

1-1-2022

## The Case for Race: An Exploration of Whether the United States Olympic and Paralympic Committee Can Require Athletes to Sign Away Their Right to Protest

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### Recommended Citation

27 Suffolk J. Trial & App. Advoc. 139 (2021-2022)

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## THE CASE FOR RACE: AN EXPLORATION OF WHETHER THE UNITED STATES OLYMPIC AND PARALYMPIC COMMITTEE CAN REQUIRE ATHLETES TO SIGN AWAY THEIR RIGHT TO PROTEST

*“It wasn’t done for a malignant reason. It was only done to bring attention to the atrocities of which we were experiencing in a country that was supposed to represent us.” – Tommie Smith, U.S. Olympic Gold Medalist.<sup>1</sup>*

### I. INTRODUCTION

The Olympic Games have always been an inherently political affair—established to bring the world together through sport.<sup>2</sup> As such, and perhaps inadvertently, the games have been a venue for political protest for almost as long as they have existed in their modern form.<sup>3</sup> Just ten years after the modern Olympic Games began in 1896, Peter O’Connor,

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<sup>1</sup> See Walter Ford, *It’s progress*, THE UNION (Jun. 12, 2020), <https://www.theunion.com/sports/walter-ford-its-progress/>.

<sup>2</sup> See INT’L OLYMPIC COMM., OLYMPIC CHARTER 8, ¶ 2 (2021), [https://stillmed.olympics.com/media/Document%20Library/OlympicOrg/General/EN-Olympic-Charter.pdf?\\_ga=2.234634012.303326392.1633619797-1409196676.1632857194](https://stillmed.olympics.com/media/Document%20Library/OlympicOrg/General/EN-Olympic-Charter.pdf?_ga=2.234634012.303326392.1633619797-1409196676.1632857194) (establishing Fundamental Principles of Olympism). The Charter states that “the goal of Olympism is to place sport at the service of the harmonious development of humankind, with a view to promoting a peaceful society concerned with the preservation of human dignity.” *Id.* The most recent Olympic games in Tokyo showcased the intersection between sports, peace, and politics when a Russian and a Ukrainian athlete, rivals from two warring countries, hugged each other as they medaled in the high jump, while their government exploited the event. Vladimir Mozgovoï, *How Russia and Ukraine Became Smear Campaign Champions*, THE MOSCOW TIMES (Aug. 11, 2021), <https://www.themoscowtimes.com/2021/08/11/how-russia-and-ukraine-became-smear-campaign-champions-a74755>.

<sup>3</sup> See Jessica Phelan, *7 of the most memorable Olympic protests in history (and one that could be)*, SALON (Feb. 13, 2014, 5:50 PM), [https://www.salon.com/2014/02/13/7\\_of\\_the\\_most\\_memorable\\_olympic\\_protests\\_in\\_history\\_and\\_one\\_that\\_could\\_be/](https://www.salon.com/2014/02/13/7_of_the_most_memorable_olympic_protests_in_history_and_one_that_could_be/) (summarizing protest history at Olympic Games); David Davis, *Olympic Athletes Who Took a Stand*, SMITHSONIAN MAGAZINE (Aug. 2008), <https://www.smithsonianmag.com/articles/olympic-athletes-who-took-a-stand-593920/> (providing overview of 1968 Olympic protest); M. . lissa Godin, *Athletes Will Be Banned From Protesting at the 2020 Tokyo Olympics. But the Games Have a Long History of Political Demonstration*, TIMES MAGAZINE (Jan. 14, 2020, 12:19 PM), <https://time.com/5764614/political-protests-olympics-ioc-ban/> (discussing protests at Olympics and use of Olympics as venue or tool of protest).

an Irish track and field athlete, was forced to compete for Great Britain during the Irish fight for independence.<sup>4</sup> In response to his new status as a British athlete, O'Connor scaled a flagpole during his medal ceremony and waved a green flag reading "Ireland Forever" in Gaelic.<sup>5</sup> The 1968 Olympic Games in Mexico City were the venue of similar protests by Věra Čáslavská, a Czechoslovakian gymnast who went into hiding when the Soviet Union invaded her country.<sup>6</sup> After winning four gold and two silver medals, Čáslavská turned her head from the Soviet flag in protest of the Soviet Union's invasion.<sup>7</sup> While the International Olympic Committee (IOC) did nothing in response to this specific act, Čáslavská was unable to coach or take any part in the world of gymnastics until the fall of the Soviet Union in 1991.<sup>8</sup>

John Carlos and Tommie Smith, two American track and field athletes, protested at the medal ceremony for the two hundred meter sprint by raising their fists in a black power salute during the Star-Spangled Banner.<sup>9</sup> Their protest was in response to the Civil Rights Movement, the continuing war in Vietnam, and the assassinations of Martin Luther King, Jr. and Robert Kennedy.<sup>10</sup> The IOC took immediate action, suspending Carlos and Smith from the American team and sending the pair back to the states.<sup>11</sup> While the lives and careers of these athletes were upended

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<sup>4</sup> See Phelan, *supra* note 3 (describing O'Connor's protest); Godin, *supra* note 3 (describing O'Connor's protest and background surrounding his status as British athlete).

<sup>5</sup> See Godin, *supra* note 3 ("In protest, O'Connor scaled a 20-foot flagpole in the stadium, waving a green flag with the words 'Erin Go Bragh' (Ireland forever) while his co-athlete Con Leahy distracted Greek authorities.") Though the International Olympic Committee ("IOC") frowned upon O'Connor's actions, it did not expel him or place him on probation, and he went on to win gold in three more competitions, waving a green flag each time. *Id.*

<sup>6</sup> See Phelan, *supra* note 3 (describing Čáslavská's protest); Godin, *supra* note 3 (describing the background and consequences of Čáslavská's protest).

<sup>7</sup> See Phelan, *supra* note 3 (recounting Čáslavská's protest). Čáslavská was present in her native Czechoslovakia when the Soviet Union invaded and was forced to go into hiding, training from home rather than at the state sponsored gymnasium. *Id.* "She kept in competition form by practicing her floor routine in fields and swinging on tree branches instead of the parallel bars." *Id.* The Soviet flag went up during Čáslavská's medal ceremony because she tied with a Soviet gymnast for the gold. *Id.*

<sup>8</sup> See Godin, *supra* note 3 (detailing Čáslavská's life after 1968 Olympics).

<sup>9</sup> See Davis, *supra* note 3 (describing Carlos and Smith's protest); Phelan, *supra* note 3 (providing background on Carlos and Smith's protest); Godin, *supra* note 3 (explaining protest's impetus).

<sup>10</sup> See Davis, *supra* note 3 (describing protest's impetus and historical background); Godin, *supra* note 3 (explaining protest's impetus and historical background). Both American runners took off their shoes to symbolize Black poverty and wore one black glove to represent African American strength and unity. Phelan, *supra* note 3. Additionally, Smith wore a black scarf for Black pride while Carlos wore a string of beads to show respect for the victims of lynching. Phelan, *supra* note 3.

<sup>11</sup> See Phelan, *supra* note 3 (describing consequences for Carlos and Smith after protest).

because they took a stand for their beliefs, there has never been consequences for a nation that chooses to boycott the Olympic Games.<sup>12</sup> This discrepancy reveals the IOC's unbalanced approach in preventing the Olympics from being used for political purposes—the politically motivated actions of athletes are punished, while the politically motivated actions of nations are effectively ignored.<sup>13</sup>

Protests by athletes are not specific to the Olympics, as professional athletes in the United States have protested at games in their own respective leagues.<sup>14</sup> In 2016, San Francisco 49ers quarterback Colin Kaepernick knelt during the national anthem to protest police brutality and racial inequality in the United States, sparking a movement that spread through all United States professional sports.<sup>15</sup> Kaepernick's protest caught the ire of the Republican Party and then-Republican presidential nominee Donald Trump, who called the act disrespectful, un-American, and an attack on veterans and service members.<sup>16</sup> Informal pressure from conservative consumers and commentators, as well as then-President

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<sup>12</sup> See Davis, *supra* note 3 (noting difficulties Carlos faced after protest). Carlos struggled to find a stable job and even attributed the suicide of his then-wife, in part, to the backlash from his protest. *Id.*; see also Phelan, *supra* note 3 (noting instances of nation boycotts). Sixty nations, led by the United States, boycotted the 1980 Olympic Games in Moscow in response to the 1979 Soviet invasion of Afghanistan, which then resulted in a sixteen-nation boycott of the 1984 Olympic Games in Los Angeles. Phelan, *supra* note 3; DeFrantz v. U.S. Olympic Comm., 492 F. Supp. 1181, 1188 (D.D.C. 1980), *aff'd* without opinion, 701 F.2d 221 (D.C. Cir. 1980) (holding USOC entitled to refuse to allow American athletes to compete, even for reasons unrelated to sport); Oren Weisfeld, *Olympics bans political protest by athletes*, NOW MAGAZINE (Jan. 22, 2020), <https://nowtoronto.com/news/olympics-2020-tokyo-protests/> (noting IOC's reaffirmation of commitment to ban athlete protest).

<sup>13</sup> See Weisfeld, *supra* note 12 (noting IOC commitment to ban athlete protests); DeFrantz, 492 F. Supp. at 1188 (endorsing USOC refusal to participate in Olympic Games).

<sup>14</sup> See Adam Kilgore & Ben Golliver, *Most sports leagues pause with second day of protests, some more unified than others*, THE WASHINGTON POST (Aug. 27, 2020, 7:17 PM), <https://www.washingtonpost.com/sports/2020/08/27/sports-protests/> (noting teams across the NBA, NHL, and NFL all canceling games due to protests). The cancelled games were a response to the shooting of Jacob Blake in Kenosha, Wisconsin, and, more generally, police brutality following the murder of George Floyd by a Minneapolis police officer in 2020. *Id.*

<sup>15</sup> See Tadd Haislop, *Colin Kaepernick kneeling timeline: How protests during the national anthem started a movement in the NFL*, SPORTING NEWS (Sept. 13, 2020), <https://www.sportingnews.com/us/nfl/news/colin-kaepernick-kneeling-protest-timeline/xktu6ka4diva1s5jxaylrcsse> (providing comprehensive timeline of Colin Kaepernick's activism). Initially, Kaepernick protested by sitting on the bench instead of standing during the national anthem during a preseason game. *Id.* Kaepernick got the idea to kneel, rather than sit, from former Seahawks player and Green Beret Nate Boyer. *Id.* When Kaepernick knelt for the first time on September 1, 2016, he was joined by teammate Eric Reid, who continued to kneel with him for the entire season. *Id.*; see also Trump Calls NFL kneeling 'disrespectful,' disrespectful to veterans, FOX NEWS (Sept. 26, 2017), <https://www.foxnews.com/politics/trump-calls-nfl-kneeling-disgraceful-disrespectful-to-veterans> (quoting President Trump's views on athlete activism).

<sup>16</sup> See FOX NEWS, *supra* note 15 (quoting President Trump).

Trump, resulted in the National Football League (“NFL”) announcing a rule penalizing players who kneel during the national anthem.<sup>17</sup> Despite the new rule, President Trump continued to criticize the NFL, sparking more protests from players and greater outcry from fans.<sup>18</sup> Americans remain divided in their views on athlete protests, and the act of kneeling during the national anthem has remained at the center of the controversy.<sup>19</sup>

This note analyzes the United States Olympic and Paralympic Committee’s (“USOPC”) previous policy of barring athlete protest during sanctioned events and seeks to prove that this action was unconstitutional.<sup>20</sup> While the USOPC does not currently enforce this policy, the risk of reversal warrants careful consideration of this issue.<sup>21</sup> Athletes who choose

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<sup>17</sup> See Haislop, *supra* note 15 (explaining NFL’s locker room rule).

<sup>18</sup> See *id.* (examining developments in dialogue surrounding Kaepernick’s protest). Nike used Kaepernick as the face for a new ad campaign supporting his activism, which was met with applause as well as the widespread burning of Nike products. *Id.*

<sup>19</sup> See Michael Tesler, *Americans Are Far More Likely To Support Athlete Protests Than They Once Were*, FIVETHIRTYEIGHT (Sept. 3, 2020, 6:00 AM), <https://fivethirtyeight.com/features/americans-are-far-more-likely-to-support-athlete-protests-than-they-once-were/> (showing statistical change over time in favorability of protest by athletes); see also Amy Tenny, *NFL: Political divide on athlete activism widens in the U.S. – Reuters/Ipsos Poll*, REUTERS, <https://www.reuters.com/article/us-football-nfl-activism/nfl-political-divide-on-athlete-activism-widens-in-the-u-s-reuters-ipsos-poll-idUSKBN2602MX> (Sep. 9, 2020, 12:22 PM) (reviewing statistics underscoring partisan divide over athlete protest). Kneeling during the national anthem is still hotly debated and support for the act is incredibly partisan. *Id.*; Oren Weisfeld, *Race Imboden: ‘I knelt because America doesn’t reflect me anymore’*, THE GUARDIAN (Sep. 1, 2020, 5:00 PM), <https://www.theguardian.com/sport/2020/sep/01/race-imboden-fencing-anthem-protest-interview> (interviewing Race Imboden regarding his decision to kneel on Olympic podium during national anthem).

<sup>20</sup> See Eddie Pells, *Pan Am Games protestors each get 12 months of probation*, ASSOCIATED PRESS (Aug. 20, 2019), <https://apnews.com/article/80b2fb3ee1da43c8909cb7b6a1a47454> (discussing sanctions, contract signed, and initial public statement).

<sup>21</sup> See Associated Press, *USOPC won’t punish athletes for protesting at the Olympics*, ESPN (Dec. 10, 2020), [https://www.espn.com/olympics/story/\\_/id/30489589/usopc-punish-athletes-protesting-olympics](https://www.espn.com/olympics/story/_/id/30489589/usopc-punish-athletes-protesting-olympics) (announcing USOPC’s refusal to sanction athletes for kneeling or raising fists at future games). A reversal of this policy is possible, given that Rule 50 remains under the IOC Olympic Charter, and the IOC has consistently defended its enforcement. *Id.*; Dave Zirin & Jules Boykoff, *The USOPC Defends Olympic Athletes’ Right to Protest*, THE NATION (Dec. 23, 2020), <https://www.thenation.com/article/society/olympics-protest/>. It should be noted that the USOPC’s new policy states that they will not punish athletes that protest “peacefully and respectfully . . . in support of racial and social justice for all human beings.” Zirin & Boykoff, *supra* note 21. This suggests that the USOPC retains the right to sanction athletes who do not protest within those categories. *Id.*; see also Ariane de Vogue & Devan Cole, *Supreme Court—over John Roberts’ sole dissent—rules in favor of student in First Amendment case*, CNN, <https://www.cnn.com/2021/03/08/politics/supreme-court-free-speech-college-religion-case-chike-uzuegbunam/index.html> (Mar. 8, 2021, 11:20 AM) (detailing decision allowing First Amendment suit where university could reestablish anti-speech policy). The potential for a policy reversal is enough to warrant intervention by the courts—especially where constitutional freedoms are abridged. Vogue & Cole, *supra* note 21. This uncertainty was apparent during the Tokyo Games

to protest at future Olympic Games or international competitions should be allowed to do so freely, without retribution from the USOPC, or the IOC acting through it.<sup>22</sup>

## II. FACTS

The IOC was established in 1894 as an independent, international organization, with the role of overseeing the Olympic Games and international sport competitions, reviewing bidding processes, facilitating the growth of sport and sportive collaboration around the world, and promoting the political neutrality of the Olympic Movement.<sup>23</sup> This dedication to political neutrality is stated in Rule 50 of the Olympic Charter, the “codification of the fundamental principles of Olympism, and the rules and bye-laws adopted by the International Olympic Committee.”<sup>24</sup> Rule 50 itself bars any “kind of demonstration or political, religious, or racial propaganda . . . in any Olympic sites, venues or other areas.”<sup>25</sup> To ensure adherence to Rule 50, the IOC relies on the National Olympic Committees to evaluate infractions and dole out consequences to their own athletes instead of imposing the sanctions itself.<sup>26</sup>

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as fencer Race Imboden and shot-putter Raven Saunders protested from their respective podiums. Matthew Futterman, et al., *Shot-Putter’s Gesture Renews Controversy Over Podium Protests*, NEW YORK TIMES, <https://www.nytimes.com/2021/08/01/sports/olympics/olympics-protests-podium.html> (Aug. 5, 2021). This led to confusion over the enforcement of Rule 50, with the IOC and USOPC both stating that the other would handle any potential disciplinary action. *Id.*

<sup>22</sup> See Pells, *supra* note 20 (discussing USOPC and Imboden fall out).

<sup>23</sup> See *Overview*, INT’L OLYMPIC COMM. (July 10, 2021), <https://olympics.com/ioc/overview> (providing IOC historical overview); *History, Principles & Financing*, INT’L OLYMPIC COMM. (July 14, 2021), <https://olympics.com/ioc/mission> (stating IOC mission); OLYMPIC CHARTER, *supra* note 2, at 8 (stating IOC’s role is “to maintain and promote its political neutrality and to preserve the autonomy of sport.”)

<sup>24</sup> See *Olympic Charter*, INT’L OLYMPIC COMM. (July 14, 2021), <https://olympics.com/ioc/olympic-charter> (republishing IOC Charter).

<sup>25</sup> See OLYMPIC CHARTER, *supra* note 2, at 94 (barring athlete activism); see also IOC ATHLETES’ COMM., RULE 50 GUIDELINES 1-3, <https://stillmedab.olympic.org/media/Document%20Library/OlympicOrg/News/2020/01/Rule-50-Guidelines-Tokyo-2020.pdf> (last visited Nov. 2, 2020, 9:26 AM) (explaining purpose of Rule 50 and how infractions are evaluated). Notably, Rule 50 bars any protest on the field of play, in the Olympic Village, during medal ceremonies, and during the opening, closing, or other official ceremonies. IOC ATHLETES’ COMM., *supra* note 25, at 2. However, it permits protests during press conferences, at team meetings, and through digital and traditional media platforms. *Id.* Ostensibly, Rule 50 bars protest where it would have the largest effect—where it reaches the largest audience. Gwen Berry, *I Used the Podium to Protest. The Olympic Committee Punished Me.*, THE NEW YORK TIMES (Sep. 7, 2020), <https://www.nytimes.com/2020/09/07/opinion/gwen-berry-olympics-protest.html?action=click&module=Opinion&pgtype=Homepage>.

<sup>26</sup> See IOC ATHLETES’ COMM., *supra* note 25, at 1-3 (explaining Rule 50 purpose and infractions).

The USOPC, the IOC's American counterpart, was initially established as the United States Olympic Committee ("USOC"), and is a federally incorporated and chartered, independent organization.<sup>27</sup> Founded in 1978, the USOC served as the coordinating and governing body for all amateur athletic activity directly related to international competition.<sup>28</sup> As such, it deals directly with, and follows the rules of, the IOC—including the IOC's infamous Rule 50.<sup>29</sup> The USOPC has the power to enforce IOC rules through its incorporating statute, and its constitution and by-laws give it full authority over the eligibility and sanctioning of athletes.<sup>30</sup>

In the lead up to the 2019 Pan-American Games, the USOPC required all its competing athletes to sign a contract promising not to violate Rule 50 by taking part in political demonstrations during the games.<sup>31</sup> In spite of this contract, American Olympic foil fencer Race Imboden took a knee on the medal podium after the U.S. Men's Foil Team won gold.<sup>32</sup> In addition to breaching his contract, his protest ran afoul of Rule 50 of the Olympic Charter.<sup>33</sup> In response to his protests, the USOPC

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<sup>27</sup> See Ted Stevens Olympic and Amateur Sports Act, 36 U.S.C. § 220502(a) (incorporating USOC).

<sup>28</sup> See 36 U.S.C. § 220502(a) (incorporating USOC); 36 U.S.C. § 220502(c) (renaming USOC as USOPC); 36 U.S.C. § 220503(2) (establishing USOPC's purposes).

<sup>29</sup> See 36 U.S.C. § 220503 (stating USOPC purposes); OLYMPIC CHARTER, *supra* note 2, at 94 (barring athlete activism); see also Zirin & Boykoff, *supra* note 21 (detailing USOPC change in Rule 50 adherence).

<sup>30</sup> See 36 U.S.C.S. § 220505 (creating the USOPC as an independent, federally chartered organization); 36 U.S.C. § 220503(3), (8) (stating USOPC authority over eligibility and disputes involving American athletes); see also 36 U.S.C. § 220502 (incorporating the USOPC); 36 U.S.C. §§ 220501-220529 (showing entire act); 36 U.S.C.S. § 220505(a) (establishing that "the corporation shall adopt a constitution and bylaws," that it "may amend").

<sup>31</sup> See OLYMPIC CHARTER, *supra* note 2, at 94 (barring any "kind of demonstration or political, religious or racial propaganda . . . in any Olympic sites, venues or other areas."); OlympicTalk, *Race Imboden kneels, Gwen Berry raises fist on Pan Am Games podium*, NBC SPORTS (Aug. 11, 2019, 11:59 PM), <https://olympics.nbcsports.com/2019/08/10/race-imboden-fencer-national-anthem-protest-knee/> (stating that "before competing, Pan Am Games athletes commit to terms including refraining from political demonstrations.")

<sup>32</sup> See Los Angeles Times Staff and Wire Reports, *U.S. Fencer Race Imboden kneels on podium to protest injustice and Trump*, THE LOS ANGELES TIMES (Aug. 10, 2019, 9:44 AM), <https://www.latimes.com/sports/story/2019-08-11/american-fencer-kneels-over-social-injustice-blasts-trump> (explaining reasons behind Imboden's Pan-American protest); Derrick Bryson Taylor, *U.S. Fencer and Hammer Thrower Lead Silent Protest at Pan-American Games*, THE NEW YORK TIMES (Aug. 11, 2019), <https://www.nytimes.com/2019/08/11/sports/race-imboden-fencer-kneels.html> (detailing Imboden's specific protest motivations). Imboden tweeted that he was motivated to kneel by the "shortcomings" of his country, most notably "racism, gun control, mistreatment of immigrants, and a president who spreads hate." Taylor, *supra* note 32. He further stated that he wanted to use his moment at the top of the podium to "call attention to issues" he believed needed to be addressed. *Id.*

<sup>33</sup> See OLYMPIC CHARTER, *supra* note 2, at 94 (barring demonstrations or protests); OlympicTalk, *supra* note 31 (noting Race violated promise not to protest).

issued a statement of disapproval.<sup>34</sup> The USOPC then sent Imboden a letter informing him that he was being put on a twelve-month probation whereby another infraction would result in his ineligibility to compete in the 2021 Tokyo Olympic Games.<sup>35</sup> In early 2020, the IOC reaffirmed its full-throated adherence to Rule 50.<sup>36</sup> This affirmation came under the guise of promoting harmony and preventing “divisive disruption” during the games.<sup>37</sup> The guidelines released by the IOC clarified that “kneeling,” specifically added as an example, would not be allowed as a form of protest on medal podiums.<sup>38</sup>

Following summer 2020’s Black Lives Matter movement, and the election of President Joe Biden, the USOPC suddenly reversed its decision,

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<sup>34</sup> See Los Angeles Times Staff and Wire Reports, *supra* note 32 (quoting USOPC’s Vice President of Communications Mark Jones’s statement). “In this case, Race didn’t adhere to the commitment [not to protest] he made to the organizing committee and the USOPC . . . [w]e respect his rights to express his viewpoints, but we are disappointed that he chose not to honor his commitment. Our leadership is reviewing what consequences may result.” *Id.*

<sup>35</sup> See Associated Press, *Race Imboden and Gwen Berry get probation for Pan Am Games podium protests*, NBC SPORTS (Aug. 20, 2019, 6:56 PM), <https://olympics.nbc.com/2019/08/20/race-imboden-gwen-berry-podium-protests-pan-am-games/> (noting USOPC’s initial response to the protests); Des Bieler, *U.S. Fencer Race Imboden given 12-month probation for Pan Am Games protest*, THE WASHINGTON POST (Aug. 21, 2019, 12:05 AM), <https://www.washingtonpost.com/sports/2019/08/21/us-fencer-race-imboden-given-month-probation-pan-am-games-protest/> (further detailing USOPC sanctions); Pells, *supra* note 20 (quoting from USOPC probation notices for Imboden and Berry). Sarah Hirshland, CEO of the USOPC, stated in her letter to Imboden:

“It is also important for me to point out that, going forward, *issuing a reprimand to other athletes in a similar instance is insufficient* . . . We recognize that we must more clearly define for Team USA athletes what a breach of these rules will mean in the future . . . Working with the (athletes and national governing body councils), we are committed to more explicitly defining what the *consequences* will be for members of Team USA who protest at future Games.”

*Id.* (emphasis added). Hirshland further stated that she respected the perspectives of the athletes and would work with the IOC “to engage on a global discussion on these matters,” but noted that she could not “ignore the rules or the reasons they exist.” *Id.* While Hirshland’s letter acknowledged that a more clearly defined punishment is required, it did not indicate that the USOPC was willing to break with its own tradition and allow its athletes to protest in any capacity. *Id.*

<sup>36</sup> See IOC ATHLETES’ COMM., *supra* note 25 (identifying “hand gesture or kneeling” as explicit examples of barred protest).

<sup>37</sup> See *id.* (clarifying IOC guidelines on Rule 50).

<sup>38</sup> See Tom Schad, *IOC: No kneeling or any form of political protest allowed at Tokyo Olympics*, USA TODAY (Jan. 9, 2020, 11:11 AM), <https://www.usatoday.com/story/sports/olympics/2020/01/09/tokyo-olympics-ioc-details-athlete-rules-political-protests/4419120002/> (discussing reposting of guidelines); see also Andrew Keh, *Olympics Allows Protests, but Not During Events or on Medal Stands*, <https://www.nytimes.com/2021/07/02/sports/olympics/olympics-protests-tokyo.html> (Aug. 6, 2021) (noting prohibition against protesting on podium remains intact under new guidelines).

renouncing its policy against athlete activism so long as protests were “peaceful” and “respectful.”<sup>39</sup> However, the USOPC retains the ability to unilaterally reverse its position again.<sup>40</sup> Were this to occur, any athlete exercising their constitutional right to free speech from the podium would be stripped of their eligibility to compete.<sup>41</sup>

### III. HISTORY

To establish that the Constitution bars the USOPC from conditioning the benefit of participation on waiving the right to protest, an athlete must prove that: (1) the USOPC functions as a state actor or has taken a state action; (2) the athlete exercised their constitutionally protected right to free speech; and (3) the USOPC, as a state actor, conditioned the benefit of competing on the athlete’s waiver of the right to exercise their constitutionally protected right to protest.<sup>42</sup>

#### A. Federally Chartered Corporations as State Actors and State Action

The question of whether the USOPC is a state actor was first addressed in *DeFrantz v. U.S. Olympic Committee*.<sup>43</sup> In 1980, under considerable pressure from the United States government, the USOPC (then the USOC) boycotted the Moscow Games in response to the Soviet

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<sup>39</sup> See Associated Press, *supra* note 21 (noting previous policy reversal); Zirin & Boykoff *supra* note 21 (establishing USOPC will not punish athletes who protest “peacefully and respectfully . . . in support of racial and social justice for all human beings.”) Without further guidance, the USOPC effectively establishes itself as the sole arbiter of what constitutes peaceful or disrespectful protest. Zirin & Boykoff, *supra* note 21. Further, there is no indication that the USOPC cannot reverse its policy, nor any explanation of the distinctions it has placed on how athletes can protest and for what causes. *Id.*

<sup>40</sup> See Pells, *supra* note 20 (describing USOPC’s original policy on athlete protest); Associated Press, *supra* note 21 (noting USOPC’s policy reversal); see also de Vogue & Cole, *supra* note 21 (discussing Supreme Court allowing First Amendment case due to concern university could reestablish anti-speech policy).

<sup>41</sup> See Pells, *supra* note 20 (describing USOPC’s original policy on athlete protest); see also de Vogue & Cole, *supra* note 21 (discussing Supreme Court allowing First Amendment case due to concern university could reestablish anti-speech policy).

<sup>42</sup> See *DeFrantz v. U.S. Olympic Comm.*, 492 F. Supp. 1181, 1192-94 (D.D.C. 1980), *aff’d*, 701 F.2d 221 (D.C. Cir. 1980) (discussing the USO[P]C and corporations as state actors); see also Thomas R. McCoy, *Unconstitutional Conditions Doctrine, The First Amendment Encyclopedia*, THE FREE SPEECH CENTER: FIRST AMENDMENT NEWS AND INSIGHTS FROM MTSU, <https://www.mtsu.edu/first-amendment/article/1026/unconstitutional-conditions-doctrine> (last visited Nov. 2, 2020, 10:07 AM) (outlining unconstitutional conditions doctrine).

<sup>43</sup> *DeFrantz*, 492 F. Supp. at 1192 (analyzing whether USO[P]C is a state actor or committed state action in boycotting Moscow Olympics).

Union's 1979 invasion and occupation of Afghanistan.<sup>44</sup> Twenty-five athletes and one USO[P]C Executive Board Member sued the USO[P]C to challenge the decision not to send American athletes to the 1980 Moscow Olympics.<sup>45</sup> The plaintiffs claimed that the USO[P]C's action to boycott the games constituted a "governmental state action" that abridged their rights of "liberty, self-expression, personal autonomy and privacy" as guaranteed by the First, Fifth, and Fourteenth Amendments to the U.S. Constitution.<sup>46</sup>

In evaluating the plaintiff's argument, the court addressed two issues: (1) whether the USO[P]C's decision was a state action; and (2) whether the USO[P]C's decision "abridged any constitutionally protected rights."<sup>47</sup> The court looked to two cases when determining whether the USO[P]C committed a state action: *Burton v. Wilmington Parking Auth.*<sup>48</sup> and *Jackson v. Metropolitan Edison Co.*<sup>49</sup> Under *Burton*, the Court asked whether the state had "so far insinuated itself into a position of interdependence with [the private entity] that [the entity] must be recognized as a joint participant in the challenged activity."<sup>50</sup> While the

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<sup>44</sup> See *id.* at 1183-84 (discussing factual background). The United States levied sanctions against the Soviet Union and requested a boycott of the games in Moscow, which the USO[P]C initially resisted. *Id.* In response to the USO[P]C's resistance, President Carter announced in his State of the Union address that he did not support sending a "United States team to compete in the Olympic Games as long as the Soviet military forces remained in Afghanistan." *Id.* at 1184. The House of Representatives and the Senate followed suit by issuing resolutions opposing participation. *Id.* Pressure mounted on the USO[P]C as White House counsel met with USO[P]C executives and officers. *Id.* White House counsel threatened to terminate federal funding and revoke the USO[P]C's tax-exempt status unless the USO[P]C complied and voted to boycott the games. *Id.* President Carter went so far as to tell the Athlete's Advisory Council that the United States would not send a team and sent a message to USO[P]C threatening legal action to enforce his decision to boycott the games. *Id.*; see also Dionne L. Koller, *How the United States Government Sacrifices Athletes' Constitutional Rights in the Pursuit of National Prestige*, 2008 BYU L. REV. 1465, 1481-82 (2008) (summarizing facts under *DeFrantz*).

<sup>45</sup> See *DeFrantz*, 492 F. Supp. at 1182 (describing plaintiffs' claim that "that in preventing American athletes from competing in the Summer Olympics, defendant has exceeded its statutory powers and has abridged plaintiffs' constitutional rights.")

<sup>46</sup> See *id.* at 1182, 1185 (identifying plaintiffs and listing plaintiffs' claims). Additionally, plaintiffs asserted claims that: (1) the USO[P]C violated its own governing statute by acting in a political manner; and (2) the USO[P]C breached its own Constitution, Bylaws and governing statute by violating the rights of a plaintiff-member of the Executive Board. *Id.* at 1185.

<sup>47</sup> *Id.* at 1192 (stating two-pronged test for constitutional claim against private entity). The USO[P]C was a federally chartered, but private, organization. *Id.* As such, the plaintiffs had to show that the USO[P]C vote to boycott was a governmental act, or state action, as understood through the Fifth and Fourteenth Amendments. *Id.*

<sup>48</sup> *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961).

<sup>49</sup> *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974); *DeFrantz*, 492 F. Supp. at 1193-94 (explaining precedent and analyzing claim).

<sup>50</sup> See *DeFrantz*, 492 F. Supp. at 1193 (quoting *Burton*, 365 U.S. at 725) (stating *Burton* inquiry). In *Burton*, the Supreme Court had found that a restaurant that discriminated on the basis

Supreme Court found that the private entity in *Burton* committed a state action, the D.C. Circuit declined to do so for the USO[P]C.<sup>51</sup> In its opinion, the court noted that there was no evidence of a “symbiotic relationship” between the government and the USO[P]C, outside of the funds Congress used to establish the USO[P]C and the fact that its incorporating statute requires the USO[P]C to submit an annual report to the President and Congress.<sup>52</sup> The court then held that there was no “obvious” or “deep enmeshment of the defendant and the state” because the “USO[P]C receive[s] no federal funding and exists and operates independently of the federal government.”<sup>53</sup>

Under *Jackson*, there is a governmental action only when there is a “sufficiently close nexus” between the state and the challenged action.<sup>54</sup> In *Jackson*, the Supreme Court held that the defendant-utility committed no state action, even though it was closely regulated by the state and the action about which the plaintiff complained was approved by the state’s utility commission.<sup>55</sup> In *DeFrantz*, the plaintiffs’ argued that the Carter Administration’s persuasion campaign had crossed the line from “governmental recommendation” to “affirmative pressure, [putting] the government’s prestige behind the challenged action.”<sup>56</sup> The D.C. Circuit disagreed, holding that the USO[P]C’s decision failed the *Jackson* test because the federal government was not required to approve any USO[P]C action.<sup>57</sup> The court also quoted *Spark v. Cath. Univ. of Am.*,<sup>58</sup> reasoning that, at least where race is not involved, “it is necessary to show that the Government exercises some form of control over the actions of the private

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of race had committed a state action. *Burton*, 365 U.S. at 717. The restaurant was physically and financially an integral part of a public building that was built and maintained by public funds, was devoted to a public parking service, and was owned by the state of Delaware. *Id.* at 717-18. The Court reasoned that this interdependence between the private and state entities was sufficient to classify the private entity as a state actor. *Id.*

<sup>51</sup> See *Burton*, 365 U.S. at 726 (finding restaurant committed state action); see also *DeFrantz*, 492 F. Supp. at 1193 (declining to recognize USO[P]C as state actor).

<sup>52</sup> See *DeFrantz*, 492 F. Supp. at 1193 (stating reasoning behind USO[P]C’s rejection as state actor).

<sup>53</sup> See *id.* (rejecting *Burton* framework for USO[P]C).

<sup>54</sup> See *Jackson*, 419 U.S. at 351 (stating “the inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself.”); *DeFrantz*, 492 F. Supp. at 1193 (quoting *Jackson*, 419 U.S. at 351) (noting *Jackson* standard).

<sup>55</sup> See *Jackson*, 419 U.S. at 346, 358-59 (stating defendant-utility regulated by state but holding state not sufficiently connected to defendant’s conduct). The action that led to the litigation was the defendant’s procedure for terminating electrical services. *Id.* at 347; *DeFrantz* 492 F. Supp. at 1193 (noting *Jackson* holding).

<sup>56</sup> See *DeFrantz*, 492 F. Supp. at 1193 (reciting plaintiff’s argument).

<sup>57</sup> See *id.* (holding USO[P]C not a state actor under *Jackson*).

<sup>58</sup> *Spark v. Cath. Univ. of Am.*, 510 F.2d 1277 (D.C.Cir. 1975).

party.”<sup>59</sup> Since there was no issue of racial discrimination, and the USO[P]C was not required to obtain approval from the federal government, the decision not to send an American team to the Moscow Olympics was not a state action.<sup>60</sup>

*DeFrantz* is not the only case that called into question the USO[P]C’s status as a state actor.<sup>61</sup> In a 5-4 decision, the Supreme Court in *S.F. Arts & Athletics, Inc.* held that the USO[P]C was not a state actor, but not without garnering a notable dissent from Justice Brennan.<sup>62</sup> Justice Brennan’s dissent rested on the belief that “‘when private individuals . . . are endowed by the State with powers or functions governmental in nature, they become agencies or instrumentalities of the State and are subject to its constitutional limitations.’”<sup>63</sup> This argument is particularly relevant in situations where the function of the individual is traditionally within the government’s “‘exclusive prerogative.’”<sup>64</sup> Brennan concluded that the USO[P]C may be classified a government actor because it represents the

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<sup>59</sup> *DeFrantz*, 492 F. Supp. at 1194 (quoting *Spark*, 510 F.2d at 1281-82) (stating *Spark* alters *Jackson* framework when race is involved).

<sup>60</sup> *See id.* at 1194 (holding USO[P]C’s actions nongovernmental). The court found that the USO[P]C is an independent organization without *per se* or *de facto* government control. *Id.* The court further reasoned that nothing in the governing statute gives the federal government control and noted that the decision to boycott was decided by the USO[P]C’s House of Delegates via secret ballot. *Id.* The court also stated that while the federal government may bar athletes from competing in the Olympics, it did not exercise its power in pressuring the delegates to vote a certain way. *Id.* The court explained that to find otherwise would “open the door” into a non-justiciable realm where courts would have to decide what “level, intensity, or type of ‘Presidential’ or ‘Administrative’ or ‘political’ pressure” on a private entity is enough to trigger federal jurisdiction. *Id.*

<sup>61</sup> *See S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 525 (1987) (discussing San Francisco corporation attempting to use “Olympic” for private event under Fifth Amendment). The incorporating statute of the USO[P]C gave it sole commercial and promotional use of the word “Olympic” and Olympic symbols, as well as the ability to grant their use. *Id.* at 526. *S.F. Arts & Athletics, Inc.* argued that this policy violated their First Amendment right to free speech. *Id.* The Court disagreed, finding that the USO[P]C was not a state agent and therefore the plaintiff’s claim must fail. *Id.* at 546-48.

<sup>62</sup> *See id.* at 548-73 (Brennan, J., dissenting) (outlining Justice Brennan’s dissent). Brennan’s dissent was joined by Justices Marshall, O’Connor and Blackmun. *Id.* at 548; *see also id.* (O’Connor, J., concurring) (“. . . for the reasons explained by Justice Brennan . . . I believe the [USOC] and the United States are joint participants in the challenged activity and as such are subject to the equal protection provisions of the Fifth Amendment.”)

<sup>63</sup> *See id.* at 549 (Brennan, J., dissenting) (quoting *Evans v. Newton*, 382 U.S. 296, 299 (1966)) (emphasizing government’s role in endowing entities with powers and related consequences).

<sup>64</sup> *See id.* at 549-50 (Brennan, J., dissenting) (quoting *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 353 (1974)) (stating USOC’s powers flow from Congressional action).

United States during the Olympics, which is a nationalistic event that the government often utilizes as a tool of foreign policy.<sup>65</sup>

While *DeFrantz* and *S.F. Arts & Athletics, Inc.* addressed the scope of the USO[P]C's general powers, Olympians have yet to litigate the USO[P]C's powers when it comes to restrictions on their First Amendment freedoms.<sup>66</sup> The court affirmed the USO[P]C's general powers regarding athlete participation in *Barnes v. Int'l Amateur Athletic Fed'n.*<sup>67</sup> where it noted that Congress intended for disputes regarding eligibility to be decided outside the judicial system.<sup>68</sup> While the infringement on the First Amendment rights of athletes has not yet been addressed, precedent set out under *Bantam Books, Inc. v. Sullivan*<sup>69</sup> indicates that organizations working on behalf of the government may face constitutional litigation.<sup>70</sup>

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<sup>65</sup> See *id.* at 549-50 (Brennan, J., dissenting) (stating Congress granted USO[P]C powers to develop amateur athletes and represent America).

The USOC is . . . our country's exclusive representative to the International Olympic Committee (IOC), a highly visible and influential international body. The Court overlooks the extraordinary representational responsibility that Congress has placed on the USOC. As the Olympic Games have grown in international visibility and importance, the USOC's role as our national representative has taken on increasing significance.

Although the Olympic ideals are avowedly nonpolitical, Olympic participation is inescapably nationalist. Membership in the IOC is structured not according to athletes or sports, but nations. The athletes the USOC selects are viewed, not as a group of individuals who coincidentally are from the United States, but as the team of athletes that represents our Nation . . . Every aspect of the Olympic pageant, from the procession of athletes costumed in national uniform, to the raising of national flags and the playing of national anthems at the medal ceremony, to the official tally of medals won by each national team, reinforces the national significance of Olympic participation.

*Id.* at 550-551; see also Koller, *supra* note 44, at 1469-86 (explaining history of sportive nationalism and athletics as foreign policy).

<sup>66</sup> See *S.F. Arts & Athletics, Inc.*, 483 U.S. at 525-27 (discussing "Olympic" copyright); *DeFrantz v. U.S. Olympic Comm.*, 492 F. Supp. 1181, 1182-86 (D.D.C. 1980) (discussing Olympian participation rights).

<sup>67</sup> *Barnes v. Int'l Amateur Athletic Fed'n*, 862 F. Supp. 1537 (S.D. W. Va. 1993).

<sup>68</sup> See *id.* at 1544 (citing *Michels v. U.S.O.C.*, 741 F.2d 155 (7th Cir. 1984)) (outlining legislative history of Ted Stevens Act). The plaintiffs in *DeFrantz* sued for their right to compete under the Due Process Clause of the Fifth Amendment, as well as their right to self-expression under the First Amendment. *DeFrantz*, 492 F. Supp. at 1182-86. The plaintiff in *S.F. Arts & Athletics, Inc.* sued for the right to use the term "Olympic" under the Due Process Clause and First Amendment. *S.F. Arts & Athletics, Inc.*, 483 U.S. at 525-27 (reciting causes of action).

<sup>69</sup> *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963).

<sup>70</sup> See *id.* at 71 (highlighting organizations acting on state's behalf are not exempt from constitutional claims).

*B. Free Speech Considerations*

For a state agent to be held liable for the deprivation of an individual's constitutional rights, the plaintiff must first show that they were prevented from exercising such a right.<sup>71</sup> Historically, a citizen's right to protest has been protected under the First Amendment's Free Speech clause.<sup>72</sup> The test used to determine whether conduct, like an act of protest, is considered speech was formulated under *Spence v. Washington*,<sup>73</sup> where the Supreme Court analyzed conduct through a two-pronged test: (1) whether there was an intent to convey a particularized message; and (2) whether, in the surrounding circumstances of the conduct, the likelihood was great that the message would have been understood by those who saw it.<sup>74</sup> This test works in tandem with the holding from *Tinker v. Des Moines*,<sup>75</sup> where the Supreme Court ruled that "symbolic speech," such as an act of protest, is protected under the First and Fourteenth Amendments, as if it were "pure speech."<sup>76</sup> The two-prong framework established by *Spence* would likely be applied to protests mounted by American athletes seeking to express themselves during the Olympic Games.<sup>77</sup>

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<sup>71</sup> See *Parratt v. Taylor*, 451 U.S. 527, 535 (1981) (explaining conduct must deprive plaintiff of "rights, privileges, or immunities secured by the Constitution or laws of the United States.")

<sup>72</sup> See *Spence v. Washington*, 418 U.S. 405, 410-11 (1974) (delineating test for when conduct is communicative and therefore protected); see also *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 505-06 (1969) (noting symbolic speech, akin to pure speech, protected under First and Fourteenth Amendments); *Texas v. Johnson*, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.")

<sup>73</sup> *Spence v. Washington*, 418 U.S. 405 (1974).

<sup>74</sup> See *Spence*, 418 U.S. at 410-11 (articulating test for classifying conduct as speech). In this case, the appellant had used removable tape to superimpose a peace symbol onto an American flag and hung it from his apartment window. *Id.* at 405-06. The flag was hung in protest of the invasion of Cambodia and the recent killings at Kent State University. *Id.* at 408; see also *Johnson*, 491 U.S. at 399 (holding flag burning, as conduct, entitled to First Amendment protections).

<sup>75</sup> *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).

<sup>76</sup> See *Tinker*, 393 U.S. at 505-06 (holding wearing of armbands akin to pure speech and protected conduct). The Court notes that wearing black armbands to protest the War in Vietnam was "... entirely divorced from actually or potentially disruptive conduct," effectively undermining the school's argument that in restricting speech it was trying to maintain order. *Id.* at 505.

<sup>77</sup> See generally *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1741-45 (2018) (Thomas, J., concurring) (exhibiting recent conduct as speech example).

*C. Unconstitutional Conditions Doctrine*

The unconstitutional conditions doctrine bars the government, or any state actor, from conditioning a benefit on the exercise of a constitutional right.<sup>78</sup> In many cases involving the unconstitutional conditions doctrine, the government has conditioned a benefit, such as federal funding, or a privilege, like tax exemption, on a party's relinquishment of their freedom of speech.<sup>79</sup> For example, in *Regan v. Taxation with Representation of Washington*,<sup>80</sup> the Supreme Court held that denying tax deductions to a lobbying non-profit was not a violation of the First Amendment.<sup>81</sup> Additional examples include *Rust v. Sullivan*,<sup>82</sup> where the Supreme Court allowed the government to subsidize certain services over others in the promotion of particular forms of family planning, and

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<sup>78</sup> See, e.g., *Speiser v. Randall*, 357 U.S. 513, 518-19 (1958) (striking down requirement for veterans to swear oath of loyalty for veteran's property-tax exemption); *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 545 (1983) (citing *Perry v. Sindermann*, 408 U.S. 593, 597 (1972)) (noting "government may not deny a benefit to a person because he exercises a constitutional right"); *Fed. Comm'n Comm'n. v. League of Women Voters of Cal.*, 468 U.S. 364, 402 (1984) (barring government from conditioning funds on station's relinquishing right to editorialize); *Legal Services Corp. v. Velazquez*, 531 U.S. 533, 549 (2001) (holding government cannot create private speech and then try to restrict it); *McCoy*, *supra* note 42 (stating overview of unconstitutional conditions doctrine); see also *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 64 (1963) (holding commission's pressure on book sellers to stop selling "objectionable" books unconstitutional); *cf. Rust v. Sullivan*, 500 U.S. 173, 177 (1991) (allowing HHS to limit ability of Title X fund recipients to engage in abortion-related activities). "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." *Rust*, 500 U.S. at 193.

<sup>79</sup> See *Speiser*, 357 U.S. at 518-519 (stating "the denial of a tax exemption for engaging in certain speech necessarily will have the effect of coercing the claimants to refrain from the proscribed speech."); *League of Women Voters of Cal.*, 468 U.S. at 402 (barring government from conditioning funds on station's relinquishing right to editorialize); *McCoy*, *supra* note 42 ("The unconstitutional conditions doctrine is encountered most often . . . where an express or implied term in [a] contract restricts the contractor's freedom to speak . . . [and] . . . the contractor [seeks] to invalidate the contractual restriction . . . on the grounds that it is an unconstitutional condition on the availability of the valuable government contract."); *cf. Taxation with Representation of Wash.*, 408 U.S. at 551 (allowing Congress, by statute, to bar public grants to charitable organizations for lobbying purposes); *Rust*, 500 U.S. at 194-95 (holding Government can selectively fund a program to encourage certain activities in public interest). The Supreme Court held that there is no distinction between a benefit or a privilege, like in *Speiser*, where a California state law required veterans to swear an oath of loyalty to the government to continue receiving their property-tax exemption, equating privileges and benefits with respect to the doctrine. See *Speiser*, 357 U.S. at 518-19.

<sup>80</sup> *Taxation with Representation of Wash.*, 461 U.S. 540 (1983).

<sup>81</sup> See *id.* at 545 (quoting *Perry*, 408 U.S. at 597) (stating "government may not deny a benefit to a person because he exercises a constitutional right.")

<sup>82</sup> *Rust v. Sullivan*, 500 U.S. 173 (1991).

*Legal Services Corp. v. Velazquez*,<sup>83</sup> where the Supreme Court invalidated a restriction on a legal services organization's ability to challenge the constitutionality or validity of laws pertaining to indigent clients.<sup>84</sup> Notably, this doctrine does not apply if the "restriction is reasonably necessary for the effective performance of the contract," such when secrecy is required, or an employee is engaged in government-specified speech.<sup>85</sup> If the doctrine does apply, then a court would automatically apply the strict scrutiny standard of review to see if: (1) the state has a compelling interest in restricting the speech; and (2) the action is narrowly tailored enough to achieve that interest.<sup>86</sup> A compelling state interest is defined as something necessary or essential to the function or interests of the government, rather than a matter of choice, preference, or discretion.<sup>87</sup> In the event that the USOPC is deemed a state actor, and an athlete's podium protest, like Imboden's, is considered free speech, that athlete could likely find redress under the unconstitutional conditions doctrine.<sup>88</sup>

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<sup>83</sup> *Legal Services Corp. v. Velazquez*, 531 U.S. 549 (2001).

<sup>84</sup> See *Taxation with Representation of Wash.*, 461 U.S. at 540 (demonstrating unconstitutional conditions doctrine as applied to nonprofit's conditional tax deductions); *Rust*, 500 U.S. 173 (applying unconstitutional conditions doctrine to government subsidies); *Legal Services Corp.*, 531 U.S. 533 (showing unconstitutional conditions doctrine consequences when examining restrictions on LSC).

<sup>85</sup> See McCoy, *supra* note 42 (first citing *Snepp v. United States*, 444 U.S. 507, 507-10 (1980); then citing *Rust*, 500 U.S. at 193). In *Snepp*, the Supreme Court upheld a CIA employment contract that required a former CIA analyst to submit his manuscript regarding CIA activities in South Vietnam to the agency for prepublication review, as a way to screen for classified materials. *Snepp*, 444 U.S. at 507-10. Similarly, in *Rust*, the Court found that the Department of Health and Human Services could fund family-planning services under the condition that fund recipients did not engage in abortion-related activities, such as counseling, communicating, suggesting, or performing abortions. *Rust*, 500 U.S. at 193. The Court further noted that selectively funding a specific program, and not an alternative program, was not viewpoint discrimination, but rather the government's own prerogative. *Id.*

<sup>86</sup> See *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 172 (2015) (exemplifying seminal *Frist* Amendment case explaining strict scrutiny evaluation requirements). Under a First Amendment strict scrutiny analysis, "narrowly tailored" means that the restriction is neither under-inclusive—so riddled with exceptions that the restriction does not actually achieve the state's interest—nor over-inclusive—so broad that it leaves no other way for someone to express themselves. *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 452-54 (2015) (defining narrowly tailored analysis contours); see also *Boos v. Barry*, 485 U.S. 312, 318 (1988) (holding barring protests is specifically understood as content-based restriction).

<sup>87</sup> See Ronald Steiner, *Compelling State Interest*, THE FIRST AMENDMENT ENCYCLOPEDIA, <https://www.mtsu.edu/first-amendment/article/31/compelling-state-interest> (last visited Jan. 22, 2021, 4:20 PM) (discussing what constitutes compelling governmental interests). Examples of compelling government interests include government regulations that are "vital to the protection of public health and safety," the "requirements of national security and military necessity," and "respect for fundamental rights." *Id.*

<sup>88</sup> See McCoy, *supra* note 42 (laying out requirements for claims under unconstitutional conditions doctrine).

## IV. ANALYSIS

While it is unclear whether the USOPC will reverse its position, the threat of such a reversal and its previous enforcement is enough to allow a suit to go forward.<sup>89</sup> Such a reversal would be unconstitutional, and the discretion to do so should be taken out of the hands of the committee.<sup>90</sup> Race Imboden's protest, a prime example of athlete activism, will serve as the fact pattern for this analysis since his actions ran afoul the previous policy, and would inevitably violate a reversal.<sup>91</sup> This analysis seeks to prove: (1) that the USOPC is a state actor; (2) that by kneeling, Race Imboden exercised his protected constitutional right of free speech; and (3) that as a state actor, the USOPC conditioned the benefit of competing on Race Imboden's signing away of his right to exercise a constitutionally protected right.<sup>92</sup>

A. *The USOPC is a State Actor*

The USOPC should be constitutionally barred from conditioning Olympic participation on the relinquishment of an athlete's First Amendment rights because the USOPC is a state actor.<sup>93</sup> The court in *DeFrantz* offered two approaches for deciding whether a private actor's conduct constituted a state action: the nexus test from *Jackson* and the

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<sup>89</sup> See *Associated Press*, *supra* note 21 (detailing USOPC decision not to sanction athletes who protest at Tokyo Games). The reversal of the previous policy was sudden and came after the USOPC had affirmed its conviction against changing the policy. *Zirin & Boykoff*, *supra* note 21. See *de Vogue & Cole*, *supra* note 21 (detailing decision allowing First Amendment suit where university could reestablish anti-speech policy); *Futterman, et al.*, *supra* note 21 (detailing protests by Saunders and Imboden, and IOC-USOPC fallout over enforcement).

<sup>90</sup> See sources cited *supra* note 31 and accompanying text (stating USOPC's actions regarding Rule 50).

<sup>91</sup> See sources cited *supra* note 31 and accompanying text (describing Imboden's actions and resulting consequences).

<sup>92</sup> See U.S. CONST. amend. I (establishing right to free speech); U.S. CONST. amend. XIV (prohibiting states from making or enforcing laws that curtail First Amendment rights without due process); *DeFrantz v. U.S. Olympic Comm.*, 492 F. Supp. 1181, 1192-94 (D.D.C. 1980) (noting USOPC a private organization despite being federally chartered); *McCoy*, *supra* note 42 (providing brief unconstitutional conditions doctrine overview); *OlympicTalk*, *supra* note 31 (reviewing facts from Imboden's protest and USOPC precautionary and reactionary measures).

<sup>93</sup> See *S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 557-59 (1987) (Brennan, J., dissenting) (arguing for profound connection between USO[P]C and U.S. government); *DeFrantz*, 492 F. Supp. at 1193 (quoting *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974) (explaining nexus requirement between government and private actors to create state action). The *DeFrantz* court ultimately found that the USO[P]C's decision not to send athletes to the Moscow Games was not a state action. *DeFrantz*, 492 F. Supp. at 1194.

symbiosis test from *Burton*.<sup>94</sup> It is unlikely that a plaintiff could prove that the USOPC is a state actor under the *Burton* test, as the committee operates independently from the federal government and takes no direct federal funding for its maintenance, governance, or function.<sup>95</sup> It is more likely that a plaintiff would prevail under the *Jackson* test, which asks whether the federal government is functionally interdependent with the alleged state actor.<sup>96</sup>

The court in *DeFrantz* incorrectly ruled that there was not a sufficient nexus between the state and the USOPC.<sup>97</sup> While it is true that the federal government has no authority to approve or reject USOPC committee actions, this does not mean that the USOPC is insulated from the pressures of the government.<sup>98</sup> The federal government can exert control over an entity in a variety of different ways, and while the court noted that the state did not retain any veto power over the committee's actions, it is insufficient to merely ask whether the government had the direct ability to dictate the USO[P]C's decision to boycott the Moscow Olympics.<sup>99</sup> For example, President Carter announced in his State of the Union address that he would not support sending American athletes to the games, and the House of Representatives and the Senate passed resolutions opposing participation in the games.<sup>100</sup> These resolutions threatened the USO[P]C's tax exemption status and federal funding, undoubtedly

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<sup>94</sup> See *DeFrantz*, 492 F. Supp. at 1192-94 (laying out precedents); see also *Jackson*, 419 U.S. at 351 (establishing nexus test); *Burton*, 365 U.S. at 725 (establishing symbiosis test).

<sup>95</sup> See *DeFrantz*, 492 F. Supp. at 1193 (applying *Burton* test). The court distinguished the USO[P]C from the restaurant in *Burton*, which was "physically and financially an integral part of a public building, built and maintained with public funds, devoted to a public parking service, and owned and operated by an agency of the State of Delaware for public purposes." *Id.* The USO[P]C, on the other hand, receives "no federal funding" and "exists and operates independently of the federal government." *Id.* While the USO[P]C is required to submit yearly reports on diversity and participation to Congress and the President, this was not enough to convert an "an independent relationship to a 'joint participation.'" *Id.*

<sup>96</sup> See *id.* at 1193 (quoting *Jackson*, 419 U.S. at 351) (outlining *Jackson* nexus test).

<sup>97</sup> See *id.* at 1193-94 (holding there must be some government control when race is not at issue). The court referenced *Spark v. Cath. Univ. of Am.*'s assertion that it is "necessary to show . . . [the] government [exercising] some form of control" where "race is not involved." *Spark v. Cath. Univ. of Am.*, 510 F.2d 1277, 1281-82 (D.C.Cir. 1975).

<sup>98</sup> See *DeFrantz*, 492 F. Supp. at 1193-94 (discussing plaintiffs' novel arguments and why they fail nexus test); see also Koller, *supra* note 44, at 1481-82 (discussing plaintiffs' argument surrounding insulation).

<sup>99</sup> See Koller, *supra* note 44, 1481-82 (listing actions taken by the United States government to force compliance, and USOPC resistance); see also *DeFrantz*, 492 F. Supp. at 1193 (summarizing plaintiffs' argument).

<sup>100</sup> See Koller, *supra* note 44, at 1481-82 (outlining USOPC's resistance to number of government actions); see also *DeFrantz*, 492 F. Supp. at 1193 (summarizing plaintiffs' argument).

influencing its decision.<sup>101</sup> The White House also threatened legal action to enjoin the committee, told the Athlete's Advisory Council that the United States would not send a team, and directed the USO[P]C Executive Board and its officers to vote for a boycott.<sup>102</sup>

The USOPC is not insulated from the pressures of the government, nor could it be, as it performs a traditionally governmental role.<sup>103</sup> Justice Brennan's dissent in *S.F. Arts & Athletics, Inc.* emphasized that the Court's majority failed to see the interdependence between Congress and the USO[P]C, noting that § 110 of the Amateur Sports Act's infringement on non-commercial speech violated both the spirit of the law and the Constitution as an overbroad restriction on free speech.<sup>104</sup> The dissent further argued that the USO[P]C should be considered a governmental actor for two reasons: (1) it performs an important governmental function; and (2) there exists a significantly close nexus between the government and the challenged action by the USO[P]C.<sup>105</sup> Regarding the first argument, Justice Brennan noted that the powers given to the USO[P]C are "endowed by the State" and "governmental in nature," making it an agency or instrumentality of the state and therefore subject to "constitutional limitations."<sup>106</sup> Those "distinctive, traditional government function[s]" included: exclusively representing the United States to the IOC and at the Olympics; training and developing amateur athletes; and serving as its own administrative and adjudicative body—something that is usually reserved

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<sup>101</sup> See Koller, *supra* note 44, at 1481-82 (demonstrating attack on tax exemption and federal funding).

<sup>102</sup> See Koller, *supra* note 44, at 1481-82 (listing actions taken by United States government forcing compliance, and USO[P]C resistance); see also *DeFrantz*, 492 F. Supp. at 1184 (discussing influential government actions).

<sup>103</sup> See *S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 548-64 (1987) (O'Connor, J., and Brennan, J., dissenting separately) (recognizing USO[P]C and government as "joint participants" in regulating use of "Olympic," and discussing USO[P]C's public role). The USO[P]C sued an athletics club in San Francisco over its use of the word "Olympic" when it promoted the "Gay Olympic Games"—an athletic contest "rivaling" the real Olympic Games—which would be paid for with promotional merchandise displaying the name. *Id.* at 525.

<sup>104</sup> See *id.* at 548 (Brennan, J., dissenting) (outlining reasoning for finding government action); see also 36 U.S.C.S. § 220506 (granting USOPC exclusive rights to word "Olympic").

<sup>105</sup> See *S.F. Arts & Athletics, Inc.*, 483 U.S. at 548 (Brennan, J., dissenting) (citing *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974)) (listing reasons why USO[P]C should be considered state actor).

<sup>106</sup> See *id.* at 549 (Brennan, J., dissenting) (providing governmental powers argument). Justice Brennan is careful to note that a definition covering all regulated businesses would be too broad, and that actions by a private entity that "serves the public," are not necessarily governmental in nature. *Id.* (citing *Jackson*, 419 U.S. at 354). Brennan instead references *Evans v. Newton*, 382 U.S. 296, 299 (1966), *Terry v. Adams*, 345 U.S. 461 (1953), and *Marsh v. Alabama*, 326 U.S. 501 (1946), stating that a private entity endowed with powers or functions that are governmental in nature should be treated as state actors. *Id.*

for ministries of sport and culture in foreign nations.<sup>107</sup> Brennan further argued that the USO[P]C should be considered a state actor under the *Burton* framework because the government and the USO[P]C each garners a financial or prestigious benefit from the other.<sup>108</sup> Additionally, Brennan opined that, to the public, there is no distinction between the decisions of the government and the USO[P]C.<sup>109</sup> He reasoned that athletes literally wear, carry, and salute the national flag throughout the entirety of the games, as well as figuratively represent American values on the international stage.<sup>110</sup>

By examining the legislative history of the incorporating act, Justice Brennan's dissent highlights why the court's treatment of the USO[P]C as a non-state actor was misguided, while respecting the ultimate ruling in *DeFrantz*.<sup>111</sup> Looking at the USOPC's status as a state actor strictly from a free speech perspective would avoid the holdings in *Barnes* and *Spark*, all while affirming the committee's strict autonomy in the realm of athlete participation.<sup>112</sup> Imboden's protest can be distinguished from these rulings because it does not pertain to pure athlete eligibility, but rather to how and whether one may exercise their right to free speech.<sup>113</sup> *Spark* should be distinguished from the case at hand because forcing a litigant to show that there is some actual level of government control misinterprets the logical conclusion of *DeFrantz* and *Barnes*—that athletes were barred from private action in court to decide eligibility in order avoid

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<sup>107</sup> See *id.* at 550-55 (Brennan, J., dissenting) (explaining USO[P]C's governmental functions). The USO[P]C was created following a Commission on Olympic Sports, which was established to investigate the deteriorating rate of performance by Americans at the Olympics and to suggest possible solutions. *Id.* at 553-54. Much like an administrative agency, the USO[P]C's powers are accompanied by several public checks, such as: (1) the inability to amend its constitution or by-laws; (2) the inability to recognize a new national governing body without both a public hearing and notice to all interested parties; and (3) a requirement to submit annual reports to the President and Congress on expenditures, operations, activities, and accomplishments. *Id.* at 554-55 (Brennan, J., dissenting) (comparing USO[P]C to administrative agency).

<sup>108</sup> See *S.F. Arts & Athletics, Inc.*, 483 U.S. at 556-59 (Brennan, J., dissenting) (applying *Burton* precedent to USO[P]C).

<sup>109</sup> See *id.* (Brennan, J., dissenting) (advocating for application of *Burton* test).

<sup>110</sup> See *S.F. Arts & Athletics, Inc.*, 483 U.S. at 556-59 (Brennan, J., dissenting) (arguing for application of *Burton* test); see also 36 U.S.C.S. § 220506 (proscribing exclusive rights to the USOPC).

<sup>111</sup> See *Barnes v. Int'l Amateur Athletic Fed'n.*, 862 F. Supp. 1537, 1544 (S.D. W. Va. 1993) (citing *Michels v. U.S.O.C.*, 741 F.2d 155 (7th Cir. 1984)) (noting Congress's removal of provision allowing athletes private action in federal court regarding competitive eligibility).

<sup>112</sup> See *id.* (demonstrating Congressional intent for athletes not to have right to private action for participation); see also *DeFrantz v. United States Olympic Committee*, 492 F. Supp. 1181, 1194 (D.D.C. 1980) (citing *Spark v. Cath. Univ. of Am.*, 510 F.2d 1277, 1281-82 (1975)) (stating that without race factor there must be some government control).

<sup>113</sup> See *Spark*, 510 F.2d at 1281-82 (illustrating holding); *DeFrantz*, 492 F. Supp. at 1182, 1194 (summarizing facts and determining USOC's action not state action).

an explosion of litigation by spurned would-be Olympians as opposed to an actual Olympians litigating for constitutional rights.<sup>114</sup> Adhering to the ruling in *DeFrantz* ignores the possibility that the court was equally affected by the sentiments of the federal government, namely, that allowing athletes to compete at the Moscow Games might have given the Soviets the impression that the Invasion of Afghanistan was “of no consequence.”<sup>115</sup>

When considering the holdings of *Spark*, *Barnes*, and *DeFrantz* within the proper context, a court could reasonably apply the *Jackson* test to the current facts while examining them through Justice Brennan’s dissent in *S.F. Arts & Athletics, Inc.*<sup>116</sup> The USOPC’s former decision to sanction United States Olympic Athletes was informed by guidance from Rule 50 in the Olympic Charter.<sup>117</sup> However, while the IOC can sanction athletes itself, its Charter does not give it the power to force governing bodies to sanction their own athletes, so those sanctions must come from the USOPC.<sup>118</sup> The federal government has its prestige abroad, and the USOPC has the financial incentive to retain viewership, as American political figures and the American public put sustained pressure on the USOPC to either recognize or ban athlete activism.<sup>119</sup> Pressure from the government and the public would have been high under the Trump administration, as going against the President of the United States and the

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<sup>114</sup> See *Barnes*, 862 F. Supp. at 1544 (citing legislative history); see also *Spark*, 510 F.2d at 1281-82 (illustrating holding); *DeFrantz*, 492 F. Supp. at 1182, 1194 (summarizing facts and determining USO[P]C did not commit state action).

<sup>115</sup> See Koller, *supra* note 44, 1483-85 (arguing *DeFrantz* decision must be put into Cold War context). The Olympic Movement in the United States stood in stark contrast to the Soviet model—while the private sector groomed and nurtured amateur athletes in the West, the Kremlin and its State Committee for Sports and Physical Education of the USSR developed the athletes of the Soviet east. *Id.* Such a contrast was likely known by the judges and, given the context of the 1970s, it is reasonable to suspect that they supported the West’s approach. *Id.*

<sup>116</sup> See *S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 559 (1987) (Brennan, J., dissenting) (highlighting USO[P]C’s state-oriented role); see also *Spark*, 510 F.2d at 1281-82 (indicating need for government control absent issues regarding race); *Barnes*, 862 F. Supp. at 1544 (citing legislative history); *DeFrantz*, 492 F. Supp. at 1182, 1194 (articulating case facts and holding that USOC’s action not state action).

<sup>117</sup> See OLYMPIC CHARTER, *supra* note 2, at 94 (stating rule 50).

<sup>118</sup> See Zirin & Boykoff, *supra* note 21 (noting uncertainty regarding who decides what is “peacefully and respectfully,” especially when IOC *still* opposes athlete protest); see also OLYMPIC CHARTER, *supra* note 2, at 94 (determining Olympic Charter does not confer power compelling governing bodies to sanction their respective athletes).

<sup>119</sup> See *S.F. Arts & Athletics*, 483 U.S. at 559 (Brennan, J., dissenting) (demonstrating USO[P]C imbued with “prestige” of the United States); see also *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 64 (1963) (holding commission’s pressure on book sellers to stop selling “objectionable” books unconstitutional).

Republican Party could result in a financial catastrophe.<sup>120</sup> This kind of mollification of the government is analogous to the compliance of the USO[P]C in *DeFrantz* in their boycott of the Moscow Games.<sup>121</sup> At the very least, this situation should be distinguished from the holding in *DeFrantz* because, here, a plaintiff would be suing under their First Amendment right to free speech as opposed to the right to compete.<sup>122</sup> Such a distinction would account for the overall ruling in *DeFrantz* and the legislative intent of the incorporating act, but prevent the USOPC from barring athletes from competing by attaching eligibility to the relinquishment of a constitutionally protected right.<sup>123</sup> In this way, a court could update the holding in *DeFrantz* and apply the holding of *Bantam Books, Inc.*, where governmental pressure was declared unconstitutional under the First Amendment.<sup>124</sup> In combining *Bantam Books, Inc.*, with Justice Brennan's dissent in *S.F. Arts & Athletics, Inc.*, a court could find that the pressure exerted by President Trump, Congress, and the Republican Party, would leave the USOPC no choice but to cave to its own financial interest.<sup>125</sup> It can be inferred that the USOPC's initial actions were meant to pacify the government, by the fact that the reversal of their policy came after President Biden was confirmed to be the next president, sufficiently demonstrating the nexus between the state and the challenged

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<sup>120</sup> See Haislop, *supra* note 15 (exemplifying President Donald Trump railing against athlete protest); Tesler, *supra* note 19 (showing statistical change over time favoring athlete protest); Tennery, *supra* note 19 (illustrating statistics underscoring partisan divide over athlete protest).

<sup>121</sup> See *DeFrantz*, 492 F. Supp. at 1183-86 (illustrating case facts).

<sup>122</sup> See *id.* at 1185 (listing plaintiffs' causes of action). The plaintiffs were suing for their right to compete under their rights to "free expression," "privacy," and personal autonomy under the First, Fifth, Ninth Amendments, respectively. *Id.* The court ultimately found that there was no constitutional right to compete in the Olympics, but did not address an athlete's constitutional right to protest. *Id.* at 1194-95; see also Bieler, *supra* note 35 (illuminating facts surrounding Imboden's protest and sanction).

<sup>123</sup> See Bylaws of the United States Olympic & Paralympic Committee §§ 9.2-9.10 (effective June 18, 2020) [hereinafter *USOPC 2020 Bylaws*] (granting USOPC exclusive control over eligibility and participation of athletes); *Barnes v. Int'l Amateur Athletic Fed'n.*, 862 F. Supp. 1537, 1544 (S.D. W. Va. 1993) (citing *Michels v. U.S.O.C.*, 741 F.2d 155 (7th Cir. 1984)) (providing legislative history of incorporating act); *DeFrantz*, 492 F. Supp. at 1194-95 (announcing case holding).

<sup>124</sup> See *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 64 (1963) (holding pressure intended to restrict book shops' constitutional rights to sell books freely).

<sup>125</sup> See *S.F. Arts & Athletics v. U.S. Olympic Comm.*, 483 U.S. 522, 549-61 (1987) (Brennan, J., dissenting) (explaining Brennan's analysis and conclusion that USOPC is a state agent); *Bantam Books, Inc.*, 372 U.S. at 64 (exemplifying unconstitutional government pressure); see also Koller, *supra* note 44, at 1481-82 (demonstrating actions taken by federal government encouraging boycott); Tennery, *supra* note 19 (showing statistics underscoring partisan divide over athlete protest).

action.<sup>126</sup> If not for the Trump administration's position on athlete activism, which encouraged society's polarized view of activism, it is likely that the USOPC may not have taken action against Race Imboden, who specifically chose to *kneel* during the National Anthem—a recognizable form of protest in 2019.<sup>127</sup>

*B. Race Imboden's Protest was Speech*

In *Texas v. Johnson*,<sup>128</sup> the Court wrote that “[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable,” and that same bedrock principle ought to apply to protests by athletes.<sup>129</sup> The test to determine whether Imboden's actions on the podium constitute speech is straight forward.<sup>130</sup> In applying the *Spence* precedent, a court must first determine whether Imboden had the intent to convey a particularized message.<sup>131</sup> Imboden clearly stated that he wanted to convey the message that the current state of America did not represent him, despite actively representing his country on the international stage as a fencer.<sup>132</sup> Imboden's kneeling was also a direct response to police brutality and the rampant gun violence spreading across the United States at the time.<sup>133</sup> Given that Imboden expressly said that he *wanted* to convey a message, it is likely that a court would find that there was an intent to convey a particularized message.<sup>134</sup>

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<sup>126</sup> See Associated Press, *supra* note 21 (reversing prior decision barring Olympic Games protest); Pells, *supra* note 20 (focusing on USOPC's original position and probational sanction against Imboden); Futterman, et al., *supra* note 21 (detailing Saunders and Imboden protests, and IOC-USOPC fallout).

<sup>127</sup> See Associated Press, *supra* note 35 (detailing USOPC's sanctions on Imboden).

<sup>128</sup> 491 U.S. 397 (1989).

<sup>129</sup> See *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (describing flag-burning as offensive). While Imboden did not burn an American flag, it is likely that many Americans would have viewed kneeling during the national anthem as “disagreeable,” if not outright “offensive.” Tesler, *supra* note 19.

<sup>130</sup> See *Spence v. Wash.*, 418 U.S. 405, 410-11 (1974) (stating test for non-verbal conduct); OlympicTalk, *supra* note 31 (reviewing Imboden's actions).

<sup>131</sup> See *Spence*, 418 U.S. at 410-11 (holding “intent to convey a particularized method” as first prong in analysis).

<sup>132</sup> See *id.* at 408 (stating that Spence “felt there had been so much killing and that this was not what America stood for. [He] felt that the flag stood for America and [he] wanted people to know that [he] thought America stood for peace”); Weisfeld, *supra* note 19 (explaining why Imboden knelt on the podium).

<sup>133</sup> See Weisfeld, *supra* note 19 (explaining Imboden's actions through interview and tweets).

<sup>134</sup> See Weisfeld, *supra* note 19 (stating why he knelt on the podium); *Spence*, 418 U.S. at 408 (discussing Spence's desire to convey a message).

Next, a court must determine whether the circumstances surrounding the act make it likely that the message would have been understood by those who viewed it.<sup>135</sup> Because Imboden was an athlete *kneeling* during the national anthem at the Olympics, it is safe to assume that most Americans would understand that Imboden was protesting by linking him, at least tangentially, to Colin Kaepernick and the kneeling movement Kaepernick started.<sup>136</sup> Similar to the defendant in *Spence*, Imboden's form of protest would have been clearly recognized as a commentary on either the Black Lives Matter movement or in response to the two mass shootings in El Paso, Texas, and Dayton, Ohio, which occurred in the week leading up to Imboden's event.<sup>137</sup> If the USOPC understood it to be a form of protest, as demonstrated through the sanctions imposed after the act, then it is probable that any spectator would understand that Imboden was protesting.<sup>138</sup> It is likely that a court would find the *Spence* test satisfied and that Imboden was participating in speech.<sup>139</sup>

### C. *The Contract Violated Athletes' Constitutionally Protected Rights*

If the USOPC is a state actor, and Imboden's protest is classified as protected speech under the First Amendment, then the contract conditioning eligibility to compete on the relinquishment of a right to protest is a violation of the unconstitutional conditions doctrine.<sup>140</sup> The overarching maxim of the doctrine is that the "government may not deny a benefit to a person because he exercises a constitutional right[.]" which is

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<sup>135</sup> See *Spence*, 418 U.S. at 411 (articulating second prong of analysis).

<sup>136</sup> See Haislop, *supra* note 15 (illustrating Kaepernick's protest timeline and the social movement he started); see also OlympicTalk, *supra* note 31 (discussing Imboden kneeling).

<sup>137</sup> See *Spence*, 418 U.S. at 406 (describing the peace symbol the defendant taped to the American flag). Anyone in the 1970s would have immediately understood Spence's action to be a direct commentary on the Vietnam War. *Id.* See Weisfeld, *supra* note 19 (noting Imboden's reasons for kneeling).

<sup>138</sup> See Los Angeles Times Staff and Wire Reports, *supra* note 32 (quoting USOPC's Vice President of Communications Mark Jones's statement); see also IOC ATHLETES' COMM., *supra* note 25, at 2 (identifying kneeling as a form of barred protest).

<sup>139</sup> See *Spence*, 418 U.S. at 410-11 (stating test). It should be noted that not all speech is protected, but none of the scenarios that protract the realm of free speech (danger; incitement of violence; hate speech) apply here and that while the actions of the USOPC could be found unconstitutional at this point through an analysis of a content based restriction this note instead chooses to focus on the actual contract athletes had to sign as the act to be overturned, rather than the bylaws of the USOPC. See OLYMPIC CHARTER, *supra* note 2, at 94 (stating rule 50); see also *Reed v. Town of Gilbert*, 576 U.S. 155, 163-64 (2015) (developing seminal case showing that free speech restrictions demand strict scrutiny analysis); *Boos v. Barry*, 485 U.S. 312, 312-16 (1988) (detailing seminal case explaining content based restrictions).

<sup>140</sup> See McCoy, *supra* note 42 (providing overview unconstitutional conditions doctrine).

exactly what the USOPC attempted to do in Lima.<sup>141</sup> The contracts that the USOPC forced its athletes to sign stated that they could not protest at the Pan American Games without risking their Olympic eligibility—a direct threat to deny the benefit of competing should they exercise their constitutional right to free speech.<sup>142</sup> The USOPC could argue that the contract did not contain restrictions as to specific types of speech and actions, and that the committee allows for protest at other points during Olympics, just not during opening, closing, or medal ceremonies, or in specific areas.<sup>143</sup> However, the most meaningful kind of protest would occur on the medal podium, where an athlete has the ability to show the world what they believe with the greatest effect.<sup>144</sup> It is likely that a court would find that the USOPC specifically conditioned the privilege of participant eligibility on the relinquishment of one's First Amendment rights, thus violating the unconstitutional conditions doctrine and forcing to the court to apply a strict scrutiny analysis to Imboden's situation.<sup>145</sup>

In defense of its position, the USOPC could reference cases such as *Rust v. Sullivan*, where the court ruled that a state actor may choose not to promote one view or opinion instead of another, or *Legal Services Corp. v. Velazquez*, where the court held that viewpoint-based funding decisions could be sustained where the government is a speaker, or where the government uses private speakers to transmit information pertaining to its

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<sup>141</sup> See *Regan v. Taxation with Representation of Washington*, 461 U.S. 540, 545 (1983) (quoting *Perry v. Sindermann*, 408 U.S. 593, 597 (1972)); Los Angeles Times Staff and Wire Reports, *supra* note 32 (acknowledging that there was an agreement entered into between athletes and the USOPC).

<sup>142</sup> See *McCoy*, *supra* note 42 (providing overview of unconstitutional conditions doctrine); Los Angeles Times Staff and Wire Reports, *supra* note 32 (showing terms of contract). Through the unconstitutional conditions doctrine, the analysis can again be distinguished from *DeFrantz*, as here the constitutional right being abridged is that of speech, in the First Amendment, and not "expression" under the First Amendment—which, conceded, was meritless—or the right to compete under the Due Process Clause of the Fifth and Fourteenth amendments. See *DeFrantz v. U.S. Olympic Comm.*, 492 F. Supp. 1181, 1183-84 (D.D.C. 1980) (describing what plaintiffs were seeking relief under). Note, also, that just because the benefit being denied is a privilege does not mean that the denial is not an infringement, nonetheless. See *Speiser v. Randall*, 357 U.S. 513, 518-19 (1958) (striking down California requirement for veteran loyalty oath to receive Veteran's property-tax exemption).

<sup>143</sup> See *Taxation with Representation of Washington*, 461 U.S. at 545 (holding that Congress had made specific conditions on funds not to be used to lobby state legislatures) (emphasis added).

<sup>144</sup> See *Berry*, *supra* note 25 (countering argument that protest is allowed elsewhere during the Olympics).

<sup>145</sup> See *Taxation with Representation of Washington*, 461 U.S. at 549 (affirming if unconstitutional conditions doctrine is violated, strict scrutiny must apply); see also *McCoy*, *supra* note 42 (providing unconstitutional conditions doctrine analysis overview).

own programs.<sup>146</sup> These exceptions would be misplaced, however, as the USOPC did not choose to promote one view over another, but rather sought to bar a certain type of speech.<sup>147</sup> Additionally, the USOPC did not speak through its athletes, nor request that they transmit information pertaining to their own program, and such an interpretation would broaden the exceptions of *Legal Services Corp.* beyond reason.<sup>148</sup> This argument fails to comport with the direct holding of *Legal Services Corp.*, as the USOPC could be argued to have created private expression through the development and participation of athletes, and subsequently tried to restrict that expression.<sup>149</sup> Without an exception, the USOPC's actions would be required to be examined under strict scrutiny.<sup>150</sup>

To pass strict scrutiny, the USOPC needs a compelling state interest, as well as a narrowly tailored means to achieve that interest.<sup>151</sup> It could be argued that the USOPC's interest is in the protection of athletes from sanctions by the IOC, as well as maintaining the neutrality of sport.<sup>152</sup> This interest is not compelling, however, as the sanctions come from the IOC anyways, rendering the USOPC's actions moot.<sup>153</sup> Simultaneously, the USOPC could argue that it has an interest in presenting a common front to the world: a unified Team USA competing for the prestige and glory of the United States at the highest level of athletic ability.<sup>154</sup> This argument fails as well, as it would run afoul of *Texas v. Johnson* and the "bedrock principle underlying the First Amendment": that the government cannot

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<sup>146</sup> See *Rust v. Sullivan*, 500 U.S. 173, 193 (1991) (allowing HHS to limit the ability of Title X funding recipients to engage in abortion-related activities); see also *Legal Services Corp. v. Velazquez*, 531 U.S. 533, 537 (2001) (invalidating restriction on the use of LSC's services to challenge the constitutionality or validity of certain laws).

<sup>147</sup> See *Rust*, 500 U.S. at 193 (restricting abortion-related speech to favor other family-planning methods).

<sup>148</sup> See *Legal Serv. Corp.*, 531 U.S. at 543 (barring restriction on private, government created, speech); see also IOC ATHLETES' COMM., *supra* note 25, at 2 (explaining where protesting is barred and where it is allowed).

<sup>149</sup> See *Legal Serv. Corp.*, 531 U.S. at 538-40 (addressing challenges to restrictions in § 504(a)(16) and creating four categories of prohibited activities).

<sup>150</sup> See *Regan v. Taxation with Representation of Washington* 461 U.S. 540, 549 (1983) (holding where unconstitutional conditions doctrine is violated strict scrutiny must be applied); see also McCoy, *supra* note 42 (providing overview of unconstitutional conditions doctrine analysis).

<sup>151</sup> See *Reed v. Town of Gilbert*, 576 U.S. 115, 163 (2015) (recent case showing that free speech restrictions demand a strict scrutiny analysis by a court); see also *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 452-54 (2015) (explaining "narrowly tailored"); Steiner, *supra* note 87 (showing examples of compelling interests).

<sup>152</sup> See generally IOC ATHLETES' COMM., *supra* note 25, at 2 (explaining justification).

<sup>153</sup> See OLYMPIC CHARTER, *supra* note 2, at 94 (stating rule 50 and sanctions).

<sup>154</sup> See generally Koller, *supra* note 44, at 1469-86 (exploring the concept of "sportive nationalism:" the use of sport to promote a nationalist message).

prohibit the expression of an idea because it may conflict with the ideas and values of society.<sup>155</sup> Akin to the flag in *Johnson*, the USOPC restricts speech to maintain an image and prevent an uproar from a certain sect of society.<sup>156</sup> This is completely unrelated to public health, safety, or national security, and it is unlikely that a court would declare these compelling interests.<sup>157</sup> To hold otherwise would be to allow the state to mandate how citizens relate to icons or symbols, out of fear of each other.<sup>158</sup>

If a court were to find that the USOPC's interest was not compelling, then the analysis could end here; but if it did find the interest sufficiently compelling, the court would then examine the narrow tailoring of the USOPC's actions.<sup>159</sup> For an act to be narrowly tailored, it must be neither over-inclusive—meaning not so broad as to restrict all manner of speech—nor under-inclusive—meaning not so riddled with exceptions that it cannot possibly achieve its desired end.<sup>160</sup> A litigant is more likely to successfully argue that a rule is overinclusive, as the exceptions are few and far between, and so this note will focus on this argument.<sup>161</sup> The USOPC's bar on athlete is over-inclusive for two reasons: (1) it anoints specific places as appropriate for protest, diminishing the value of the speech to the point where it might not be heard at all; and (2) the IOC's list of barred conduct could encompass nearly any kind of speech or protest.<sup>162</sup> Without a viable counter argument, it is likely that a court would find such a contract unconstitutional under the unconstitutional conditions doctrine because the action does not have a compelling interest, and even if there was one, it is not narrowly tailored to achieve that interest.

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<sup>155</sup> See *Texas v. Johnson*, 419 U.S. 397, 414 (1989) (articulating bedrock principle underlying First Amendment)

<sup>156</sup> See *id.* (illustrating restriction's purpose in *Johnson*).

<sup>157</sup> See *Johnson*, 419 U.S. at 414 (discussing proper restriction purposes); see also Steiner, *supra* note 87 (providing examples of compelling interests).

<sup>158</sup> See *Johnson*, 419 U.S. at 414 (noting SCOTUS denouncing such mandating by Congress); see also Steiner, *supra* note 87 (providing examples of compelling interests).

<sup>159</sup> See *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 452-54 (2015) (explaining scope of "narrowly tailored"); Ruth Ann Strickland, *Narrowly Tailored Laws*, THE FIRST AMENDMENT ENCYCLOPEDIA (last visited Jan. 31, 2021, 2:47 AM) <https://mtsu.edu/first-amendment/article/1001/narrowly-tailored-laws> (explaining briefly "narrowly tailored").

<sup>160</sup> See *Williams-Yulee*, 575 U.S. at 452-54 (scope of "narrowly tailored").

<sup>161</sup> See IOC ATHLETES' COMM., *supra* note 25, at 2 (explaining Rule 50 meaning and protests prohibited and locations allowed).

<sup>162</sup> See *id.* (explaining Rule 50 and conduct requirements); cf. *Williams-Yulee*, 575 U.S. at 452-54 (deciding law barring judges from soliciting campaign donations was narrowly tailored). The law in question did not have so many exceptions to it as to render it unnecessary and did not restrict the free speech of judges to the extent that they could not act in a political capacity, rather it only restricted soliciting campaign donations in the interest of preserving the integrity of the Florida elected judiciary. *Williams-Yulee*, 575 U.S. at 452-54.

2022]

*The Right to Protest at the Olympic Games*

165

## V. CONCLUSION

The USOPC's actions run afoul of the unconstitutional conditions doctrine by forcing American athletes to sign away their right to protest in exchange for participation in international and Olympic events. While the committee has changed its stance on athlete protest for now, it may reverse its position, or narrowly construe what it views as a peaceful and respectful protest. This affords far too much discretion to a private body, especially one so unregulated and closely tied to the government. While the USOPC recently chose to stand with its athletes against the IOC, there is nothing stopping the committee from reverting its stance and siding with its international counterpart once again. Without a ruling permanently barring the USOPC from returning to its old pattern of conduct, every future American athlete is at risk of losing their eligibility at the hands of the committee and the administration it follows. As such, the action taken against Race Imboden should be ruled as unconstitutional, and the USOPC must be stripped of its discretion regarding the enforcement of Rule 50. The United States has always said it stands for free speech: this should be especially true when its athletes stand on the Olympic podium.

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