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Administrative Law - United States Entitled to Sovereign Immunity under the Foreign Intelligence

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ADMINISTRATIVE LAW–UNITED STATES ENTITLED TO SOVEREIGN IMMUNITY UNDER THE FOREIGN INTELLIGENCE SURVEILLANCE ACT'S CIVIL-LIABILITY PROVISION, SECTION 1810–*AL-HARAMAIN ISLAMIC FOUNDATION, INC. V. OBAMA*, 705 F.3D 845 (9TH CIR. 2012)

Under well-established common law of the United States, the nation is immune from being held liable by suit from any party therein or foreign to the United States under the principle of sovereign immunity.[1] However, the Supreme Court of the United States has carved out an important exception to this broad protection, providing that where the sovereign has explicitly waived its sovereign immunity by an act of Congress, a plaintiff may bring an action holding the United States liable.[2] In *Al-Haramain Islamic Foundation, Inc. v. Obama (Al-Haramain II)*,[3] the Ninth Circuit was confronted with the threshold issue of whether the Foreign Intelligence Surveillance Act's ("FISA") civil-liability provision, 50 U.S.C. § 1810, impliedly waived the United States' sovereign immunity from being held liable for violations therein.[4] The Ninth Circuit held that FISA's civil-liability provision did not waive the United States' sovereign immunity because there was no mention of the term "United States" in the statute, and thus there was no explicit waiver.[5]

After the attacks on September 11, 2001, former President George W. Bush authorized the National Security Agency ("NSA") to conduct a warrantless communications surveillance program, later named the Terrorist Surveillance Program ("TSP").[6] The program was leaked by the *New York Times* and was followed by a series of public disclosures

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[1] *See infra* notes 21-24 and accompanying text (discussing history and development of sovereign immunity principle).

[2] *See infra* notes 25-29 and accompanying text (explaining unequivocal and express waiver is exception to sovereign immunity principle).

[3] 705 F.3d 845 (9th Cir. 2012).

[4] *Id.* at 848 (stating issue before court).

[5] *See id.* at 855 (announcing court's holding); *see also infra* notes 35-46 and accompanying text (discussing finding of no waiver of sovereign immunity in FISA's civil-liability provision).

[6] *See* Al-Haramain Islamic Found., Inc. v. Bush (Al-Haramain I), 507 F.3d 1190, 1192 (9th Cir. 2007) (describing surveillance program). The program was instituted to intercept all international communications into and out of the United States with all persons, companies, and organizations who were alleged to have ties with Al Qaeda and other terrorist networks. *Id.* The program was suspended in January 2007. *Id.* at 1194.

regarding details of the TSP.[7] In 2004, before the TSP was leaked, the Treasury Department announced an investigation of Al-Haramain Islamic Foundation, Inc. ("Al-Haramain"), alleging links with Al Qaeda.[8] During the investigation, the Treasury Department inadvertently handed over a sealed document from the Office of Foreign Assets Control to Al-Haramain which allegedly suggested that Al-Haramain and some of its lawyers had been the subject of electronic surveillance.[9] Along with the discovery of the document, a slew of public evidence surfaced favorable to Al-Haramain, including the Federal Bureau of Investigation's ("FBI") admission that they were both using surveillance in connection with their investigation of Al-Haramain and had intercepted phone conversations involving an Al-Haramain member in 2003, as well as testimony of top executive branch officials before Congress claiming that most modern international communications had been wired.[10] Based upon the information publicly disclosed and the contents of the sealed document, Al-Haramain filed suit against federal officials in their individual and official capacities pursuant to FISA, alleging that its members had been unlawfully

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[7] *See id.* The day after the *New York Times* leaked the TSP, President Bush confirmed the existence of the program in a radio address, stating that he had authorized the wiring of international communications with individuals and organizations thought to have ties with Al Qaeda and other terrorist organizations. *Id.* Attorney General Alberto Gonzales and other executive branch officials also made public disclosures surrounding the government's use of electronic surveillance. *Id.*

[8] *Al-Haramain II*, 705 F.3d at 848. Al-Haramain is a Muslim charity, and its activities include developing Islamic educational programs and building mosques in the more than fifty countries in which it is active. *Al-Haramain I*, 507 F.3d at 1194. Al-Haramain had already been labeled as an entity associated with Al Qaeda by the United Nations Security Council. *Id.* Ultimately, the Treasury Department listed members of Al-Haramain as "Specially Designated Global Terrorists." *Id.*

[9] *See Al-Haramain II*, 705 F.3d at 848-49 (explaining contents of "Top Secret" document inadvertently disclosed to Al-Haramain). The sealed document was the subject of much litigation before the Ninth Circuit ordered the ruling in the present case. *Al-Haramain I*, 507 F.3d at 1194-96 (discussing litigation surrounding sealed document and whether document protected under state secrets privilege). During the initial proceedings, the government, invoking the state secrets privilege, moved to bar Al-Haramain from accessing the sealed document because "'it [was] not possible to describe the document in a meaningful manner without revealing classified information, including classified sources and methods of intelligence.'" *Id.* at 1195 (quoting John Hackett, then-Director of Information Management, Office of the Director of National Intelligence). The district court granted the government's motion barring the document, but allowed Al-Haramain to file affidavits *in camera* attesting to their memory of certain parts of the document. *Id.* at 1196. The Ninth Circuit ultimately agreed with the lower court's decision to bar the use of the sealed document, but reversed the decision of the lower court to allow the reconstruction of the document with the memory of those affiliated with Al-Haramain, and remanded back to the district court to proceed in accordance with its holding. *Id.* at 1193.

[10] *See Al-Haramain II*, 705 F.3d at 848 (listing surfaced evidence suggesting Al-Haramain was subject to unlawful surveillance).

subject to surveillance.[11]

Al-Haramain's procedural journey has been a long and complicated one.[12] On appeal from the government's first motions to dispose of the case, the Ninth Circuit agreed with the district court that dismissal was not appropriate: litigation could not be barred by the state secrets privilege; however, the government's inadvertently disclosed document was properly excluded.[13] On remand, the district court dismissed Al-Haramain's claim and granted leave to amend their complaint to include pleadings sufficient to show that they were "aggrieved persons" under FISA.[14] Upon Al-Haramain's filing of the first amended complaint, the government filed yet another motion to dismiss, or for summary judgment in the alternative, which the court denied because Al-Haramain had

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[11] *Id.* at 849. Al-Haramain filed suit pursuant to the civil-liability provision of FISA. *Id.*; *see also* 50 U.S.C. § 1810 (2012) ("An aggrieved person . . . who has been subjected to an electronic surveillance or about whom information obtained by electronic surveillance of such person has been disclosed or used in violation of section [1809 of FISA] shall have a cause of action against any person who committed such violation . . . .") (alteration in original). In his article comparing FISA with Title III of the Omnibus Crime Control and Safe Streets Act of 1968, which primarily regulates electronic surveillance in the context of criminal activity, Andrew Adler explains that FISA was created as a limited method for the United States government to gather foreign intelligence as opposed to investigating criminal behavior. Andrew Adler, Note, *The Notice Problem, Unlawful Electronic Surveillance, and Civil Liability Under the Foreign Intelligence Surveillance Act*, 61 U. MIAMI L. REV. 393, 404-05 (2007). Enacted in 1978, FISA stood as a response to the negative reaction by the American people to government abuse of its surveillance powers during President Richard Nixon's administration, and was later amended by the USA PATRIOT Act and other subsequent changes arising from the events of September 11, 2001. *See* ACLU v. NSA, 493 F.3d 644, 709 (6th Cir. 2007) ("FISA was specifically drafted 'to curb the practice by which the Executive [B]ranch may conduct warrantless electronic surveillance on its own unilateral determination that national security justifies it.'" (alteration in original) (citation omitted)); ACLU v. U.S. Dep't of Justice, 265 F. Supp. 2d 20, 21 (D.D.C. 2003) (noting USA PATRIOT Act's purpose of preventing terrorism and permitting monitoring of foreign activity).

[12] *See Al-Haramain II*, 705 F.3d at 849-50 (outlining long procedural journey of Al-Haramain litigation). Al-Haramain filed its original suit in the United States District Court for the District of Oregon in 2006. Al-Haramain Islamic Found., Inc. v. Bush, 451 F. Supp. 2d 1215, 1217 (D. Or. 2006). The government moved to dismiss, or for summary judgment in the alternative, invoking the state secrets privilege that such litigation would result in the disclosure of many details surrounding the TSP, including the nature of the Al Qaeda threat. *Al-Haramain I*, 507 F.3d at 1195. The district court denied the government's motion, holding that the state secrets privilege did not bar litigation surrounding the TSP because there had been so much voluntary disclosure to the public regarding the program. *See id.* at 1198-2000. However, the district court did bar use of the sealed document under the state secrets privilege, but permitted Al-Haramain to submit affidavits from members recalling memories of parts of the sealed document. *Id.* at 1195-96.

[13] *Al-Haramain I*, 507 F.3d at 1193. However, the Ninth Circuit disagreed with the district court on the allowance of the affidavits recalling parts of the sealed document, holding that such a proposition would circumvent the privilege and "would eviscerate the state secret itself." *Id.*

[14] *In re* NSA Telecomms. Records Litig., 564 F. Supp. 2d 1109, 1111 (N.D. Cal. 2008). On remand, the district court found that FISA preempts the state secrets privilege. *Id.*

provided sufficient pleadings showing "aggrieved person" status.[15] After the government denied access to classified documents, Al-Haramain moved forward with their unclassified evidence and successfully filed for summary judgment against the government.[16]

In the same order granting summary judgment to Al-Haramain, the lower court also denied the government's cross-motion to dismiss the case for lack of jurisdiction.[17] The government argued that Al-Haramain's claim for damages under FISA was barred because the section of FISA from which Al-Haramain brought its claim does not expressly waive the United States' sovereign immunity.[18] The court denied the government's motion to dismiss, holding that waiver of the United States' sovereign immunity is implied by FISA's civil-liability provision.[19] The government appealed, and the Ninth Circuit vacated the order of the district court and reversed the judgment that awarded damages to Al-Haramain.[20]

Under well-established common law, the United States, as a sovereign, is immune from liability unless it otherwise consents to be

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[15] *See In re* NSA Telecomms. Records Litig., 595 F. Supp. 2d 1077, 1086 (N.D. Cal. 2009) (finding Al-Haramain sufficiently alleged aggrieved person status and allowing litigation to move forward). Based on the unclassified information made available by the government and the purported content of the sealed documents, the district court denied the government's motion to dismiss for failure to establish standing under FISA. *Id.* at 1089. The court decided to review the sealed document in camera and determine whether there was enough information in the sealed document, along with the unclassified information, to support further proceedings. *Id.*

[16] *In re* NSA Telecomms. Records Litig., 700 F. Supp. 2d 1182, 1184 (N.D. Cal. 2010), *rev'd*, Al-Haramain Islamic Found., Inc. v. Obama (*Al-Haramain II*), 705 F.3d 845 (9th Cir. 2012). The district court entered summary judgment for Al-Haramain because the government failed to rebut Al-Haramain's prima facie case of electronic surveillance with evidence that a warrant was obtained, that Al-Haramain was never subject to surveillance, or that surveillance was otherwise lawful. *Id.* Al-Haramain developed its case for unlawful surveillance without the classified documents by relying on other unclassified evidence, including the President's authorization to intercept electronic communications with any groups suspected to have ties to Al Qaeda and the Office of Foreign Assets Control admission of surveillance, which ultimately led to Al-Haramain's designation as a "Specially Designated Global Terrorist Organization." *Id.* at 1185, 1188-89.

[17] *Id.* at 1192-93 (denying government's motion to dismiss for lack of jurisdiction arising from non-waiver of sovereign immunity).

[18] *Id.* at 1192 (discussing government's argument for sovereign immunity).

[19] *Id.* at 1192-93 (noting court already considered and ruled on issue in previous order); *see also In re NSA Telecomms. Records Litig.*, 564 F. Supp. 2d at 1124-25 (implying sovereign immunity waiver into FISA). In *in re NSA Telecommunications Records Litigation*, the court reasoned that FISA prohibits federal officials and employees from engaging in unlawful electronic surveillance, and that it is "only such officers and employees acting in their official capacities that would engage in surveillance of the type contemplated by FISA." 700 F. Supp. 2d at 1192-93 (citations omitted). The court concluded that waiver was implied, stating that "the remedial provision of FISA . . . would afford scant, if any, relief" if it did not apply to federal employees in their official capacity. *Id.* (citations omitted).

[20] *Al-Haramain II*, 705 F.3d at 848.

sued.[21] The doctrine of sovereign immunity has its roots in English common law which provided that the King was to never be included under statutory schemes as a potentially liable party as a matter of public policy.[22] The rationale behind the doctrine of sovereign immunity is that the public, as represented by the government, should not suffer or be penalized by the acts and violations of its agents.[23] The doctrine of sovereign immunity is viewed as a limitation on the subject matter jurisdiction of district courts, and thus can be raised at any time before final judgment in the course of litigation.[24]

The United States' sovereign immunity can be waived so long as the government consents to being sued.[25] On numerous occasions, the Supreme Court has held that a waiver of the United States' sovereign immunity from suit must be explicitly and unequivocally expressed.[26] In

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[21] United States v. Mitchell, 445 U.S. 535, 538 (1980) (barring Indian reservation from bringing suit against United States pursuant to Indian General Allotment Act); United States v. Sherwood, 312 U.S. 584, 586 (1941) (holding United States immune from liability for breach of contract with debtor under Tucker Act); *see also* John Copeland Nagle, *Waiving Sovereign Immunity in an Age of Clear Statement Rules*, 1995 WIS. L. REV. 771, 776-77 (1995) (explaining that although not in Constitution, Supreme Court recognized sovereign immunity since 1821).

[22] United States v. Thompson, 98 U.S. 486, 489 (1878). In *Thompson*, the Supreme Court acknowledged that the very same policy reasons that support a finding that the statute of limitations does not run against the United States are the same supporting the doctrine of sovereign immunity. *Id.* at 490; *see also* Nagle, *supra* note 21, at 776 (explaining sovereign immunity doctrine's roots in notion that English King never wrong).

[23] *Thompson*, 98 U.S. at 489 ("In a representative government, where the people do not and cannot act in a body, where their power is delegated to others, and must of necessity be exercised by them, if exercised at all, the reason for applying these principles [of sovereign immunity] is equally cogent." (citations omitted)).

[24] *See* Adam v. Norton, 636 F.3d 1190, 1192 n.2 (9th Cir. 2011) (noting government not barred from asserting jurisdictional requirements because sovereign immunity is jurisdictional limitation); *see also* Capron v. Van Noorden, 6 U.S. (2 Cranch) 126, 127 (1804) (holding challenge to subject matter jurisdiction can be raised any time before final judgment); Dunn & Black, P.S. v. United States, 492 F.3d 1084, 1090-91 (9th Cir. 2007) (noting government's failure to raise sovereign immunity in course of litigation not waiver).

[25] *Mitchell*, 445 U.S. at 538 (acknowledging United States, as sovereign, cannot be held liable unless it consents); *Sherwood*, 312 U.S. at 586 ("The United States, as sovereign, is immune from suit save as it consents to be sued."); Gregory C. Sisk, *The Continuing Drift of Federal Sovereign Immunity Jurisprudence*, 50 WM. & MARY L. REV. 517, 529 (2008) ("Under the doctrine of federal sovereign immunity as it has evolved in Supreme Court jurisprudence over the past 200 years, the amenability of the federal government to legal action in court turns upon consent by the government, expressed through legislation enacted by a democratically elected congress." (citations omitted)). Gregory C. Sisk, a professor at the University of St. Thomas School of Law, contends that federal waiver of sovereign immunity permits the United States government to appropriately withhold judicial involvement when public concerns outweigh the need for private complaints, and waive its immunity when such policy implications are minute. Sisk, *supra*, at 530.

[26] *See, e.g.*, FAA v. Cooper, 132 S. Ct. 1441, 1448 (2012) (holding sovereign immunity

considering whether an express waiver exists, there are no "magic words" required so long as the waiver is clearly discernible from the text of the statute under which a plaintiff brings an action.[27] However, any ambiguities that exist must be construed in favor of the government for sovereign immunity.[28] Furthermore, courts have refused to diverge from the requirement of an unequivocal expression of waiver, and firmly reject implying waivers into the contexts of statutory schemes.[29]

Sovereign immunity analysis is often a tool for interpreting statutes and must be analyzed in tandem with traditional tools of statutory construction.[30] When engaging in statutory construction to analyze

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waiver must be unequivocally expressed in statutory text); Lane v. Pena, 518 U.S. 187, 192 (1996) (noting waiver must be unequivocally expressed in statutory text); United States v. Nordic Vill., Inc., 503 U.S. 30, 33 (1992) (same); Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 95 (1990) (same); *Mitchell*, 445 U.S. at 538 ("A waiver of sovereign immunity 'cannot be implied but must be unequivocally expressed.'" (citation omitted)); *see also* Nagle, *supra* note 21, at 778 (noting requirement of express and unequivocal waiver). Law professor John Copeland Nagle argues that there had always been two conditions in assessing whether Congress has intended to waive the sovereign immunity of the United States. Nagle, *supra* note 21, at 778. First, there is no such principle of implied waiver, and Congress must be unequivocal in its expression of waiving sovereign immunity of the United States. *Id.* Second, the statute must be construed narrowly such that its interpretation does not go above and beyond the meaning of the words therein. *Id.*

[27] *Cooper*, 132 S. Ct. at 1448 (noting analysis of waiver is one of many interpretative tools of statutory construction).

[28] *Id.* The Supreme Court has explained that an ambiguity exists in the statutory text when there is any plausible interpretation of the statute from which one can infer that sovereign immunity is not waived. *Id.* In *Cooper*, the Supreme Court addressed the scope of immunity where the government disclosed information regarding the plaintiff to other governmental organizations, in violation of the Privacy Act of 1974, which states that the United States is liable for "actual damages" for violations found to be intentional or willful. *Id.* at 1446. The Court articulated that the government waived its sovereign immunity as to actual damages in the Privacy Act, but the issue remained whether the government could be held liable for damages for mental and emotional distress. *Id.* Because the ambiguity existed as to whether the United States waived its immunity from liability for mental and emotional damages, the Court interpreted the ambiguity in favor of the United States and found that the government could not be held liable. *Id.* at 1456.

[29] *See* United States v. King, 395 U.S. 1, 4 (1969) (holding waivers must be unequivocally expressed and cannot be implied); Levin v. United States, 663 F.3d 1059, 1061 (9th Cir. 2011), *rev'd on other grounds*, Levin v. United States, 133 S. Ct. 1224 (2013) (same). Although there has been a modern trend towards numerous and broad statutory waivers of sovereign immunity, Supreme Court jurisprudence has been hesitant to diverge from its long-standing belief that the United States is only subject to suit on such terms and conditions as it explicitly prescribes. *See* Sisk, *supra* note 25, at 543-44. Sisk explains that courts must be weary of broadly expanding waivers beyond their plain statutory meaning out of fear that governmental prerogatives and administration may be impaired, and the policy-making process of a democratic government may be subject to interference by an unelected judiciary. *Id.* at 544.

[30] *See Cooper*, 132 S. Ct. at 1448 ("[S]overeign immunity canon 'is a tool for interpreting the law' and . . . does not 'displac[e] the other traditional tools of statutory construction.'" (citation omitted)).

whether the United States has waived its sovereign immunity, courts have required a very strict construction in favor of the sovereign.[31] Courts must consider the controversial component of the statute in the context of the entire statutory scheme when employing traditional tools of statutory construction.[32] The Supreme Court has avoided implying terms and definitions into statutes, instead giving the words within statutes their common and plain meanings.[33] When interpreting the meaning of a statute, courts rely on the following interpretative tools: (1) purpose of the statute; (2) legislative history and congressional intent; and (3) structure.[34]

In reaching its decision in *Al-Haramain II*, the Ninth Circuit employed traditional methods of statutory construction to ultimately reverse the lower court's decision that FISA's civil-liability provision does not explicitly waive sovereign immunity.[35] The Ninth Circuit relied on statutory structure, legislative history, and congressional intent to reach its conclusion.[36] Reasoning upon the principle that a waiver of sovereign immunity must be explicitly stated, the Ninth Circuit began its analysis by comparing the provision in question with other provisions of FISA and other congressional acts that explicitly waive the United States' sovereign immunity.[37] The Ninth Circuit held that the sole use of the word "person" in FISA's civil-liability provision was too ambiguous and stood in stark contrast to the explicit use of the term "United States" in other waiver provisions.[38] Furthermore, taking the FISA statutory scheme as a whole,

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[31] *See Levin*, 663 F.3d at 1063 (holding limitations upon waiver of immunity should be strictly construed in favor of sovereign); Sisk, *supra* note 25, at 561 (same).

[32] *See* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 132-33 (2000) (explaining particular statutory provision should not be analyzed alone when addressing meaning of statute); Brown v. Gen. Servs. Admin., 425 U.S. 820, 829-33 (1976) (considering amendment in light of entire statutory structure to decide whether it provided exclusive remedy).

[33] Mohamad v. Palestinian Auth., 132 S. Ct. 1702, 1706-07 (2012).

[34] *See Levin*, 663 F.3d at 1062-63 (considering legislative history and reading Gonzalez Act to determine Act does not waive immunity); ACLU v. NSA, 493 F.3d 644, 685 (6th Cir. 2007) (relying on congressional intent to determine there was no implied right to private action). *But see* Nagle, *supra* note 21, at 773 (arguing courts "refuse to consider other indicia of legislative intent").

[35] Al-Haramain Islamic Found., Inc. v. Obama (Al-Haramain II), 705 F.3d 845, 851-55 (9th Cir. 2012) (employing cannons of statutory construction to construe civil-liability provision); *see also supra* notes 30-34 and accompanying text (discussing history and tools for statutory interpretation including structure, history, and intent).

[36] *Al-Haramain II*, 705 F.3d at 851-55; *see also supra* notes 30-34 and accompanying text (discussing various tools of statutory construction employed by Ninth Circuit in reaching its conclusion).

[37] *Al-Haramain II*, 705 F.3d at 851-52 (distinguishing civil-liability provision from Federal Tort Claims Act, employment discrimination statute, and others); *see also* 50 U.S.C. § 1810 (2012) (statutory text of FISA's civil-liability provision at issue).

[38] *See Al-Haramain II*, 705 F.3d at 851 (noting difference between FISA's civil-liability

the Ninth Circuit identified that Congress did not intend to waive sovereign immunity in FISA's civil-liability provision because of its explicit use of the term "United States" with respect to other aspects of FISA: most notably, the USA PATRIOT Act.[39] The Ninth Circuit reasoned that Congress clearly knew how to waive the United States' sovereign immunity in the context of FISA; their omission of the term "United States" into the text of FISA's civil-liability provision tends to show that Congress did not intend to waive sovereign immunity with regard to this specific provision.[40] The Ninth Circuit also gave great weight to the fact that section 1810 lacked any procedures to bring an action for civil damages against the United States, and that the remedy provided by section 1810 was premised on a violation of section 1809—a criminal provision.[41]

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provision and others with respect to waiver). The Ninth Circuit compared FISA's civil-liability provision to several other provisions that have been deemed sufficient waiver outside the context of FISA. *Id.*; *see also, e.g.*, 26 U.S.C. § 7433(a) (2012) ("If . . . any officer or employee of the Internal Revenue Service . . . disregards any provision of this title . . . [a] taxpayer may bring a civil action for damages against the *United States* . . . ." (emphasis added)); Federal Tort Claims Act, 28 U.S.C. § 2674 (2012) ("The *United States* [is] liable . . . in the same manner and to the same extent as a private individual under like circumstances . . . ." (emphasis added)); 42 U.S.C. § 2000e-5(k) (2012) ("In any action or proceeding under this subchapter . . . the *United States* shall be liable for costs the same as a private person." (emphasis added)); 46 U.S.C. § 30903(a) (2012) ("A civil action in admiralty in personam may be brought against the *United States* . . . ." (emphasis added)).

[39] *Al-Haramain II*, 705 F.3d at 851. Section 2712(a) of the USA PATRIOT Act created civil remedies for certain violations arising from FISA. *See* 18 U.S.C. § 2712(a) (2012). This section of the USA PATRIOT Act reads: "[a]ny person who is aggrieved by any willful violation of . . . sections 106(a), 305(a), or 405(a) of [FISA] may commence an action in United States District Court against the *United States* to recover money damages." *Id.* (emphasis added). The provisions mentioned in section 2712(a) of the USA PATRIOT Act correspond to the following FISA provisions: 50 U.S.C. § 1806(a) (limiting use and disclosure of information acquired by electronic surveillance by Federal officers); 50 U.S.C. § 1825(a) (limiting use and disclosure of information acquired by physical search); 50 U.S.C. § 1845(a) (limiting use and disclosure of information acquired through communication interception devices). *See Al-Haramain II*, 705 F.3d at 851 n.3 (summarizing FISA's statutory limitations on use and disclosure of intercepted information).

[40] *See Al-Haramain II*, 705 F.3d at 852. The Ninth Circuit paid special attention to Congress's incorporation of the term "person" into FISA's section 1810, but used the term "United States" in the USA PATRIOT Act with respect to other provisions within FISA. *Id.* at 853. Considering that all ambiguities in the text are to be interpreted in favor of the sovereign, the Ninth Circuit relied on the disparity between section 1810 and the USA PATRIOT Act's provision under 18 U.S.C. § 2712(a) to determine that there is no explicit waiver of sovereign immunity in FISA's civil-liability provision. *Id.*

[41] *See* Al-Haramain Islamic Found., Inc. v. Obama, 690 F.3d 1089, 1097 (9th Cir. 2012), *amended by* Al-Haramain Islamic Found., Inc. v. Obama, 705 F.3d 845 (9th Cir. 2012) (noting congressional inconsistency in prescribing suit procedures in part of FISA but not others). The Ninth Circuit's amended opinion does not discuss the variance in prescribed procedures, but those procedures referenced in the original opinion are still part of the statutory framework. *Id.* (discussing USA PATRIOT Act's prescribed procedures to bring action against United States). The USA PATRIOT Act's liability provision, 18 U.S.C. § 2712, outlines certain procedures to

Although the Ninth Circuit noted that its reason for holding that section 1810 of FISA did not explicitly waive the United States' sovereign immunity is based on the structure of FISA's statutory scheme and lack of express use of the term "United States," the court also found support for its decision in legislative history.[42] The court acknowledged that the first version of the USA PATRIOT Act provided a remedy for governmental electronic surveillance; furthermore, FISA, in itself, did not waive sovereign immunity.[43] However, the proposed amendment to create an explicit waiver of sovereign immunity within the context of section 1810 was deleted the very next day.[44] The Ninth Circuit reasoned that Congress's inclusion of an explicit waiver of sovereign immunity in the USA PATRIOT Act for section 1806 without a similar waiver in section 1810 demonstrates that Congress intended to bar suit against the United

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bring an action against the United States for FISA violations stated therein. *See* § 2712(b)(4) ("Notwithstanding any other provision of law, the procedures set forth in section 106(f), 305(g), or 405(f) of [FISA] shall be the exclusive means by which materials governed by those sections may be reviewed."). Under FISA's section 1810, there are no procedures that prescribe bringing suit against the United States or any person in their official capacity. *See Al-Haramain Islamic Found.*, 690 F.3d at 1097. Section 1810 is premised on a violation of FISA's section 1809. *See* 50 U.S.C. § 1810 (2012) (providing aggrieved person under section 1809 has action under 1810). Section 1809 provides:

> (a) . . . A person is *guilty* of an offense if he intentionally—
> (1) engages in electronic surveillance . . . or
> (2) discloses or uses information obtained under color of law by electronic surveillance, knowing or having reason to know that the information was obtained through electronic surveillance not authorized . . . .
> (d) [T]here is Federal jurisdiction . . . if the person committing the *offense* was an officer or employee of the United States at the time the offense was committed.

50 U.S.C. § 1809(a), (d) (2012) (emphasis added); *see also* Adler, *supra* note 11, at 426-27 (stating FISA's section 1810 provides relief for violation of 1809's criminal-liability provision). To seek a remedy pursuant to section 1810, the party against whom the action is brought must have intentionally, and without authorization or pursuant to a FISA order, engaged in electronic surveillance. *See* Adler, *supra* note 11, at 427. Because one cannot maintain a criminal charge against an office of the United States, the Ninth Circuit concluded that section 1810 does not contemplate an action against the United States for a criminal violation. *Al-Haramain II*, 705 F.3d at 854-55. The Ninth Circuit purported that a federal office could not be held liable under section 1810 for a violation of section 1809 because this interpretation could result in a successor in office being criminally prosecuted for the actions of their predecessor. *Id.*

[42] *See Al-Haramain II*, 705 F.3d at 852-53.

[43] *See id.* The initial version of the USA PATRIOT Act proposed a waiver of sovereign immunity for violations of section 1810 and aimed to provide a remedy pursuant to the Federal Tort Claims Act. *See id.* ("Because FISA did not, on its own terms, waive sovereign immunity, an initial version of the PATRIOT Act proposed a sovereign immunity waiver for violations of § 1810.").

[44] *Id.* (noting amendment to section 1810 deleted and incorporated into USA PATRIOT Act).

States for electronic surveillance while providing such a remedy for its use and disclosure.[45] Ultimately, the Ninth Circuit decided that section 1810 of FISA does not waive the United States' sovereign immunity for the electronic surveillance of Al-Haramain because there is no explicit waiver within the statutory text, and the legislative history and statutory structure demonstrate that an implied waiver was never contemplated.[46]

Despite the lower court's fear of scant relief with respect to FISA's civil-liability provision, the decision rendered was consistent with years of American jurisprudence on the waiver of sovereign immunity.[47] The Ninth Circuit's holding that Al-Haramain could not bring the alleged action against the United States pursuant to FISA's civil-liability provision is in line with the Supreme Court's refusal to imply a waiver of sovereign immunity.[48] Where sovereign immunity jurisprudence requires strict

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[45] *Id.* ("Under this scheme, [a plaintiff] can bring a suit for damages against the United States for *use* of the collected information, but cannot bring suit against the government for collection of the information itself."). The Ninth Circuit explains that section 1806 and the USA PATRIOT Act's liability provision—18 U.S.C. § 2712—render the United States liable for the use and disclosure of any information seized by illegal means, such as electronic surveillance without a warrant; however, FISA's section 1810 purposely allows liability against individual collection of information and electronic surveillance without similarly holding the United States liable for such actions. *Id.*

[46] *See Al-Haramain II*, 705 F.3d at 852-55. The Ninth Circuit iterated that FISA is not a dead letter because it still retains governmental liability; however, liability is retained under section 1806, not section 1810. *See id.* at 853. *But see* Melissa Sachs, *U.S. Immune from Liability in 'Terrorist' Surveillance Case, 9th Circuit Says*, THE KNOWLEDGE EFFECT (Aug. 28, 2012), http://blog.thomsonreuters.com/index.php/u-s-immune-from-liability-in-terrorist-surveillance-case-9th-circuit-says (discussing Ninth Circuit's decision in *Al-Haramain II*). Sachs quotes Sahar Aziz, associate professor at Texas Wesleyan University School of Law, who contends that the Ninth Circuit's reasoning "eviscerated" FISA's civil-liability provision and leaves victims of unlawful government surveillance without any legal recourse, despite the intended purpose of FISA as a protection against such government practices. Sachs, *supra*.

[47] *See supra* notes 21-34 and accompanying text (summarizing history and modern development of doctrine of sovereign immunity). Most persuasive is the Ninth Circuit's reliance on the Supreme Court's recent pronouncement of the doctrine of sovereign immunity and waiver in *Federal Aviation Administration v. Cooper*. 132 S. Ct. 1441, 1449 (2012) ("What we thus require is that the scope of Congress' waiver be clearly discernible from the statutory text in light of traditional interpretive tools. If it is not, then we take the interpretation most favorable to the Government.").

[48] *See supra* note 29 and accompanying text (explaining American courts' reluctance to imply waivers despite modern trend towards more statutory waivers). Modern jurisprudence surrounding waiver of sovereign immunity has continually rejected implying waivers into the context of statutory text. *See, e.g.*, *Cooper*, 132 S. Ct. at 1448 (acknowledging courts cannot supply waiver if not evident in statutory language); United States v. King, 395 U.S. 1, 4 (1969) (holding waivers must be unequivocally expressed and cannot be implied); Levin v. United States, 663 F.3d 1059, 1064 (9th Cir. 2011) (same). Although in recent years Congress has shifted towards including common and broad waivers of sovereign immunity in statutory text, the Supreme Court's jurisprudence surrounding waiver of sovereign immunity has refused to diverge from the commonly held belief that the United States cannot be sued unless Congress explicitly

construction of statutory waivers in favor of the sovereign, it is not inconsistent that a court would find that the absence of the term "United States" from FISA's civil-liability provision suggests that the United States maintains its sovereign immunity with respect to claims arising under section 1810.[49] It is irresponsible to interpret the civil-liability provision to include an implied waiver where Congress explicitly waived the government's right to sovereign immunity with respect to certain other provisions, including descriptive processes within those provisions to bring such a suit.[50] Furthermore, the fact that section 1810 exclusively provides a remedy for a violation of FISA's section 1809—a criminal provision—Congress could not have meant to waive the United States' sovereign immunity and hold any of the government's offices "criminally liable" for unlawful electronic surveillance.[51] A decision contrary to that of the Ninth Circuit's risks transcending the boundaries of Congress and threatens the democratic process of policy decision-making—exactly what the doctrine of sovereign immunity aims to protect.[52]

The Ninth Circuit's disposal of Al-Haramain's case against the United States is also consistent with the underlying policy of FISA.[53]

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consents to suit. *See* Sisk, *supra* note 25, at 543-44.

[49] *See* Sisk, *supra* note 25, at 561 (explaining sovereign immunity analysis requires very strict statutory construction in favor of sovereign). According to Sisk, because there is a strong presumption against waiver of sovereign immunity when analyzing whether the government intended to expose itself to liability, the absence of the term "United States" in the statutory text must be seen as Congress's attempt to retain the United States' immunity to suit pursuant to section 1810. *Id.* at 563. Absent any clear statement by Congress that plainly and unequivocally expresses their intent to waive the government's sovereign immunity, the ambiguity that arises under section 1810's civil-liability provision must be interpreted in the light most favorable to retaining the United States' sovereign immunity. *See id.* at 565; *see also* 50 U.S.C. § 1810 (2012) (providing language of section 1810, FISA's civil-liability provision).

[50] *See supra* notes 37-41 and accompanying text (comparing non-waiver language of section 1810 with sufficient waivers in FISA and other statutory schemes). The Ninth Circuit notes that under section 2712(a) of the USA PATRIOT Act—an amendment to FISA's original statutory scheme—Congress expressly used "United States" in the language and created a right to bring a civil action against the government for willful violations of sections 106(a), 305(a), and 405(a) of FISA to the exclusion of sections 1809 and 1810. *Al-Haramain II*, 705 F.3d at 851-52; *see also* 18 U.S.C. § 2712(a) (providing statutory text for relevant provision in USA PATRIOT Act).

[51] *See supra* note 41 and accompanying text (explaining section 1810 premised upon violation of section 1809).

[52] *See* United States v. Thompson, 98 U.S. 486, 489 (1878) (purporting sovereign immunity preserves ability to address public concerns without yielding to private suit). As the *Thompson* Court explained, sovereign immunity shields the public from penalization due to the acts of its elected representatives and their agents. *Id.*; *see also* Sisk, *supra* note 25, at 530 (explaining that sovereign immunity policy is balance between private complaints against government and public concerns).

[53] *See supra* note 11 and accompanying text (explaining FISA's purpose as providing Congress ability to gather intelligence while limiting use and disclosure).

Although the Ninth Circuit diverged from the standard analysis for waiver of sovereign immunity, which is typically limited to the statute's plain meaning and a contextual analysis of the entire statutory scheme, Congress's intent also requires this result.[54] The doctrine of sovereign immunity allows Congress to prioritize important public concerns and government administration without bowing to the claims of private actors, and FISA's civil-liability provision was drafted with that purpose in mind.[55] FISA was promulgated to permit the government to collect intelligence while limiting its ability to use and disclose that information.[56] FISA's statutory scheme is consistent with this underlying policy objective, and finding a waiver of sovereign immunity under section 1810 would be contrary to FISA's ultimate purpose.[57]

However, criticism of the Ninth Circuit's decision against Al-Haramain's ability to bring suit is not without merit.[58] Section 1810, as written, could easily be interpreted as a dead letter considering, with the government immune to suit under section 1810, there may not be an alternative defendant in the case where a foreign entity, such as Al-Haramain, is subject to electronic surveillance absent probable cause.[59] However, section 1810 intentionally provides a limited remedy in the very

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[54] *See* Nagle, *supra* note 21, at 773 (contending sovereign immunity analysis for waiver does not include interpretation of congressional intent or history). Nagle criticizes the requirement that waiver must adhere to the clear-statement rule; although it is easy for Congress to waive sovereign immunity by statutory provision, it is often difficult for Congress to define the scope of its waiver textually. *Id.* at 776.

[55] *See* Sisk, *supra* note 25, at 529-30.

[56] *See supra* note 11 and accompanying text (explaining purpose for creating FISA was American electorate's worry over domestic surveillance by government); *see also supra* notes 39-46 (viewing FISA's statutory scheme as whole, alongside legislative history, to demonstrate FISA's purpose and intent).

[57] *See supra* notes 39-46 and accompanying text (explaining court's finding with respect to FISA's section 1810 is consistent with FISA's statutory scheme). FISA's amendment under the USA PATRIOT Act—18 U.S.C. § 2712—provides that the United States is liable for the use and disclosure of any information seized by illegal means, such as electronic surveillance, absent a warrant or authorization, while FISA's section 1810 purposely creates individual liability for collection of information and electronic surveillance without holding the United States liable for such actions. *See* Al-Haramain Islamic Found., Inc. v. Obama (Al-Haramain II), 705 F.3d 845, 851-53 (9th Cir. 2012). Such an interpretation of FISA is consistent with the underlying purpose of the Act: to permit the government to gather intelligence via electronic surveillance while providing a remedy for its unlawful use and disclosure. *See id.* at 852.

[58] *See* Sachs, *supra* note 46 (quoting Professor Sahar Aziz, who claims Ninth Circuit's decision renders section 1810 dead letter law).

[59] *See id.* (claiming Ninth Circuit's decision leaves victims without legal recourse); *see also In re* NSA Telecomms. Records Litig., 700 F. Supp. 2d 1182, 1192-93 (N.D. Cal. 2010), *rev'd*, Al-Haramain Islamic Found., Inc. v. Obama (Al-Haramain II), 705 F.3d 845 (9th Cir. 2012) (summarizing lower court's position that immunity in section 1810 would afford "scant, if any, relief").

narrow circumstances where there has been an intentional and unauthorized gathering of intelligence.[60] Despite the Ninth Circuit's decision, FISA stays true to its original purpose by protecting individuals from use and disclosure of unlawfully gathered information.[61] Ultimately, even if section 1810's language provides a very limited remedy, only Congress may correct it because they are principally in charge of deciding when the government's public policy concerns and administration ought to yield to the relief of injured private actors.[62]

In *Al-Haramain Islamic Foundation, Inc. v. Obama*, the Ninth Circuit was confronted with the commonly litigated and complex issue of whether a court can imply a waiver of sovereign immunity absent Congress's express inclusion of the term "United States" in the statutory waiver. Although critics argue that the surrounding circumstances suggest that Congress must have intended to waive the United States' sovereign immunity with respect to FISA's civil-liability provision, the Ninth Circuit chose not to diverge from years of sovereign immunity jurisprudence requiring strict statutory construction in favor of the sovereign. Strictly construing the text of FISA's civil-liability provision, it is clear that Congress permitted a remedy against individuals who intentionally and without authorization subjected others to electronic surveillance in violation of FISA's section 1809. Such a conclusion is consistent with the legislative intent of FISA, which was aimed at allowing the government to gather foreign intelligence while limiting their ability to use and disclose the collected information. The doctrine of sovereign immunity permits Congress to address public policy concerns and preserve its administrative ability without having to yield to private complaints. The Ninth Circuit's decision is consistent with sovereign immunity jurisprudence, and correctly preserved the democratically elected Congress's ability to utilize its own decision-making process to explicitly include a waiver of sovereign immunity where government interests are mundane in comparison to the necessity of private relief.

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[60] *See* Adler, *supra* note 11, at 426-27 (explaining limited circumstances when section 1810 provides civil relief for violation of section 1809). Adler states that section 1810 does provide civil relief where surveillance is both intentional and not authorized by or conducted pursuant to a FISA order by the Federal Intelligence Surveillance Court. *Id.* at 427.

[61] *See supra* notes 39, 50 and accompanying text (explaining remedies available under FISA and USA PATRIOT Act for use and disclosure of intelligence).

[62] *See* Sisk, *supra* note 25, at 529 (purporting waiver turns upon governmental consent expressed through democratically elected Congress).

ANTITRUST LAW—SEVENTH CIRCUIT SEES THROUGH FAÇADE, EXPOSES NCAA SCHOLARSHIP LIMITS TO SHERMAN ANTITRUST SCRUTINY—*AGNEW V. NCAA*, 683 F.3D 328 (7TH CIR. 2012)

The Sherman Antitrust Act prohibits business agreements that unreasonably restrain competition in the marketplace.[1] Courts have inconsistently applied the Act in its dealings with the National Collegiate Athletic Association ("NCAA").[2] In *Agnew v. NCAA*,[3] the Seventh Circuit considered whether the Sherman Act regulates the relationship between NCAA member institutions and student-athletes.[4] The Seventh Circuit recognized that the exchange of tuition scholarships for student-athlete services signifies an economic transaction that takes place in a cognizable market under the Sherman Act.[5]

In exchange for athletic scholarships to play college football, plaintiffs James Agnew ("Agnew") and Patrick Courtney ("Courtney") enrolled at Rice University and North Carolina Agricultural and Technical State University ("North Carolina A&T"), respectively.[6] Once enrolled, both Agnew and Courtney sustained football-related injuries, and neither school elected to renew their annual scholarships.[7] Both plaintiffs paid for

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[1] *See* 15 U.S.C. § 1 (2012) ("Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal."). A 1914 amendment to the Sherman Act specified that penalties for violating antitrust law and injuring a person's "business or property" include "threefold the damages by him sustained." 15 U.S.C. § 15 (2012) (detailing provisions added to Sherman Act through Clayton Act).

[2] *Compare* Smith v. NCAA, 139 F.3d 180, 185-86 (3d Cir. 1998) (reasoning Sherman Act does not apply to NCAA eligibility rules), *vacated*, 525 U.S. 459 (1999), *with* Agnew v. NCAA, 683 F.3d 328, 340 (7th Cir. 2012) (stating Sherman Act applies to NCAA bylaws generally), *and* McCormack v. NCAA, 845 F.2d 1338, 1343 (5th Cir. 1988) (assuming without deciding that Sherman Act applies to NCAA eligibility rules).

[3] 683 F.3d 328 (7th Cir. 2012).

[4] *See id.* at 346-47 (explaining issue before court).

[5] *See id.* at 338, 340 (using term "cognizable" to illustrate market's relevancy under Sherman Act analysis).

[6] *See id.* at 332 (defining scholarship terms to include one year of education, room, and board at no charge).

[7] *See id.* (explaining why scholarships not renewed). Agnew enrolled at Rice University in 2006 and his first two years of tuition were covered by his athletic scholarship. *Id.* When Agnew suffered an injury his sophomore year, Rice University did not renew his scholarship for his junior year. *Id.* Agnew successfully appealed the decision and received a one-year scholarship

the remainder of their college tuition out-of-pocket.[8]

Agnew and Courtney (hereinafter "Plaintiffs") filed suit against the NCAA, alleging that the NCAA bylaw that caps the number of student-athlete scholarships a member school can offer per sport each year violates section one of the Sherman Antitrust Act.[9] The NCAA argued that the case should be dismissed due to a failure to allege a relevant market in the Plaintiffs' complaint.[10] The Plaintiffs argued that the amended complaint identified two markets: the market for the sale of bachelor's degrees and the labor market for student-athlete services.[11]

At the trial court level, the United States District Court for the Southern District of Indiana granted the NCAA's motion to dismiss, ruling that Agnew failed to identify a relevant market in his complaint.[12] Furthermore, the court explained that granting the motion to dismiss would still have been proper even if Agnew identified a market because the markets for bachelor's degrees or for student-athletes are not cognizable under Sherman Act analysis.[13] The Seventh Circuit affirmed the dismissal

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for his junior year. *Id.* However, Agnew paid for his senior year in full. *Id.* Courtney enrolled at North Carolina A&T in 2009 and received one year of scholarship-funded education. *Id.* When Courtney sustained an injury during his freshman year training camp, North Carolina A&T chose not to renew his scholarship. *Id.* Courtney transferred to a different school, citing financial circumstances and high out-of-state tuition costs. *Id.*

[8] *See Agnew*, 683 F.3d at 332 (outlining circumstances leading to Plaintiffs' tuition costs).

[9] *See* Agnew v. NCAA, No. 1:11-cv-0293-JMS-MJD, 2011 WL 3878200, at *1 (S.D. Ind. Sept. 1, 2011). Plaintiffs also alleged that another NCAA bylaw prohibiting member schools from offering multiyear athletic scholarships violated the Sherman Act. *Id.* The NCAA approved a lift of the multiyear scholarship ban in October 2011 and narrowly survived repeal in February 2012. *See* Steve Wieberg, *Multiyear Scholarship Rule Narrowly Overrides Vote*, USA TODAY, http://usatoday30.usatoday.com/sports/college/story/2012-02-17/multiyear-scholarships-survives-close-vote/53137194/1 (last updated Feb. 17, 2012, 7:00 PM) (describing how NCAA schools came two votes short of overturning this measure).

[10] *See Agnew*, 2011 WL 3878200, at *2 (noting NCAA's argument that Plaintiffs failed to allege relevant market). In addition, the NCAA argued the case should be dismissed because the Plaintiffs failed to allege a geographic market, an anti-competitive effect on a relevant market, and that the Plaintiffs lacked antitrust standing to challenge the NCAA bylaws at issue. *Id.*

[11] *See id.* at *6 (analyzing proposed markets despite inadequate complaint). The district court noted that Agnew removed allegations of a bachelor's degree market during the amending process, and that the amended complaint never mentioned the concept of a labor market. *Id.* at *6-7. Nevertheless, the Plaintiffs argued that the contended bylaws "resulted in a horizontal agreement to fix prices and reduce output" of these markets. *Agnew*, 683 F.3d at 333.

[12] *See Agnew*, 2011 WL 3878200, at *10 (dismissing for failure to allege relevant market). To successfully claim a section one violation of the Sherman Act, plaintiffs must prove three elements: "(1) a contract, combination, or conspiracy; (2) a resultant unreasonable restraint of trade in [a] relevant market; and (3) an accompanying injury." *Id.* at *2 (citation omitted). Failing to allege a discernable market is grounds for dismissal because it is a material element. *Id.* at *9.

[13] *See id.* at *7 (explaining reasons for case dismissal). The district court dismissed the case with prejudice for two reasons. *Id.* at *6-7. First, the Plaintiffs had already amended their

because Agnew failed to identify a relevant labor market in his complaint.[14] However, the Seventh Circuit rejected the district court's reasoning that Agnew could not have identified a relevant labor market.[15] Instead, the appeals court concluded that the labor market for student athletes is a cognizable market; therefore, if properly alleged, the plaintiff's burden to identify a market could potentially be met under Sherman Act analysis.[16]

The NCAA describes itself as an organization that was founded to protect student-athletes.[17] The NCAA believes that maintaining amateur status is necessary to protect student-athletes from being exploited by professional and commercial enterprises.[18] Although most NCAA bylaws

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complaint and chose to omit a relevant market. *Id.* Second, the district court did not believe that the markets discussed by the Plaintiffs at oral argument would be cognizable under Sherman Act analysis. *See id.* at *7.

[14] *See Agnew*, 683 F.3d at 347 (noting Plaintiffs had chance to amend complaint but strategically chose to forego identifying specific market). The NCAA argued that Agnew did not allege there was a relevant market and that markets for bachelor's degrees and student-athlete labor are not commercial, therefore the Sherman Act does not apply. *Id.* at 334.

[15] *See id.* at 346-47 (rejecting lower court's reasoning).

[16] *See id.* at 346 ("The proper identification of a labor market for student-athletes . . . would meet plaintiffs' burden of describing a cognizable market under the Sherman Act."). However, the court observed that the "[p]laintiffs appear to have made the strategic decision to forgo identifying a specific relevant market." *Id.* at 347.

[17] *See About the NCAA*, NCAA, http://www.ncaa.org/wps/wcm/connect/public/ncaa/about+the+ncaa (last visited May 14, 2013) (emphasizing NCAA's focus on protecting student-athletes). According to NCAA bylaws, "[a] basic purpose of this Association is to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body and, by so doing, retain a clear line of demarcation between intercollegiate athletics and professional sports." 2011-2012 NCAA DIVISION I MANUAL: CONSTITUTION, OPERATING BYLAWS, ADMINISTRATIVE BYLAWS 1, *available at* http://www.dartmouthsports.com/pdf8/794646.pdf. The NCAA's inception is often attributed to President Theodore Roosevelt, who believed a centralized league would help reduce the amount of football-related deaths that were prevalent at the time. Neil Gibson, Note, *NCAA Scholarship Restrictions as Anticompetitive Measures: The One-Year Rule and Scholarship Caps as Avenues for Antitrust Scrutiny*, 3 WM. & MARY BUS. L. REV. 203, 211-14 (2012) (providing detailed history of NCAA's ascension from humble beginnings). The NCAA's role expanded greatly over time, and the league now has jurisdiction over nearly every aspect of intercollegiate athletics. *See* Sean M. Hanlon, *Athletic Scholarships as Unconscionable Contracts of Adhesion: Has the NCAA Fouled Out?*, 13 SPORTS LAW. J. 41, 47 (2006) ("Since its inception . . . the number and extensiveness of NCAA rules and regulations have increased exponentially to the point where the NCAA literally controls nearly every aspect of intercollegiate athletics.").

[18] 2011-2012 NCAA DIVISION I MANUAL: CONSTITUTION, OPERATING BYLAWS, ADMINISTRATIVE BYLAWS, *supra* note 17, at 4 ("Student-athletes shall be amateurs in an intercollegiate sport, and their participation should be motivated primarily by education . . . student-athletes should be protected from exploitation by professional and commercial enterprises."). Despite President Roosevelt's concerns about amateurism, the NCAA's early focus on preserving amateurism was haphazard at best. *See* Taylor Branch, *The Shame of College Sports*, The Atlantic, Oct. 2011, *available at* http://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-

focus on amateurism and competition, in 1976 the NCAA proposed hundreds of amendments aimed at cutting costs for member organizations.[19] One of these amendments was a scholarship cap that limits the amount of scholarship aid that colleges can award to student-athletes.[20]

The Sherman Act protects markets from diminished competition by prohibiting unreasonable trade restraints.[21] To determine whether an action

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collegesports/308643/?singlepage=true ("For nearly 50 years, the NCAA, with no real authority and no staff to speak of, enshrined amateur ideals that it was helpless to enforce."); Gibson, *supra* note 17, at 212 ("Nonetheless, the principle had been expressed, its association with the NCAA affirmed by the President's words, and its message made available for posterity to claim as part of the NCAA's legacy."). For example, after the NCAA began touting amateurism, University of Pittsburgh freshmen went on strike because they were paid less than their upperclassmen teammates, and the University of Virginia held a press conference that forgave players for being paid because their studies were so rigorous. *See* Branch, *supra* (highlighting NCAA's persistent lack of regulatory power until 1950s).

[19] *See* Gibson, *supra* note 17, at 221 (describing how NCAA member schools struggling to grapple with swollen budgets).

[20] *See* Peter Keating, *The Silent Enemy of Men's Sports*, ESPN (May 23, 2012, 12:44 PM), http://espn.go.com/espnw/title-ix/7959799/the-silent-enemy-men-sports (noting scholarship caps were implemented in 1970s to protect competition within high-revenue sports); Gibson, *supra* note 17, at 221 (suggesting scholarship caps were introduced as "cost-reducing . . . measures" in tough financial times); *see also In re* NCAA I-A Walk-On Football Players Litig., 398 F. Supp. 2d 1144, 1149 (W.D. Wash. 2005) (choosing not to dismiss allegations that NCAA scholarship caps were implemented to cut costs); 2011-2012 NCAA DIVISION I MANUAL: CONSTITUTION, OPERATING BYLAWS, ADMINISTRATIVE BYLAWS, *supra* note 17, at 202-15 (defining NCAA scholarship rules); Gibson, *supra* note 17, at 218-19 (describing how lower profile schools began offering free education to attract recruits). An NCAA spokesman admitted that the NCAA treats football and basketball financial aid differently from all other sports because doing so generates more money. Keating, *supra*. As a result, men's football and men's basketball currently have the two highest rates of available scholarships per starting lineup, which is determined by section 15 of the NCAA bylaws. *Id.* For example, the NCAA limits Division I football programs from providing more than eighty-five student-athletes with athletics-based scholarship aid; these values vary by sport and division. *See generally* Rock v. NCAA, No. 1:12-CV-1019 JMS-DKL, 2012 WL 3096760, at *15 (S.D. Ind. July 25, 2012) (explaining NCAA scholarship caps); 2011-2012 NCAA DIVISION I MANUAL: CONSTITUTION, OPERATING BYLAWS, ADMINISTRATIVE BYLAWS, *supra* note 17, at 202-15 (providing complete list of NCAA bylaws relating to scholarship caps and required compliance measures). This scholarship cap has been challenged before, but the issue went undecided because the plaintiffs failed to receive class certification. *See In re* NCAA I-A Walk-On Football Players Litig., No. C04-1254C, 2006 WL 1207915, at *9 (W.D. Wash. May 3, 2006) (dismissing for failure to protect interests of all class members); ROGER D. BLAIR & JEFFREY L. HARRISON, MONOPSONY IN LAW & ECONOMICS 197-98 (2nd ed. 2010) (explaining NCAA's victory due to lack of class standing). The NCAA prevailed in *In re NCAA* because the plaintiffs that brought the lawsuit could not protect the interests of all class members—a requirement to obtain class certification. BLAIR & HARRISON, *supra*, at 197-98. For example, if it were determined that, in the absence of the NCAA scholarship bylaw, schools would have offered twenty additional scholarships to prospective students, a class containing more than twenty student-athletes would only be partially protected. *Id.* at 198.

[21] *See* Banks v. NCAA, 977 F.2d 1081, 1087-88 (7th Cir. 1992) (describing Sherman Act's aim to rectify consumer injury). Every contract restrains trade in one way or another, so the Supreme Court limits the Act's application to unreasonable restraints of trade. NCAA v. Bd. of

is unreasonably restraining trade, courts focus on the anticompetitive effects the restraint has upon a relevant market.[22] Unless a restraint is "entirely void of redeeming competitive rationales"—which renders the activity illegal-per-se—the court will resort to "rule of reason" analysis to investigate the practice's anticompetitive and procompetitive impact on the market.[23] The rule-of-reason standard imposes a burden on the plaintiff to first show that the defendant has market power, and second, that the defendant is abusing their market power by implementing a restraint that has anticompetitive effects on the relevant market.[24] If this burden is met, the defendant must provide procompetitive justifications for their anticompetitive behavior that outweighs the detrimental effect on the market.[25] Nevertheless, in instances of blatant anticompetitive behavior, courts may opt to apply a "quick look rule of reason analysis," which bypasses the market-analysis stage entirely and proceeds to the aforementioned balance of procompetitive and anticompetitive values embedded in the conduct.[26]

Regents, 468 U.S. 85, 98 (1984) (holding only unreasonable trade restraints violate Sherman Act). The Sherman Act also only applies to commercial transactions. Apex Hosiery Co. v. Leader, 310 U.S. 469, 495-97 (1940) (refusing to apply Sherman Act absent presence of commercial competition).

[22] *See Bd. of Regents*, 468 U.S. at 104 (determining that reasonableness of restraint based on its impact on competition); Denny's Marina, Inc. v. Renfro Prods., Inc., 8 F.3d 1217, 1220 (7th Cir. 1993) (outlining required elements of successful section one claims).

[23] *See* Law v. NCAA, 134 F.3d 1010, 1016-17 (10th Cir. 1998) (quoting SCFC ILC, Inc. v. Visa USA, Inc., 36 F.3d 958, 963 (10th Cir. 1994)) (describing both analytical approaches). Illegal-per-se restraints are "so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality . . . ." Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 692 (1978); *see also Bd. of Regents*, 468 U.S. at 103-04 (applying per-se standard when further examination is unjustified); Ariz. v. Maricopa Cnty. Med. Soc'y, 457 U.S. 332, 343-44 (1982) ("The costs of judging business practices under the rule of reason…have been reduced by the recognition of *per se* rules.").

[24] *See Law*, 134 F.3d at 1016-17 (highlighting steps to prevail under rule of reason); Valley Liquors, Inc. v. Renfield Imps., Ltd., 822 F.2d 656, 666 (7th Cir. 1987) (determining market power presence is threshold question for any rule-of-reason case). Rule of reason is the standard framework for measuring anticompetitiveness. *See* Bus. Elecs. Corp. v. Sharp Elec. Corp., 485 U.S. 717, 726 (1988) (describing general presumption that favors rule-of-reason analysis in antitrust cases).

[25] *See* Clorox Co. v. Sterling Winthrop, Inc., 117 F.3d 50, 56 (2d Cir. 1997) (describing rule-of-reason analysis). If the defendant provides procompetitive justifications for their behavior, the plaintiff may suggest less intrusive means to reach the same procompetitive end. *Id.* The ultimate goal is to determine whether an agreement among competitors is harming the consumer. *Id.*; *see also Law*, 134 F.3d at 1019 (utilizing burden of proof shifting to define rule-of-reason analysis).

[26] *See Law*, 134 F.3d at 1020 (applying quick-look rule of reason). When the court adopts quick-look analysis, anticompetitive behavior is presumed to exist without determining the presence of a relevant market or market power. *See id.* (acknowledging market power is unnecessary when conduct has obvious anti-competitive effects). The plaintiff must show that

The NCAA's rapid ascension into a billion-dollar enterprise eventually subjected its activity to Sherman Act scrutiny.[27] However, courts have held the NCAA to a lighter antitrust standard on the grounds that their product cannot survive without engaging in typically forbidden horizontal restrictions on competition. [28] As a result, only two court decisions—*Board of Regents* and *Law*—have ever held the NCAA in violation of the Sherman Act.[29] In *Board of Regents*, the Supreme Court

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the defendant successfully implemented a naked-trade restraint, such as a price or output limit, that benefitted the defendant beyond the providence of an unaltered market. *See id.* (focusing on NCAA bylaw's effect on market competition).

[27] *See* *Revenue*, NCAA, http://www.ncaa.org/wps/wcm/connect/public/NCAA/Finances/Revenue (last updated Feb. 13, 2013) (breaking down NCAA revenue stream); *see also infra* note 29 and accompanying text (describing two instances where NCAA was liable for Sherman Act violations). The NCAA reported revenues of $871.6 million in 2011; eighty-one percent of which came from television broadcasting contracts with Turner Broadcasting and CBS Sports. *Revenue*, *supra*. At least one court recognized that colleges and universities engage in commercial activity unrelated to the NCAA, such as providing financial aid, which can be subjected to Sherman Act scrutiny. *See* United States v. Brown Univ., 5 F.3d 658, 668 (3d Cir. 1993) (holding student financial aid is commercial transaction). Although the court in *Brown University* made the point that MIT's nonprofit status and important social welfare goals help their case in a Sherman Act analysis, these traits do not make the school's actions noncommercial. *Id.*

[28] *See Bd. of Regents*, 468 U.S. at 101 ("[H]orizontal restraints on competition are essential if the product is to be available at all."). The Court in *Board of Regents* applied rule-of-reason analysis, despite acknowledging that horizontal price fixing and output limitation are illegal per se, because the NCAA is in an industry that needs to commit typically illegal-per-se acts in order to preserve its product. *Id.* at 117. Prior to 1975, self-regulatory organizations like the NCAA were immune from antitrust law. *See* Goldfarb v. Va. State Bar, 421 U.S. 773, 787-88 (1975) (rejecting antitrust immunity for self-regulatory organizations). The *Goldfarb* Court overturned several doctrines that were shielding self-regulated organizations from antitrust laws on the theory that these organizations did not engage in "trade or commerce." *Id.*

[29] See *Bd. of Regents*, 468 U.S. at 119-20 (holding television contract bylaw violates Sherman Act); *Law*, 134 F.3d at 1024 (holding bylaw regulating assistant coach salaries violates Sherman Act); *see also* Gibson, *supra* note 17, at 208 n. 22 ("Only twice, however, have these courts recognized NCAA violations of the Sherman Act, first in *NCAA v. Board of Regents of the University of Oklahoma*, and later in *Law v. NCAA*."). In *Board of Regents*, the Supreme Court held that the NCAA violated the Sherman Act by restricting member universities from negotiating their own television contracts. *Bd. of Regents*, 468 U.S. at 120. The Court held:

> But consistent with the Sherman Act, the role of the NCAA must be to preserve a tradition that might otherwise die; rules that restrict output are hardly consistent with this role. Today we hold only that the record supports the District Court's conclusion that by curtailing output and blunting the ability of member institutions to respond to consumer preference, the NCAA has restricted rather than enhanced the place of intercollegiate athletics in the Nation's life.

Id. In *Law*, the Tenth Circuit held that an NCAA bylaw capping assistant coach salaries violated the Sherman Act because the NCAA failed to offer enough procompetitive justifications to carry its burden of proof. 134 F.3d at 1024.

presumed certain NCAA regulations were procompetitive under Sherman Act analysis because the regulations were deemed necessary for the NCAA's survival.[30] However, *Board of Regents* only listed a few specific examples of presumptively procompetitive behavior, making it unclear whether NCAA regulations like scholarship limits can violate the Sherman Act.[31] Critics argue that the courts have enabled the NCAA to exploit this

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[30] 468 U.S. at 120 (aiming to preserve NCAA product). The Court deemed it "reasonable to assume that most of the regulatory controls of the NCAA are justifiable means of fostering competition among amateur athletic teams and therefore procompetitive because they enhance public interest in intercollegiate athletics." *Id.* at 117. Eligibility rules also fall within this enumerated category. *Id.* The Court reasoned:

> The NCAA plays a critical role in the maintenance of a revered tradition of amateurism in college sports. There can be no question but that it needs ample latitude to play that role, or that the preservation of the student-athlete in higher education adds richness and diversity to intercollegiate athletics and is entirely consistent with the goals of the Sherman Act.

Id. at 120. Historically, courts that have analyzed NCAA bylaws have most often determined that the rules were procompetitive attempts to protect either eligibility or amateurism in college sports. *See* Gibson, *supra* note 17, at 240 (calling plaintiff history in lawsuits against the NCAA "grisly"); *see also* Smith v. NCAA, 139 F.3d 180, 187(3d. Cir. 1998) (determining that NCAA may prohibit graduate students from competing to preserve amateurism), *vacated*, NCAA v. Smith, 525 U.S. 459 (1999); Banks v. NCAA, 977 F.2d 1081, 1090 (7th Cir. 1992) (holding NCAA may revoke eligibility once student-athlete declares for professional draft); McCormack v. NCAA, 845 F.2d 1338, 1345 (5th Cir. 1988) (holding NCAA may limit player compensation to preserve amateurism); Justice v. NCAA, 577 F.Supp. 356, 382 (D. Ariz. 1983) (holding NCAA may revoke eligibility once student-athlete participates for pay).

[31] *See Bd. of Regents*, 468 U.S. at 117 (listing contest conditions and eligibility rules as examples of procompetitive attempts to foster competition); *see also Banks*, 977 F.2d at 1091 (noting different opinions between majority and dissent regarding what constitutes protected eligibility rules). The *Banks* majority opined in dicta that discovering a labor market for student-athletes is improbable because "the value of [a] scholarship is based upon the school's tuition and room and board, not by the supply and demand for players." 977 F.2d at 1091. Dissenting in *Banks*, Judge Flaum argued that there was a cognizable market for student-athlete labor, mainly because the value of a scholarship goes beyond room and board, including access to coaches, facilities, and likelihood of ascension to professional sports. *Id.* at 1098-99 (Flaum, J., dissenting) (opining deeming eligibility rules noncommercial "an outmoded image . . . that no longer jibes with reality"); *see also In re* NCAA I-A Walk-On Football Players Litig., 398 F. Supp. 2d 1144, 1149 (W.D. Wash. 2005) (framing NCAA scholarship cap as eligibility issue is "a mischaracterization"). In *White v. NCAA*, the plaintiffs alleged that the NCAA capped student-athlete "grant-in-aid" awards to cut costs in a market where "student-athletes are potential buyers of the unique combination of coaching-services and academics offered by . . . colleges and universities." Order Denying NCAA's Motion to Dismiss at 3, White v. NCAA, No. CV-06-999 RGK (C.D. Cal. Sep. 20, 2006), *available at* http://www.ncaaclassaction.com/deny.pdf. The court found a relevant market sufficient to survive a motion to dismiss, and the NCAA settled with the student-athlete plaintiffs for $228 million dollars. *See* Notice of Class Action Settlement and Fairness Hearing at 2, White v. NCAA, No. CV06-999 VBF (C.D. Cal. Feb. 4, 2008), *available at* http://www.ncaaclassaction.com/settlementnotice.pdf (describing settlement figures). In addition to these recent cases, the plaintiff's attorney in *Agnew* filed a new class action on

lack of clarity behind the shield of procompetitiveness to the detriment of the student-athlete.[32]

In *Agnew v. NCAA*, the Seventh Circuit considered whether the NCAA's demand for student-athlete labor constitutes a cognizable market that implicates the Sherman Act.[33] The court determined that the Sherman Act applies generally to the NCAA's bylaws because member schools anticipate economic gain, and that both schools and athletes specifically weigh economic factors when contemplating scholarship offers. [34] The

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behalf of NCAA student-athletes with intentions of "following the road map given to us by the 7th Circuit." *See Another Student-Athlete Challenges NCAA Scholarship Rules* Rock v. NCAA, 20 No. 5 WESTLAW J. ANTITRUST 9, *1 (Aug. 15, 2012), *available at* 2012 WL 3405320 (describing merits behind *Rock* lawsuit); *see also* Plaintiff's Class Action Complaint and Jury Trial Demand, Rock v. NCAA, No. 1:12-CV-1019-JMS-DKL, 2012 WL 3096760, at *1 (S.D. Ind. July 25, 2012). In *Rock*, the district court found that the plaintiff's failed to adequately describe the relevant market in their complaint. Rock v. NCAA, No. 1:12-CV-1019-JMS-DKL, 2013 WL 786775, at *9 (S.D. Ind. March 1, 2013). The court noted:

> Whereas the *Agnew* plaintiffs opted for a "nothing" approach by refusing to plead a relevant market, the strategy here appears to be taking the "all" approach by including all NCAA institutions and sports. As plaintiffs' counsel stated to this Court in *Agnew*, "[p]leading [a] market in antitrust cases is a complicated and often time-consuming matter." If counsel wants this claim to proceed, the moment has come to spend the time and undertake the potentially complicated task of the "proper identification" of a relevant market."

Id. at 13 (quoting NCAA v. Agnew, 683 F.3d 328, 346 (7th Cir. 2012)).

[32] *See* Christopher L. Chin, Comment, *Illegal Procedures: The NCAA's Unlawful Restraint of the Student-Athlete*, 26 LOY. L.A. L. REV. 1213, 1214, 1228 (1993) (analyzing NCAA's ability to avoid antitrust law by championing amateurism). Chin argues that *Board of Regents* was a rare example of clear commercial activity, and that most aspects of college athletics fall within a murky combination of commercial and noncommercial markets. *Id.* As a result, the NCAA can rely on its traditional argument of preserving amateurism to convince a court to deem their restraint procompetitive and consequently reasonable under the Sherman Act. *Id.* Courts distinguish commercial activity from non-commercial activity—like amateurism, competitive balance, and academic integrity—and allow collusion to protect these interests. *See* Gibson, *supra* note 17, at 208 (suggesting NCAA can violate antitrust provisions to advance "noncommercial" objectives); Hanlon, *supra* note 17, at 56 ("[T]he principle of student-athlete welfare has unfortunately eroded over the time, blurring the principle of amateurism along with it."). Another author, Taylor Branch, believes that the term "student-athlete" aims to "conjure the nobility of amateurism," but is actually a "sophisticated formulation" designed to save colleges money. *See* Branch, supra note 18 (attempting to demystify "the myth of the 'student-athlete'").

[33] 683 F.3d 328, 337-38 (7th Cir. 2012) (describing issue before court).

[34] *Id.* at 340 (" [T]he Sherman Act applies to commercial transactions, and the modern definition of commerce includes 'almost every activity from which [an] actor anticipates economic gain.'" (citation omitted)). Schools can make millions of dollars from these transactions, making them likely to pay millions of dollars on football coaches, training facilities, and other in-kind benefits, instead of putting that money toward educational resources. *Id.* (pointing to top college football coaching salary in 2011 that eclipsed five million dollars).

Seventh Circuit then adhered to the procompetitive presumptions set forth in *Board of Regents*, but made it a point to focus on the context surrounding the Supreme Court's logic when making such presumptions.[35] The Seventh Circuit narrowly interpreted the Supreme Court's "blessing" of presumptively procompetitive regulations in *Board of Regents*, finding the at-issue scholarship regulations "not inherently or obviously necessary for the preservation of amateurism, the student-athlete, or the general product of college football."[36] In doing so, the Seventh Circuit adopted its dissenting opinion in *Banks v. NCAA*, finding a relevant market for student-athlete labor and requiring a more searching analysis of procompetitive

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Conversely, student athletes likely include economic factors when choosing a college, such as likelihood of ascension to the professional ranks. *Id.* at 341, 346-47 (reasoning schools hire coaches that know how to launch players into professional ranks). The court postulated that the only reason NCAA schools do not pay athletes directly is because of the bylaw itself. *Id.* at 340-41.

[35] *Id.* at 343-44 ("[I]f a regulation is not, on its face, helping to 'preserve a tradition that might otherwise die,' either a more searching Rule of Reason analysis will be necessary to convince us of its procompetitive or anticompetitive nature, or a quick look at the rule will obviously illustrate its anticompetitiveness." (quoting NCAA v. Bd. of Regents, 468 U.S. 85, 120 (1984))). The court interpreted the scope of *Board of Regents* in great detail, essentially concluding that collusion is permitted to preserve certain aspects of the NCAA that define the product, such as amateurism, student-athlete eligibility, and uniformed rules and regulations. *Id.* at 343-44. *Agnew* places the procompetitive presumption from *Board of Regents* back into the context in which it was created, focusing on whether a bylaw is necessary to preserve the product and not whether it merely relates to amateurism or eligibility. *Id.* at 342 ("In . . . attempting to discern the scope of the presumption established by *Board of Regents*, it is important to consider the context in which that presumption was discussed."); *see also Bd. of Regents*, 468 U.S. at 117 (describing presumption's origin and purpose). "[A] certain degree of cooperation is necessary if the type of competition that [the NCAA] and its member institutions seek to market is to be *preserved*." *Bd. of Regents*, 468 U.S. at 117 (emphasis added).

[36] *Agnew*, 683 F.3d at 343-44 (discussing precedent). Somewhat ambiguously, the *Board of Regents* Court granted procompetitive presumptions to NCAA bylaws that fit within the same mold as rules that foster competition. *See Bd. of Regents*, 468 U.S. at 117 (finding restraining football telecasts does not fit mold); *supra* note 35 and accompanying text (discussing *Agnew's* interpretation of *Board of Regents*). In *Board of Regents*, the Supreme Court established the assumption that most NCAA bylaws enhance competition, public interest, or otherwise aim to protect the NCAA from failing, and are therefore procompetitive. 468 U.S. at 117. Because only two cases have ever ended with an NCAA Sherman Act violation, courts have apparently interpreted the mold very broadly. *See supra* note 29 and accompanying text (describing both cases). In contrast, the *Agnew* court refused to grant the NCAA's scholarship bylaw a procompetitive presumption, interpreting the "mold" as a narrow class of bylaws that does not include student-athlete scholarship caps. *Agnew*, 683 F.3d at 343-44 ("The Bylaws at issue . . . are not eligibility rules, nor do we conclude that they 'fit into the same mold' as eligibility rules."). The court determined that the bylaws were not necessary to protect the NCAA's product and therefore did not earn the presumption of procompetitiveness under Sherman Act analysis. *Id.* The Seventh Circuit believed that the scholarship bylaw was aimed at containing university costs, but noted that the NCAA could theoretically show procompetitive justifications that render the bylaw necessary for the survival of NCAA football. *Id.*

justifications.[37] The court reasoned that *Banks* failed to recognize that in-kind benefits are simply roundabout forms of student-athlete compensation that reach the same recruiting pool.[38]

In *NCAA v. Agnew*, the Seventh Circuit correctly identified the market for student-athlete labor as a cognizable market with respect to the Sherman Act.[39]Abandoning the majority dicta from *Banks* was appropriate, as *Agnew* chose to perceive the NCAA through a modern lens in its attempt to categorize the complicated relationship between student-athlete and school.[40] The *Agnew* court gracefully deviated from Seventh Circuit precedent while conforming to that of the Supreme Court set forth in *Board of Regents*.[41] The *Agnew* court rightfully conceded that eligibility rules fall within the procompetitive presumption—the term was explicitly mentioned by the *Board of Regents* Court—but the Seventh Circuit narrowly defined the term "eligibility" under the impression that the Supreme Court did not intend to protect all eligibility bylaws, rather only those that relate directly to the preservation of amateurism or other elements key to the NCAA's survival.[42]

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[37] *Agnew*, 683 F.3d at 340-41 (distinguishing *Agnew* from *Banks)*. Judge Flaum echoed his dissenting opinion in *Banks*, reasserting that a market for student-athlete labor exists and that the procompetitive justifications for the NCAA bylaws should have been examined more closely instead of being categorized as a presumptively procompetitive eligibility rule. *Id.* at 340; *see also supra* note 31 and accompanying text (describing conflicting opinions in *Banks*). *Compare* Banks v. NCAA, 977 F.2d 1081, 1091 (7th Cir. 1992) ("We fail to understand how the dissent can allege that NCAA colleges purchase labor through the grant-in-aid athletic scholarships offered to college players when the value of the scholarship is based upon the school's tuition and room and board, not by the supply and demand for players."), *with Agnew*, 683 F.3d at 340-41 (describing economic factors beyond tuition costs contemplated by schools and student-athletes).

[38] *Agnew*, 683 F.3d at 346-47 (explaining why *Banks* dicta was incorrect). The *Agnew* court reasoned that colleges pay for student-athlete services via in-kind benefits because NCAA bylaws prohibit schools from paying cash, thus this backdoor, million-dollar market should be subject to Sherman Act scrutiny like any other market. *Id.*; *see also* Branch, *supra* note 32 (discussing commercialism within college athletics). Branch believes that "sentiment blinds us to what's before our eyes," namely a "fully commercialized" NCAA and the billions of dollars that flow through the NCAA, its member schools, and affiliated corporate sponsors. Branch, *supra* note 32.

[39] *Agnew*, 683 F.3d at 340-41 ("Thus, the transactions between NCAA schools and student-athletes are, to some degree, commercial in nature, and therefore take place in a relevant market with respect to the Sherman Act."); *see also supra* notes 34, 37 and accompanying text (describing composition of market for student-athletes).

[40] *Agnew*, 683 F.3d at 340 ("No knowledgeable observer could earnestly assert that big-time college football programs competing for highly sought-after high school football players do not anticipate economic gain from a successful recruiting program."); *see also supra* notes 31, 35 and accompanying text (discussing *Banks* and *Board of Regents*).

[41] *Agnew*, 683 F.3d at 346-47 (finding *Banks* majority argument "unconvincing"). In an attempt to comply with precedent, the Seventh Circuit goes to great lengths to discern the Supreme Court's intent in *Board of Regents*. *Id.* at 342-43.

[42] *Id.* at 343-44 (explaining justification behind procompetitive presumption for eligibility

Despite a troubling history of failed student-athlete lawsuits under the Sherman Act, the Seventh Circuit's narrow interpretation of *Board of Regents* and its procompetitive presumptions paves the way for future litigants that wish to challenge NCAA scholarship bylaws.[43] Student-athlete plaintiffs that follow the *Agnew* blueprint and allege a relevant market have a strong chance to find themselves in unchartered territory: awaiting a procompetitive justification from the NCAA that falls outside those enumerated by *Board of Regents*.[44] Plaintiffs have struggled to satisfy the market-analysis phase under Sherman Act scrutiny, but *Agnew* acknowledged the existence of market presence and moved the discussion to procompetitive versus anticompetitive justifications for the bylaw, a

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rules). The *Agnew* court believed that "most—if not all" rules pertaining to eligibility deserve a presumption of procompetitiveness because "they are clearly necessary to preserve amateurism and the student-athlete in college football." *Id.* at 343. However, the court in *Agnew* did not liberally categorize bylaws as "eligibility" bylaws; the court expected protected eligibility rules to be necessary for product preservation, again working within the scope defined by *Board of Regents*. *See id.* at 343-44 (concluding bylaw at dispute is not eligibility bylaw); *see also In re* NCAA I-A Walk-On Football Players Litig., 398 F. Supp. 2d 1144, 1149 (W.D. Wash. 2005) (finding NCAA mischaracterized issues pertaining to scholarship bylaws). The *In re NCAA* court found that NCAA bylaws that cap scholarships "[do] not clearly implicate student-athlete eligibility in the same manner as rules requiring students to attend class and rules revoking eligibility for entering a professional draft." 398 F. Supp. 2d at 1149; *see also supra* note 20 and accompanying text (explaining why NCAA's motion to dismiss was upheld).

[43] *See Agnew*, 683 F.3d at 342-43 (defining scope under which *Board of Regents* operated); *supra* note 30 and accompanying text (emphasizing history of unsuccessful lawsuits against NCAA).

[44] *See supra* note 31 and accompanying text (describing "roadmap" followed by *Rock v. NCAA*).

Rock v. NCAA represents a failed attempt to follow the *Agnew* roadmap, primarily because the plaintiffs failed to describe the necessary "rough contours" of the relevant market. Rock v. NCAA, No. 1:12-CV-1019-JMS-DKL, 2013 WL 786775, at *8-9 (S.D. Ind. March 1, 2013). The court noted:

> In holding that a labor market of some sort was at play in *Agnew*, the Seventh Circuit intended for future plaintiffs to do more than just write the words "nationwide labor market for student athletes" on paper. Plaintiffs make no effort to properly identify the labor market at issue, plead its rough contours, or account for the commercial reality of the transaction, and it is not the Court's duty to do so.

Id. at *9. *Rock* failed because the plaintiff portrayed a seller's market that was far too broad: it included all student-athletes, regardless of division, gender, sport, or level of success. *Id.* at *4. Also to blame was a narrowly described buyer's market: *Agnew* focused on Division I college football players looking for programs that had the coaching, facilities, and exposure necessary to play professionally; whereas *Rock*, by expanding the class of sellers, also expanded the class of buyers to include non-NCAA schools that cannot offer the extra in-kind benefits that Division I football players seek, but can certainly offer the scholarship money sought by athletes in other divisions, sports, and degrees of success. *Id.* at *8-9.

state that few litigants have been able to reach.[45]

This result sets the stage for future student-athlete challenges of NCAA bylaws that do not appear to facially preserve the NCAA's amateur product.[46] If future litigants can adequately identify the labor market for student-athletes and the NCAA fails to introduce a sufficient procompetitive explanation, the scholarship cap bylaw will almost certainly be amended or revoked.[47] Based on recent favorable litigation and increased public awareness, *Agnew* may very well influence other circuits to reexamine their treatment of the NCAA.[48] Without the shield of amateurism as a defense, the NCAA will struggle to find a procompetitive justification for this bylaw, and perhaps many other bylaws to come.[49]

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[45] *Agnew*, 683 F.3d at 345 ("The lack of a procompetitive presumption . . . means that [the bylaw] cannot be deemed procompetitive at the motion-to-dismiss stage."). The court called the Plaintiffs' failure to allege a relevant market "unfortunate" because a competitive, commercial market for student-athletes does exist, and "it is incumbent on the plaintiff to describe the rough contours of the relevant commercial market." *Id.* at 345-47; *see also* Gibson, *supra* note 17, at 241 (predicting NCAA's predicament had *Agnew* succeeded). Gibson predicted that the plaintiff would have to convince the court to apply the quick-look rule-of-reason analysis to avoid the "troublesome market analysis stage of the full blown rule of reason." *See* Gibson, *supra* note 17, at 241. Now that the Seventh Circuit has acknowledged the existence of a relevant market, future litigants that adequately describe this market will satisfy the rule-of-reason threshold and shift the burden of proof to the NCAA, a very unfamiliar position for the organization. *Id.*; *see also supra* note 26 and accompanying text (comparing quick-look versus full rule-of-reason analyses).

[46] *See supra* note 35 and accompanying text (defining presumptively procompetitive NCAA bylaws due to their purpose to preserve product); *see also supra* note 44 and accompanying text (outlining *Rock v. NCAA*). Attorney Steve Berman believes that by following the road map set forth by the Seventh Circuit, "now the NCAA must answer for its blatantly anticompetitive acts." *See Another Student-Athlete Challenges NCAA Scholarship Rules* Rock v. NCAA, 20 No. 5 WESTLAW J. ANTITRUST 9, *2 (Aug. 15, 2012), *available at* 2012 WL 3405320 (quoting Steve Berman).

[47] *Agnew*, 683 F.3d at 344 ("The Bylaws at issue…seem to be aimed at containing university costs, not preserving the product of college football . . . ."); *see also supra* note 12 and accompanying text (describing ramifications of establishing presence of relevant market). If the plaintiffs in *Agnew* had reached a point where the NCAA would have been forced to provide procompetitive justifications for the scholarship restriction, Gibson believes that a winning argument by the NCAA would be "unlikely." Gibson, *supra* note 17, at 241.

[48] *See supra* note 31 and accompanying text (highlighting recent cases that appear to support *Agnew*). Recent cases such as *In Re Player's Litigation*, *White*, and *Agnew* are only three examples of modern courts trending toward the general perception that the NCAA might deserve greater scrutiny than it has faced in the past. *Id.* Author Taylor Branch believes that the emerging trend of lawsuits "cast a harsh light on the absurdity of the system [and] threaten to dislodge the foundations on which the NCAA rests." *See* Branch, *supra* note 18 (criticizing NCAA's bylaws). Branch also points out that President Barack Obama, Congress, and the United States Justice Department have all voiced concerns about the NCAA's current operation, specifically the organization's conformity to Sherman Act antitrust law. *See id.* at 25-26 (noting nationwide concern about NCAA's behavior).

[49] *Agnew*, 683 F.3d at 344 ("[T]he rules limiting the number of scholarships available for every NCAA team may have procompetitive effects, such as the prevention of elite programs stockpiling athletes, but it is not intuitive that the recruiting market would be unable to handle this

In *Agnew v. NCAA*, the Seventh Circuit considered whether the market for student-athlete labor was a cognizable market with respect to the Sherman Act. Sifting through decades of decisions that overwhelmingly favor the NCAA, the *Agnew* court sent a message that the landscape of collegiate athletics has changed, and that the court will no longer enable the NCAA to broadly regulate a billion-dollar market under the pretense of protecting the student-athlete. The court held that the market for student-athlete labor is a cognizable market with respect to the Sherman Act, and the NCAA will not be able to rely upon the procompetitive presumptions set forth by *Board of Regents*. Rather, once a plaintiff defines the rough contours of this undefined, relevant market, the NCAA will need to conjure up procompetitive justifications that do not rely upon the broad definition of "amateurism." Recent precedent leads many to believe that the NCAA will lose their argument. By treating the NCAA as the billion-dollar conglomerate it is rather than the toothless safety initiative it was, *Agnew* has set the stage for a potential windfall of litigation against the NCAA bylaws.

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potential pitfall on its own."); *see also supra* note 32 and accompanying text (criticizing NCAA's faulty use of "amateurism" to deflect bylaw opposition).