had "acknowledged that its purpose is directly related, not just to the content of the Exhibit, but to the particular viewpoints expressed."[247] As the court saw it, "There can be no greater showing of a First Amendment violation."[248]

The court distinguished the present situation from that in Finley, where the Court held the "decency and respect" provision "facially constitutional upon finding that it '[did] not preclude awards to projects that might be deemed "indecent" or "disrespectful" nor place conditions on grants'"[249] Moreover, the *Finley* Court "did 'not perceive a realistic danger' that [the decency and respect provision] will be used 'to effectively preclude or punish the expression of particular views.'"[250] The difference, according to the *Brooklyn Museum* court was that *Finley* involved "'considerations' that could apply in the awarding of grants," that did not constitute viewpoint discrimination on their face.[251] That differed from the current case, in that City had already appropriated funding for the Museum.[252] Thus, in *Brooklyn Museum*, the government was withdrawing funding because of objections to the content of an exhibit, whereas in *Finley*, the issue was standards that took content into consideration in the competitive granting of funds, standards that did not actually forbid the funding of art that did not exhibit "decency and respect."

A similar case to *Brooklyn Museum* is *Esperanza Peace and Justice Center v. City of San Antonio*.[253] In 1997, after a public campaign protesting City funding of gay and lesbian-oriented programming offered by a community arts center, the San Antonio City Council, influenced in no small part by public pressure, voted to eliminate City funding for the art center. The arts center was the Esperanza Peace and Justice Center ("Esperanza"), which offered a wide variety of arts programming "as well as space and assistance to many local organizations and artists."[254] Esperanza had been provided funding by the City of San Antonio from 1990 through 1997 under a City program that provided funding to a number of arts organizations.[255] As part of that program, "The City encouraged [recipients] to connect art and social issues" by allowing the funding to be used to support "work addressing or involving social and political concerns."[256]

In both 1997 and 1998, as the City Council began focusing on the budgets for the upcoming fiscal years, Esperanza became the target of an "extensive" and "vicious" lobbying effort to have its funding eliminated due to its "perceived advocacy of the 'gay and lesbian lifestyle.'"[257] Also targeted in this campaign was the San Antonio Lesbian & Gay Media Project ("Media Project"), which presented "Out at the Movies," an annual lesbian and gay film festival[258] cosponsored by Esperanza.[259] Taking a prominent role in these campaigns against Esperanza was Christian talk-radio host Adam McManus,[260] who, as part of the campaign, interviewed several City council members on his show.[261] On the show, "McManus, his guests, and his listeners expressed their negative attitudes toward Esperanza and their strong opposition to arts funding for Esperanza, based primarily on its co-sponsorship of the 'Out at the Movies' film festival."[262] Also taking part in the campaign against Esperanza was the Christian Pro-Life Foundation, which sent a flyer to 1,200 of its members, as well as to City Council members, "urging opposition to City funding" for "gay and lesbian programs," singling out Esperanza by name.[263] Council members also received "calls, letters, e-mail and other communications opposing funding" of Esperanza, typically focusing on the "homosexual agenda" or "deviant lifestyle" promoted by Esperanza.[264] Other than these communications, "[t]he majority of the eleven council members had no personal knowledge regarding Esperanza or its programming beyond what they were told by constituents or gathered from news reports."[265]

In both 1997 and 1998, the San Antonio City Council approved budgets that eliminated funding for Esperanza as well as for Media Project, cosponsor of the "Out at the Movies" gay and lesbian film festival with Esperanza.[266] In 1997, funding for Esperanza and Media Project had been recommended by the City's Department of Art and Cultural Affairs (DACA), but Esperanza and Media Project were two of the only three "organizations whose funding was completely eliminated in the adopted budget."[267] (The third organization was also affiliated with Esperanza.[268]) This was the first time that the City entirely eliminated funding for an organization that the DACA had recommended be funded.[269] Esperanza and Media Project's funding requests

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were again denied by the City in 1998.[270] Esperanza, along with the Media Project, challenged the City's funding denials as "viewpoint discrimination in violation of their free speech rights under the First Amendment" as well as a "violation of their equal protection rights under the Fourteenth Amendment."[271]

To begin its analysis of the case, the court articulated a "fundamental First Amendment principle—that government may not proscribe speech or expressive conduct because it disapproves of the ideas expressed."[272] The court pointed to *National Endowment for the Arts v. Finley*,[273] in which "the Supreme Court made clear that the First Amendment forbids 'invidious viewpoint discrimination' in the arts subsidy context [and that] '[e]ven in the provision of subsidies, the government may not aim at the suppression of dangerous ideas.'"[274] Turning to the present case, the court observed, "The clearest example of viewpoint discrimination is that alleged here: the denial of government funding because the applicant espouses an unpopular, controversial, or uncommon viewpoint."[275] For the court, the City's "decision to refuse all funding to an applicant because of disapproval of one program or presentation is a form of viewpoint discrimination."[276]

San Antonio attempted to justify its funding denial on the grounds that "Esperanza is a 'political organization' or is 'too political,'" under "[t]he theory . . . that arts funds should be reserved for arts groups, not political groups."[277] The court responded, "We should be most wary whenever a government official undertakes to restrict speech because it is too 'political.' Labeling expression as 'political' can often serve as proxy for suppression of unfavored ideas."[278] Furthermore, the court found this argument to be a pretext, as the political nature of Esperanza's programming had never been a factor in all the years it was previously granted funding by the City and the fact that one of the goals of the arts grant program was to support programs addressing social and political concerns.[279]

As another justification for its actions, the City pointed to its constituents' opposition to the funding of "groups 'advocating a gay and lesbian lifestyle,'" and its council's "right and . . . obligation to listen to constituent opinion in making arts funding decisions."[280] While the court acknowledged this to be "true," it also observed:

> And if its constituents decided that they wanted to fund, say, performing arts at the expense of visual arts, no constitutional prohibition would forbid the council from enacting their will. Likewise, if its constituents preferred to fund arts projects that would attract tourist dollars instead of projects geared only to local participation, that too is acceptable. But the voters cannot require the council to deny funding to an arts group merely because that group promotes a social or political viewpoint those voters find objectionable."[281]

Pointing to public statements by council members about Esperanza's gay-themed programming and the decision to defund it, the court then found that "seven [out of a total of eleven[282]] council members, a clear majority, were motivated at least in part to defund Esperanza in response to its constitutionally-protected conduct."[283] With the City unable "to show that it would have made the same decision absent [Esperanza's and Media Project's] viewpoints,"[284] the court concluded that "this choice—the decision to defund the plaintiffs—was made because of the plaintiffs' constitutionally-protected expressions of viewpoint,"[285] and thus, San Antonio's "decision to defund plaintiffs constituted viewpoint discrimination in violation of the First Amendment. . . ."[286]

The *Esperanza* court made the following observation about government funding of art in general:

> Nothing in this decision requires that the governing body of a city fund any art. The public funding of art remains within the complete discretion of the city council. Cities may determine the extent and scope of the services they provide, and whether the arts in whatever form will occupy a core role in the life of the city. Cities, not the courts, raise the taxes to fund services, and cities should make the decisions concerning how much, if any, of the public funds will be spent to support art. Once a governing body chooses to fund art, however, the Constitution requires that it be funded in a viewpoint-neutral manner, that is, without discriminating among recipients on the basis of their ideology. . . It should be remembered, however, that First Amendment principles also protect the right of those citizens who oppose funding for the plaintiffs to freely make their own views known.[287]

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In both *Brooklyn Museum* and *Esperanza*, then, the government terminated, or sought to terminate, funding for arts organization because of objections to artistic exhibits or programming offered by the organizations. In both cases it was clear that government objections to the organization's speech was the cause of the government action. In addition, the government had initially provided the funding, only terminating (or seeking to terminate) the funding once it determined the organization's speech was objectionable. This sounds similar to the facts in the *Machete* case, discussed *infra*, where the Texas Film Commission approved the preliminary grant application for the film, then withdrew that approval after controversy arose over the film's content. That case is returned to next.

IX. Machete and Machete Kills

As was previously discussed, the production company responsible for *Machete*, Chop Shop, applied for and was given initial approval for a grant from the Texas Film Commission. At the time it was notified of this approval, Chop Shop was also notified that this initial review "'pertain[ed] only to the qualification of the application' and that '[i]f the final content is determined to be in violation of the rules and regulations of the incentive program, the project [would] not be eligible to receive funds' from the Program.'" The Commission also informed Chop Shop "that 'approval of an incentive application does not guarantee payment of incentive funds.'"[288] Controversy concerning the film then arose following the release of a trailer for the film tied to a divisive Arizona anti-immigration law from those who saw the film as inciting a race war.[289] This controversy led to public pressure on the Texas Film Commission to withdraw its support for the film.[290] Following the film's release in September 2010, Chop Shop provided the Commission with its final documentation, including a final script for the film, as required by Incentive Program guidelines.[291] Chop Shop was subsequently informed that "'[b]ased on the final review of content, the feature *Machete* does not qualify for a grant from the Texas Moving Image Industry Incentive Program.'"[292] As the basis for the denial, the Commission cited Texas "Government Code subsection 485.022(e), which provides that the Commission 'may deny an application because of inappropriate content or content that portrays Texas or Texans in a negative fashion, as determined by the [Commission].'"[293]

Chop Shop challenged the denial on multiple grounds ("*Machete I*"). One of Chop Shop's contentions was that once the Commission approved its initial application—in essence "verif[ying] that 'the [[film's] content is in compliance with the rules and regulations governing the application process,'"—it could not then later deny Chop Shop an Incentive Program grant unless "substantial changes had occurred during production"[294] of the film to include "inappropriate content or content that portrays Texas or Texans in a negative fashion."[295] That was not the case here, as "the final script of *Machete* did not differ from the script originally reviewed by [Commission]…."[296] Without any such changes, Chop Shop argued, the Commission was bound by its initial determination that Chop Shop qualified for the Incentive Program grant.[297]

The court focused its analysis on construction of the statute and regulations that created the Incentive Program and detailed the manner of its operation. The court found that the statute requiring a review of the final script for a film by the Commission before awarding any grant:

> [C]annot be read to create a "standard" for either awarding or denying a grant application. The statute does not direct the Commission to take any particular action based on its final content review. It does not require that a grant be awarded if no substantial changes occurred during production, nor does it require that the Commission deny a grant if substantial changes occurred during production that caused the film to include content that portrays Texas or Texans in a negative fashion. The decision to award or deny a grant remains within the Commission's discretion. Indeed, the only constraint on the Commission's authority is the mandate that "the [Commission] shall consider general standards of decency and respect for the diverse beliefs and values of the citizens of Texas" when determining whether to act on or deny a grant application.[298]

The court found that the Texas Legislature "undoubtedly intended" "to provide the Commission with discretion throughout the entire grant approval process…."[299] It based this conclusion on the fact that the statute "specified that the Commission 'is not required to act on any grant application and may deny an application because of inappropriate content or content that por-

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trays Texas or Texans in a negative fashion.'"[300] As a result, the Commission's "denial of Machete's grant application, even post-production, was authorized by the statute"[301] and "not beyond its statutory authority…."[302] Thus, to the court, the Commission was free to deny Chop Shop's application at any point in the application process, even if it had previously determined that the application qualified for a grant.[303]

The First Amendment did not factor into the court's analysis, as Chop Shop had not raised a First Amendment challenge to the denial of its grant application; in fact, the First Amendment is not even mentioned or cited in the decision. This case, then, provides little guidance on the constitutionality of restrictions such as these in state film incentive programs under the First Amendment. Nevertheless, this case has a few important differences from *Brooklyn Museum* and *Esperanza*. As opposed to those two cases, the plaintiff had not already received funding from the government. Instead, Chop Shop had only been notified that it preliminary application had been approved, but that that did not guarantee the payment of any funds. Further, unlike in the other cases, the grant denial here was pursuant to a statute which provided the government discretion to take the action it did. In fact, the Texas statute is similar to the standard at issue in *Finley*, in that it requires the Commission to consider certain factors—inappropriate content or content portraying Texas or Texans in a negative way—but does not require that incentives be denied to films that contain such content. Finally, there do not seem to be public statements by Texas government officials—at least nowhere to the extent found in *Brooklyn Museum* and *Esperanza*—stating their objections to the film's content in the *Machete* case. While there was a fairly vocal protest by members of the public over the film's content, that protest would itself by protected by the First Amendment.[304]

For its part, *Machete* opened nationwide on September 3, 2010 in 2,670 theaters, making $11.4 million on its opening weekend (on an estimated budget of $10.5 million) and coming in second for the weekend to the George Clooney-starring film *The American*.[305] *Machete* ending up grossing over $26.5 million in its theatrical run,[306] making it the 100th largest box office grossing film that year.[307] When filmmakers set out to make a sequel to *Machete*, they again applied for incentives from the State of Texas, which were denied from the outset this time.[308] The filmmakers filed a second court challenge against the Texas Film Commission,[309] and this time they did raise a First Amendment challenge to the Commission's denial.

In 2012, Machete Productions began production on a sequel to the film *Machete*, *Machete Kills*, also to be filmed in Texas.[310] Despite the denial of its application for *Machete*, Machete Productions again sought a grant from the state under its Incentive Program for the film. Even before doing so, however, Machete Productions was informed by the Film Commission "that the film would never receive an Incentive Program grant due to the perceived political nature and content of the film."[311] Undeterred, Machete Productions filed an application. In response, Machete Productions received a letter from the Commission denying its grant application because of "inappropriate content," but was not provided with an explanation of what the Commission found unacceptable.[312] Machete Productions filed suit to challenge the denial, arguing "that [the Film Commission] applied the Incentive Program to it in a way that discriminated against it on the basis of viewpoint, thus violating its First Amendment rights."[313] Machete Productions asserted that "[t]he real reason for the Commission's denial is that the Commission was concerned with the political fallout from providing public money to a film perceived as glorifying the role of a Mexican Federale and sympathizing with immigrants."

Addressing Machete Productions' claim of unconstitutional viewpoint discrimination, the court cited *Rust* for the principle that the government may "selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way," and that doing so does not constitute viewpoint discrimination.[314] Rather, the government "has merely chosen to fund one activity to the exclusion of the other.'"[315] Thus, the court continued, such a government funding provision does not violate the First Amendment "as long as it '[does] not silence speakers by expressly threaten[ing] censorship of ideas,' or 'introduce considerations that, in practice, would effectively preclude or punish the expression of particular views.'"[316] Acknowledging that while "the First Amendment certainly has application" in regard to subsidies, the court observed that the government—here the Texas Film Commission—"may allocate competitive funding according to criteria that would be impermissible were direct regulation of speech or a criminal penalty [at] stake."[317] Nevertheless, "Government funding provisions can become unconstitutional conditions if they 'effectively prohibit[] the recipient from engaging in the protected conduct outside the scope of the [government] funded program,'[318] or if the subsidy is 'manipulated to have a coercive effect.'"[319]

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Applying these principles to the present case, the court concluded that the grant denial did not "'effectively preclude[] or punish[]' Machete [Productions] from or for holding particular viewpoints in *Machete Kills*."[320] Nor did the denial effectively prohibit Machete Productions from producing the film "'outside the scope' of the Incentive Program."[321] After all, "[d]espite the denial of an Incentive Program grant, *Machete Kills* was still filmed in Texas, produced, and released."[322] The court thus rejected Machete Productions' contention that "the First Amendment requires a state which has an incentive program like this one to fund films casting the state in a negative light."[323] So long as Machete Productions remained free to make its film outside of the context of the Incentive Program, which it was and which it in fact did, the Commission acted within its discretion in denying Machete Productions funding.

Machete Productions also attacked the "vagueness" of the standards used to award and deny grants. In a brief explanation of its reason for rejecting the vagueness claim, the court acknowledged that the "Due Process Clause does protect speakers 'from arbitrary and discriminatory enforcement of vague standards,' but 'when the [g]overnment is acting as a patron rather than as sovereign, the consequences of imprecision are not constitutionally severe.'"[324] The court observed that in the present case, "the Incentive Program's funding criteria are not any more imprecise than the criteria found to pass constitutional muster in *Finley*."[325]

Thus, the court found that the denial of Machete Productions' grant application did not violate its First Amendment rights. Offering little more analysis than that described above, the court put great weight in the fact that Machete Productions was free to make the film despite the denial of its application, and in fact did make the film. The *Machete Kills* court read the Supreme Court's decisions in *Rust* and *Finley* as allowing the Texas Film Commission to deny Machete Productions' grant application for reasons related to the film's content.

X. Discussion and Conclusion

Can states refuse to provide financial assistance through their film incentive programs for films that contain content the state finds objectionable, such as "inappropriate content" or content that portrays the state or its residents in a negative way? As the foregoing analysis indicates, the likely answer to this question is "yes." This is largely due to the wide latitude provided by courts to the government to designate subsidies as being for particular purposes[326] (as long as the subsidies are not intended to encourage a diversity of views from private speakers[327]) as well as utilize criteria in the granting of those subsidies that would be impermissible in the context of the regulation of speech.[328] So long as the denial of funding does not "effectively prohibit" the filmmaker from making the film outside the scope of the incentive program, such a denial of funding by the state is likely to be found to be within its authority and not a violation of the applicant's First Amendment rights.[329]

Rosenberger and *Finley* together indicate that film incentive programs are unlikely to be found to constitute a public forum as the programs are not intended to encourage a diversity of views from private speakers. Instead, the purposes are typically to encourage economic activity within the state, not just from film production but from attracting tourism and other economic activity as well, which would seem more likely to result from productions that provide a favorable impression of a state. Considerations of film content would seem to be relevant in a state's decision as to what productions to support to best allow it to achieve these purposes. As film incentive programs are unlikely to be considered public forums,[330] prohibitions on viewpoint discrimination, or the requirement that the exclusion of a speaker from the forum satisfies the requirements of strict scrutiny (be necessary to achieve a compelling government interest) do not apply here.[331] Nevertheless, this does not mean that any discrimination by the government will be upheld by the courts. If the awarding of incentives were manipulated to have a coercive effect, or were aimed at the suppression of dangerous ideas, then courts are likely to find those government actions to be unconstitutional.[332] However, laws or regulations which allow for considerations of content—rather than acting as prohibitions on particular types of content—are unlikely to be found unconstitutional on their face.[333]

The Texas statute, for example, provides that the Texas Film Commission "may deny an application because of inappropriate content or content that portrays Texas or Texans in a negative fashion, as determined by the [Commission], in a moving image project. In determining whether to act on or deny a grant application, the [Commission] shall consider general standards of

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decency and respect for the diverse beliefs and values of the citizens of Texas."[334] The first part of this provision—dealing with inappropriate content or negative portrayals of Texas or Texans—would seem to be consistent with the program's purpose to attract economic activity and tourism to the state and is thus permissible under *Rust*, as the *Machete Kills* court held.[335] The second part—dealing with "decency and respect for the diverse beliefs and values of the citizens of Texas"—is, with the exception of its focus on Texas residents, the same language that was upheld in *Finley*. Furthermore, as in *Finley*, these provisions are not written as prohibitions. Instead, the Commission "may" deny an application because of inappropriate content or negative portrayals of Texas or Texans; it is not required to deny applications for productions that contain these types of content, and in fact, is able to provide funding to such productions. The same is true of the second half of the provision: it simply requires a consideration of decency and respect; again, productions that are indecent or disrespectful might still be funded under the statute. As the court observed in *Machete I*, Texas law gives the Texas Film Commission great discretion to approve or deny applications, even allowing the Commission to take no action on an application whatsoever.

The provisions of the Texas Film Incentive Program have indeed been the subject of court challenge, and were upheld in those particular situations, even though it appeared the denial of government funding was due, at least in part, to some objection over the content of the films seeking assistance. However, there were important differences in these cases from the cases where First Amendment violations were found when the government withdrew funding due to objections to the content of art exhibited by the recipient. In both *Brooklyn Museum* and *Esperanza*, the government was already providing funding to the arts organizations when it came to light that the organization was exhibiting art that the government found objectionable, leading the government to withdraw its funding.[336] At issue in the *Machete* cases was the statutory standards pursuant to which the Texas Film Commission made its determination to deny the *Machete* applications. These cases determined that the Texas Film Commission was granted a great deal of discretion in exercising its authority to approve or deny applications. The *Machete Kills* case also relied heavily on *Rust* to determine that the filmmaker's First Amendment rights were not violated so long as the denial of incentives did not effectively prevent it from making the film, which it did not.[337] These cases suggest that it may be easier for the government to initially deny funding due to content when done pursuant to the standards of the funding program, but that once funding has been granted, the government has much less leeway to terminate that funding because of objections to the recipient's speech.

Another significant difference between these cases is the reason provided by the government for its refusal or withdrawal of funding. In both *Brooklyn Museum* and *Esperanza*, government officials made numerous public statements expressing their objection to the speech provided by the recipient, allowing courts to easily connect those objections with the decisions to deny funding. These kinds of statements by government officials were lacking in the *Machete* cases. While there was a significant public outcry against the first *Machete* film, government officials were much more restrained about expressing any objections they might have had to the films than were the officials in *Brooklyn Museum* or *Esperanza*. Producers of the *Machete* films were given little reason for the rejection of their applications rather than that the films contained inappropriate content and/or depicted the state or its residents in a negative light, language which is found in the statute itself (and which is language, for reasons discussed above, that does not violate the First Amendment on its face).

Much of the analysis here is based on the Supreme Court's opinions in *Rust* and *Finley*. *Finley*, however, takes on the most relevance here, being a case of selective government subsidies for art, and for the funding guidelines as issue in that case closely resembling those in the Texas Film Incentive Program. Some commentators have suggested that there are disturbing implications of the Court's holding in *Finley*. Kowalski makes the following observations:

> The majority opinion [in *Finley*] . . . took the stance that the decency [and respect] clause was constitutional because it was advisory and not a direct restriction on the content or viewpoint of the artistic expression. There are arguably two effects on First Amendment doctrine because of the new "advisory language" category for government regulation of expression. First, the Court's conclusion that the clause is constitutional because it is "advisory" encourages the deceptive drafting of future legislation. The Court sends the message to future legislators that the constitutionality of any legislation will depend not on what type of expression they seek to prohibit, but rather whether they include enough prepositions. If by including certain jargon,

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> the legislation can be read to consider factors rather than require the presence of certain factors, the legislation will be constitutional. . . [W]hether legislation is phrased to consider or require the consideration of certain values is inconsequential because the decisionmaker will regard the factors as a mandate from Congress rather than merely a helpful hint.[338]

Walther also found the holding in *Finley* to be "problematic because by holding that only those acts of Congress that expressly threaten the censorship of ideas will be deemed unconstitutional, the Court implicitly afforded Congress the power to discriminate against an individual group or an individual viewpoint."[339] As Walther sees it, *Finley* gives "Congress a 'violate the First Amendment free' card, provided that Congress is inventive enough to reach their desired ends implicitly, rather than expressly."[340]

The *Finley* opinion does indeed to appear to provide Congress—and other legislative bodies—guidance on how to lessen the likelihood that disfavored content will be funded with government subsidies, and how to do so without violating the First Amendment. By requiring that disfavored content be considered by a funding decisionmaker, rather than directly prohibiting the funding of that content, Congress may be able to do indirectly what it could not do directly. It appears that the Texas Legislature might have learned this lesson when it created the Texas Film Incentive Program, as its content provisions are only considerations for the Commission, not prohibitions,[341] and the language used in the statute closely tracks that of the provision upheld in *Finley*.[342]

In addition to the lessons in statute drafting provided by *Finley*, the *Brooklyn Museum*, *Esperanza*, and *Machete* cases may also provide some guidance to government officials on how to avoid funding objectionable artistic speech without being held to violate the speaker's First Amendment rights. A significant problem for the government in both *Brooklyn Museum* and *Esperanza* was that government officials in those cases made it abundantly clear that their decisions were motivated by opposition to the speakers' views. As Warren observes, "The difficulty with *Esperanza* arises only because the City Council was not savvy enough to deny funding to the Esperanza Center without admitting that they were doing so based on the particular views expressed. In fact, the City did little to conceal its motives behind the budget cut. Indeed, they were quite honest about their dislike for the Esperanza Center's views."[343] On the other hand, in the *Machete* cases it appears that the government did little more than cite the statutory language as the reason for the denial of those grant applications, which certainly didn't appear to hurt the government's cases when those actions were challenged in court. Notably, government officials did not add their voices to the public campaign against the first *Machete* film, considered so objectionable by some members of the public, unlike the government officials in *Brooklyn Museum* and *Esperanza*. That restraint may not have helped the Texas Film Commission prevail in the Machete cases, but it certainly didn't hurt it; the public statements by government officials in *Brooklyn Museum* and *Esperanza* certainly did hurt the government's cause in those cases.

These lessons, while potentially instructive for legislators and other government officials, likely give little comfort to filmmakers. As discussed above, courts provide the government wide latitude in the denial of government subsidies, even allowing criteria to be used in the subsidy context that would be clearly impermissible in a regulatory context.[344] Impermissible discrimination is very difficult to prove in these situations, as the Supreme Court has recognized:

> When the limited spending program does not create a public forum, proving coercion is virtually impossible, because simply denying a subsidy "does not 'coerce' belief," and because the criterion of unconstitutionality is whether denial of the subsidy threatens "to drive certain ideas or viewpoints from the marketplace." Absent such a threat, "the Government may allocate . . . funding according to criteria that would be impermissible were direct regulation of speech or a criminal penalty at stake."[345]

Finley seems to grant legislators even more latitude to craft subsidy program to include otherwise impermissible criteria so long as those criteria are only considerations for the decisionmaker rather than prohibitions.[346] Furthermore, the denial of a subsidy only eliminates a potential source of funding for a filmmaker, and the filmmaker is in no worse a position to make its film that it was before it applied for the subsidy. This is a key factor for the government in avoiding the application of the unconstitutional conditions doctrine: that the filmmaker remains free to make the film with the objectionable content outside of the incen-

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tive program. Using the state of Texas as an example one final time, though the observation should apply to other state film incentive programs as well, filmmakers are free to make films that portray Texas negatively, they just aren't entitled to have the state of Texas pay for it.

ENDNOTES

1 *Machete* (2010) Quotes, IMDb, http://www.imdb.com/title/tt0985694/trivia?tab=qt&ref_=tt_trv_qu.

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5 Aschenbrenner, *supra* note 2.

6 Gavin Edwards, *Horror Film Directors Dish About Grindhouse Trailers*, Rolling Stone, April 19, 2007, https://web.archive.org/web/20080501084049/http://www.rollingstone.com/news/story/14022408/online_exclusive_horror_film_directors_dish_about_grindhouse_trailers.

7 Frank Scheck, *Machete: Film Review*, Hollywood Reporter, October 14, 2007, http://www.hollywoodreporter.com/review/machete-film-review-29917.

8 Peter Sciretta, *Grindhouse: Rodriguez to Turn They Call Him Machete into Feature Length Movie, /Film*, March 10, 2007, http://www.slashfilm.com/grindhouse-rodriguez-to-turn-they-call-him-machete-into-feature-length-movie/.

9 Scheck, *supra* note 7.

10 *Id.*

11 *Id.*

12 Machete Productions L.L.C. v. Page, 809 F.3d 281, 286 (5th Cir. 2015). Specifically, Chop Shop was notified that "an initial review of the film's content as described in Chop Shop's application fulfilled the Incentive Program's initial content requirement. Chop Shop was informed that this initial review "'pertain[ed] only to the qualification of the application' and that '[i]f the final content is determined to be in violation of the rules and regulations of the incentive program, the project [would] not be eligible to receive funds' from the Program.'" *Machete's Chop Shop, Inc. v. Texas Film Commission*, 483 S.W.3d 272, 276 (Tex. Ct. App. 2016).

13 That law was SB 1070, which made "it a crime for immigrants not to carry their documents." *See* Jay A. Fernandez and Borys Kit, *How 'Machete' Inflames Immigration Debate*, Hollywood Reporter, Aug. 26, 2010, http://www.hollywoodreporter.com/news/how-machete-inflames-immigration-debate-27149; Soraya Roberts, *Robert Rodriguez Cuts 'Illegal' Trailer for 'Machete' to Protest Arizona Immigration Law*, NY Daily News, May 6, 2010, http://www.nydailynews.com/entertainment/tv-movies/robert-rodriguez-cuts-illegal-trailer-machete-protest-arizona-immigration-law-article-1.190695.

14 Fernandez and Kit, *supra* note 13.

15 Richard Whittaker, *Is That a Wrap for Incentives?*, Austin Chronicle, Jan. 28, 2011, https://www.austinchronicle.com/screens/2011-01-28/is-that-a-wrap-for-incentives/.

16 *Id.*

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19 Whittaker, *supra* note 15.

20 *Id.* "Over the period of six months, the film commission received around 500 letters…." Id. "Joining in the protest of the film and any state funding for it, FoxNews.com contributor James Pinkerton wrote, 'The Reconquista is here—at a theater near you,' referring [to] a nativist conspiracy theory about Mexico plotting to 'reconquer' the American Southwest that is also known as the Plan de Aztlan." Alexander Zaitchik, *Does Robert Rodriguez's 'Machete' Evoke 'Race War'?*, Southern Poverty Law Center, Sept. 10, 2010, https://www.splcenter.org/hatewatch/2010/09/10/does-robert-rodriguez%E2%80%99s-%E2%80%98machete%E2%80%99-advocate-%E2%80%98race-war%E2%80%99. "Richard Spencer, a former American Conservative editor who [is editor of] AlternativeRight.com, [asserted] that the movie was 'a catalogue of depraved and predictably left-wing outrages' whose only message is 'Kill Whitey! Kill Whitey! Kill Whitey!'" *Id.*

21 *See Action Comedy 'Machete' Explores Illegal Immigration Controversy*, VOA, Sept. 6, 2010, https://www.voanews.com/a/action-comedy-machete-explores-illegal-immigration-controversy-102338284/164770.html; Nicole Kinsley, *Texas Film Commission Permitted to Slice and Dice Financial Incentives to Machete Films*, Trademark and Copyright Law, Feb. 29, 2016, http://www.trademarkandcopyrightlawblog.com/2016/02/texas-film-commission-permitted-to-slice-and-dice-financial-incentives-to-machete-films/.

22 *Synopsis for Machete* (2010), IMDb, http://www.imdb.com/title/tt0985694/synopsis?ref_=tt_stry_pl.

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24 Kinsley, *supra* note 21.

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28 Jones and Dykes, *supra* note 25.

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32 Jones and Dykes, *supra* note 30.

33 Father Hidalgo was a leader of the Mexican War of Independence. *See Miguel Hidalgo y Costilla*, Wikipedia, https://en.wikipedia.org/wiki/Miguel_Hidalgo_y_Costilla.

34 Jones and Dykes, *supra* note 30.

35 *Machete Productions L.L.C. v. Page*, 809 F.3d 281, 286 (5th Cir. 2015).

36 *See* Kinsey, *supra* note 21.

37 *Machete's Chop Shop, Inc. v. Texas Film Commission*, 483 S.W.3d 272, 277 (Tex. Ct. App. 2016).

38 *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995) (citing *Simon & Schuster, Inc. v. Members of N. Y. State Crime Victims Bd.*, 502 U.S. 105 (1991)).

39 *See* Brice Wallace, *The Screening Process: A Form of Censorship or a Way to Safeguard Taxpayer Money?*, Deseret News, Nov. 16, 2008, http://www.deseretnews.com/article/705263109/The-screening-process-A-form-of-censorship-or-a-way-to-safeguard-taxpayer-money.html?pg=all.

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49 *Id.* (citations omitted).

50 *Id.* at 403-04 (citations omitted). An example of this, although being far from typical, is that "65,000 tourists a year visit the cornfield in Iowa where the 1989 movie Field of Dreams was set." *Id.* at 404. (citation omitted).

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56 *See* e.g., Michael Thom, L*ights, Camera, but No Action? Tax and Economic Development Lessons From State Motion Picture Incentive Programs*, American Review of Public Administration (2016), http://journals.sagepub.com/doi/abs/10.1177/0275074016651958; Robert Tannenwald, *State Film Subsidies: Not Much Bang For Too Many Bucks*, Center on Budget and Policy Priorities, Dec. 10, 2010, http://www.cbpp.org/research/state-film-subsidies-not-much-bang-for-too-many-bucks?fa=view&id=3326.

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58 *Id.*

59 *Id.*

60 *Id.*

61 National Conference of State Legislatures, *supra* note 40.

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67 Vine, *supra* note 63. According to former director of the Texas Film Commission Bob Hudgins, "The senators were not pleased that a Texas school was cast in a bad light in this film, so their charge to [him as Commission director] was, make sure that doesn't happen. We don't want to give money to films that do that." *Id.*

68 *Id.*

69 *See* Hylton, *supra* note 63.

70 Ealy and Garcia, *supra* note 63.

71 Wallace, *supra* note 39.

72 Tex. Gov. Code § 485.022(e).

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73 Hollis L. Hyans and Open Weaver Banks, *Should Filmmakers Be Content to Have Taxing Authorities Judge Their Content?*, Lexology, Jan. 17, 2012, http://www.lexology.com/library/detail.aspx?g=e3f9ae01-93b2-4654-a763-0689336852a6 (citing Wis. Admin. Code § 133.30(4)).

74 Hyans and Banks, *supra* note 73 (citing W. Va. Code § 11-13X-3(b)(8)(F)).

75 Hyans and Banks, *supra* note 73 (citing Wyo. Stat. Ann. § 9-12-403(a)(v)).

76 Hyans and Banks, *supra* note 73 (citing Ky. Rev. Stat. Ann. § 148.546(9); Film Tax Credit Program Guidelines, October 2009, http://filminpa.com/wp-content/uploads/2009/07/Film-Tax-Credit_Guidelines-09.pdf.).

77 *See* Ahmad, supra note 48, at 403 (citations omitted). Ahmad identifies four categories of content restrictions in state film incentive programs: "(1) categorical; (2) negative image; (3) implicit; and (4) carte blanche." *Id.* at 411. Ahmad also has a comprehensive listing of the content restrictions found in the various state incentive programs. *Id*. at 410-19.

78 The Music, Film, Television and Multimedia Office assigned administration of the Incentive Program to one of its divisions, the Texas Film Commission. *See Machete Productions L.L.C. v. Page*, 809 F.3d 281, 285 (5th Cir. 2015).

79 Tex. Gov. Code § 485.004(b).

80 *See* Texas Moving Image Incentive Program, Texas Film Commission, https://gov.texas.gov/film/page/miiip.

81 Tex. Gov. Code § 485.024(a). The Commission's rules require it to consider "the following criteria to assess, in the aggregate, the potential magnitude of the economic impact of the project in the State of Texas:

(A) The financial viability of the Applicant and the likelihood of successful project execution and planned spending in the State of Texas;
(B) Proposed spending on existing state production infrastructure (such as soundstages and industry vendors);
(C) The number of Texas jobs estimated to be created by the project;
(D) The ability to promote Texas as a tourist destination through the conduct of the project and planned expenditure of funds;
(E) The magnitude of estimated expenditures in Texas; and
(F) Whether the project will be directed or produced by an individual who is a Texas Resident (where the term 'produced by' is intended to encompass a non-honorary producer with direct involvement in the day to day production of the project, but above the level of line producer)." Tex. Admin. Code §121.9(c)(3).

82 Tex. Admin. Code §121.4(b).

83 Tex. Gov. Code § 485.022(e).

84 Tex. Admin. Code §121.4(b).

85 Tex. Gov. Code § 485.022(e).

86 *Id.*

87 Tex. Gov. Code § 485.022(f).

88 Tex. Admin. Code §121.9(c)(5).

89 Tex. Admin. Code §121.9(c)(6).

90 *Id.*

91 *See* Wallace, *supra* note 39.

92 Tex. Admin. Code §121.8(a).

93 Tex. Gov. Code § 485.022(f).

94 Wallace, *supra* note 39.

95 *See* Hamilton, *supra* note 17.

96 *Machete's Chop Shop, Inc. v. Texas Film Commission*, 483 S.W.3d 272 (Tex. Ct. App. 2016); *Machete Productions L.L.C. v. Page*, 809 F.3d 281 (5th Cir. 2015).

97 U.S. Const. amend. I. *See*, e.g., *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, at 828-29 (1995).

98 Alicia M. Choi, Note, *National Endowment for the Arts v. Finley: A Dispute over the "Decency and Respect" Provision*, 32 Akron L. Rev. 327, 336 (1999) (citing *Police Dep't. v. Mosley*, 408 U.S. 92, 95 (1972)).

99 *See*, e.g., *Miller v. California*, 413 U.S. 15, 34 (1973); *see also Hurley v. Irish-American Gay, Lesbian & Bisexual Group*, 515 U.S. 557, 569 (1995) (reaffirming the rationale for protection of art as expression).

100 *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952) (quoting Winters v. New York, 333 U.S. 507, 510 (1948)) (internal quotations and citation omitted).

101 *Rosenberger*, 515 U.S at 828 (citing *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 96, (1972)).

102 *Rosenberger*, 515 U.S. at 828 (citing *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 641-643 (1994)).

103 *Turner*, 512 U.S. at 641 (quoting *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd.*, 502 U.S. 105, 116 (1991)).

104 *See, e.g., Rosenberger*, 515 U.S. at 828-29.

105 *Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 677 (1988) (quotations and citation omitted).

106 *See*, *e.g.*, *Forbes*, 523 U.S. at 677-79; *Bryant v. Gates*, 532 F.3d 888, 895 (D.C. Cir. 2008) (citing *Stewart v. D.C. Armory Bd.*, 863 F.2d 1013, 1016 (D.C. Cir. 1988)).

107 *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985) (citation omitted).

108 *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992).

109 *See*, *e.g.*, *Forbes*, 523 U.S. at 678-80.

110 *Id.* at 677.

111 *Christian Legal Soc'y Chapter of the Univ. of California v. Martinez*, 130 S.Ct. 2971, 2984 note 11 (2010) (citation omitted).

112 *Id.* at 2985 (citation omitted).

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113 *Good News Club v. Milford Central School*, 533 U.S. 98, 106-07 (2001).

114 *Christian Legal Soc'y*, 130 S.Ct. at 2984 note 11 (citation omitted).

115 *Forbes*, 523 U.S. at 679-80.

116 Marc Rohr, *The Ongoing Mystery of the Limited Public Forum*, 33 NOVA L. REV. 299, 323 (2009) (citing *Forbes*, 523 U.S. at 678-79).

117 *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 808-09, 811 (1985).

118 Norman T. Deutsch, *Does Anybody Really Need a Limited Public Forum?*, 82 St. John's L. Rev. 107, 119 (2008) (citing *Cornelius*, 473 U.S. at 801).

119 Deutsch, *supra* note 118, at 801 (citing *Cornelius*, 473 U.S. at 801).

120 Deutsch, *supra* note 118, at 120 (citing *Cornelius*, 473 U.S. at 800-02).

121 Deutsch, *supra* note 118, at 120 (citations omitted).

122 *Finley v. National Endowment for the Arts*, 100 F.3d 671, 686 (9th Cir. 1996) (Kleinfeld, J., dissenting) (discussing *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993)).

123 515 U.S. 819 (1995).

124 *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 822 (1995).

125 *Id.* at 824.

126 *Id.* at 824-25.

127 *Id.* at 822.

128 *Id.* at 834.

129 *Id.* at 830.

130 *Id.* at 830.

131 *Id.*

132 *Id.* at 830-31.

133 *Id.* at 831.

134 *Id.* at 837.

135 *Finley v. National Endowment for the Arts*, 100 F.3d 671, 686 (9th Cir. 1996) (Kleinfeld, J., dissenting) (discussing *Rosenberger*).

136 524 U.S. 569 (1998).

137 *Id.* at 572 (quoting 20 U.S.C. § 954(d)(1) (1990)).

138 *Id.* at 574 (1998) (citing e.g., 135 Cong. Rec. 22372 (1989)).

139 *Finley*, 524 U.S. at 574 (citing e.g., 135 Cong. Rec. 22372 (1989)).

140 *Finley*, 524 U.S. at 574 (citing e.g., 135 Cong. Rec. 9789 (1989)).

141 *Finley*, 524 U.S. at 575 (citing Department of the Interior and Related Agencies Appropriations Act, 1990, Pub. L. 101-121, 103 Stat. 738, 738-742).

142 *Finley*, 524 U.S. at 576 (discussing and citing 20 U.S.C. § 954(d)(1)).

143 *Finley*, 524 U.S. at 577-78 (citing First Amended Complaint, 1 Record, Doc. No. 16, p. 1 (Mar. 27, 1991)).

144 *Finley*, 524 U.S. at 577.

145 *Id.* at 580.

146 *Id.* at 613-14 (Souter, J., dissenting) (quoting *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 548 (1983) (internal quotations omitted))

147 *Finley*, 524 U.S. at 586.

148 *Id.*

149 *Id.* (quotations omitted) (citing *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 824 (1995); *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384, 386, (1993); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 555, (1975); *Hannegan v. Esquire, Inc.*, 327 U.S. 146, 148, note 1, (1946)).

150 David Hungerford, Note, *The Fallacy of Finley: Public Fora, Viewpoint Discrimination, and the NEA*, 33 U.C. Davis L. Rev. 249, 276 (1999) (citing 20 U.S.C. § 954(d)(1) (1994) (stating that primary consideration when awarding NEA grants is artistic excellence); *Finley*, 118 S. Ct. at 2178; *Rosenberger*, 515 U.S. at 824-25).

151 *Hungerford*, supra note 150, at 276 (citing *Finley v. National Endowment for the Arts*, 795 F. Supp. 1457, 1475 (C.D. Cal. 1992), *aff'd*, 100 F.3d 671 (9th Cir. 1996), *rev'd*, 118 S. Ct. 2168 (1998) (stating that NEA funds represent limited resource)).

152 *Finley*, 524 U.S. at 586 (citing *Rosenberger*, 515 U.S. at 834-35).

153 *Finley*, 524 U.S. at 586.

154 Hungerford, *supra* note 150, at 276 (1999) (citing *Finley*, 118 S. Ct. at 2178 (noting that NEA makes funding decisions through use of competitive process)).

155 *Finley*, 524 U.S. at 586 (citing *Rosenberger*, 515 U.S. at 834-35). One commentator interpreted the Court's reasoning on this point as follows: "the Court seemed to suggest that the point of the program is to encourage good art regardless of whether it leads to a public forum-like environment. Thus, for the majority, diversity of viewpoint in NEA funded art would seem to be more of a happy by-product of the program than its intended goal." Lackland H. Bloom, Jr., *NEA v. Finley: A Decision in Search of a Rationale*, 77 Wash. U. L. Q. 1, 14 (1999).

156 *Finley*, 100 F.3d at 686 (Kleinfeld, J., dissenting) (discussing *Rosenberger*; *Big Mama Rag, Inc. v. United States*, 631 F.2d 1030 (D.C. Cir. 1980); *Bullfrog Films, Inc. v. Wick*, 847 F.2d 502 (9th Cir. 1980)).

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157 *Finley*, 524 U.S. at 580.

158 *Id*. 580-81.

159 *Id*. at 581.

160 *Id.* at 582.

161 *Id.* at 581.

162 *Id.* (discussing 20 U.S.C. § 954(d)(2)).

163 *Finley*, 524 U.S. at 583 (citation omitted).

164 *U.S. v. American Library Association*, 539 U.S. 194, 205 (2003) (discussing and quoting *Finley*, 524 U.S. at 586).

165 Tex. Gov. Code § 485.024(a).

166 For example, the Texas film incentive program was allocated $95 million for 2014-15 by the Texas State Legislature. That amount was reduced to $32 million for 2016-17, then to $22 million for 2018-19. *See* Gromer Jeffers Jr., *Texas Film Incentive Program Picked up for Another Season, But Critics Vow to End Its Run, Dallas Morning* News, May 28, 2017, https://www.dallasnews.com/news/texas-legislature/2017/05/28/texas-film-incentive-program-picked-another-season-critics-vow-end-run.

167 *Bd. Of County Comm'ns v. Umbehr*, 518 U.S. 668, 674 (1996) (citing *Perry v. Sindermann*, 408 U.S. 593, 597 (1972)).

168 *Sindermann*, 408 U.S. at 597.

169 *Id.*

170 *Id.* (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)). The unconstitutional conditions doctrine has been applied to the denial of a variety of government benefits: tax exemptions, unemployment benefits, welfare payments, and, most often, government employment. *See Sindermann*, 408 U.S. at 597 (citations omitted).

171 500 U.S. 173 (1991).

172 See David Cole, *Beyond Unconstitutional Conditions: Charting Spheres of Neutrality in Government-Funded Speech*, 67 N.Y.U.L. REV. 675, 684 (1992) (discussing 42 C.F.R. § 59.10(a) (1991) ("Grants for Family Planning Services. Prohibition of activities that encourage or promote abortion.")).

173 *See Rust*, 500 U.S. at 177-79.

174 *Id.* at 180.

175 *Id.* at 196.

176 *Id.* at 192.

177 *Id.* at 194.

178 *Id.* at 193.

179 *Id.* at 198.

180 *Id.* at 199, note 5.

181 *Id.* at 197.

182 *Id.*

183 *Id.* at 199.

184 Cole, *supra* note 172, at 676 (citing *Rust*, 500 U.S. at 196-99).

185 *Rust* at 193 (quoting *Harris v. McRae*, 448 U.S. 297. 317 note 19 (1980)).

186 *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 549 (1983).

187 *Id*. at 549-50 (citation omitted).

188 *Davenport v. Washington Educ. Ass'n*, 551 U.S. 177, 188-89 (2007).

189 *Arizona Free Enterprise Club's Freedom Club Pac v. Bennett*, 131 S.Ct. 2806, 2834 (2011) (Kagan, J., dissenting).

190 The purpose of the program was also a relevant factor in *Finley*. There the majority observed, "In the 1990 Amendments that incorporated § 954(d)(1), Congress modified the declaration of purpose in the NEA's enabling act to provide that arts funding should 'contribute to public support and confidence in the use of taxpayer funds,' and that 'public funds . . . must ultimately serve public purposes the Congress defines.'" *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 588 (1998) (quoting 20 U.S.C. § 951(5)). This could have been an additional factor in the Court's decision to uphold the "decency and respect" provision at issue in that case.

191 Tex. Gov. Code § 485.024(a).

192 Tex. Gov. Code § 485.022(e).

193 *See* Tex. Admin. Code § 121.9(c)(3).

194 *Rust*, 500 U.S. at 199.

195 *Finley*, 524 U.S. at 612, note 7 (Souter, J., dissenting) (quoting *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995) (citing *Rust*, 500 U.S. at 194)).

196 *Finley*, 524 U.S. at 612 (Souter, J., dissenting) (citing *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 548 (1983) (internal quotation marks and brackets omitted); *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993) (when the government subsidizes private speech, it may not "favor some viewpoints or ideas at the expense of others"); *Hannegan v. Esquire, Inc.*, 327 U.S. 146, 149, (1946) (the Postmaster General may not deny subsidies to certain periodicals on the ground that they are "morally improper and not for the public welfare and the public good").

197 *Finley v. National Endowment for the Arts*, 100 F.3d 671, 684 (9th Cir. 1996) (Kleinfeld, J., dissenting).

198 847 F.2d 502 (9th Cir. 1980).

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199 *Finley*, 100 F.3d at 686 (Kleinfeld, J., dissenting) (discussing *Bullfrog Films*, 847 F.2d 902).

200 631 F.2d 1030 (D.C. Cir. 1980).

201 *Finley*, 100 F.3d at 686 (Kleinfeld, J., dissenting) (discussing *Big Mama Rag*, 631 F.2d 1030).

202 *Id.*

203 *Id.*

204 532 F.2d 792 (1st Cir. 1976)

205 *Finley*, 100 F.3d at 685 (Kleinfeld, J., dissenting) (discussing *Advocates for the Arts*, 532 F.2d at 795, *cert. denied*, 429 U.S. 894 (1976)).

206 *Finley*, 100 F.3d at 685 (Kleinfeld, J., dissenting) (discussing *Advocates for the Arts*, 532 F.2d at 795).

207 *Finley*, 100 F.3d at 685 (Kleinfeld, J., dissenting) (discussing *Advocates for the Arts*, 532 F.2d at 795).

208 *Finley*, 100 F.3d at 685 (Kleinfeld, J., dissenting) (discussing *Advocates for the Arts*, 532 F.2d at 795).

209 *Advocates for the Arts*, 532 F.2d at 796.

210 *Id.*

211 *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 552-53 (2001) (Scalia, J., dissenting) (citations omitted).

212 *Id.* (Scalia, J., dissenting) (citations omitted).

213 *Bullfrog Films, Inc. v. Wick*, 847 F.2d 502, 512 (9th Cir. 1980) (citing *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972)).

214 *Bullfrog Films*, 847 F.2d at 512 (citing *Grayned*, 408 U.S. at 108).

215 *Bullfrog Films*, 847 F.2d at 512 (citing *Grayned,* 408 U.S. at 108-09).

216 *Bullfrog Films*, 847 F.2d at 512 (citing *Grayned*, 408 U.S. at 109).

217 *Finley*, 524 U.S. at 589.

218 *Finley v. National Endowment for the Arts*, 100 F.3d 671, 688 (9th Cir. 1996) (Kleinfeld, J., dissenting).

219 *Id.* at 688 (Kleinfeld, J., dissenting) (citations omitted).

220 *Finley*, 524 U.S. at 588-89 (1998) ("Under the First and Fifth Amendments, speakers are protected from arbitrary and discriminatory enforcement of vague standards." *Id.* at 588 (citing *NAACP v. Button*, 371 U.S. 415, 432-433, (1963)).

221 *Finley*, 524 U.S. at 588 (citations omitted).

222 *Id.* at 589 (citation omitted). "In the context of selective subsidies, it is not always feasible for Congress to legislate with clarity." Id. "Section 954(d)(1) merely adds some imprecise considerations to an already subjective selection process. It does not, on its face, impermissibly infringe on First or Fifth Amendment rights." Id. at 590.

223 *Finley*, 524 U.S. at 587-88 (citing *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 587-88 (1983)).

224 *Finley*, 524 U.S. at 586 "In fact, after filing suit to challenge § 954(d)(1), two of the individual respondents received NEA grants." *Id.*

225 *Id.* at 587.

226 *Id.*

227 *Finley*, 524 U.S. at 587 (citing *Regan*, 461 U.S. at 550 (internal quotation marks omitted); *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 237 (1987) (Scalia, J., dissenting).

228 64 F. Supp. 2d 184, 190 (E.D. N.Y. 1999).

229 *Id.*

230 Kwame Holman, *The Art of Controversy*, PBS NewsHour (Oct. 8, 1999), transcript available at http://www.pbs.org/newshour/bb/entertainment-july-dec99-art_10-8/.

231 *Id.*

232 *Brooklyn Institute of Arts and Sciences*, 64 F. Supp. 2d at 184.

233 *Id.* at 189.

234 *Id.*

235 *Id.* at 191

236 *Id.*

237 *Id.* at 186.

238 *Id.*

239 *Id.* at 191.

240 *Id.* at 186

241 *Id.* at 191-92

242 *Id.* at 191.

243 *Id.* at 198 (quoting *Perry v. Sindermann*, 408 U.S. 593, 597 (1972)).

244 *Brooklyn Institute of Arts and Sciences*, 64 F. Supp. at 200 (citing *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 548 (1983)).

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245 *Brooklyn Institute of Arts and Sciences*, 64 F. Supp. 2d at 200 (citing *Regan*, 461 U.S. at 548).

246 *Brooklyn Institute of Arts and Sciences*, 64 F. Supp. 2d at 200 (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 791, (1989)).

247 *Brooklyn Institute of Arts and Sciences*, 64 F. Supp. 2d at 202 (discussing *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998)).

248 *Brooklyn Institute of Arts and Sciences*, 64 F. Supp. 2d at 200. The court discussed a "remarkably similar" case, *Cuban Museum of Arts and Culture, Inc. v. City of Miami*. In that case, the *City of Miami* had "refus[ed] to renew an expired lease with the Cuban Museum because . . . [of] the City's opposition to the museum's exhibition of works of Cuban artists who were either living in Cuba or who had not denounced Fidel Castro," which "were highly offensive to a large segment of the Cuban population of Miami." The City's refusal to renew the lease because of objections to the museum's exhibit was held to violate the museum's First Amendment rights. *Brooklyn Institute of Arts and Sciences*, 64 F. Supp. 2d at 200 (discussing *Cuban Museum of Arts and Culture, Inc. v. City of Miami*, 766 F. Supp. 1121, 1126-27 (S.D. Fla. 1991).

249 *Brooklyn Institute of Arts and Sciences*, 64 F. Supp. 2d at 202 (discussing *Finley*, 524 U.S. 569).

250 *Brooklyn Institute of Arts and Sciences*, 64 F. Supp. 2d at 202 (discussing *Finley*, 524 U.S. 569).

251 *Brooklyn Institute of Arts and Sciences*, 64 F. Supp. 2d at 202.

252 *Id.*

253 316 F. Supp. 2d 433 (W.D. Tex. 2001).

254 *Id.* at 436-37 (citation omitted).

255 *Id.* at 439 (citation omitted).

256 *Id.* (citations omitted).

257 *Id.* at 440, 443-44 (citation omitted).

258 *Id.* at 437 (citation omitted).

259 *Id.* at 440.

260 *Id.* at 440-441 (citation omitted).

261 *Id.* 441 (citation omitted).

262 *Id.* (citation omitted).

263 *Id.* (citation omitted).

264 *Id.* (citation omitted).

265 *Id.* at 441-42 (citations omitted).

266 *Id.* at 442-44 (citations omitted).

267 *Id.* at 442 (citations omitted). "[A]rts funding for the City of San Antonio ("City") [was] vetted through the Department of Arts and Cultural Affairs (DACA)." Id. at 438.

268 The 1997 budget also eliminated funding for VAN, an organization whose purpose was to "bring[] national and international artists who are visiting or working in other parts of Texas to San Antonio for programs and networking." Id. Esperanza had acted as a sponsor and fiscal agent for VAN in its grant applications with the city. *Id.* at 439.

269 *Id.* at 442.

270 *Id.* at 443-44.

271 *Id.* at 436. VAN also joined the challenge. *Id.*

272 *Id.* at 444 (citing *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 644 (1943)).

273 524 U.S. 569 (1998).

274 *Esperanza*, 316 F. Supp. at 446 (quoting *Finley*, 524 U.S. at 586).

275 *Esperanza*, 316 F. Supp. at 447 (citing *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) (defining "viewpoint" as "the specific motivating ideology or the opinion or perspective of the speaker"); *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384, 393 (1993) (finding viewpoint discrimination where school "permitted school property to be used for the presentation of all views about family issues and child rearing except those dealing with the subject matter from a religious standpoint"); *R.A.V. v. St. Paul*, 505 U.S. 377, 384 (1992) (government may not "proscribe only libel critical of the government")).

276 *Esperanza*, 316 F. Supp. 2d at 447 (citing *Brooklyn Institute of Arts and Sciences v. City of New York*, 64 F. Supp. 2d 184, 200 (E.D. N.Y. 1999); *Cuban Museum of Arts and Culture, Inc. v. City of Miami*, 766 F. Supp. 1121, 1129 (S.D. Fla. 1991)).

277 *Esperanza*, 316 F. Supp. 2d at 456.

278 *Id.*

279 *Id.* at 457-58 (citations omitted).

280 *Id.* at 454-55 (citation omitted).

281 *Id.* at 455 (citation omitted).

282 *Id.* at 441.

283 *Id.* at 461.

284 *Id.* "[T]he evidence in this case cannot support a conclusion that the council would have defunded the plaintiffs in the absence of Esperanza's expressions of viewpoint. Indeed, the overwhelming evidence suggests that absent the constitutionally protected conduct, most city council members would never have heard of Esperanza." *Id.* at 462.

285 *Id.* at 463.

286 *Id.* at 479.

287 *Id.*

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288 *Machete's Chop Shop, Inc. v. Texas Film Commission*, 483 S.W.3d 272, 276 (Tex. Ct. App. 2016).

289 *See* Whittaker, *supra* note 15.

290 *See supra* notes 12-20 and accompanying text.

291 *Machete's Chop Shop*, 483 S.W.3d at 276-77.

292 *Id.* at 277.

293 *Id.* The statute specifies that the Music, Film, Television, and Multimedia Office shall make this determination. That Office assigned administration of the Incentive Program to the Film Commission. *See id.* at 276.

294 *Id.* at 279 (discussing Tex. Gov. Code § 485.022(f).

295 *Machete's Chop Shop*, 483 S.W.3d at 279 (discussing Tex. Gov. Code § 485.022(e)).

296 *Machete's Chop Shop*, 483 S.W.3d at 279.

297 *Id.*

298 *Id.* at 282-83.

299 *Id.* at 283.

300 *Id.* (Tex. Ct. App. 2016) (citing Tex. Gov. Code § 485.022(e)). Furthermore, "the absence of an applicant's right to judicial review of the Commission's decision on a grant application confirms the Legislature's intent to delegate broad discretion to the Commission to determine which projects will receive Program grant funds." *Machete's Chop Shop*, 483 S.W.3d at 283. (citation omitted).

301 *Machete's Chop Shop*, 483 S.W.3d at 283.

302 *Id.* at 282.

303 *Id.* at 283.

304 First Amendment issues are only raised when it's the government objecting to or restricting speech. See Columbia Broadcasting System v. Democratic National Committee, 412 U.S. 94, 139 (1973) (Stewart, J., concurring) ("The First Amendment protects the press from governmental interference….")

305 *September 3-5, 2010*, Box Office Mojo, http://www.boxofficemojo.com/weekend/chart/?view=&yr=2010&wknd=36&p=.htm.

306 *Machete (2010)*, IMDb, http://www.imdb.com/title/tt0985694/.

307 *2010 Domestic Grosses*, Box Office Mojo, http://www.boxofficemojo.com/yearly/chart/?yr=2010&p=.htm.

308 *Machete Productions L.L.C. v. Page*, 809 F.3d 281, 286 (5th Cir. 2015).

309 809 F.3d 281 (5th Cir. 2015).

310 *Id.* at 286.

311 *Id.*

312 *Id.*; Muriel Perkins, *'Machete Kills' Producer Sues Texas Officials*, Courthouse News Service, March 17, 2014, https://www.courthousenews.com/machete-kills-producer-sues-texas-officials/.

313 *Machete Productions*, 809 F.3d at 289.

314 *Id.* (quoting *Rust v. Sullivan*, 500 U.S. 173, 193, 196 (1991)).

315 *Machete Productions*, 809 F.3d at 289 (quoting *Rust*, 500 U.S. at 193, 196).

316 *Machete Productions*, 809 F.3d at 289 (quoting *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 572, 583).

317 *Machete Productions*, 809 F.3d at 290 (quotations omitted) (quoting *Finley*, 524 U.S. at 587-88).

318 *Machete Productions*, 809 F.3d at 290 (quoting *Rust*, 500 U.S. at 197).

319 *Machete Productions*, 809 F.3d at 290 (quoting *Finley*, 524 U.S. at 587).

320 *Machete Productions*, 809 F.3d at 290 (quoting *Finley*, 524 U.S. at 583).

321 *Machete Productions*, 809 F.3d at 290 (quoting *Rust*, 500 U.S. at 197).

322 *Machete Productions*, 809 F.3d at 290.

323 *Id.* (citing *Ashcroft v. al-Kidd*, 563 U.S. 731 (2011)).

324 *Machete Productions*, 809 F.3d at 291 (quoting *Finley*, 524 U.S. at 588-89).

325 *Machete Productions*, 809 F.3d at 291. Here, the court observed:

> Both provisions require that the relevant agency consider the "general standards of decency and respect for the diverse beliefs and values" of citizens. The Incentive Program's statute, however, adds that the Commission may also deny an application due to "inappropriate content or content that portrays Texas or Texans in a negative fashion." *Id.* (citations omitted).

326 *See supra* notes 171-89 and accompanying discussion.

327 *See supra* notes 123-35 and accompanying discussion.

328 *See supra* notes 209-22 and accompanying discussion.

329 *See supra* notes 314-23 and accompanying discussion.

330 *See supra* notes 164-66 and accompanying discussion.

331 *See supra* notes 105-17 and accompanying discussion.

332 *See supra* notes 195-96, 226-27, and accompanying discussions.

333 However, if those laws or regulations are applied in a coercive or suppressive manner, an affected filmmaker may be able to mount a successful First Amendment challenge in court. *See supra*

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notes 195-96, 226-27, and accompanying discussions.

334 Tex. Gov. Code § 485.022(e).

335 *See supra* notes 314-23 and accompanying discussion.

336 *See supra* notes 323-42, 253-71, and accompanying discussions.

337 *See supra* notes 314-23 and accompanying discussion.

338 Karen M. Kowalski, *National Endowment for the Arts v. Finley: Painting a Grim Picture for Federally-Funded Art*, 49 DePaul L. Rev. 217, 268 (1999). (citations omitted).

339 Harold B. Walther, Note, *National Endowment for the Arts v. Finley: Sinking Deeper into the Abyss of the Supreme Court's Unintelligible Unconstitutional Conditions Doctrine*, 59 Md. L. Rev. 225, 250 (2000).

340 *Id.*

341 Tex. Gov. Code § 485.022(e).

342 *See supra* notes 142, 325, and accompanying discussions.

343 *See* Sarah F. Warren, Note, *To Fund or Not to Fund? That Is Still the Question*, 19 Cardozo Arts & Ent LJ 149, 171 (2001) (citations omitted).

344 See *supra* notes 209-22 and accompanying discussion.

345 *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 552-53 (2001) (Scalia, J., dissenting) (citations omitted).

346 *See supra notes* 157-63 and accompanying discussion.

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NCAA Bribery Scandal: A Full Court Press

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suade student-athletes to sign with particular universities associated with Adidas, and upon entering the NBA, to sign apparel agreements with Adidas.[28] Because the payments are in violation of NCAA bylaws, Gatto and others concealed the payments by "(i) funneling them to athletes and/or their families indirectly through surrogates and non-profit institutions controlled by the scheme participants; and (ii) making or intending to make misrepresentations to the relevant universities regarding the involvement of student-athletes and coaches in violation of NCAA rules."[29]

Among other similar transactions, Gatto and his alleged accomplices funneled $100,000 from Adidas to the family of a high school basketball player in exchange for that athlete to play at an Adidas-sponsored school.[30] Further, this bribe returned the commitment from that player to retain one of the accomplices as his agent upon turning professional[31] and sign his apparel deal with Adidas once joining a professional league.[32]

The DOJ case hinges on the notion that Gatto and others defrauded the relevant universities in multiple ways.[33] First, the bribery scheme allowed student-athletes to obtain financial aid for their athletic services through fraudulent means in violation of NCAA rules.[34] For the student athletes and coaches, this means falsely certifying they did not accept or have knowledge of any acceptance of additional payment in violation of NCAA rules. Second, the bribery scheme defrauded universities by depriving them of information necessary to making informed choices and a creating risk of tangible economic harm to the university: plummeting reputation from scandal, monetary fines, ineligibility of the team and ineligibility of the player.[35]

The complaint details four charges against Gatto. The first is wire fraud conspiracy. Gatto allegedly willfully and knowingly did combine, conspire, confederate and agree together (with other named actors) and with each other to commit wire fraud in violation of 18 U.S.C. § 1343.[36] The statute applies to anyone intending "to devise any scheme to defraud … by means of false or fraudulent pretenses … in interstate or foreign commerce…."[37] The complaint states that because these student-athletes were ineligible to participate in athletics programs after receiving payment, Gatto and other agents were defrauding the universities who sought to recruit and provide scholarships for such athletes.[38]

The second is wire fraud. The complaint uses this count to demonstrate the achievement of completing such fraud by Gatto and the other conspirators.[39] It finishes by stating that the fraudulent behavior caused "the universities to provide athletic scholarships to student-athletes who, in truth and in fact, were ineligible to compete as a result of the bribe payments."[40]

The third count, wire fraud, alleges the fraudulent behavior exposed the universities to "tangible economic harm, including monetary and other penalties imposed by the NCAA."[41] This differs from the harm in Count Two (defrauding universities to recruit ineligible student-athletes) but cites the same federal statutes.[42]

Count four charges a money laundering conspiracy. The complaint alleges behavior to conceal the source, ownership, and control of proceeds of specified unlawful activity.[43] It highlights the conducting of a financial transaction, involving proceeds from an unlawful activity, being part of the process of completing Counts One, Two, and Three.[44]

The remainder of the complaint goes into extensive fact detail of phone calls, video recording, FBI surveillance, funneling payments, and highly correlated player decisions regarding where they will attend school.[45] The initial news sent waves throughout the sports world, as this was the first major criminal indictment regarding alleged recruiting violations.[46] However, to many with knowledge of the college basketball recruiting process, there was little surprise and the news was a long time coming.[47]

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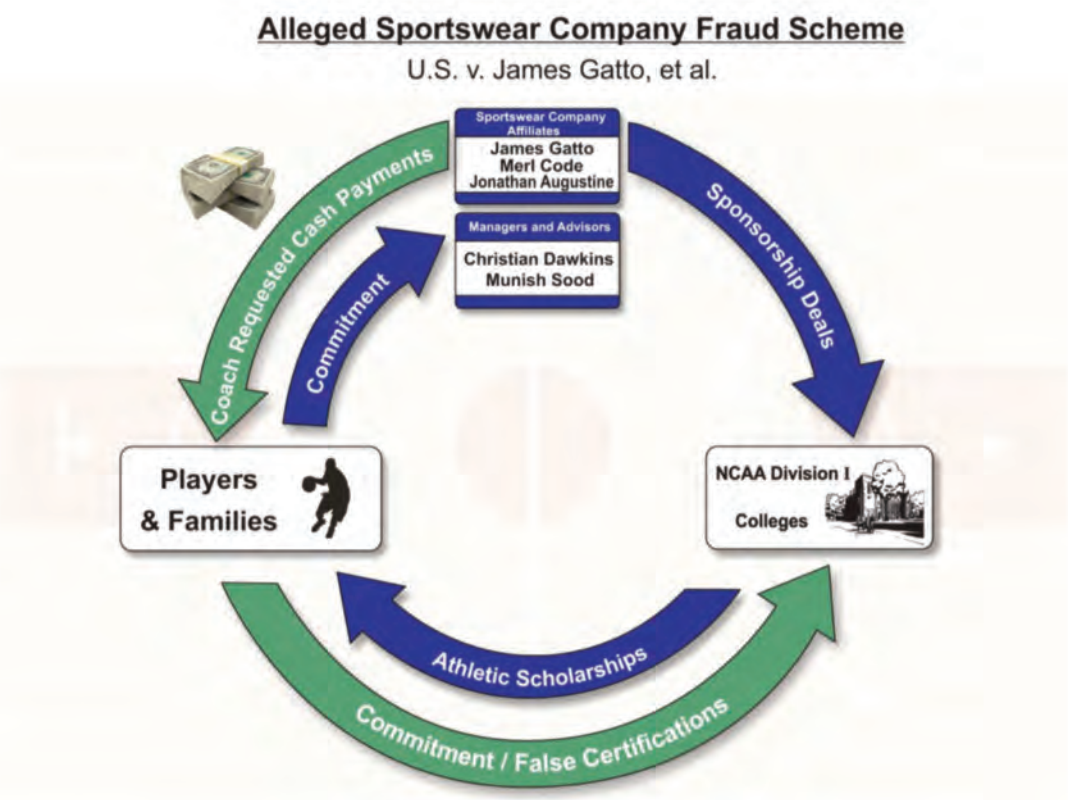

D. The Fraud Scheme Playbook

Posted by the Southern District of New York, the above diagram has become the best visual for analyzing the flow of money and incentives found in the indictment. Again, the defendants send bribe payments to families of multiple student-athletes in exchange for commitments that the student-athletes would enroll in the universities sponsored by the defendant's apparel company, Adidas. Then, the student-athletes would sign lucrative endorsement contracts with Adidas and retain the professional services of the manager and advisors upon becoming professionals.

E. In the Courtroom

Gatto, along with each of the other defendants listed in the three complaints, pleaded not guilty to their respective charges on November 15th, 2017.[48] On December 22nd, Gatto and other defendants filed a joint motion to dismiss the indictment.[49] In this joint motion, the defendants contend that the payments to prospective student-athletes and their families do not constitute a crime.[50] Specifically, the defendants urge that charges filed against them are merely federal prosecutors trying to criminalize violations of NCAA rules.[51] The NCAA Bylaws, of course, are private legislation, where enforcement for violations of such rules lies solely within the NCAA's jurisdiction.[52]

The motion states that the "payments purportedly made by Defendants were not themselves unlawful … It is not against the law to offer a financial incentive to a family to persuade them to send their son or daughter to a particular college."[53] Gatto's legal representatives maintain that the indictment misses the legal footing on three marks. First, the indictment "fails to allege the existence of a scheme to defraud because the purpose of the alleged scheme was to assist, not to injure" the universities mentioned (including Louisville).[54] Specially, the motion states, "The wire fraud statute prohibits 'schemes to defraud' victims, not

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schemes to help them. The Indictment takes pains to assert that the purpose of Defendants' alleged conspiracy was to 'step up and help' Louisville … In particular, the Government expressly alleges that Defendants' scheme was motivated by a desire to 'assist' the Universities to recruit talented athletes and concedes that Defendants provided funds to the three families only after they were asked to do so by the Universities' basketball coaches."[55] Second, the indictment also fails to properly allege the wire fraud conspiracy charge "because the object of the alleged scheme was not to obtain money or property from the universities."[56] Third, the indictment fails to allege that the defendants schemed to mark false representation of material fact,[57] that "a wire fraud charge cannot rest on an allegation that either there was a false statement or there was none at all."[58]

The motion was also critical of public policy considerations regarding the DOJ investigation.[59] It states, "After spending enormous resources, the Government has strained to find any legal theory—ultimately resorting to one that was directly rejected by a Federal Court of Appeals—in order to transform NCAA rule violations into a conspiracy to commit federal wire fraud."[60] The motion commented on the newfound enthusiasm for investigating these NCAA violations, stating that schools and agents had already committed "thousands of violations over the decades" with "conduct identical to—or far worse than—Defendants' here."[61] "What is new is not the Defendants' conduct, but the Government's claim that it constitutes wire fraud."[62] Further, "it is extremely rare for the Government to prosecute an alleged wire fraud schemer where, as here, the defendants sought to obtain nothing from the victim."[63]

On January 19, 2018, attorneys from the Southern District of New York filed the United States' response to the motion to dismiss, most provokingly calling the motion "premature."[64] Procedurally, the response states that the defendants "do not seriously dispute that the Indictment satisfies the pleading requirements of Fed. R. Crim. P. 7…."[65]

The government highlights the defendants committing fraud by, under false pretenses, causing the universities to provide, and later lose, something of value—in this case, the athletic scholarships awarded to ineligible student-athletes.[66] The second major theory of fraud the government offers centers around the withholding of information necessary for the universities to properly "exercise their intangible right to control the use of their assets, including how to best allocate a limited number of athletic scholarships and the funds necessary to finance those scholarships, while exposing the Universities to a risk of even greater economic loss, including fines and other financial penalties."[67] These theories are advanced while being coupled with the premise that the fraud scheme was causing harm to the victim-universities.[68] This, the government argues, does not require the alleged fraudsters to obtain money or property from the universities.[69] The defendants' motion to dismiss and the government's response pair neatly and allow for a fairly clean comparative analysis.

II. Why the Department of Justice Is the Heavy Favorite

The high-profile nature of the NCAA Bribery Scandal has spawned an outpouring of media opinions across the country. It is, naturally, the easiest route to take, using generalities from the available legal documents at this juncture to form an estimation of what will eventually be the outcome of the case. The appropriate course, however, is to thoroughly analyze the particular law behind the issue.

The alleged bribery and defrauding scheme conducted by numerous actors (agents, coaches, student-athletes and their families, global shoe company executives)— said by many to be accountable only through the jurisdiction of the NCAA and thus out of the reach of the federal courts—will not only be punishable by career-debilitating NCAA enforcement measures which will effect wide-spread, long-term disciplinary provisions, but more critically, can and will be fully prosecuted because of the high degree of Second Circuit case law that is directly applicable to the facts found in this indictment.

There is a plethora of cases on point, with facts not only similar to those presented, but also including the NCAA, which is important to note because of the slightly nuanced manner in which courts have treated legal proceedings involving the NCAA since the landmark *NCAA v. Okla. Board of Regents* case in 1984. It is this Second Circuit binding precedent which greatly favors an outcome in favor of the United States Attorney's Office in each of the three separate indictment files regarding the case at large. There is no contention that the fraudulent conduct of these actors is in severe violation of NCAA bylaws, but it is now

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the prosecution's job to persuade the court of their felony fraud crimes. The following detailed analysis of applicable law shows that the game clock is waning on the indicted defendants.

A. The Indictment Properly Alleges That the Defendants' Fraud Scheme Harmed the Universities

One of the main contentions that the defendants seek to raise in their motion to dismiss is that the fraudulent scheme actually benefited the universities by incentivizing student-athletes to attend.[70] They argue that the indictment fails to properly allege a fraud scheme because there is not fraud when "the scheme's purpose is to *help* the victim, or where the schemers acted at the victim's instruction."[71] These assertions are wrong for a number of factual reasons that conflict with significant legal precedent.

First, the indictment sufficiently alleges the defendants' thorough efforts to withhold information about their scheme from university officials.[72] If the university officials would have had knowledge of such facts—bribery payments to players—the basketball program would likely not offer scholarships to such players. Even if they did, they would be doing so at great peril, knowing the ramifications of student-athlete ineligibility and NCAA sanctions upon the university. Thus, the information withheld from the university had a high economic value in its ability to help the university properly make decisions regarding control of university assets. Because the loss of scholarships (tangible financial loss) and potential sanctions from the NCAA (unknown tangible financial loss) are money and property from the university, the fraud scheme, factually, would serve to cause harm to the university.

Moreover, there is very strong legal precedent, dealing with highly similar factual situations, that support the validity of the indictment. In *United States v. Gray*, three Baylor University basketball coaches were charged with fixing academic records for basketball recruits to ensure their eligibility to play for the team.[73] The Fifth Circuit affirmed the fraud conviction on the premise that the conduct of the defendant basketball coaches caused harm to Baylor.[74] Sure, the conduct of the coaches was *meant* to assist Baylor in fielding a better basketball team—as the defendants in the Gatto indictment also claim. However, the actual result of the fraudulent behavior had highly detrimental costs to the university. The harms noted by the Fifth Circuit include the university being forced into a costly investigation, not receiving the quality of student it desired, and detrimental effects on the basketball team itself.[75] The court finished with a statement, similar to that which was properly mentioned in this indictment, that "it is quite reasonable to believe that [the university] would have changed its business conduct had it known of" the defendants' conduct.[76]

In *United States v. Piggie*, the defendant ran an AAU basketball program in which he paid young athletes in cash to play on his team, with the understanding that they would share their profits with him should they become professional players.[77] This is essentially the same factual scenario that accounts for part (not all) of the fraud scheme at issue in the indictment.[78] These athletes were ineligible for NCAA competition after receiving payment from the coach.[79] Once the athletes were required to make representations to universities regarding their amateur status to obtain scholarships, they were required to submit false and fraudulent statements.[80] In reliance on such statements, universities awarded these student-athletes scholarships, which they likely would not have done with full and proper knowledge of their ineligible status.[81] The Eighth Circuit properly rejected the argument (in line with other similar opinions) that the defendant did not intend for the universities (who accepted his AAU athletes) to be the victims of his scheme.[82] The court continued, stating that the cost of the university issuing these scholarships under false pretenses was attributable to the actions of the defendant, and, most damningly, he had "intended to deprive the [u]niversities … of the intangible right to award scholarships to amateur players and maintain a system of *amateur* athletic competition."[83]

Finally, in *United States v. Walters*, a sports agent was convicted of fraud in a bribery scheme paying multiple college football players in order to achieve commitments that he could represent them once they turn professional.[84] Though the Seventh Circuit reversed the conviction on other grounds (discussed later), it still maintained that the bribery scheme harmed the universities.[85] It stated that if the paid student-athletes had "told the truth," the universities would have stopped awarding them scholarships, thus better allocating the scholarships which are property of the university.[86]

The defendants also maintain that the bribery payments were not "otherwise unlawful" (in reference to merely violating NCAA bylaws) because it "is not unlawful to pay someone to select a particular school or to use one's services in the future."[87] This

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may be true in a vacuum, but obviously there are additional factors that must be considered in this situation. The government correctly argues that these are not merely payments to have someone select a particular school, but for someone "to *seek a scholarship* from that school and to do so under false pretenses."[88] The defendants made these payments to the prospective student-athletes knowing they would be concealed from the recruiting universities and that if known by the universities, would be extremely critical in the resulting decision-making.

In sum, the defendants are making run-around arguments relying on a technicality. In reality, it not only makes common sense that actions that lead to universities awarding scholarships under false pretenses significantly harm the university in reputational and economic ways, but legal precedent also has aligned itself squarely against the defense. The scheme in and of itself was meant to mislead the universities. Each of the defendants are exceptionally well-versed in the commercial and social world behind amateur and professional basketball, and have full knowledge of their fraudulent actions and the potential ramifications they would have, now publicly known, for the universities. The defendants were aware that they violated NCAA Bylaws, that there was pending public fallout from scandal, and of the financial injury that would ensue. The finding of tangible harm to the universities in the indictment is readily discernable.

B. Evidence of Obtaining Money or Property by the Defendants in a Fraud Scheme is Unnecessary to Prove Guilt Under Second Circuit Law

The defendants also argue that the indictment fails to properly allege wire fraud conspiracy because it "fails to allege that defendants schemed to *obtain* money or property" from the universities, which the defendants contend is a "fatal defect."[89] The defendants rely, with particularly considerable weight, on the *Walters* case to emphasize that for a valid wire fraud conspiracy to be alleged, the defendants must use false pretenses to obtain money or property for themselves.[90] Again, the defense comes short in face of significant factual and legal stances.

Sure, it may be true that the scholarships earned by the student-athletes under false pretenses, thus defrauding the universities of property, are not awarded to the named defendants in the indictment. However, the scholarships are directly obtained and benefit scheme participants, the families of student-athletes who are participants in the fraud scheme.[91] Thus, the transfer of money to members of the fraud scheme is properly alleged by the government in the indictment.

The *Walters* case is critical to distinguish as it is the premier weapon used by the defendants because its favorable holding. The *Walters* case, again, references a sports agent convicted of fraud based on his payments to college football players—already enrolled at universities.[92] Similar to an aspect of the scheme listed in the indictment, the payments were intended to gain assurances that the players would retain Walters as their agent upon turning professional.[93] The Seventh Circuit reversed the conviction of Walters—in evaluating the quality of evidence after the trial was complete—because "no money moved from the universities to Walters."[94] A critical difference in these facts to those present in the indictment is that the indictment does allege behavior defrauding the universities AND that those obtaining the benefits of the fraud (families of athletes obtaining athletic scholarships) are part of the defrauding scheme.[95]

Moreover, the requirement stated in *Walters* that the fraudsters must obtain money from the victim (even though this is cleared up in the above paragraph) is not the law in the controlling Second Circuit.[96] Stated succinctly in one of the many *Procelli* fraud cases handled by the Second Circuit, "Neither the mail nor wire fraud statute requires that a defendant 'obtain' property before violating the statute."[97] Procelli argued that his fraud conviction could not stand after intentionally failing to collect a New York state sales tax at a number of his gas stations he owns because he had not obtained any money from the state.[98] The Second Circuit rejected this argument.[99] Again in court, Porcelli argued that because no money went from the state into his pockets, that he did not "obtain" money for the purposes of the statute.[100] Again, the Second Circuit held firm in stating that "neither the mail nor wire fraud statute requires that a defendant 'obtain' property before violating the statute,"[101] and moreover, "under this [c]ourt's analysis, the defendant does not need to literally 'obtain' money or property to violate the statute."[102]

As recently as this past year, the Second Circuit has reaffirmed its core ruling from the *Porcelli V* case in *United States v. Finazzo*.[103] It is also important to note that several other circuits endorse this view, challenging the Seventh Circuit ruling in the *Walters* case.[104] Through other courts' support, and particularly the precedent set by the Second Circuit, the defendants' argument

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cannot stand. The indictment properly alleges the scheme to defraud the universities because it "alleges that the defendants' scheme was intended to deprive the victims of money or property under false pretenses."[105]

Next, a second aspect of depriving a fraud victim of property must be discussed, one that was not mentioned by the defendants, as pointed out by the government's response.[106] The more commonly thought of deprivation of property includes tangible assets, such as money found in an athletic scholarship or spent on resulting investigations into fraudulent behavior. However, this second aspect, depriving victims of an intangible right, is also supported by Second Circuit law and is highly adverse to the defendants' position. This theory does not require a transfer of property at all, or even that money or property be "obtainable" by the defendants.[107] This "right to control" theory has been recognized by the Second Circuit.[108] It is based upon the victim of the fraud having "been deprived of potentially valuable economic information."[109] First-year property courses teach students about the varying interests related to property.[110] Here the Circuit acknowledges the property interest of "controlling his or her own assets."[111] Specifically, wire fraud can occur if the resulting withholding or misrepresentation of information results in an uninformed decision that has an economic impact.[112] This chief harm—depriving one of necessary information in its control of its assets and in economic decision-making—defines a violation to the "right to control" theory.[113] To illustrate, in the previously mentioned *Finazzo* case, the defendant was charged with defrauding his employer on this theory because he intended to cause tangible economic harm to his employer.[114] There was no mention of the defendant obtaining any property or money himself, merely using fraudulent methods to deprive his employer of the control of its assets.

In the present indictment, the government correctly points to the extensive measures taken by the fraud schemers to withhold material information—that the prospective athletes would be ineligible to compete—from the universities that would certainly affect their decision-making regarding awarding athletic scholarships to the student-athletes.[115] This withholding of information leads not only to the direct benefit of fraud schemers—through the obtaining of money through scholarship funds by families participating in the scheme—but also to depriving the university of tangible economic interests in the form of athletic scholarships and now the extensive costs of investigation, litigation, and public relations. Furthermore, the indictment sufficiently alleges that the deprivation of the intangible right to control and properly allocate property, without the fraudulent withholding or misrepresentation of information, is a violation under the wire fraud statute. This violation need not require the victim to have tangible economic loss nor the fraudster to directly gain. The defendants fail to address this critical Second Circuit component of the alleged charges.

C. The Indictment Properly Alleges That the Object of the Fraud Scheme Was to Deprive the Universities of Money or Property

Finally, the defendants argue in favor of their motion to dismiss stating that the indictment "does not even allege that the object of defendants' fraudulent schemes was to *deprive* the Universities of money or property.[116] This argument will be the most challenging for the government to overcome because of the difficulty of proving intent. The defendants in this indictment are seeking personal financial gain. James Gatto is Adidas' Director of Global Sports Marketing for basketball.[117] His interest is not in seeing Louisville basketball or other universities succeed by recruiting star players—he went to a small college in upstate New York.[118] He does not have interest in providing families with money to pivot their child to a certain school. His only interests are in the bottom line. How can he grow Adidas' brand by putting the best athletes in Adidas apparel in college and professionally? How can he use the increased exposure and marketing results to leverage his compensation higher? Merl Code and Christian Dawkins, other defendants in the case, are financial advisors and agents. They are not interested in a particular university's basketball program, or even the results of a global apparel company. They are interested in securing guarantees that they will represent top basketball talent when they turn professional and the 4% fee of the contracts that those players will sign. The totality of the entire scheme can be wrapped up succinctly: one actor at each step of the scheme must be willing to break the rules, and if so, all actors will profit.

The government's response does its best to persuade the court of the intentions of the defendants using legal parameters.[119] It reminds the court of the parameters of Section 1343 wire fraud—that obtaining money or property was the "object" of the scheme.[120] Here, the defendants argue that the harms alleged were "unintended repercussions" of their conduct.[121] The government contends that this amounts to the defendants not wanting to get caught.[122] Furthermore, even if the scheme were

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never uncovered, the actions still defrauded universities out of their intangible right to control the allocation of their scholarships without misrepresentation of information.[123] The *Piggy* and *Gray* cases are used to support these notions legally. Even if the "scheme had never been discovered," the universities were defrauded because they were stripped of their ability to accurately give scholarships to true amateurs.[124] By misrepresenting students' academic records to ensure their eligibility, the defendants in the Gray case harmed the university by not allowing it to get the type of student it anticipated, and that "failure to disclose the scheme" to the university was highly critical as the university would have otherwise been able to recruit prospective student athletes that properly fit the academic standards.[125]

The defendants point to two civil cases which indicate holdings where the money and property of others was not the "goal" of the fraud scheme. First, a motion to dismiss was granted because the complaint did "not allege that the defendants used—or intended to use—their misrepresentations to target a third party's money or property."[126] This is fairly easily quashed with another look at the government's indictment which clearly indicates that it alleges misrepresentations were made with the purpose to obtain scholarships from the universities.[127] Second, a judge dismissed an election controversy suit because the "objection of the scheme … was control over the Independence party, which cannot be considered property" of a victim.[128] This too is easily handled by the original indictment which very blatantly alleges the defendants schemed to obtain money and intangible property.[129]

The indictment argues that goal of the conspiracy was to "obtain athletic-based financial aid for the student-athletes from NCAA Division I universities through false and fraudulent means."[130] It continues, in a factual stretch, stating the defendants' additional goal was to "deprive the Universities of their intangible right to control their assets by not only causing false and fraudulent statements to be made to the Universities, but further by taking careful steps to conceal their criminal scheme from the Universities."[131] The first goal is reasonable when observed. It indeed was the intention of the defendants to push the particular student-athletes to certain schools, and to do so required fraudulent means.

The additional goal seems much more of a reach by the government. It implies that the defendants sought to harm the property rights of the respective universities. As previously mentioned, the defendants have no interest in affecting the property rights of the schools. They are solely interested in pushing certain student-athletes to play at Adidas schools. This is how they make their money. By making this leap, the government loses some credibility in the persuasiveness of its argument. Indeed, by studying the material related to the charges, trends for each side become more and more apparent. The defendants argue with strong practical tact, through knowledge of the industry and of the full extent of their own actions and communications. The government, in contrast, relies much more strongly on sound legal theory. While doing so, they have shown a strong grasp for the applicable law in accordance to the facts of the indictment—one that should provide a great advantage. They must not be too boisterous as litigation continues to unfold to lose credibility. It is more intelligent to build a shack on a rock than a castle in the sand. Nonetheless, this particular issue of purpose is highly contentious and should reflect that particular argument throughout litigation.

In sum, popular opinion around the country continues to view the NCAA Bribery Scandal as a case outside the reach of the federal government.[132] This group sees violations only of the NCAA bylaws, and an overreach of DOJ authority that, in turn, improperly uses its resources in an area where they could more properly be allocated elsewhere. A deeper analysis into the controlling law indicates that is not the circumstance. Second Circuit precedent and other highly similar factual cases strongly favor an outcome in favor of the government. The DOJ will need to convince the court that the universities were harmed by the defendants and their scheme. Highlighted most prominently by the aforementioned *Gray* and *Piggie* cases, this burden can and should be met.

The matter is critical for a number of reasons. First, it is the most extensive federal judicial intervention into the NCAA and its governing policies since the extensive antitrust discussion found in the *NCAA v. Okla. Board of Regents* case.[133] Second, it clearly shows the NCAA's lack of ability to regulate its own system.[134] While many around the world of amateur and college basketball are correctly aware of the prevalence of illegal financial recruiting, the NCAA had turned a blind-eye to the issue.[135] In an era where there is increasing outside support to alter the current amateurism model used by the NCAA,[136] the scandal certainly provided an opportunity to further the discussion. The United States is the only country that relies on the amateurism model

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for major sports and in such large context.[137] With an increasing level of frequency, prominent young athletes are leaving the country to play overseas in an effort to avoid the NCAA: whether it be for publicity purposes,[138] the opportunity to provide financial support for their family,[139] or an increasingly frustrating and lengthy investigation in which the NCAA has yet to come to a resolution.[140] A seismic shift in the billion-dollar industry of intercollegiate athletics is on the horizon. It is most definitely a matter of when, not if.

III. Posturing Towards the Future of "Modified-Amateurism"

In advancing the likely outcome of the NCAA Bribery Scandal, there must be discussion of how it affects the future of the NCAA as a whole. Issues with the NCAA, the AAU, and amateurism date all the way back to the Cold War.[141] This indictment thrusted the realities of the illegal money cycle into the spotlight. Just like in any illegal industry, when one door is closed, the crooks will find a way to pry open another one.

The NCAA is currently (or on the cusp of) running a business that faces (or will face) enormous social and economic pressures to adapt its practices. Altering its current bylaws, just slightly, by allowing athletes to be compensated for their likenesses and off-the-field market value, would serve to greatly improve the perception of the NCAA, its viability as the long-term governing body of intercollegiate athletics, and also move itself from an institution that is reluctant to change to one that can continue its monopoly in a sustainable manner for just pennies on the dollar, and in the good graces of the American public. This "Modified-Amateurism" proposal focuses on increased scrutiny of basketball and apparel company practices below the college level, an observation of the competitive alternative (the European Club-Model) and finishes with discussion of the birth of the "likeness" debate and how it is the correct next step in the development of college athletics.

To begin, the argument focuses on the first step in the cycle: AAU Basketball. These pre-college amateur teams bear strong ties to apparel companies and few ties to the NCAA. In a free market society, there will be few limits to how these companies and teams interact to form partnerships, as long as they fall within the guidance of applicable law. AAU teams have begun to structure themselves as non-profit organizations to address potential concerns with the NCAA.[142] More and more frequently, boosters[143] are doing the majority of the funding for the nation's top AAU teams holding the nation's top basketball talent.[144] All too frequently, it is common for there to a "common understanding" related to where the AAU coach will push players to attend school at the desired location of the booster.[145] Dalton similarly posits that AAU basketball is "here to stay" in a theory that major change in the process must come from elsewhere.[146] Corruption amongst coaches in the AAU and high school basketball circuits has developed into a major issue – and these coaches are an easy contact point for apparel companies or university boosters choosing to act outside the guidelines of the NCAA bylaws. By imposing a much stricter penalty for violations of these ethics and bylaws, there can be a higher standard enforced.[147]

This can serve two basic tenants of punishment theory: incapacitation (for longer sanctions imposed against individuals who violate the rules) and deterrence (fear of such incapacitation, where at the current state the punishment might be worth the crime).[148] Another important correction point would be capping the amount that apparel companies can contribute to the respective AAU teams.[149] This would allow for more reasonable donation levels to properly accommodate the true needs of the teams. It also would slow a source of money into the industry, which could easily find itself in malicious hands at some eventual point. It allows players to choose AAU teams based upon more "amateur friendly" reasons, and not simply going to the highest bidder.[150]

The immediate issue with any proposed regulations, of course, is antitrust concern. It is known from *NCAA v. Okla. Board of Regents* and other Supreme Court cases that matters involving the NCAA can be treated with nuance due to necessity.[151] Applying the rule of reason, courts could look at the anticompetitive and procompetitive benefits of the suggested regulations to see where the correct resolution, in antitrust terms, falls. The rule of reason has a "flexibility" that allows for well-articulated arguments to take hold.[152] But restrictions on the market, including price fixing and output restrictions, are so plainly anticompetitive that they can even fall under the infrequently used label of "per se" illegal.[153] For this reason, it is much more likely that punishment and sanctions theories would be the most reasonable moving forward in regards to AAU and amateur changes prior

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to reaching the college level. To fix the problem, the NCAA (or whatever shall remain of it) should first focus on clearing any improprieties that stem from the AAU level.

In contrast to proposed changes at the AAU level, where free market principles are strongly in play and thus require a much more fundamental (and highly likely to be disfavored) change in its operation than technical regulations, the arena for alterations at the NCAA level is significantly more grandiose. From an economic standpoint, the NCAA has garnered comparisons as the "modern day plantation."[154] It accounts for thousands of unpaid amateurs, performing sport for universities and the NCAA which bring in billions of dollars from their productions. Athletes receiving nothing in return, except from their scholarship (if they receive one).[155] Even recently, the NCAA has settled a Ninth Circuit case which now moves the benefits of a scholarship from room, board and tuition, up to full cost-of-attendance.[156] This shows the reluctant and slow-moving NCAA giving into some pressure to more fairly compensate the athletes who drive its revenue.[157]

The NCAA, as whole, provides a fairly thorough framework from which intercollegiate athletics should act upon. Its regulations regarding most corners of athletics have been generally well-accepted and adaptive to changes in the industry at that time.[158] The NCAA, however, has been stubborn in its view on the amateurism model, though this is not surprising. Anyone conducting a business with any acumen would attempt to maximize profits by keeping costs as low as possible. What the NCAA really benefits from is having a monopoly on college sports.[159] This is beginning to change (at least in basketball where there is a strong overseas market) as high profile recruits, such as Terrence Ferguson, elect to play professionally for a year before returning to enter the NBA draft.[160] Ferguson developed his skills against professional talent for a year and then returned to the draft being selected in the first round.[161] While there is good talent and coaching in Division I basketball, Ferguson received what no American amateur could imagine—a six-figure salary with a car and housing benefits.[162] Ferguson's decision to choose to play abroad instead of in the amateur American system is part of a growing trend of current NBA players including former Southern Methodist University basketball commit, Emmanuel Mudiay.[163] Europe and Australia have been aggressive in their recruitment of American talent during the past decade.

Scholars Joshua Lee and Jaimie McFarlin wrote extensively on the issue in Harvard's Journal of Sports and Entertainment Law.[164] In their article, Lee and McFarlin correctly point to two critical issues that curse college basketball specifically: the commercialization of amateur basketball (which this article discusses at length) and the professionalization of Division I basketball.[165] These issues, commercialization and professionalization, clash and result in an escapable problem that attacks right at the roots of the spirit of amateurism. The solution is one modeled by the next most successful basketball market: Europe.[166] As Lee and McFarlin confirm, the monopoly that the NCAA holds must deteriorate and a reliable alternative here in the United States must form (not simply players like Mudiay and Ferguson going overseas).[167] Athletes will have little leverage to for which to bargain with the NCAA until the majority have another option. Once this alternative forms, there will be competition between the traditional university route and the more "professional" club-model route.[168] The issue with this bi-modal forming is that whichever one of the routes gains will likely detract from the other route. Sure, this is competition in its truest form in which the best "route" will succeed. From a spectator standpoint, this likely dilutes the quality of the entertainment product, a real concern. Because from this quality reduction comes a demand reduction which serves as a significant business concern. The club-model route, however, does have tremendous benefits to players who are seeking to focus primarily on basketball (not school) and to be compensated for doing so. These solutions offered by Lee and McFarlin have long-term plausibility, but, in the current context, are fairly difficult to see occurring even by 2030.

The best fix, which allows for free market principles to enter into the NCAA without completely abandoning the amateurism model, is to allow players to be compensated for their likeness. This is the principle stemming from current NCAA litigation that received high attention at the time due to its status in pop culture. The *O'Bannon v. NCAA* case is a class action suit of current and former NCAA athletes whose image and likenesses were used to make popular the Electronic Arts video game "NCAA Football" which had licensing deals with the NCAA.[169] The game had names such as "Player #2" on Auburn University, with physical attributes matching that of Cam Newton, who coincidentally wore the #2 jersey for Auburn University. The class action was brought against the NCAA because it was profiting from the likeness of its players, without the student-athletes receiving a dime. Lee and McFarlin also argue this could bring "substantial changes" that could "transform the NCAA."[170]

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The system would include no additional payments to athletes by the universities or the NCAA, the low-cost solution each would want to achieve. The athletes could use the marketability of their status as student-athletes to earn income at their own behest. This could come in many forms: (1) college basketball star Devonte Graham earning a portion of Kansas Basketball jerseys sold with #4 on it; (2) college football star Baker Mayfield earning fees from speaking and signing events; or (3) University of Central Florida kicker Donald De La Hay, a marketing major, earning advertising dollars from his creative YouTube videos.[171] Each of the three situations above are unique, but there is common ground—the student-athlete, individually, is providing the value for which people are willing to pay for. There is no threat to the amateurism model if student-athletes are compensated fairly for their likeness. Perhaps, for those paranoid that the money would create an issue, trusts are set up for each student-athlete which open following their graduation from the university (which would improve academic incentives). Universities, through their contracts with apparel companies, would control the apparel and brands worn by their players. This keeps the "Nikes" and "Adidas" out of the financial picture. The result would be a small hit to the bottom lines of the NCAA and universities and a major windfall to those student-athletes who have a market for their talents, whatever they may be.

NCAA Legislation could quickly and easily amend its bylaws to this issue. It would not cause sweeping overhauls to its currently existing structure, which would keep the continuity of the NCAA—important to universities, spectators, coaches, players, sponsors, etc.—intact. A task force could be assembled to preemptively sniff out areas that may invite noncompliance for illegal commercial benefit. Further, the NCAA would see a major improvement in its reputation as a whole, for at least allowing student-athletes to be compensated for their market value off the field.

IV. Conclusion

The NCAA Bribery Scandal can serve as a catalyst to meaningful change in collegiate sports in America. First, the fraudulent acts highlighted in the DOJ's indictment indicate a pervasive issue of the competing interests of commercialism and amateurism. The Second Circuit has solid footing to fully prosecute this defrauding scheme, which stems from the financial vacuum created by the NCAA amongst its "employees," the student-athletes. A limited free market must develop to allow these student-athletes to be compensated for the individual talents they have amassed, while retaining the "on-field" amateurism principle. The result would be a financially minimal impact for the major institutions at play—apparel companies, universities, the NCAA—and a major boost for athletes who have marketability that would otherwise be freely compensated if not for the Archean bylaws of the NCAA.

V. Most Recent Developments Prior to Publication

In October of 2018, James Gatto, Merl Code. Jr., and Christian Dawkins were found guilty of felony wire fraud charges (defrauding the universities) in the pay-to-play scheme.[172] Gatto received a nine-month prison sentence; Code and Dawkins each received six-month sentences.[173]

In May of 2019, Dawkins and Code were found guilty of conspiracy to commit bribery (payments to assistant basketball coaches) but acquitted of their respective counts alleging wire fraud.[174] The acquittal from wire fraud contrasts with the guilty verdict for fraud in the October 2018 case against Dawkins, Code, and James Gatto.[175] This suggests that the May 2019 jury "disagreed with the government's contention that the universities that employed the coaches who received money were victims."[176] In August of 2019, all three men filed for appeal on their fraud convictions.[177]

However, the scandal at large is not quite ready to fall out of the news cycle. Celebrity attorney Michael Avenatti has come forward alleging a similar payment scheme conducted by Nike involving superstar athletes such as Zion Williamson.[178] The revival of the scandal, widening its reach to include the most prominent footwear company in college basketball, increases the risk exposure of athletes, basketball programs, coaches, and administration at a number of prominent schools.

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ENDNOTES

1 James V. Koch, Title IX and the NCAA, 3 W. St. U. L. Rev. 250, 252 (1976).

2 *Id.*

3 The primary exceptions being the National Association of Intercollegiate Athletics (NAIA) and the National Junior College Athletic Association (NJCAA).

4 Steve Berkowitz, *NCAA incurred $1.4 billion in expenses in 2016*, USA Today Sports (Mar. 7, 2017, 4:29 PM), https://www.usatoday.com/story/sports/college/2017/03/07/ncaa-incurred-14-billion-in-expenses-in-2016/98856520.

5 468 U.S. 85 (1984).

6 Two universities brought suit against the NCAA under the Sherman Act because the NCAA had restraints in televising college football games. The Court found that the NCAA's conduct restricted output and raised prices. Critically, the Court applied a rule-of-reason analysis because of the NCAA's unique industry.

7 *Id.* at 122.

8 *Id.* at 120.

9 NCAA Manuals, https://www.ncaapublications.com (last visited Feb. 21, 2018).

10 2.9 Principle of Amateurism, NCAA Division I Manual, 4 (2017-18).

11 2.8.3 Penalty for Noncompliance, NCAA Division I Manual, 4 (2017-18) (emphasis added).

12 Article 16, Awards, Benefits and Expenses for Enrolled Student-Athletes, NCAA Division I Manual, 221 (2017-18).

13 Article 19, Infractions Program, NCAA Division I Manual, 329 (2017-18).

14 *What is the AAU?*, http://www.aausports.org/FAQ (last visited Feb. 21, 2018).

15 Matt Dalton, *Shoe Money, AAU Basketball, and the Effects on College Basketball Recruiting*, 6 Miss. Sports L. Rev. 108 (2016).

16 *Id.*

17 *Id.*

18 Marc Tracy & Rebecca R. Ruiz, *In College Basketball Scandal, Follow the Money… and the Shoes* (Sep. 27, 2017), https://www.nytimes.com/2017/09/27/sports/ncaabasketball/adidas-pitino-louisville.html.

19 Nike Basketball, *"It's Gotta Be The Shoes"* (1989), https://www.youtube.com/watch?v=fkY7W6kCRY4.

20 Dennis Green, *KEVIN DURANT: 'Nobody Wants to Play in Under Armour' Shoes* (Aug. 30, 2017, 10:49 AM), www.businessinsider.com/kevin-durant-slams-under-armour-shoes-2017-8.

21 Jeff Greer, *Louisville has new $160M deal with Adidas, Tom Jurich tells boosters* (Aug. 25, 2017, 12:49 PM), www.courier-journal.com/story/sports/college/louisville/2017/08/24/louisville-new-160-million-deal-adidas-tom-jurich-tells-boosters/600363001.

22 UCLA's sponsorship deal with Under Armour is the nation's largest, inked at $280 million over fifteen years. David Wharton, *UCLA's Under Armour deal for $280 million is the biggest in NCAA history* (May. 24, 2016, 6:29 PM), www.latimes.com/sports/ucla/la-sp-0525-ucla-under-armour-20160525-snap-story.html.

23 The other major profitable sport, football, is increasingly becoming more and more like the AAU circuit through the implementation of "7-on-7" camps. These non-contact scrimmage camps allow athletes to showcase their skills in the same manner as an AAU basketball tournament, but with the ability to avoid the playing violence associated with tackle football. Nike, Adidas, and Under Armour are all very much in play here. Randy Whetstone Jr., *The Rise of 7-on-7 in High School Football* (July 26, 2017), https://voice-tribune.com/_/life-style-2/sports/hs-sports-report/rise-7-7-high-school-football.

24 Cork Gaines & Diana Yukari, *The NCAA Tournament is an enormous cash cow as revenue keeps skyrocketing* (Mar. 17, 2017, 2:43 PM), http://www.businessinsider.com/ncaa-tournament-makes-a-lot-of-money-2017-3.

25 *U.S. v. Gatto*, Overview of the Investigation, ¶ 10 (2017). The complaint also recognizes that two other corresponding complaints were unsealed on the same day, referencing allegations against assistant coaches who participated in the alleged bribery scheme. *See U.S. v. Gatto*, Count 1, ¶ 2 at Note 1. (2017); *see supra* notes 12 & 13.

26 U.S. Attorney's Office, S.D.N.Y., Press Releases, *U.S. Attorney Announces The Arrest Of 10 Individuals, Including Four Division I Coaches, For College Basketball Fraud And Corruption Schemes* (Sep. 26, 2017), www.justice.gov/usao-sdny/pr/us-attorney-announces-arrest-10-individuals-including-four-division-i-coaches-college.

27 *U.S. v. Gatto*, Overview of the Investigation, ¶ 10 (2017).

28 *Id.*

29 *Id.*

30 *Id.* at ¶ 11(a).

31 Being an agent for prominent professional basketball players is a highly lucrative profession. Agents receive a 4% fee of the compensation negotiated for the player. With a minimum salary around $500,000, an agent makes $20,000 on the acquisition of just one minimally paid player, many of whom will increase their salary tenfold over their career. NBPA Regulations Governing Player Agents (Feb. 2016).

32 *U.S. v. Gatto*, Overview of the Investigation, ¶ 11(a) (2017).

33 *Id.* at ¶ 12.

34 *Id.*

35 *Id.*

36 *U.S. v. Gatto*, Count One, ¶ 1.

37 18 U.S.C. § 1343. The exceptionally broad reach of interstate commerce and the Commerce Clause can be attributed to many cases, notably *Gonzales v. Raich*, 545 U.S. 1 (2005).

38 *U.S. v. Gatto*, Count One, ¶ 2.

39 *Id.* at Count Two, ¶ 4.

40 *Id.* citing 18 U.S.C. §§ 1343, 1349, 2

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41 *U.S. v. Gatto*, Count Three, ¶ 5.

42 18 U.S.C. §§ 1343, 1349, 2.

43 18 U.S.C. § 1956(a)(1)(B)(i).

44 *U.S. v. Gatto*, Count Four, ¶ 7. 18 U.S.C. § 1956(h) states: "Any person who conspires to commit any offense defined in this section … shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy."

45 The complaint states one particularly visible behavior, where a student-athlete had already committed to another school to play basketball. However, almost immediately following a payment to his family, he made the decision to de-commit from that school and commit to Louisville. Press reports at the time called the move a "surprise commitment" that "came out of nowhere" and a "late recruiting coup."

46 *See e.g.*, Chuck Culpepper & Matt Bonesteel, *Rick Pitino's ouster leaves Louisville dazed from scandal fatigue* (Sep. 27, 2017), www.washingtonpost.com/sports/colleges/rick-pitinos-ouster-leaves-louisville-dazed-from-scandal-fatigue/2017/09/27/b38c6164-a3bd-11e7-ade1-76d061d56efa_story.html?utm_term=.4425a076b0a1.

47 *See e.g.*, The News & Observer—Editorial Board, *College sports scandal was inevitable* (Sep. 30, 2017, 8:30 AM), www.newsobserver.com/opinion/editorials/article176126436.html.

48 US District Court for the S.D.N.Y., Criminal Docket, 1:17cr686, *USA v. Gatto* et al.

49 *Id.*

50 Nathan Fenno, *Three defendants ask federal court to dismiss college basketball bribery case* (Dec. 22, 2017, 2:05 PM), www.latimes.com/sports/sportsnow/la-sp-college-basketball-motion-20171222-story.html. (Joint Motion to Dismiss document not available online).

51 *Id.*

52 *See* Article 19, Infractions Program, NCAA Division I Manual, 329.

53 Fenno, *supra* note 50.

54 Andy Giegerich, *Attorneys for ex-Adidas exec, two others, seek to dismiss NCAA-related fraud charges* (Dec. 22, 2017), www.bizjournals.com/portland/news/2017/12/22/attorneys-for-ex-adidas-exec-two-others-seek-to.html.

55 Marcus DiNitto, *Lawyers argue Adidas execs, AAU coach did not break federal law in college hoops scandal* (Dec. 23, 2017), www.sportingnews.com/ncaa-basketball/news/college-basketball-corruption-scandal-motion-to-dismiss-adidas-aau/1sa3mlkb16efr1m9bx4g7epr37.

56 Giegerich, *supra* note 54.

57 *Id.* (Here lies a question for the fact-finder of the case. Without a strong legal tie, this article will not address this particular point made by the defense. The government's response to the motion to dismiss similarly acknowledges this on page 3 of its brief).

58 Danielle Lerner & Justin Sayers, *Alleged payments in basketball recruiting scandal 'not against the law,' attorneys argue* (Dec. 22, 2017, 6:02 PM), www.courier-journal.com/story/sports/college/louisville/2017/12/22/louisville-recruiting-scandal-investigation-fbi-college-basketball-motion-dismiss-dawkins-gatto/977833001.

59 Fenno, *supra* note 50.

60 *Id.*

61 *Id.*

62 *Id.*

63 *Id.*

64 Government's Brief in Opposition to Defendant's Motion to Dismiss the Indictment, p. 2.

65 *Id.*

66 *Id.* at 10.

67 *Id.* at 10-11.

68 *Id.* at 15.

69 *Id.* at 22.

70 Government's Brief in Opposition to Defendant's Motion to Dismiss the Indictment, p. 15.

71 *Id.* This is referring to the defendants' notion that because some of the assistant basketball coaches at universities were instructing Gatto and Adidas' representatives to pay money directly or indirectly to players families, that Gatto and defendants were acting on behalf of the universities. There is debate on the extent that these "rogue" coaches acted on their own accord or through the guidance or "blind eye" of the head coach. The NCAA has a provision in its bylaws directly addressing Responsibility of Head Coach, Bylaw 11.1.1.1, stating that the "institution's head coach is presumed to be responsible for the actions of all institutional staff members who report, directly or indirectly, to the head coach."

72 Government's Brief in Opposition to Defendant's Motion to Dismiss the Indictment, p. 15.

73 96 F.3d 769 (5th Cir. 1996).

74 *Id.* at 775.

75 *Id.*

76 *Id.*

77 303 F.3d 923 (8th Cir. 2002).

78 *Supra* note 32.

79 303 F.3d at 924-25.

80 *Id.*

81 *Id.*

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82 *Id.* at 927.

83 *Id.* (emphasis in original).

84 997 F.2d 1219 (7th Cir. 1993).

85 *Id.* at 1224.

86 *Id.*

87 Government's Brief in Opposition to Defendant's Motion to Dismiss the Indictment, p. 20, Note 8.

88 *Id.*

89 Government's Brief in Opposition to Defendant's Motion to Dismiss the Indictment, p. 22.

90 *Id.*

91 *Id.* Prospective student-athletes must undergo significant educational training on the recruitment process in order to be put in the "PSA" recruiting bank. Each young man or woman must take online tests before becoming eligible for recruitment. Especially at the highest levels of recruitment, these athletes know the rules guiding proper and improper recruitment strategies. The issue of illegal financial recruiting is all too prevalent to be a used as an excuse. This is not to say, however, that the young athlete is directly at fault. Unfortunately, and too often, the dirty recruiting goes on behind the back of the player. Greedy parents, uncles, aunts, and anyone who wants a small cut can be the "schemer" of the family and use their influence to steer the athlete to a particular school. It is, tragically, the student-athlete who is punished when they are deemed ineligible.

92 *Walters*, 997 F.2d at 1221.

93 *Id.*

94 *Id.* at 1226.

95 Government's Brief in Opposition to Defendant's Motion to Dismiss the Indictment, p. 22-23.

96 *Id.* at 23.

97 *Porcelli v. U.S.*, 404 F.3d 157, 162 (2nd Cir. 2005) (Procelli V).

98 *U.S. v. Porcelli*, 854 F.2d 1352 (2nd Cir. 1989).

99 *Id.*

100 *Porcelli,* 404 F.3d at 162.

101 *Id.*

102 *Id.*

103 850 F.3d 94, 107 (2nd Cir. 2017).

104 *See e.g., U.S. v. Welch*, 327 F.3d 1081 (10th Cir. 2003); *U.S. v. Hedaithy*, 392 F.3d 580 (3rd Cir. 2004); *U.S. v. Kinkaid-Chauncy,* 556 F.3d 923 (9th Cir. 2009).

105 Government's Brief in Opposition to Defendant's Motion to Dismiss the Indictment, p. 26.

106 *Id.* at 28.

107 *Id.* at 26.

108 *See e.g., Finazzo*, 850 F.3d at 106.

109 *U.S. v. Wallach*, 935 F.2d 445, 462-63 (2nd Cir. 1991).

110 *Popov v. Hayashi*, 2002 Cal. Super. LEXIS 5206. The notable interest found in this case was a "pre-possessory" interest. When Barry Bonds hit his recording breaking home-run into the stands in right field, a man reached out with a glove to snag the prized baseball. Almost immediately, a mob of fans piled on top of him, hoping to obtain the baseball in the resulting scrum. Another man came up with the baseball, and the resulting suit was filed over the right to possession. The "pre-possessory" right was created by the court as to the man who had originally, for a brief moment, had control of the baseball. The court also acknowledged typical fan behavior in the standing-room area of the ballpark where the ball landed, and awarded part of the right to the second man. In the end, a most unsatisfactory result was obtained, as proceeds of the ball were split between the two parties and failed to even cover attorney's fees.

111 *U.S. v. Carlo*, 507 F.3d 799, 801-02 (2nd Cir. 2007).

112 *Id.*

113 *U.S. v. Catalfo*, 64 F.3d. 1070, 1076-77 (7th Cir. 1995).

114 *Finazzo*, 850 F.3d at 107.

115 *U.S. v. Gatto*, Overview of the Investigation, ¶ 11

116 Government's Brief in Opposition to Defendant's Motion to Dismiss the Indictment, p. 29.

117 Dennis Green, *Here's everything we know about the Adidas marketing exec at the center of the college basketball bribery scandal* (Sep. 26, 2017, 1:36 PM), www.businessinsider.com/adidas-executive-college-bribery-investigation-jim-gatto-2017-9.

118 LinkedIn Account, Jim Gatto, https://www.linkedin.com/in/jim-gatto-869bb46.

119 Government's Brief in Opposition to Defendant's Motion to Dismiss the Indictment, p. 29.

120 18 U.S.C. § 1343.

121 Government's Brief in Opposition to Defendant's Motion to Dismiss the Indictment, p. 29.

122 *Id.*

123 *Id.*

124 *Piggy*, 303 F.3d at 927.

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125 *Gray*, 96 F.3d at 775.

126 *Tymoshenko v. Firtash*, 57 F. Supp. 3d 311, 321 (S.D.N.Y. 2014).

127 *U.S. v. Gatto*, Count Three, ¶ 5.

128 *Westchest Cty. Indep. Party v. Astorino*, 137 F. Supp. 3d 586 (S.D.N.Y. 2015).

129 *U.S. v. Gatto*, Count Three, ¶ 5.

130 Government's Brief in Opposition to Defendant's Motion to Dismiss the Indictment, p. 29.

131 *Id.* at 29-30.

132 *See e.g.*, Joe Nocera, *Why is the FBI trying to enforce NCAA rules?* (Sep. 27, 2017, 5:01 AM), https://nypost.com/2017/09/27/why-is-the-fbi-trying-to-enforce-ncaa-rules.

133 468 U.S. 85 (1984).

134 Jeremy Bauer-Wolf, *Black Eye for College Basketball* (Sep. 27, 2017), www.insidehighered.com/news/2017/09/27/corruption-charges-are-huge-moment-college-basketball.

135 To be fair, the NCAA lacks many of the investigational powers the DOJ used to solidify its case, such as subpoena and wire-tapping power. It was, however, so in the dark about the DOJ investigation (which evidently did an excellent job of keeping it close to the chest) that a close source inside meetings at the NCAA's Indianapolis headquarters said NCAA Vice Presidents were "completely surprised" when word of the indictment broke.

136 The Government of Amateur Athletics: The NCAA-AAU Dispute, 41 S. Cal. L. Rev. 464 (1968).

137 Taylor Branch, *The Shame of College Sports*, The Atlantic (Oct. 2011), www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/308643.

138 Andrew Keh, *How This Lithuanian Outpost Lured LiAngelo and LaMelo Ball* (Dec. 21, 2017), www.nytimes.com/2017/12/20/sports/liangelo-lamelo-ball-lithuania.html.

139 Sam Vecenie, *After Skipping College Ball, Can Aussie NBA Star Terrance Ferguson Crack the NBA?* (Jun. 4, 2017, 1:15 PM), https://sports.vice.com/en_au/article/9k5w7v/can-terrance-ferguson-jump-from-high-school-to-australia-to-the-nba.

140 Jesse Newell, *Billy Preston signs with Bosnian professional team, leaves KU without playing a game*, (Jan. 22, 2018, 4:13 PM), www.kansascity.com/sports/college/big-12/university-of-kansas/article195738719.html.

141 The Government of Amateur Athletics: The NCAA-AAU Dispute, 41 S. Cal. L. Rev. 464 (1968).

142 Matt Dalton, *Shoe Money, AAU Basketball, and the Effects on College Basketball Recruiting*, 6 Miss. Sports L. Rev. 108, 109 (2016).

143 The NCAA defines boosters as anyone who represents the athletic institution's interests. Most simply, it refers to a someone who donates to a particular university. These boosters have enormous sway in major decisions, particularly in the athletic departments of the respective universities. This past fall, Jimmy Haslam, the owner of the Cleveland Browns NFL franchise and University of Tennessee alumnus and prominent booster, made headlines for his interference in the University's head football coaching search.

144 Dalton, *supra* note 142, at 109.

145 *Id.* at 110.

146 *Id.* at 113.

147 *Id.*

148 Erik Luna, *The Practice of Restorative Justice, Punishment Theory, Holism, and the Procedural Conception of Restorative Justice*, 2003 Utah L. Rev. 205, 258 (2003).

149 Dalton, *supra* note 142, at 113.

150 *Id.*

151 468 U.S. 85 (1984).

152 *Nat'l Soc'y of Prof'l Eng'rs v. U.S.*, 435 U.S. 679 (1978).

153 *Id.* at 692.

154 *See e.g.*, Matthew R. Cali, *The NCAA's Transfer of Power: An Analysis of the Future Implications the Proposed NCAA Transfer Rules Will Have on the Landscape of College Sports*, 21 Jeffrey S. Moorad Sports L. J. 217 (2014); A.J Daulerio, *Why It's Okay to Compare College Athletes to Slaves* (Sep. 16, 2011), www.theatlantic.com/entertainment/archive/2011/09/why-its-okay-to-compare-college-athletes-to-slaves/245195.

155 Michael P. Acain, *Revenue Sharing: A Simple Cure for the Exploitation of College Athletes*, 18 Loy. L.A. Ent. L.J. 307 (1998). A common misconception is that most athletes are "on scholarship" and therefore are receiving a free education. Football, basketball, and somewhat ironically women's tennis, are "headcount" sports (www.scholarshipstats.com/ncaalimits.html), meaning the scholarships presented to these athletes are all-or-nothing. In contrast, equivalency sports are allowed to split their scholarships up. For example, NCAA bylaws allow baseball programs to give 11.7 scholarships per season. This means that coaches are dividing this among the roster of typically more than 25 players. In reality, an extremely small portion of student-athletes receive the "compensation" by scholarship that many defenders of amateurism so often base their arguments.

156 Steve Berkowitz, *Judge approves $208 million settlement in NCAA scholarship dispute* (Nov. 17, 2017, 5:56 PM), www.usatoday.com/story/college/2017/11/17/judge-approves-200-million-settlement-ncaa-scholarship-lawsuit/875055001.

157 Michael P. Acain, *Revenue Sharing: A Simple Cure for the Exploitation of College Athletes*, 18 Loy. L.A. Ent. L.J. 307, 308 (1998).

158 Dan Wolken, *NCAA passes 'Harbaugh rule' banning spring break practice trips* (Jan. 20, 2017, 2:26 PM), www.usatoday.com/story/sports/ncaaf/2017/01/20/ncaa-ban-spring-break-practice-trips-jim-harbaugh/96836772.

159 Sharon Terlep, *Do Colleges Sports Really Need the NCAA?* (Sep. 25, 2015, 11:37 AM), www.wsj.com/articles/do-college-sports-really-need-the-ncaa-1443187831.

160 Scott Cacciola, *Australia Emerges as the New Front in the College Recruiting Wars* (Nov. 12, 2016), www.nytimes.com/2016/11/13/sports/basketball/australia-college-basketball-recruiting.html.

161 *Id.*

162 *Id.*

163 *Id.*

164 Joshua Lee; Jaimie McFarlin, *A European Solution to America's Basketball Problem: Reforming Amateur Basketball in the United States*, 6 Harv. J. Sports & Ent. L. 95 (2015).

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165 *Id.* Student-athletes are hardly students. The athletic team requires an enormous amount of attention, often detracting from desired classes to enroll in and including frequent travel to miss class.

166 *Id.* at 138.

167 *Id.* at 155.

168 *Id.* at 157.

169 802 F.3d 1049 (9th Cir. 2015).

170 *Id.* at 156.

171 Valentina Palladino, *UCF kicker ruled ineligible, losses scholarship after monetizing YouTube videos* (Aug. 1, 2017, 10:32 AM), https://arstechnica.com/gaming/2017/08/ncaa-deems-ucf-kicker-ineligible-after-he-refused-to-demonetize-youtube-videos.

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