

## NOTE

### DON'T TAKE ME OUT TO THAT BALLPARK: STATE ACTION, GOVERNMENT SPEECH, AND CHIEF WAHOO AFTER MATAL

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*Close your eyes and imagine yourself driving to a concert. On the way, you pass a car bearing a license plate with the image of a Confederate flag. You pause, and ask . . . Did the state approve that license plate? Does the state endorse the use of the Confederate flag? You keep driving. Eventually you reach the concert and walk in. To your surprise, an Asian-American band named “The Slants” is opening. You pause, and ask . . . I thought the government approves trademarks? Does the Patent and Trademark Office endorse derogatory slurs? These questions strike at the heart of government speech—a doctrine which allows the government to speak as it pleases. Why is a license plate government speech, but a trademark not? On what basis can a court distinguish between the two? Given that government speech occurs outside of First Amendment protections, the answer has profound implications. And that answer may come from left field. The Cleveland Indians’ controversial logo, Chief Wahoo, provides the perfect context for explaining why a license plate is government speech while a band’s trademark is not. Before the publication of this Note, the Indians announced that, starting in 2019, they would remove Chief Wahoo from their jerseys. Even though the removal is a step forward in respecting indigenous communities, Chief Wahoo will continue to appear on team merchandise and will remain on the team’s jerseys for*

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*the 2018 season. This Note examines how Chief Wahoo's appearance in the publicly-owned Progressive Field may constitute government speech. To do so, this Note introduces basic principles for reconceptualizing government speech after Matal—understanding government speech as a subset of state action and thus applying state action tests to discern the line between government speech and private speech.*

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#### INTRODUCTION

Situated between the shore of Lake Erie (named after the Erie tribe)<sup>1</sup> and the bank of the Cuyahoga River (Iroquois translation: “crooked river”),<sup>2</sup> Progressive Field sits as a bastion of Cleveland pride. It houses the beloved Cleveland Indians and memorializes over a century of Clevelanders’ rapturous cheers and cherished memories. It also houses Chief Wahoo—a “damaging” caricature representing an otherwise-treasured baseball franchise.<sup>3</sup> The logo depicts Chief Wahoo as having a cherry-red face, protrusive nose, and native headdress. Initially created to “convey a spirit of pure joy and unbridled enthusiasm,” Chief Wahoo has adorned Cleveland’s uniforms since 1951.<sup>4</sup>

<sup>1</sup> *Lake Erie*, ERIE COUNTY, <http://www.eriecounty.oh.gov/resources/kids-re-sources/erie-county/lake-erie/> [<https://perma.cc/4NCP-5B7B>].

<sup>2</sup> Justin Glanville, *A River Runs Through It*, KENT ST. MAG. (Jan. 22, 2015), <https://www.kent.edu/magazine/news/river-runs-through-it> [<https://perma.cc/H9XS-VX4J>].

<sup>3</sup> *NCAI Applauds Major League Baseball and the Cleveland Franchise for Retiring Offensive Chief Wahoo Logo*, NCAI (Jan. 29, 2018) [hereinafter NCAI], <http://www.ncai.org/news/articles/2018/01/29/ncai-applauds-major-league-baseball-and-the-cleveland-franchise-for-retiring-offensive-chief-wahoo-logo> [<https://perma.cc/WB8S-EEHE>].

<sup>4</sup> Tim Bannon, *10 Things to Know About the Cleveland Indians*, CHI. TRIB. (Oct. 25, 2016, 10:42 AM), <http://www.chicagotribune.com/sports/baseball/ct-10-things-indians-world-series-spt-1025-20161024-story.html> [<https://perma.cc/LQT8-FHJB>]. Cleveland has not won a World Series championship since placing Chief Wahoo on their uniforms. They currently have the longest championship drought in professional baseball.

Looking out from its perch on the team hat and jersey sleeve, the logo “reduce[s] all Native people into a single outdated stereotype that harms the way Native people, especially youth, view themselves.”<sup>5</sup>

While the Indians slugged their way to a 12-0 rout of the Baltimore Orioles, on June 19, 2017, the Supreme Court released its opinion in *Matal v. Tam*. In an 8-0 decision, the Court held that the government cannot deny registration to disparaging trademarks. Although the decision was a victory for “The Slants,” a band which used the trademark to reclaim and combat derogatory racial stereotypes, the decision was an even bigger victory for the Indians and the Washington Redskins. Justice Samuel Alito’s plurality opinion classified the offensive trademark as private speech, not government speech. Because the trademark was private speech, he concluded, the government could not discriminate on the basis of viewpoint. Here, by invalidating The Slants’ trademark due to its offensiveness, the government engaged in impermissible viewpoint discrimination. This logic makes the Indians’ and Redskins’ trademarks essentially “open-and-shut” cases: because these trademarks are private speech and the government cannot engage in viewpoint discrimination, these trademarks will survive post-*Matal* attacks.<sup>6</sup>

As demonstrated by the Indians’ recent decision to remove Chief Wahoo from their jerseys, perhaps the best extra-legal strategy remains exerting public pressure on the teams’ owners.<sup>7</sup> That said, even accepting *Matal*’s supposedly fatal holding and assuming that these disparaging trademarks

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<sup>5</sup> NCAI, *supra* note 3. The nickname, “Indians,” also raises similar concerns. Imagine if the name were different, such as the Cleveland “Jews.” The fact that the latter sparks indignation but the former receives silent approval further demonstrates how Chief Wahoo and the team’s nickname perpetuate a culture of willful ignorance. See David Leonhardt, *Cleveland’s Unthinking Racism*, N.Y. TIMES (Oct. 29, 2016), <https://www.nytimes.com/2016/10/28/opinion/cleveland-unthinking-racism.html> [<https://perma.cc/J4CA-ZEDF>].

<sup>6</sup> See *Pro-Football, Inc. v. Blackhorse*, 709 F. App’x 182, 183 (4th Cir. 2018) (vacating district court order cancelling Redskins’ trademark registration).

<sup>7</sup> The Redskins’s owner, Dan Snyder, remains opposed to any potential changes:

I respect the opinions of those who disagree. I want them to know that I do hear them, and I will continue to listen and learn. But we cannot ignore our 81 year history, or the strong feelings of most of our fans as well as Native Americans throughout the country. After 81 years, the team name “Redskins” continues to hold the memories and meaning of where we came from, who we are, and who we want to be in the years to come.

We are Redskins Nation and we owe it to our fans and coaches and players, past and present, to preserve that heritage.

(hereinafter referred to as “Marks”) are valid trademarks, some small cracks in speech law remain open for activists to attack Chief Wahoo and the like.

Exposing one of these cracks, one can argue that because Progressive Field and FedEx Field (the Redskins’ stadium) are publicly funded,<sup>8</sup> the Marks displayed in these stadiums constitute government speech. If the Marks are construed as government speech, the government may discriminate on the basis of viewpoint and remove the Marks from display in these stadiums. To determine whether the government is in fact speaking, one must reconcile the recent *Matal* decision with previous government speech doctrine. Because the government might speak through a private entity, discerning the line between government speech (which the government can restrict on the basis of viewpoint) and private speech (which the government cannot restrict on the basis of viewpoint) is crucial. Although current government speech doctrine makes this line difficult to discern, this Note seeks to offer principles and examples for how state action can clarify the scope of government speech.

Previous articles have analyzed the intersection between free speech and sports facilities in depth.<sup>9</sup> In the context of fan free speech, the First Amendment applies with the most force when a private club is deemed a state actor. Because a publicly-owned stadium is likely a public or limited public forum,

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Dan Snyder, *Letter from Washington Redskins Owner Dan Snyder to Fans*, WASH. POST (Oct. 9, 2013), [https://www.washingtonpost.com/local/letter-from-washington-redskins-owner-dan-snyder-to-fans/2013/10/09/e7670ba0-30fe-11e3-8627-c5d7de0a046b\\_story.html?utm\\_term=.3a3078480b1e](https://www.washingtonpost.com/local/letter-from-washington-redskins-owner-dan-snyder-to-fans/2013/10/09/e7670ba0-30fe-11e3-8627-c5d7de0a046b_story.html?utm_term=.3a3078480b1e) [perma.cc/4EJY-PTEK].

<sup>8</sup> Progressive Field (formerly named “Jacobs Field” after the team’s former owner Dick Jacobs) is a stronger case study for the offensive Marks as government speech. The local government owns the stadium and taxpayers funded 48% of its construction. Case W. Reserve Univ., *Progressive Field*, ENCYCLOPEDIA OF CLEVELAND HIST. [hereinafter *Progressive Field*], <https://case.edu/ech/articles/p/progressive-field/> [https://perma.cc/J8EC-G6PM].

Meanwhile, Dan Snyder owns FedEx Field and the stadium was predominantly built on private financing (although taxpayers did contribute over \$70 million). Nonetheless, Snyder is seeking massive taxpayer aid to build a new stadium by 2027. Tyler Foote, *Virginia Should Pass on a Taxpayer-Funded Redskins Stadium*, WASH. POST (Sept. 2, 2016), [https://www.washingtonpost.com/opinions/virginia-should-pass-on-a-taxpayer-funded-redskins-stadium/2016/09/02/35c391e8-6ee5-11e6-9705-23e51a2f424d\\_story.html?utm\\_term=.3c1127e13d90](https://www.washingtonpost.com/opinions/virginia-should-pass-on-a-taxpayer-funded-redskins-stadium/2016/09/02/35c391e8-6ee5-11e6-9705-23e51a2f424d_story.html?utm_term=.3c1127e13d90) [perma.cc/N773-JUEL].

<sup>9</sup> See Nick DeSiato, *Silencing the Crowd: Regulating Free Speech in Professional Sports Facilities*, 20 MARQ. SPORTS L. REV. 411, 420 (2010); Howard M. Wasserman, *Fans, Free Expression, and the Wide World of Sports*, 67 U. PITT. L. REV. 525, 544 (2006).

the First Amendment will protect fans from the state actor's speech restrictions when these restrictions discriminate on the basis of viewpoint. For example, a club could not create a policy preventing fans from rooting against the home team. If a private club is not deemed a state actor, then fans are at the mercy of the club's speech restrictions, even if they discriminate on the basis of viewpoint.<sup>10</sup>

Using these lessons from the fan free speech context, this Note seeks to embark into uncharted territory. Rather than asking to what extent the First Amendment protects *fans* from a private club's speech restrictions in a publicly funded stadium, this Note asks to what extent the First Amendment protects a *private club*, who plays in a publicly funded stadium, from government speech restrictions. The answer is simple—if the government is speaking, then the government may speak, or restrict its speech, as it pleases. The path to this “government speech” answer is less simple. To better discern the line between government speech and private speech, this Note looks to a different legal universe—state action. Just like Texas's decision to disassociate itself from Confederate license plates, a government will want to disassociate itself from a private actor's controversial speech when that private actor bears a close relationship to the government. Because the most difficult government speech cases arise when a government seeks to disassociate itself from private speech, state action is useful insofar as it shows which private actors indeed bear a close relationship to the government.

In the wake of *Matal*, this Note proposes principles for understanding how state action can aid in discerning the difference between government speech and private speech. In doing so, this Note examines how activists can leverage government speech to pressure the removal of harmful messages. Part I describes the history of the Indians' team name and Chief Wahoo. By providing this necessary factual background, Part I demonstrates why a government may value the ability to disassociate itself from controversial speech.

Part II analyzes recent court decisions in the government speech arena. In particular, Part II attempts to reconcile the holdings of *Walker v. Texas Division, Sons of Confederate Veterans* and *Matal v. Tam*. To reconcile these holdings, Part II

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<sup>10</sup> Of course, social and financial pressure would restrain a team owner from implementing onerous speech restrictions. For example, if Dallas Cowboys owner Jerry Jones created a policy ejecting fans for sitting through the National Anthem, fans could protest by spending their money elsewhere.

provides the principles behind government speech and state action and proposes anchoring the former to the principles of the latter. In particular, this Note uses a “relationship” analysis, the touchstone of state action, to discern the line between when the government is speaking and when a private entity is speaking.

Part III provides an in-depth look at how state action principles can provide guidance in drawing the line between when the government is speaking, and when a private entity is speaking. To do so, Part III returns to the Cleveland Indians and comprehensively examines the relationship between the Indians and the City of Cleveland. In doing so, this Note lays the groundwork for why the display of these Marks in stadiums constitutes state action, and thus government speech. If the display of these Marks does not constitute state action, then the display is purely the private club’s private speech, and the government cannot restrict it. If the display constitutes state action, then we must discern how the government speaks through the private “state actor.”

## I

### BRIEF HISTORY OF CHIEF WAHOO AND THE CLEVELAND INDIANS

In 1871, Louis Francis Sockalexis was born in Maine on the Penobscot Indian Reservation.<sup>11</sup> His legend began during his days as a centerfielder for the College of the Holy Cross.<sup>12</sup> In a game against Harvard University, he reportedly threw a ball from the wall to home plate on the fly.<sup>13</sup> The throw became known as the “Lightning Throw” and Harvard professors measured it at 414 feet long.<sup>14</sup> Sockalexis and his golden arm soon made it to the big leagues.<sup>15</sup> In 1897, he debuted for the Cleveland Spiders, becoming the first Native American to play professional baseball.<sup>16</sup> Between newspapers describing him as a

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<sup>11</sup> Joe Posnanski, *The Cleveland Indians, Louis Sockalexis, and The Name*, NBC SPORTS (Mar. 18, 2014, 1:55 PM), <http://mlb.nbcsports.com/2014/03/18/the-cleveland-indians-louis-sockalexis-and-the-name/> [<https://perma.cc/7W97-YH2J>] (compiling one of the most comprehensive accounts of the Cleveland Indians’s logo and name). Posnanski, who opposes the logo, concludes that the history is not necessarily clear. *Id.* On the one hand, the team name and logo were clearly not intended to honor Sockalexis. On the other hand, the team’s account of the name and logo’s inception is not entirely fabricated either. *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

“noble savage,” “redskin,” and “educated Indian,” and fans jeering him with references to collecting scalps, Sockalexis faced relentless racism.<sup>17</sup> After a brief, three-year tenure in Cleveland, he was released from the team.<sup>18</sup>

Over the course of the next fifteen years, Cleveland’s various team names included the Spiders, Bronchos, Blues, Exiles, Castoffs, Misfits, Molly McGuires, and the Naps (named after Cleveland legend Napoleon Lajoie).<sup>19</sup> After a horrendous 1914 season, Cleveland released Lajoie and needed another team name.<sup>20</sup> In search of a new team name, team owner Charles Somers held a fan team-naming contest and brought together a group of Cleveland sportswriters to suggest ideas.<sup>21</sup> The result? The Cleveland “Indians.” Although the team maintains that the name is meant to honor Sockalexis, the evidence weighs against that conclusion.<sup>22</sup> During the entire year of 1915, only one newspaper story made mention of Sockalexis.<sup>23</sup> Two other reasons appear more convincing. First, the Boston “Braves” won the pennant in 1914 and had popularized Native American nicknames.<sup>24</sup> Second, the new nickname allowed

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<sup>17</sup> *Id.*; see also Joe Posnanski, *Cleveland Indians: The Name*, JOE BLOGS (Mar. 18, 2014), <http://joeposnanski.com/cleveland-indians-the-name/> [<https://perma.cc/V6NJ-5ZPP>] (“There was hardly a mention of Sockalexis that did not include some reference to collecting scalps or wampum or General Custer or, in later coverage, firewater. War whoops followed him everywhere. The favorable stories usually involved some sort of bizarre Indian tale.”).

<sup>18</sup> Posnanski, *supra* note 11.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> Peter Pattakos, *The Curse of Chief Wahoo: Are We Paying the Price for Embracing America’s Last Acceptable Racist Symbol?*, CLEVELAND SCENE (Apr. 25, 2012), <https://www.clevelandscene.com/cleveland/the-curse-of-chief-wahoo/Content?mode=read&oid=2954423> [[perma.cc/MWV5-N5LY](https://perma.cc/MWV5-N5LY)].

<sup>23</sup> See Joe Posnanski, *Sockalexis Addendum*, JOE BLOGS (Mar. 20, 2014), <http://joeposnanski.com/sockalexis-addendum/> [<https://perma.cc/V6NJ-5ZPP>] (“I mentioned in my story about Louis Sockalexis and the naming of the Indians that I could not find Sockalexis named a single time in the 1915 newspapers I searched. That included more than 300 papers around the country . . . . As it turns out, my search engine did not include the Cleveland Plain Dealer. In an editorial on the day after the team was named Indians, it turns out that Sockalexis very specifically was mentioned in an editorial under a headline ‘Looking Backward.’”). Despite conceding that a connection may exist between the team name and Sockalexis, Posnanski concludes that the team name was in no way meant to honor Sockalexis. He suggests that although intrigued fans excited by Sockalexis’s arrival referred to the 1897 team as the “Indians,” this unofficial 1897 team name was at best one reason (among others) for the 1915 name change. In other words, though Sockalexis may have had something to do with the name change, the team is wrong insofar as it suggests that the name change was meant to honor him. *Id.*

<sup>24</sup> Posnanski, *supra* note 11.

fans and writers alike to engage in stereotypical chants and commentary when attending games or describing the team's play.<sup>25</sup>

In 1932, the next chapter in the team name's story began when a newspaper cartoonist introduced a caricature of a Native American in the *Cleveland Plain Dealer*.<sup>26</sup> "The Little Indian" quickly became popular and was a regular feature in the newspaper's coverage of the team.<sup>27</sup> "In a way, it was an earlier version of an emoji. His image popped up throughout the sports pages and was used to express feelings of happiness during winning streaks or dismay during rainouts."<sup>28</sup> In 1947, Indians owner Bill Veeck sought to adopt "The Little Indian," or "Chief Wahoo" as fans came to call the cartoon, as the team logo.<sup>29</sup> By 1951, when the team placed Chief Wahoo on its jersey, the logo settled into its current form—a red face, with exaggerated facial features and a red feather sticking out of a black headdress.<sup>30</sup> Despite small, technical changes (such as the color of the logo's outlining), the logo has remained a constant in Cleveland sports. Only recently, the team yielded to pressure from Major League Baseball (MLB) to remove Chief Wahoo from the team's jerseys starting in 2019.<sup>31</sup> Nonetheless, Chief Wahoo will continue to appear on team merchandise and will remain on the team's jerseys for the 2018 season.<sup>32</sup>

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<sup>25</sup> *Id.* For example, fans regularly "whoop" during home games.

<sup>26</sup> Chris Chavez, *How Chief Wahoo Has Evolved over Time*, SPORTS ILLUSTRATED (Oct. 27, 2016), <https://www.si.com/mlb/2016/10/27/chief-wahoo-cleveland-indians-mascot-history> [<https://perma.cc/CG69-QCUY>].

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> Camila Domonoske, *Cleveland Indians Will Remove 'Chief Wahoo' From Uniforms In 2019*, NPR (Jan. 29, 2018, 3:00 PM), <https://www.npr.org/sections/two-way/2018/01/29/581590453/cleveland-indians-will-remove-chief-wahoo-from-uniforms-in-2019> [<https://perma.cc/GH7K-9AMS>].

<sup>32</sup> *Id.* The decision to remove Chief Wahoo has sparked heightened tensions between those advocating and those decrying its removal. The heightened tensions have centered on the morality of the logo and on future implications—such as changing the team name. See Matt Stevens & David Waldstein, *As Cleveland Indians Prepare to Part with Chief Wahoo, Tensions Reignite*, N.Y. TIMES (Apr. 9, 2018), <https://www.nytimes.com/2018/04/09/sports/baseball/cleveland-indians-chief-wahoo-protests.html> [<https://perma.cc/JH6F-5JCB>]. Unfortunately (but not surprisingly), the backlash surrounding the removal has revealed much of the racism and ignorance that inspired the logo in the first place. *Id.* ("In response [to an anti-Chief Wahoo protest at Opening Day], some fans walking to the stadium hurled profanity-laced tirades at the protesters, along with ugly names and obscene gestures. 'Get a job,' one fan yelled, along with an expletive. 'Get a grip,' shouted another. Several flaunted team jackets, jerseys and caps



II  
RECONCILING *WALKER*<sup>33</sup> AND *MATAL*<sup>34</sup>

The First Amendment serves as a barrier to government attempts to restrict speech.<sup>35</sup> The government may only restrict speech that falls within an unprotected category of speech: political advocacy as incitement,<sup>36</sup> libel,<sup>37</sup> defamation,<sup>38</sup> fighting words,<sup>39</sup> obscenity,<sup>40</sup> child pornography,<sup>41</sup> threats,<sup>42</sup> and speech owned by others.<sup>43</sup> For the purposes of this Note, what is important here is what is not included in the list of unprotected speech categories—speech that stereotypes or discriminates on the basis of race.<sup>44</sup> This exclusion follows from the long-standing free speech tradition that the solution to undesired speech is more speech, not censored speech.<sup>45</sup> However, First Amendment protections shift when the government is speaking or restricting *its own* speech. This is “government speech.” If the government is speaking, then the government may speak however it pleases so long as it does not violate the Establishment Clause.<sup>46</sup> If the government is restricting its own speech, perhaps that of a government agency, then the government may discriminate on the basis of viewpoint.<sup>47</sup> For example, the government may issue pamphlets

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emblazoned with the Chief Wahoo logo. One fan made whooping noises as she walked by.”).

<sup>33</sup> *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239 (2015).

<sup>34</sup> *Matal v. Tam*, 137 S. Ct. 1744 (2017).

<sup>35</sup> U.S. CONST. amend. I.

<sup>36</sup> *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

<sup>37</sup> *Beauharnais v. Illinois*, 343 U.S. 250 (1952).

<sup>38</sup> *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964).

<sup>39</sup> *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

<sup>40</sup> *Miller v. California*, 413 U.S. 15 (1973).

<sup>41</sup> *New York v. Ferber*, 458 U.S. 747 (1982).

<sup>42</sup> *Virginia v. Black*, 538 U.S. 343 (2003).

<sup>43</sup> *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539 (1985).

<sup>44</sup> See *Matal v. Tam*, 137 S. Ct. 1744, 1764 (2017) (“Speech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express ‘the thought that we hate.’” (quoting *United States v. Schwimmer*, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting))).

<sup>45</sup> See *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) (“If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.”).

<sup>46</sup> See Nelson Tebbe, *Government Nonendorsement*, 98 MINN. L. REV. 648, 650 (2013) (arguing that the government is restricted not only by the Establishment Clause, but also by a constitutional principle of “nonendorsement” towards ideas that “abridge[ ] full and equal citizenship”).

<sup>47</sup> See *Pleasant Grove City v. Summum*, 555 U.S. 460, 468 (2009). Compare *Lamb’s Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394

and posters encouraging the war effort in World War II without having to also issue pamphlets and posters discouraging war.<sup>48</sup>

First gaining prominence after the 1991 Supreme Court decision in *Rust v. Sullivan*, “government speech” is a doctrine that allows the government to speak without First Amendment constraints. In other words, the government may speak, and restrict its own speech, however it pleases.<sup>49</sup> In *Rust*, recipients of Title X funding brought suit challenging the government’s prohibition on “abortion-related activities.”<sup>50</sup> Writing for a five-justice majority, Chief Justice William Rehnquist explained:

The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way. In so doing, the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other.<sup>51</sup>

In other words, “when Congress established a National Endowment for Democracy to encourage other countries to adopt democratic principles, . . . it was not constitutionally required to fund a program to encourage competing lines of political philosophy such as communism and fascism.”<sup>52</sup>

In 2009, the Supreme Court took another step in addressing the line between government speech and private speech. In *Pleasant Grove City v. Sumnum*, the Court asked whether adherents of the Sumnum religion could force Pleasant Grove City to place a privately-funded monument in a public park, alongside fifteen other permanent monuments.<sup>53</sup> The Supreme

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(1993) (“[T]he First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others.”) (quoting *City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984)), with *Matal*, 137 S. Ct. at 1757 (“[I]mposing a requirement of viewpoint-neutrality on government speech would be paralyzing. When a government entity embarks on a course of action, it necessarily takes a particular viewpoint and rejects others. The Free Speech Clause does not require government to maintain viewpoint neutrality when its officers and employees speak about that venture.”).

<sup>48</sup> See *Matal*, 137 S. Ct. at 1758.

<sup>49</sup> *Id.*

<sup>50</sup> *Rust v. Sullivan*, 500 U.S. 173, 177–78 (1991).

<sup>51</sup> *Id.* at 193.

<sup>52</sup> *Id.* at 194.

<sup>53</sup> *Pleasant Grove City v. Sumnum*, 555 U.S. 460, 464–65 (2009) (“This case presents the question whether the Free Speech Clause of the First Amendment entitles a private group to insist that a municipality permit it to place a permanent monument in a city park in which other donated monuments were previously erected.”). *Id.* at 464. Among these other monuments, eleven of which were

Court held that they could not. Rather than designating the park as a public forum for private speech, Justice Samuel Alito, writing for the Court, found that the city was engaging in its own speech.<sup>54</sup> “There may be situations in which it is difficult to tell whether a government entity is speaking on its own behalf or is providing a forum for private speech, but this case does not present such a situation.”<sup>55</sup> With the Court adopting Justice Alito’s government speech doctrine, the table was set for *Walker v. Texas Division, Sons of Confederate Veterans*.<sup>56</sup>

On June 18, 2015, the Supreme Court released its opinion in *Walker*. The case involved a First Amendment challenge to the denial of a specialty license plate that included an image of the Confederate flag.<sup>57</sup> In a majority opinion written by Justice Stephen Breyer, the Court held that license plates are government speech and therefore, the government can regulate license plate messages on the basis of viewpoint.<sup>58</sup> Relying on the Court’s previous holding in *Sumnum*, Justice Breyer used three factors in his analysis: (1) whether the government had long used license plates to speak to the public; (2) whether a reasonable observer would believe that the government was conveying a message through a specialty license plate; and (3) whether the government maintained control over the selection of specialty license plates.<sup>59</sup>

The Court first found that Texas had selected messages it intended to communicate on its license plate designs since 1919.<sup>60</sup> For example, Texas has displayed a “Lone Star” emblem, a silhouette of the state, and various messages including “150 Years of Statehood,” “Read to Succeed,” “Houston Livestock Show and Rodeo,” “Texans Conquer Cancer,” and “Girl Scouts.”<sup>61</sup> Second, the Court found that the “Texas license plate designs ‘are often closely identified in the public mind with the [State].’”<sup>62</sup> According to the Court, a Texas license plate is a form of government ID.<sup>63</sup> Additionally, the Court

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privately donated, were a September 11 memorial and a Ten Commandments monument. *Id.* at 465.

<sup>54</sup> *Id.* at 469–70.

<sup>55</sup> *Id.* at 470.

<sup>56</sup> 135 S. Ct. 2239 (2015).

<sup>57</sup> *Id.* at 2243–44.

<sup>58</sup> *Id.* at 2246.

<sup>59</sup> *Id.* at 2247.

<sup>60</sup> *Id.* at 2248.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 2242 (alteration in original) (quoting *Pleasant Grove City v. Sumnum*, 555 U.S. 460, 472 (2009)).

<sup>63</sup> *Id.* at 2249.

noted that as the issuer of an ID, Texas would not want to permit the placement of “a message with which [it would] not wish to be associated.”<sup>64</sup> The Court also expressed concern that “a person who displays a message on a Texas license plate likely intends to convey to the public that [Texas] has endorsed that message.”<sup>65</sup> Lastly, the Court found that Texas maintained direct control over the messages that the specialty plates conveyed.<sup>66</sup>

In so finding, the Court declined to perform a public forum analysis because the fact that private parties helped design the specialty plates did not erase the messages that the government meant to convey through the license plates.<sup>67</sup> Rather, the Court explained that the license-plate-message-selection process was a necessary one for the government. If Texas could not select its own messages, it would likely need to shut down specialty license plates altogether. Otherwise, Texas would be forced to issue plates “promoting al Qaeda” every time it approved a plate stating, “Fight Terrorism.”<sup>68</sup>

In dissent, Justice Alito argued that the license plates served as limited public forums for private expression. Like Justice Breyer, Justice Alito also identified three factors from *Summum* that applied to the case: (1) whether the government had long used license plates to speak to the public; (2) whether Texas had a history of selectivity in selecting license plate designs; and (3) whether the license plates presented spatial limitations on the number of designs that Texas could accommodate.<sup>69</sup> First, Justice Alito noted that specialty license plates, on which motorists could choose which messages they want to convey, were not available in Texas until 1991.<sup>70</sup>

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<sup>64</sup> *Id.* (quoting *Pleasant Grove City v. Summum*, 555 U.S. 460, 471 (2009)). “[P]ersons who observe [designs on IDs] routinely—and reasonably—interpret them as conveying some message on the [issuer’s] behalf.” *Id.*

<sup>65</sup> *Walker*, 135 S. Ct. at 2249 (“If not, the individual could simply display the message in question in larger letters on a bumper sticker right next to the plate. But the individual prefers a license plate design to the purely private speech expressed through bumper stickers. That may well be because Texas’s license plate designs convey government agreement with the message displayed.”).

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 2251 (“In this case, as in *Summum*, the ‘government entity may exercise [its] freedom to express its views’ even ‘when it receives assistance from private sources for the purpose of delivering a government-controlled message.’” (quoting *Pleasant Grove City v. Summum*, 555 U.S. 460, 468 (2009))).

<sup>68</sup> *Id.* at 2249 (“Texas offers plates that pay tribute to the Texas citrus industry. But it need not issue plates praising Florida’s oranges as far better.” (citation omitted)).

<sup>69</sup> *Id.* at 2258–59 (Alito, J., dissenting).

<sup>70</sup> *Id.* at 2260 (Alito, J., dissenting).

In other words, he noted that no long history of government speech on Texas license plates existed.<sup>71</sup> Second, he challenged the selectivity that Texas applied to its specialty plate program.<sup>72</sup> He noted that, by design, the program is not selective.<sup>73</sup> Rather, the program is designed to encourage more designs and generate additional revenue for the state.<sup>74</sup> Lastly, Justice Alito explained that Texas has infinite space, unlike the park in *Sumnum*, to approve as many license plates as it desires:<sup>75</sup>

Texas has space available on millions of little mobile billboards. And Texas, in effect, sells that space to those who wish to use it to express a personal message—provided only that the message does not express a viewpoint that the State finds unacceptable. That is not government speech; it is the regulation of private speech.<sup>76</sup>

In the wake of *Walker*, lower courts began applying the government speech doctrine to speech that seemingly came from both a government speaker and a private speaker.<sup>77</sup> Then, almost two years after *Walker*, the Supreme Court released its decision in *Matal v. Tam*. In an 8–0 decision, the Court refused to extend *Walker* and the government speech doctrine any further, holding that the Lanham Act’s prohibition on disparaging trademarks violated the First Amendment.<sup>78</sup> “The Slants,” a band led by Simon Tam, chose its band name in an effort to reclaim stereotypes typically targeted towards people of Asian ethnicity.<sup>79</sup> After the Patent and Trademark Office (PTO) rejected the registration for the band’s name, Tam brought suit under the First Amendment.<sup>80</sup> Writing for the

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<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 2261 (Alito, J., dissenting).

<sup>76</sup> *Id.* at 2262 (Alito, J., dissenting).

<sup>77</sup> See *Mech v. Sch. Bd. of Palm Beach Cty.*, 806 F.3d 1070, 1074–79 (11th Cir. 2015), *cert. denied*, 137 S. Ct. 73 (2016) (allowing a school district to remove a paid business advertisement posted on a school fence because the owner of the advertisement previously performed in pornographic films); *Vista-Graphics, Inc. v. Va. Dep’t of Transp.*, 171 F. Supp. 3d 457, 477 (E.D. Va. 2016) (holding that private businesses’ advertisement materials located in Virginia’s highway welcome centers constituted government speech).

<sup>78</sup> *Matal v. Tam*, 137 S. Ct. 1744, 1751 (2017).

<sup>79</sup> *Id.* at 1754.

<sup>80</sup> *Id.*

Court, Justice Alito found that the trademarks constituted private speech, not government speech.<sup>81</sup> The Court noted:

[I]t is far-fetched to suggest that the content of a registered mark is government speech. If the federal registration of a trademark makes the mark government speech, the Federal Government is babbling prodigiously and incoherently. It is saying many unseemly things. It is expressing contradictory views. It is unashamedly endorsing a vast array of commercial products and services. And it is providing Delphic advice to the consuming public.<sup>82</sup>

Finally, the Court took one last jab at the government speech doctrine, dismissing any semblance that trademarks hold to previous instances of government speech:

In sum, the federal registration of trademarks is vastly different from the beef ads in *Johanns*, the monuments in *Summum*, and even the specialty license plates in *Walker* . . . . Perhaps the most worrisome implication of the Government's argument concerns the system of copyright registration. If federal registration makes a trademark government speech and thus eliminates all First Amendment protection, would the registration of the copyright for a book produce a similar transformation?<sup>83</sup>

Because the trademarks constituted private speech, the court held that the government could not discriminate on the basis of viewpoint, and therefore, the Lanham Act prohibition violated the First Amendment.

In attempting to reconcile *Walker* and *Matal*, understanding the nexus between state action and government speech will prove important. Several constitutional amendments, including the First Amendment, are phrased as restrictions on government, or "state," action.<sup>84</sup> As such, to allege a violation of these amendments, a plaintiff must prove that the government was responsible.<sup>85</sup> In other words, "courts ask whether the

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<sup>81</sup> *Id.* at 1758 ("The Federal Government does not dream up these marks, and it does not edit marks submitted for registration.")

<sup>82</sup> *Id.* (footnote and citation omitted). Justice Samuel Alito wasn't finished just yet. He continued: "For example, if trademarks represent government speech, what does the Government have in mind when it advises Americans to 'make.believe' (Sony), 'Think different' (Apple), 'Just do it' (Nike), or 'Have it your way' (Burger King)? Was the government warning about a coming disaster when it registered the mark 'EndTime Ministries'?" *Id.* at 1759 (footnotes omitted).

<sup>83</sup> *Id.* at 1760.

<sup>84</sup> U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . . ." (emphasis added)).

<sup>85</sup> See Stephen K. Wirth, Note, *State Action, Government Speech, and the Narrowing Spectrum of Private, Protected Speech*, 99 CORNELL L. REV. 485, 485 (2014).

ultimate decisionmaker [behind the unlawful action] was a government officer or whether the action should be attributed to the government for some other reason.”<sup>86</sup> The state action requirement marks “the boundary between public and private spheres in a world of overlapping interests and roles.”<sup>87</sup> In doing so, it restrains the government from encroaching on individual liberty and promotes federalism values.<sup>88</sup> In application, the state action requirement is an oft-criticized, confusing puzzle that often protects the politically-powerful from the politically-powerless.<sup>89</sup> Put bluntly, “the field is a conceptual disaster area.”<sup>90</sup> Despite its conceptual confusion, the state action requirement exists to define “public and private spheres”—a useful proxy for better defining the relationship between the government and a private speaker in the government speech context.

In some ways, state action and government speech operate on different planes:

[T]he Court declines to extend First Amendment protection to speech that is censored by a third party by claiming that there has been no state action, yet it invokes a seemingly opposite rationale—claiming that certain private speech is in fact government speech—to deny, once again, First Amendment protection.<sup>91</sup>

These doctrines diverge in other ways too. For example, state action imputes the power of the state to a private individual or business for the purpose of preventing private discrimination, whereas government speech allows the government to speak for itself without regard to the usual First Amendment restrictions.<sup>92</sup> Whereas state action restrains the government in its regulatory capacity, government speech empowers the government in its proprietary capacity. In other words, state action draws the line between whether a government or private actor is violating an individual’s rights; meanwhile, government speech draws the line between whether the government is reg-

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<sup>86</sup> John Fee, *The Formal State Action Doctrine and Free Speech Analysis*, 83 N.C. L. REV. 569, 578 (2005). For examples of when a court may impute state action to otherwise private conduct, see *infra* Part III.

<sup>87</sup> Fee, *supra* note 86, at 572.

<sup>88</sup> See *id.* at 575–76 (suggesting that the state action requirement prevents Congress from legislating private conduct and therein preserves a space for states to legislate).

<sup>89</sup> See *id.* at 576.

<sup>90</sup> *Id.* (quoting Charles L. Black, Jr., *Foreword: “State Action,” Equal Protection, and California’s Proposition 14*, 81 HARV. L. REV. 69, 95 (1967)).

<sup>91</sup> Wirth, *supra* note 85, at 498.

<sup>92</sup> *Id.* at 485–86.

ulating or speaking. Further, a plaintiff must prove state action in asserting a First Amendment violation, whereas a government raises government speech as a defense to a First Amendment claim.<sup>93</sup>

Despite operating on different planes in certain contexts, these doctrines still converge because they sprout from the structure of the First Amendment and exist as fundamental necessities for the government in promoting its policies. “[G]overnment speech is one of the means that the government can employ to achieve a desired policy. Government speech is a form of state action.”<sup>94</sup> Naturally, one could argue that raising taxes is also a fundamental necessity for the government in promoting its policies. Does that mean a court should import tax doctrine into government speech doctrine? Of course not. While taxing surely is a fundamental necessity for the government, the government’s ability to tax emerges from Congress’ taxing power and states’ reserved powers. In contrast, the structure of the First Amendment gives rise to state action and government speech. In other words, tax doctrine’s source is conceptually different than the First Amendment. The taxing power is an affirmative authorization of government action; meanwhile, the First Amendment defines the space of individual liberty that ought to be free from government intrusion. State action and government speech doctrines serve to clarify where the individual’s liberty ends, and the government’s interests begin.

In the context of mixed speech, in which one cannot definitively tell whether the government or a private actor is speaking,<sup>95</sup> state action doctrine may aid in determining who is

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<sup>93</sup> *Id.* at 494.

<sup>94</sup> *Id.* at 501.

<sup>95</sup> See Helen Norton, *The Measure of Government Speech: Identifying Expression’s Source*, 88 B.U. L. REV. 587, 588–89 (2008) (“A growing body of First Amendment litigation involves private parties who seek to alter or join what the government contends is its own expression. These disputes involve competing claims to the same speech: a private speaker maintains that a communication reflects (or should be allowed to reflect) her own views, while a governmental body characterizes that expression as its own, along with the ability to control its content. Examples include Tennessee’s decision to issue a ‘Choose Life’ specialty license plate while rejecting the ACLU’s proposed ‘Pro-Choice’ plate, Missouri’s refusal to acknowledge the Ku Klux Klan on state Adopt-a-Highway signs, and a public school district’s rejection of advocates’ requests to post pro-voucher materials on the district’s webpage conveying the school board’s opposition to voucher legislation.” (footnotes omitted)); see also Caroline Mala Corbin, *Mixed Speech: When Speech Is Both Private and Government*, 83 N.Y.U. L. REV. 605, 607 (2008) (arguing that speech usually is neither purely private nor governmental, but mixed and best conceptualized as a question of degree).



speaking. For example, the state action doctrines of symbiotic relationship and entwinement could help a court in determining the extent to which the Cleveland Indians' speech is government speech. State action provides a logical outer boundary for the expansion of government speech. Because government speech is a form of state action and thus cannot exist without state action, a logical conclusion is that the government speech doctrine should anchor itself to state action doctrine. Rather than crafting a three-factor analysis, as Justice Breyer employed in *Walker*,<sup>96</sup> or using a reasonable observer test, as Justice David Souter suggested in his concurrence *Sumnum*,<sup>97</sup> the Court should use state action principles as a proxy for determining when the government is actually speaking. Insofar as state action determines the extent to which a seemingly private individual or business acts on behalf of the government, it can also help a court determine the extent to which that same individual or business *speaks* on behalf of the government. In anchoring government speech only to places where a *state actor* is speaking, a court can rest assured knowing that the government may advance its goals without forcing private individuals and businesses to serve as government messengers for those goals.

In response, one could question whether importing state action doctrine into government speech doctrine actually is a logical conclusion. Whereas state action doctrine determines whether the government or a private actor is regulating, government speech doctrine determines whether the government is regulating or speaking. At first glance, the two doctrines appear similar, yet not equivalent. One answer to this criticism is to reconceptualize the criticism. If the government is regulating speech, it is not speaking. It is regulating a private actor's speech. Thus, government speech doctrine is really asking whether the government is regulating a private actor's speech or speaking itself. This is simply another way of saying that government speech doctrine determines whether the government or a private actor is speaking. Designed to analyze the nexus between the government and a private actor, state action doctrine is best suited to draw this line.

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<sup>96</sup> *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2247 (2015).

<sup>97</sup> *Pleasant Grove City v. Sumnum*, 555 U.S. 460, 485–87 (2009) (Souter, J., concurring) (suggesting that the Court employ a reasonable observer test so as to cohere with Establishment Clause jurisprudence).

In the “public property, private lease” state action sphere, the key analysis focuses on the relationship between the public and private entities. In other words, courts examine how close the nexus is between the government and the private actor—considerations include “whether there is an interdependent relationship between [them] . . . [or] whether government officials are entangled in the management or control of a private entity.”<sup>98</sup> In the same way, the government speech doctrine, especially where the distinction between government speech and private speech is blurred, should focus on the nature of the relationship between the government and the private entity through which it attempts to speak. Using a state action-like “relationship” analysis can help distinguish *Walker* and its progeny from *Matal*.

On the one hand, in *Walker*, Texas and the Sons of the Confederate Veterans (SCV) had more than a passing relationship. If Texas had approved the SCV’s license plate, its relationship with SCV would not have ended there. Rather, the license plate design would have memorialized the relationship between Texas and the SCV, and the license plate would have announced that relationship wherever the car carrying the license plate went.<sup>99</sup> In this way, Texas could be understood to agree “directly with the aims, activities and policies” of the SCV; or, more plausibly, Texas “could be understood to legitimate the [SCV] through its endorsement, not necessarily sharing the [SCV’s] policies or prior history but attesting to its rehabilitation in a new form.”<sup>100</sup>

While Texas speaks on many seemingly trivial things through its specialty license plates, it places implicit endorsement behind the diverse culture and spirit that each plate

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<sup>98</sup> Fee, *supra* note 86, at 584–85 (compiling cases that apply these nexus considerations to state action questions).

<sup>99</sup> In its brief, Texas argued that the relationship between the government and a license plate applicant is similar to the relationship between a NASCAR driver and his sponsors:

[T]he driver is publicly placing his name and reputation behind the messages, products, and corporations that appear on that uniform. Those advertisements are undoubtedly the ‘speech’ of the NASCAR driver. One cannot acknowledge this and simultaneously deny that the State’s decision to exclude the confederate battle flag from its state-issued license plates involves government speech.

Brief for the Petitioner at 26, *Walker*, 135 S. Ct. 2239 (No. 14-144).

<sup>100</sup> Randall P. Bezanson & William G. Buss, *The Many Faces of Government Speech*, 86 IOWA L. REV. 1377, 1477 (2001) (describing a state’s interest in disassociating from the Ku Klux Klan).

evokes.<sup>101</sup> When all the plates are seen together, they represent a tapestry of Texan pride. As such, Texas enters into a relationship with each specialty license plate customer, ensuring that each relationship plays a role in advancing Texan pride.<sup>102</sup> In reality, Texas's interest is not necessarily focused on making sure each license plate represents Texas pride; rather, Texas's interest is focused on disassociating from a license plate that does not properly represent Texas.<sup>103</sup>

On the other hand, in *Matal*, the PTO and Simon Tam had no more than a passing relationship and as a result, the PTO had a lesser disassociation interest than Texas. The PTO had no relationship with "The Slants" trademark beyond ensuring trademark protection. Rather than making value-laden decisions, the PTO is tasked with making value-neutral decisions.<sup>104</sup> Unlike Texas, the PTO does not think through how each trademark would create a tapestry of American pride or advance American ingenuity.<sup>105</sup> As such, the PTO does not need to enter into anything more than a formal relationship with its applicants. Whereas Texas reaps benefits of civic pride

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<sup>101</sup> "The State retains absolute editorial control over the content of those plates, and the panoply of specialty plates reflects not the absence of editorial control, but rather the diverse array of Texans' educational backgrounds, interests, and points of pride that the State is willing to showcase." Brief for the Petitioner, *supra* note 99, at 23.

<sup>102</sup> One could scarcely imagine Texas approving a plate that said, "Texas stinks!" Put differently, Texas is sending "a message about the things they want to celebrate about [its] state and citizens—be that education, sports, recreation, civic organizations, military service, arts, environmental issues, and the list goes on." Scott W. Gaylord, "Kill the Sea Turtles" and Other Things You Can't Make the Government Say, 71 WASH. & LEE L. REV. 93, 149 (2014). A state could showcase its citizens through creative ways. For example, while some might say that Texas approving an Oklahoma Sooners's plate undermines the purpose of promoting Texan pride, one could see the Oklahoma plate as showcasing Texans' diverse educational experiences. *See id.* at 149–50.

<sup>103</sup> *See* Michael Dorf, *The Slants, Government Speech, and Elane Photography*, DORF ON L. (June 22, 2017), <http://www.dorfonlaw.org/2017/06/the-slants-government-speech-and-elane.html> [perma.cc/7XZE-C8ZX]; *see also* Norton, *supra* note 95, at 592 ("Not only does such misattribution mislead the public about its government's actual values, but those views may carry greater persuasive force than they would otherwise enjoy because a message's source can—and often does—change its reception. This dynamic threatens to skew the public debate and inhibit informed self-governance by misleading onlookers into evaluating ideas differently than they would if those views were accurately assigned to a private party.").

<sup>104</sup> *See Matal v. Tam*, 137 S. Ct. 1744, 1758 (2017).

<sup>105</sup> One could *easily* imagine the PTO approving a trademark that said, "America stinks!" Likewise, the PTO shows little interest in promoting a message of American pride when it approves trademarks such as "Take Yo Panties Off," "Capitalism Sucks Donkey Balls," and "Murder 4 Hire." Brief for the Respondent at 28, *Matal*, 137 S. Ct. 1744 (15-1293).

and unity from its plates, in addition to generating revenue, the PTO only generates revenue from trademark registrations.

The Cleveland Indians provide a perfect opportunity to further examine the benefits of a government speech analysis grounded in state action principles. Because state action doctrine is rooted in a “relationship” analysis, analyzing whether the Indians are a state actor allows one to see how the Indians’ relationship with Cleveland advances the government’s goals. In other words, determining the nature of their relationship will shed light on whether the government uses the Indians as a conduit for government speech. In turn, this allows one to see how the relationship between the Indians and Cleveland is more akin to the relationship between Texas and license plate designers than it is to the relationship between the PTO and trademark applicants. If the Indians, by virtue of their stadium lease with Cleveland, are state actors, they speak on behalf of the government when they speak in accordance with their state activity. For example, if the Indians’ operation of stadium displays constitutes state action, then the Indians speak on behalf of the government when they speak through the logos they place throughout the stadium.<sup>106</sup> We turn to state action doctrine to determine the nature of the relationship between the Indians and Cleveland.

### III

#### THE GOVERNMENT LEASE OF A PUBLICLY-FUNDED BALLPARK TO A PROFESSIONAL SPORTS TEAM CONSTITUTES STATE ACTION

The state action doctrine stands at the gate for most First Amendment claims. In the context of sports stadiums, courts typically apply three tests: symbiotic relationship, entwinement, and public function.<sup>107</sup> So long as one test is satisfied, a court will find that state action exists. In applying these tests, courts rely heavily on the unique factual circumstances sur-

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<sup>106</sup> See Norton, *supra* note 95, at 608 (“[U]nattended displays on government property enhance the possibility of misattribution. While an observer watching an individual speak in a public forum tends to attribute the speech to the speaker, one observing an unattended display (and any message it conveys) tends to attribute the display to the owner of the land on which it stands.” (internal quotations and footnotes omitted)).

<sup>107</sup> The Indians likely are not a state actor under the public function test because operating stadium displays is not a public function (such as managing a sidewalk) that a public entity would typically perform. See *United Church of Christ v. Gateway Econ. Dev. Corp. of Greater Cleveland, Inc.*, 383 F.3d 449, 455 (6th Cir. 2004) (finding state action where owners of Progressive Field managed sidewalk outside the stadium).

rounding the relationship between the government and the private club. Here, we examine how the symbiotic relationship and entwinement tests apply to Progressive Field.

### A. Symbiotic Relationship

In applying the symbiotic relationship test, a court asks whether both the government and the private club both receive benefits as a result of their relationship. The district court in *Ludtke v. Kuhn* directly examined the symbiotic relationship test.<sup>108</sup> In *Ludtke*, a female sports reporter sought to enjoin a MLB policy that excluded female sports reporters from entering teams' locker rooms.<sup>109</sup> According to the court, the key inquiry in finding state action was "whether New York City's involvement with Yankee Stadium and the lease arrangement with the Yankees is such as to make the Kuhn policy determination state action . . . ."<sup>110</sup> Although the discrimination took place on "ostensibly private premises (the Yankee Clubhouse)," the Yankees Clubhouse was located in old Yankee Stadium, which New York City leased to the Yankees.<sup>111</sup> In finding a symbiotic relationship between the Yankees and New York City, the court noted several ways in which their relationship was mutually beneficial. First, the media's access to the Clubhouse further publicized the team and highlighted the personalities of its players, thus increasing the Yankees' profits.<sup>112</sup> Second, the publicity and profitability of the Yankees directly correlated to the annual rent that the city collected.<sup>113</sup> In turn, the city "invested substantial sums of public money to enhance that drawing power by modernizing and improving the stadium itself."<sup>114</sup>

A typical benefit accruing to a club in a symbiotic relationship analysis is a "favorable lease under which the team keeps a substantial (if not complete) share of the nontraditional revenues associated with the special features of" the stadium.<sup>115</sup> Perhaps just as importantly, a club would receive a substantial benefit if the government covered much of the stadium's con-

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<sup>108</sup> 461 F. Supp. 86 (S.D.N.Y. 1978).

<sup>109</sup> *Id.* 87–88.

<sup>110</sup> *Id.* at 93.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 93–94. "It is an undisputed fact that the City's profit from its lease with the Yankees escalates when attendance at Yankee games increases. Thus the City has a clear interest in the preservation and maintenance of baseball's audience, image, popularity and standing." *Id.* at 94.

<sup>114</sup> *Id.*

<sup>115</sup> Wasserman, *supra* note 9, at 544.

struction costs.<sup>116</sup> In receiving this benefit, clubs can exert a significant amount of leverage:

Stadiums are built either to keep an existing team from skipping town or to lure a new team into town. Teams insist they need these new, publicly funded stadiums to be competitive on the field and off. And the situation is so dire, they claim, that the franchise may be forced to relocate. Whether teams actually follow through on that threat, the pain felt by cities burned by the notorious relocations (Brooklyn and the baseball Dodgers, Baltimore and the NFL Colts, and Cleveland and the NFL Browns) makes the threat real enough. Given the scarcity of professional sports franchises, there always is another community willing to make a play to bring a team into town by building its own modern stadium.<sup>117</sup>

Meanwhile, the primary benefit accruing to a city supporting a sports club is a substantial economic boost.<sup>118</sup> For example, Baltimore used a brand-new stadium, Oriole Park at Camden Yards, to anchor a makeover of its Inner Harbor.<sup>119</sup> Oriole Park generates nearly \$170 million per year in local business sales and \$18 million per year in total taxes, and supports nearly 2,500 jobs and \$72.6 million in personal income.<sup>120</sup> This economic impact is accelerated when the team performs well on the field. During their 2014 pennant chase, the Orioles saw an increase in attendance, sponsorships, and

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<sup>116</sup> See *id.* at 545.

<sup>117</sup> *Id.* at 542 (footnotes omitted). Former Cleveland Browns owner Art Modell's decision to move the Browns to Baltimore in 1995 sparked vehement protests. Then-Cleveland Mayor Michael R. White put words to just how deeply Cleveland felt the pain of relocation. "This community has been wronged. . . . We've loved this franchise for 50 years. These fans are the most loyal of the most loyal of the NFL. And what they got for 50 years of loyalty was a kick in the teeth." Steve Rushin, *The Heart of a City: Cleveland Won Round 1 in What Will Be an Agonizing Battle to Hold on to Its Beloved Browns*, SPORTS ILLUSTRATED (Dec. 4, 1995), <https://www.si.com/vault/1995/12/04/208707/the-heart-of-a-city-cleveland-won-round-1-in-what-will-be-an-agonizing-battle-to-hold-on-to-its-beloved-browns> [<https://perma.cc/C2CK-DT5P>].

<sup>118</sup> Wasserman, *supra* note 9, at 545.

<sup>119</sup> Orioles counsel Alan Rifkin reflected, "The primary argument in favor of an urban location was that by attracting hundreds of thousands, if not millions, of patrons into the city they in turn would help generate economic activity to hotels, restaurants, retailers and boost the economic energy of the city." Jeff Barker, *Impact of Camden Yards is Debated as it Turns 25*, BALT. SUN (Apr. 1, 2017, 10:28 AM), <http://www.baltimoresun.com/business/bs-bz-camden-yards-impact-20170331-story.html> [<https://perma.cc/JEF4-Z5MQ>].

<sup>120</sup> CABER, TOWSON UNIV., THE IMPACT OF ORIOLE PARK AT CAMDEN YARDS ON MARYLAND'S ECONOMY, 2006, at 2 (2007).

team valuation—thus increasing foot traffic in the Inner Harbor and creating new streams of revenue.<sup>121</sup>

In addition to the stadium's economic impact, one cannot overlook "the psychic, symbolic, and cultural benefit to the community of being a 'major league city' and the civic pride and unity created by luring or keeping a successful team."<sup>122</sup> Although one cannot necessarily quantify civic pride, Camden Yards is widely renowned as a stadium that transformed baseball, and the Orioles are a beloved franchise to the passionate Baltimore fan base.<sup>123</sup> Then-MLB Commissioner Allan H. "Bud" Selig said:

Building Camden Yards was one of the most important things that happened to baseball in the last 20 to 25 years . . . . It changed the whole dynamic. It led to all these wonderful stadiums and allowed us to finally market our sport to its potential—particularly the last five years of terrific growth . . . . It set it all off. It never would have happened without Camden Yards. But I don't think anybody could really have understood how dramatically it was going to change the face of baseball and the Orioles.<sup>124</sup>

After nearly six decades playing in front of scarce crowds at Cleveland Municipal Stadium, the Indians petitioned Cleveland for a new stadium. After voters approved a "sin tax" to fund nearly half of the total cost of construction, Cleveland created the Gateway Economic Development Corporation of Greater

<sup>121</sup> Scott Dance, *Orioles and Sponsors Look to Ride 2014 Success into a New Season*, BALT. SUN (Apr. 11, 2015), <http://www.baltimoresun.com/business/bs-bz-orioles-success-20150411-story.html> [<https://perma.cc/KS8W-QX8R>].

<sup>122</sup> Wasserman, *supra* note 9, at 545.

<sup>123</sup> However, some believe that the city should have spent its money elsewhere. Louis Miserendino, a visiting fellow at the Maryland Public Policy Institute, remarked that, "It's definitely a beautiful ballpark, . . . but if we want to think of the ballpark as a tool for reviving the inner city, I think it falls short of that. If the stadium was built for that purpose, we were doing something that wasn't as effective as other alternatives." Peter Schmuck, *Camden Yards, the Stadium that Changed Baseball and Baltimore, Turns 20*, BALT. SUN (Mar. 31, 2012, 1:52 PM), <http://www.baltimoresun.com/sports/orioles/bs-sp-orioles-camden-yards-0401-20120330-story.html> [<https://perma.cc/5X4A-JX78>]. Debate still rages today about the benefits and consequences of spending significant public funds to build sports stadiums. See Pat Garofalo & Travis Waldron, *If You Build It, They Might Not Come: The Risky Economics of Sports Stadiums*, THE ATLANTIC (Sept. 7, 2012), <https://www.theatlantic.com/business/archive/2012/09/if-you-build-it-they-might-not-come-the-risky-economics-of-sports-stadiums/260900/> [<https://perma.cc/6CPA-WVSX>]; Elaine S. Povich, *Why Should Public Money Be Used to Build Sports Stadiums?*, PBS NEWSHOUR (July 13, 2016 9:47 AM), <https://www.pbs.org/newshour/nation/public-money-used-build-sports-stadiums> [<https://perma.cc/3VVS-2ZGE>].

<sup>124</sup> Schmuck, *supra* note 123.

Cleveland (GEDC) to build and operate the stadium.<sup>125</sup> The GEDC is a 501(c)(3) non-profit that owns both Progressive Field and Quicken Loans Arena and leases them to the Cleveland Indians and Cleveland Cavaliers, respectively.<sup>126</sup> Cleveland and Cuyahoga County elected officials appoint the GEDC's Board of Directors.<sup>127</sup>

In 1992, the corner of Carnegie and Ontario was cleared for construction.<sup>128</sup> Two years later, the Indians moved in under a twenty-year lease from the GEDC.<sup>129</sup> Immediately thereafter, the Indians embarked on a period of prolonged success. Registering World Series appearances in 1995 and 1997,<sup>130</sup> they attracted thousands of fans to the newly refurbished Gateway District—in fact, the Indians set a then-MLB record of 455 straight sellouts from June 12, 1995 to April 4, 2001.<sup>131</sup> Indians radio broadcaster Tom Hamilton noted, “No ballpark ever changed the perception of a city nationally like our park did . . . . For so long, Cleveland was a punch line for jokes on national TV. A lot of that died out in the 1990s. It seemed everyone was feeling better about Cleveland.”<sup>132</sup>

Here, the Indians appear to have a symbiotic relationship with Cleveland and Cuyahoga County. Since moving into “The Jake” in 1994, the Indians have benefitted greatly from their partnership with the local government. For one, they received a substantial subsidy to build a new stadium—then-owner Richard Jacobs paid only 52% of the \$175 million construction cost.<sup>133</sup> But more importantly, the Indians benefitted from a renewed enthusiasm amongst fans and significant contributions from the GEDC for capital repairs. Bolstered by a unique combination of a new ballpark, the 1994 baseball strike,<sup>134</sup> a

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<sup>125</sup> *Progressive Field*, *supra* note 8.

<sup>126</sup> *Who We Are*, GATEWAY ECON. DEV. CORP. OF GREATER CLEVELAND, <http://www.gatewaysportscomplex.org/who.html> [<https://perma.cc/37T7-CELN>].

<sup>127</sup> *Id.*

<sup>128</sup> *Progressive Field*, *supra* note 8.

<sup>129</sup> *Id.*

<sup>130</sup> *Postseason Results*, CLEVELAND INDIANS, [http://cleveland.indians.mlb.com/cle/history/postseason\\_results.jsp](http://cleveland.indians.mlb.com/cle/history/postseason_results.jsp) [<https://perma.cc/E6M4-LEC2>].

<sup>131</sup> Terry Pluto & Tom Hamilton, *For Cleveland Indians, Fans and City, Jacobs Field Was a Whole New Ballgame: 'Glory Days in Tribe Town' Excerpts, Part 3*, CLEVELAND.COM (Nov. 5, 2014, 6:00 AM), [http://www.cleveland.com/pluto/in dex.ssf/2014/11/for\\_cleveland\\_indians\\_fans\\_and.html](http://www.cleveland.com/pluto/in dex.ssf/2014/11/for_cleveland_indians_fans_and.html) [<https://perma.cc/LAXD-QK8A>].

<sup>132</sup> *Id.*

<sup>133</sup> *Progressive Field*, *supra* note 8.

<sup>134</sup> Indians fans' enthusiasm was not tempered by the strike:

Tribe fans were so giddy about the new stadium and the young, gifted team that was emerging, their anger at the 1994 baseball strike was not aimed at the franchise. They just wanted baseball



bustling Cleveland economy, a mediocre Cavaliers team, and the Browns' move to Baltimore, the Indians dominated radio talk shows and newspaper coverage.<sup>135</sup> Soon, they dominated MLB attendance rankings as well. As the MLB average game attendance dropped below 30,000 people from 1995 to 2000, the Indians average game attendance soared above 40,000.<sup>136</sup> As a result, the Indians' revenue multiplied, giving the front office the ability to attract and retain marquee players, such as Jim Thome, Omar Vizquel, Albert Belle, Manny Ramirez, Eddie Murray, Dave Winfield, and Roberto Alomar.<sup>137</sup> Increased revenues resulted in better rosters, more fans, and ultimately, historic success:<sup>138</sup>

For more than two decades, the Cleveland Indians languished at the bottom of the American League. The team's revenues have increased dramatically since the heavily subsidised [sic] Jacobs Field opened. In 1990[,] the team earned \$34.8 million; in 1997, the team's earnings had increased to \$134.2 million . . . . In the same period, the team's payroll increased from \$19.1 million to \$66.9 million . . . . Increased revenues and expenditures for players . . . changed Cleveland from a two-decade loser to an annual competitor for the American League title.<sup>139</sup>

Progressive Field has also generated substantial economic benefits for the city of Cleveland. An average season generates nearly \$92 million in earnings, \$221 million in local business sales, and \$15 million in total taxes, and supports nearly 2,500 jobs.<sup>140</sup> The team's on-the-field success has translated into

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back. They wanted to go to the ballpark. They believed that this team would indeed deliver a World Series, and they wanted to watch it happen.

Pluto & Hamilton, *supra* note 131.

<sup>135</sup> *Id.*

<sup>136</sup> From 1994 to 1997, the MLB average game attendance was 31,256; 25,022; 26,510; and 28,261, respectively. In contrast, the Indians average game attendance was 39,121; 39,483; 41,477; and 42,034, respectively. Pluto & Hamilton, *supra* note 131.

<sup>137</sup> Danny Knobler, *The Cleveland Indians' Star-Studded '90s MLB Dynasty That Never Was*, BLEACHER REPORT (Oct. 24, 2016), <http://bleacherreport.com/articles/2671087-the-cleveland-indians-star-studded-90s-mlb-dynasty-that-never-was> [<https://perma.cc/XZT3-TNCK>].

<sup>138</sup> See TREVOR SLACK, *THE COMMERCIALISATION OF SPORT* 113 (2004); see also Knobler, *supra* note 137 ("[T]he Indians were among the best teams baseball has seen. They averaged 94 wins a year and nearly six runs a game over a five-year span. They had 44 players who made All-Star teams at some point in their career.").

<sup>139</sup> SLACK, *supra* note 138, at 109.

<sup>140</sup> GREATER CLEVELAND PARTNERSHIP, *PROTECTING THE PUBLIC'S INVESTMENT* 37 (2014), [http://council.cuyahogacounty.us/pdf\\_council/en-US/Misc.%20Reports](http://council.cuyahogacounty.us/pdf_council/en-US/Misc.%20Reports)

economic benefits for the city. From 1995 to 2012, the Indians played 34 postseason games at home, generating approximately \$26 million in earnings, \$61 million in business sales, and \$5.6 million in taxes.<sup>141</sup> Beyond sustained economic impact, the stadium has also elicited pride amongst the local community—as it was intended to. In designing the stadium, HOK Sports Facilities Group worked hard to incorporate elements unique to Cleveland’s “culture, spirit, and architectural landscape.”<sup>142</sup> For example, the stadium holds a “significant collection of public art,”<sup>143</sup> including a “Who’s on First” display commemorating the famous “Abbott and Costello” skit.<sup>144</sup> The city also soaked in the team’s success, flocking downtown to create a captivating atmosphere.<sup>145</sup> Cleveland even held a celebratory parade after losing in one of their World Series appearances.<sup>146</sup> According to star shortstop Omar Vizquel, “[t]hat [atmosphere] was magical . . . . It was amazing. Every time you came to the park, it was electrifying.”<sup>147</sup>

The Indians and Cleveland are interconnected in a mutually-beneficial relationship. In fact, their relationship has formed a mutually reinforcing, circular pattern. When Cleveland contributes subsidies to the Indians, the Indians can divert more funds to its on-the-field performance. When the Indians perform well on the field, they attract more fans. When they attract more fans, the city and local businesses benefit. Not only are the Indians and the city locked in an inter-dependent relationship, they also depend on each other to send messages to fans that encourage civic pride and unity. Just as the aesthetics of the stadium are uniquely designed to capture

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%20and%20Presentations/Sin%20Tax%20Presentations/20140121-GCPExcise Tax-Presentation.pdf [https://perma.cc/PC5L-NDTP].

<sup>141</sup> *Id.*

<sup>142</sup> *Progressive Field*, *supra* note 8.

<sup>143</sup> *Id.*

<sup>144</sup> See JOSH PAHIGIAN & KEVIN O’CONNELL, *ULTIMATE BASEBALL ROAD TRIP: A FAN’S GUIDE TO MAJOR LEAGUE STADIUMS 237* (2012); see also Marc Bona, ‘Who’s on First?’ Benches Moved at Progressive Field: 3 Things About the Famous Baseball Routine, CLEVELAND.COM (Apr. 27, 2015, 8:00 AM) [http://www.cleveland.com/tribe/index.ssf/2015/04/whos\\_on\\_first\\_benches\\_moved\\_at.html](http://www.cleveland.com/tribe/index.ssf/2015/04/whos_on_first_benches_moved_at.html) [https://perma.cc/P68C-K3DQ] (“The National Baseball Hall of Fame and Museum in Cooperstown, New York, plays the routine on a continuous loop in its third-floor home.”).

<sup>145</sup> Knobler, *supra* note 137.

<sup>146</sup> *Id.*; see also The Associated Press, *Baseball: World Series; 50,000 Turn Out to Cheer Indians*, N.Y. TIMES (Oct. 29, 1997), <http://www.nytimes.com/1997/10/29/sports/baseball-world-series-50000-turn-out-to-cheer-indians.html> [https://perma.cc/4ZUR-CCHG] (“While the Indians lost the World Series, you would not have known it from the reception they got yesterday in Cleveland.”).

<sup>147</sup> Knobler, *supra* note 137.

the spirit of Cleveland and evoke civic pride and unity, the messages that the team posts throughout the stadium are similarly designed to channel pride and unity. For example, the team might post “This Town is a Tribe Town” to serve as a rallying cry for fans. Similarly, the team might post a “smiling” Chief Wahoo when the team wins, or a “frowning” Chief Wahoo when the team loses. In both instances, the team hypothetically attempts to create a oneness between itself and its fans. In other words, the team wants the fans to feel that “we win together, or we lose together.”<sup>148</sup> In this way, the Indians and Cleveland engage in a symbiotic relationship, even in the Indians’ messaging throughout the stadium. As such, a court could find that the Indians are a state actor and that the government speaks through the displays at Progressive Field.

### B. Entwinement

A second test that courts apply to find state action is the entwinement test. In conducting the entwinement test, a court asks, “is the private actor so entwined with the government that the private actor’s conduct takes on a public character?” Factors that a court may assess include: who actually owns title to the facility, who provides security resources, and who maintains control over speech restrictions within the facility.<sup>149</sup> The Supreme Court introduced the entwinement test in the First Amendment context in *Brentwood Academy v. Tennessee Secondary School Athletic Ass’n*.<sup>150</sup> In 2001, Brentwood Academy used the First Amendment to challenge the state athletic association’s anti-recruiting rule.<sup>151</sup> At the threshold, the Court noted that it may find state action if “there is such a ‘close nexus between the State and the challenged action’ that seemingly private behavior ‘may be fairly treated as that of the State itself.’”<sup>152</sup> The Court then stressed:

What is fairly attributable [to the government] is a matter of normative judgment, and the criteria lack rigid simplicity. From the range of circumstances that could point toward the

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<sup>148</sup> See Tim Rees, S. Alexander Haslam, Pete Coffee & David Lavallee, *A Social Identity Approach to Sport Psychology: Principles, Practice, and Prospects*, 45 SPORTS MED. 1083, 1088 (2015) (“[W]e are more likely to offer help to people we perceive as belonging to an ingroup that is salient for us, and that we are more likely to receive help from those who perceive us as belonging to an ingroup that is salient for them.”).

<sup>149</sup> See DeSiato, *supra* note 9, at 420.

<sup>150</sup> 531 U.S. 288 (2001).

<sup>151</sup> *Id.* at 293.

<sup>152</sup> *Id.* at 295 (quoting *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974)).

State behind an individual face, no one fact can function as a necessary condition across the board for finding state action . . . .<sup>153</sup>

According to the Court, previous cases “have identified a host of facts that can bear on the fairness of such an attribution.”<sup>154</sup> Within this “host of facts,” the Court noted that a “challenged activity may be state action when it results from the State’s exercise of ‘coercive power,’ when the State provides ‘significant encouragement, either overt or covert,’ or when a private actor operates as a ‘willful participant in joint activity with the State or its agents.’”<sup>155</sup>

To further clarify the test, the Court distinguished its previous ruling in *National Collegiate Athletic Ass’n v. Tarkanian*,<sup>156</sup> in which it did not find state action, from the situation in *Brentwood Academy*, in which it did. In *Tarkanian*, the Court did not find that the NCAA was a state actor because the NCAA’s employment policies were shaped by hundreds of universities, not just the one university implicated in the case.<sup>157</sup> In *Brentwood*, the Court did find that the state athletic association was a state actor because,<sup>158</sup> as the Court noted in *Tarkanian*, “[t]he situation would, of course, be different if the [association’s] membership consisted entirely of institutions *located within the same state*.”<sup>159</sup> In other words, the state athletic association was closely linked to, and integrally shaped by, its various public and private member institutions. The Court also found top-down involvement from the state in the athletic association’s affairs; especially important to the Court, “State Board members [were] assigned ex officio to serve as members of the board of control and legislative council.”<sup>160</sup>

Here, the Cleveland Indians and Cleveland are entwined to such an extent that a court could find that the Indians are a state actor. The Supreme Court introduced the entwinement test in the First Amendment context sixteen years ago. The relationship between the Indians and Cleveland provides an opportunity for a court to apply the test to a publicly-owned

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<sup>153</sup> *Id.*

<sup>154</sup> *Id.* at 296.

<sup>155</sup> *Id.* (citing *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982) (declining to extend state action to nursing homes in Medicaid recipients’ claim); *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 941 (1982) (extending state action to corporate creditor for depriving debtor of property without due process)).

<sup>156</sup> 488 U.S. 179 (1988).

<sup>157</sup> *Id.* at 193.

<sup>158</sup> *Brentwood Acad.*, 531 U.S. at 298.

<sup>159</sup> *Tarkanian*, 488 U.S. at 193 n.13 (emphasis added).

<sup>160</sup> *Brentwood Acad.*, 531 U.S. at 300.

facility leased to a private organization. In fact, the team and the city are legally entwined due to the largely overlapping identity they created—the Gateway Economic Development Corporation.<sup>161</sup>

The city also largely influences the Indians' security and crowd-control policies. Not only does the city provide over fifty police officers outside the stadium before and after the game, it also provides officers to work alongside stadium ushers.<sup>162</sup> Working alongside these ushers, the officers “perform a ‘well-choreographed bunker maneuver’ to watch the crowd and dissuade any misconduct during stoppages in play.”<sup>163</sup>

[This] present[s] the different case of government lending its enforcement muscle to assist the private entity in its long-term and exclusive management and control of government property. Pervasive entwinement is present because [the] government has turned long-term control over its space to the private entity, then agreed to wield the public power to enforce those private choices. The exercise of private power . . . is a product of public laws and public force.<sup>164</sup>

By virtue of their overlapping corporate identity, and their collaboration in setting and enforcing stadium–security policies, the Indians and Cleveland are sufficiently entwined for a court to find that the Indians are a state actor.

State action subsumes the whole of government speech. Because state action subsumes the whole of government speech, it follows that the government cannot speak without acting. In the publicly owned, privately leased property context, a court analyzes the nature of the relationship between a public and private entity. In the blurred public-private speech sphere that is government speech, we should use state action principles to determine whether the government is in fact speaking through a private entity. If the government could not act through a private entity, it could not speak either. If a government could act through a private entity, it could speak too. Here, the Indians and Cleveland hold an interdependent relationship such that the Indians could qualify as a state actor when it manages Progressive Field. If a court could consider the displays at Progressive Field to be state action, it follows that the city is intricately associated with whatever speech the Indians convey through those displays. In other words, the city

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161 Wasserman, *supra* note 9, at 549.

162 *Id.*

163 *Id.* at 550 (internal quotations omitted).

164 *Id.*

speaks through the displays when the Indians speak through the displays. Thus, when the Indians post logos of Chief Wahoo throughout Progressive Field, the taxpayers of Cleveland can assume that the city implicitly endorses or condones such racially derogatory messaging.

If the Indians are not a state actor, we would consider the Indians to be a private actor speaking on publicly-owned property. Because the government cannot restrict private speech on the basis of viewpoint, it could not restrict the Indians' use of Chief Wahoo at Progressive Field.

#### CONCLUSION

Over the past two years, the Cleveland Indians have reentered the national spotlight. Between participating in a memorable World Series Game Seven, and recording the longest winning streak in baseball history,<sup>165</sup> the Indians have captivated the hearts of their faithful followers. Meanwhile, the Washington Redskins have continued their own success, attracting sold-out crowds and garnering support for a new, publicly-funded stadium to be constructed by 2027. Nonetheless, these storied organizations also remain devoted to long-standing stereotypes that target Native Americans. Given the pervasiveness of these stereotypes in professional sports and the continued marginalization of Native Americans in the public consciousness, many community leaders are seeking avenues for removing the Marks. Although *Matal* foreclosed the possibility of revoking these teams' trademarks, other creative legal and political avenues still exist.

One potential strategy for placing increased pressure on the teams is a government regulation restricting the display of the Marks in the teams' respective stadiums. Although courts have applied different state action tests to professional sports stadiums, strong precedent exists to demonstrate that a private entity's action within a publicly-owned, publicly-funded stadium is, in some contexts, state action. Because state action exists when a government leases a ballpark to a private organization, one could argue that the display of those Marks represents government speech, and that the government is thus permitted to remove (what could be construed as) its own speech from the publicly funded ballpark it owns.

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<sup>165</sup> Mike Axisa, *Roundtable: Do the Indians Already Have the Longest Winning Streak in MLB History?*, CBS SPORTS (Sept. 15, 2017), <https://www.cbssports.com/mlb/news/roundtable-do-the-indians-already-have-the-longest-winning-streak-in-mlb-history/> [http://perma.cc/9CH2-A8GH].

Although this legal avenue is complex and unique, it provides principles for understanding the nexus between state action and government speech. In doing so, it clarifies the line between government speech and private speech. It also provides both real and symbolic tools to pressure both the government and teams to restrict the display of offensive stereotypes towards Native Americans. Accordingly, this avenue creates the potential for a new intersection between sports and First Amendment law that has implications for other unique situations, such as New York City Mayor Bill de Blasio's fight with Trump Golf Links.<sup>166</sup> More importantly, this avenue would begin the process of increasing social awareness towards Native American communities and the unique challenges they face. For far too long, the sports world remained blind to how it perpetuates injustice. Recent events, such as the NFL National Anthem protests, have changed that perception in part. Removing Native American stereotypes from professional sports is a long-overdue step in the right direction.

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<sup>166</sup> Ginia Bellafante, *Golf Course Deal with Donald Trump Leaves New York City in the Rough*, N.Y. TIMES (Aug. 12, 2016), <https://www.nytimes.com/2016/08/14/nyregion/golf-course-deal-with-donald-trump-leaves-new-york-city-in-the-rough.html> [<https://perma.cc/NPR9-36MW>].

