1986 WL 720600 (U.S.) (Appellate Brief)
Supreme Court of the United States.

SAN FRANCISCO ARTS & ATHLETICS, INC. and Dr. Thomas F. Waddell, Petitioners,

v.

UNITED STATES OLYMPIC COMMITTEE and International Olympic Committee, Respondents.

No. 86-270.
October Term, 1986.
December 4, 1986.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Brief Amici Curiae of (Amici listed on following page) in Support of Petitioners

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***3 INTEREST OF AMICI CURIAE**

Amici file this brief in support of petitioners San Francisco Arts & Athletic, Inc. (“SFA&A”) and Thomas F. Waddell. In the brief, amici address only the question whether respondent United States Olympic Committee (“USOC”), in discriminating against petitioners by preventing them -- but not certain other persons -- from using the term “olympic” in connection with athletic competitions, engaged in “state action” for purposes of the equal protection component of the Fifth Amendment to the Constitution.

The individual interests of the amici are contained in the Appendix.

*4 I.

SUMMARY OF ARGUMENT

The USOC, an entity created by Federal charter, takes the position that, pursuant to 36 U.S.C. §380, [1] Congress has granted the USOC an absolute monopoly over the word "olympic," including the right to discriminate among groups at will in connection with the use of the word -- even it the discrimination is based solely on a group's exercise of its First Amendment rights. [2] In prohibiting petitioners from using the word *5 "olympic" in connection with the SFA&A's amateur athletic competition (which was to be entitled "The Gay Olympic Games I"), while at the same time allowing other groups to use the word, the USOC has discriminated against petitioners in connection with petitioners' exercise of their fundamental First Amendment right to freedom of expression.

This brief will show that, assuming arguendo that Congress did intend to grant the USOC the exclusive and blanket right to use the word "olympic" (and that the Constitution permitted Congress to do so), the USOC's discriminatory conduct [3] *6 in allowing some groups, but not petitioners, to use the word "olympic" constitutes "state action" [4] for purposes of the Fifth Amendment. [5]

The Court of Appeals for the Ninth Circuit, without engaging in a proper factual and legal analysis, found, inter alia, an absence of state action on the part of the USOC and affirmed the district court's order granting respondents' motion for summary *7 judgment. In fact, as this brief will demonstrate, the USOC's conduct did constitute state action for several independent reasons.

First, the USOC's conduct deprived petitioners of a preferred right -- the free speech right to use the word "olympic" to promote the public's understanding of gay persons. Where such a preferred right is involved, a court must engage in a closer inquiry to determine whether the conduct at issue constitutes state action. Such an inquiry reveals that, in enacting the Amateur Sports Act of 1978 ("the Act"), Congress amended the USOC's charter in order to further a strictly national interest: improving performance of the United States in international amateur athletic competition. Under the Act, futhermore, Congress chose to legislate *8 almost all phases of the USOC's activity. Moreover, the Act gave the USOC a monopoly over the word "olympic," which had been firmly established in the English language. The USOC was able to carry out the challenged conduct -- the prohibition against petitioners' use of the word "olympic" -- solely by virtue of the federal statute. In light of these factors, a finding of state action was required.

Second, the USOC was expressly chartered in 1978 as an agent of the federal government. Moreover, the USOC's function (to coordinate amateur athletics and resolve disputes) could not be performed without federal action (in the form of the Act). The USOC's function is therefore the exclusive prerogative of the government, and the USOC necessarily performs a public *9 function, rendering its conduct in this case state action.

Third, by granting the USOC a monopoly over the word "olympic," Congress took a word that had previously existed in the public domain and gave absolute control over it to a private entity (the USOC), which now has the power to decide who among the public may use that word. As a result of this governmental action, the USOC now exercises exclusive control over a significant vehicle of expression. For this reason, also, the USOC engaged in state action when it exercised its monopoly over a standard English word to prevent petitioners from using that word in their efforts to increase the public's understanding of gay persons.

At the outset, amici emphasize that compelling policy reasons require that *10 the decision of the Court of Appeals be reversed. To affirm the Court of Appeals' ruling on the issue of state action would grant the USOC a license to discriminate with impunity in connection with the use of the word "olympic." Thus, the USOC could discriminate on the basis of race, religion, or ethnic background (as well as on the basis of sexual orientation or the content of expression), without being subject to any court's inquiry into the constitutionality of its discriminatory conduct. There would be nothing to prevent the USOC from, for example,

granting the right to use the word "olympic" only to white supremacist organizations, but not to racial minorities. Such a result simply cannot be tolerated where the actor is specifically chartered by Congress for ***11** the purposes of serving national interests and where the discrimination depends completely on the existence of a government-conferred monopoly.

As discussed below, the holding of the Court of Appeals on the issue of state action must be reversed.

II.

THE COURT OF APPEALS COMPLETELY FAILED TO UNDERTAKE THE APPROPRIATE FACTUAL INQUIRY INTO WHETHER THE CONDUCT OF THE USOC CONSTITUTED STATE ACTION.

A. The Court Below Failed to Analyze The Factors That Are Significant In Determinating Whether State Action Exists.

Importantly, "adherence to the 'state action' requirement . . . requires careful attention to the ***12** gravamen of the plaintiff's complaint." Blum v. Yaretsky, 457 U.S. 991, 1003 (1982). The state action inquiry is "necessarily fact bound." Lugar v. Edmondson Oil Co., 457 U.S. at 939. "Only by sifting facts and weighing circumstances can the non-obvious involvement of the State in private conduct be attributed its true significance." Burton v. Wilmington Parking Authority, 365 U.S. 715, 722 (1961).

The "necessarily fact bound" inquiry means that no universal and unwavering rule can be applied to every situation to determine whether state action exists. This Court, however, has readily found state action in the presence of certain factors. The Court has tended to find state action where (a) the ostensibly private actor has ***13** deprived the challenger of a fundamental right; (b) the ostensibly private actor has a close nexus to a strictly public interest and is the object of extensive legislation and government regulation related thereto; and (c) the state has conferred on the ostensibly private actor a monopoly which is directly and closely related to the private actor's impairment of the challenger's fundamental right. [6] See, e.g., Terry v. Adams, 345 U.S. 461 (1953); Smith v. Allwright, 321 U.S. 649 (1944). In addition, state action will be found to exist where the ostensibly private actor performs a public function that was ***14** traditionally the exclusive prerogative of the state. Blum v. Yaretsky, 457 U.S. at 1004-05 (1982).

In Smith v. Allwright, supra, the Texas Democratic Party refused to admit black Texans to membership and thus prohibited them from voting in the Democratic primary election. In concluding that the actions of the Texas Democratic Party constituted state action, the Court in Smith, 321 U.S. at 664, stated:

> "If the state requires a certain electoral procedure, prescribes a general election ballot made up of party nominees so chosen and limits the choice of the electorate in general elections for state offices, practically speaking, to those whose names appear on such a ballot, it endorses, adopts and enforces the discrimination against Negroes, practiced by a party entrusted by Texas law with the determination of the ***15** qualifications of the participants in the primary. This is state action within the meaning of the Fifteenth Amendment."

An examination of the holding in Smith v. Allwright reveals the several factors that led the Court to find state action on the part of the Texas Democratic Party: the challenged act involved a fundamental right (the right to vote as guaranteed by the Fifteenth Amendment); the Democratic Party in fact enjoyed a monopoly over Texas' electoral process (i.e., the regulations limited the choice of the electorate in general elections for state offices); and the State closely regulated its electoral procedure. See also Terry v. Adams, 345 U.S. 1003 (1953) (opinion of Black, J.) (state action found where a Texas political organization excluded blacks ***16** from the electoral process on racial grounds).

Analogously, in Marsh v. Alabama, 326 U.S. 501 (1946), the Court reversed a state trespass conviction of a member of the Jehovah's Witness, who had distributed religious literature in a privately-owned company town. That distribution contravened

the wishes of the town's owners, who invoked the state trespass law. This Court found that the company's conduct constituted state action. The Court noted that free speech rights occupy a preferred position under the Constitution. Marsh, 326 U.S. at 509. It also noted that, since the entire town was the company's private property, it was inevitable that the residents of the town could only exercise their free speech rights on the company's property. Id. Put differently, ***17** the company town enjoyed monopolistic control over the property within its borders. Finally, the company town performed the regulatory functions that would have been performed by a public municipality. Id. This is analogous to close regulation by the state.

Moreover, in the cases finding the existence of state action, the private actor's monopoly related directly to the challenged act itself. Indeed, absent the monopoly, the wrongful conduct could not have occurred. Thus, in Smith v. Allwright and Terry v. Adams, the absolute control of the Texas Democratic Party over the state's electoral processes enabled the ostensibly private actor (i.e., the Texas Democratic Party) to engage in the challenged acts of discrimination. Absent these ***18** monopolies, the parties could not have excluded blacks from the states' electoral processes. Likewise, in Marsh v. Alabama, but for the company town's monopoly over its property, the challenged act -- prohibiting the distribution of religious literature -- could not have occurred. In short, the monopoly was so closely related to the challenged act that a finding of state action was appropriate.

As noted below, the principles leading to the finding of state action in Smith v. Allwright and Marsh v. Alabama define the parameters of the state action inquiry in this particular case. Under the proper analysis -- ignored by the court below -- the inescapable conclusion is that the USOC, in using its monopoly power over the word “olympic” to discriminate against ***19** petitioners in connection with their fundamental right to free expression, engaged in state action.

B. In Concluding That The Conduct Of The USOC Was Not State Action, The Court Of Appeals Relied On An Inapposite Comparison Of The USOC With Owners of Copyrights And Trademarks And Failed To Consider The Factors Salient To The State Action Inquiry.

Apparently trying to avoid deciding what it conceded to be “the difficult issue of applicability of equal protection guarantees” and the equally difficult issue of whether the “USOC discriminated,” the Court of Appeals, without analysis, found that the conduct of the USOC did not constitute state action. The Court of Appeals discussed the issue of “state action” in two parts. First, the Court of Appeals ***20** noted that conferring “special property rights in USOC's trademarks [by Congress] does not make USOC's exploitation of those rights state action.” International Olympic Committee v. San Francisco Arts and Athletics, 781 F.2d 733, 737 (1986). Since the monopoly rights of these other owners “can be enforced to limit protected speech without violating the Constitution because there was no state action,” the court reasoned that there was no state action where the USOC discriminatorily enforced its monopoly rights in the word “olympic” against petitioners. Id.

Second, the Court of Appeals relied on Rendell-Baker v. Kohn, supra, and explained that it was irrelevant that the government financed the USOC and jointly marketed olympic medals with it, ***21** because “neither financing nor contractual relationships by themselves suffice to make a private entity a governmental actor.” 781 F.2d at 737.

1. The Court Of Appeal Erroneously Compared The Enforcement of The USOC's Broad, Governmentally Created Monopoly Rights With The Enforcement of The Limited, Privately Created Rights Of Copyright And Trademark Owners.

The Court of Appeals initially concluded that the USOC's monopoly over the word “olympic” was insufficient to find state action. The court below compared the USOC with owners of copyrights and trademarks, who, the court concluded, also had a monopoly conferred by Congress or by law, but who were not state actors. The Court of Appeals, however, failed to recognize that the method by which the USOC ***22** obtained its monopoly rights in the word “olympic” (solely by virtue of an act of Congress) differs completely from the method by which copyright and trademark owners attain their respective “monopoly rights.” The Court of Appeals also failed to recognize that the USOC's monopoly rights are far broader than the rights of copyright and trademark owners. For the purposes of a state action analysis, the distinction is crucial.

The rights of copyright and trademark owners are not created by a direct legislative act; instead their rights are created, not by Congress, but by the owners themselves. For example, copyright owners create their copyrights by fixing an original work in a tangible medium of expression. 17 U.S.C. §§ 101, 102, 302; Sony Corp. of America v. ***23** Universal City Studios, Inc., 464 U.S. 417, ____, 104 S. Ct. 774, 783-84 (1984). Similarly, a trademark owner creates or attains its rights in a distinctive mark by adopting and using the mark in commerce to identify its goods or services and distinguish them from those manufactured or sold by others. 15 U.S.C. § 1127; Blue Bell, Inc. v. Farah Mfg. Co., Inc., 508 F.2d 1260, 1264-65 (5th Cir. 1975).

Unlike section 380, which grants the USOC monopoly rights over words that were and would otherwise still be in the public domain but for congressional intervention, the law of copyright does not give monopoly rights to works in the public domain. Harper & Row Publishers v. Nation Enterprises, 471 U.S. 539, ____, 105 S. Ct. 2218, 2224 (1985). Furthermore, unlike the law of ***24** copyright, section 380 does not require that the USOC earn its statutory monopoly rights by creating something original. Since the interests of creativity and originality, which are the constitutional underpinnings of the limited monopoly provided by copyright (see Sony Corp. v. Universal City Studios, supra, 464 U.S. 417, ____, 104 S. Ct. at 782), are not served by granting monopoly rights to the USOC over the word "olympic," it is improper to compare the legal consequences of the enforcement of the USOC's monopoly rights with the enforcement of copyrights.

In addition, the rights of copyright and trademark owners are limited by registration requirements, duration limitations, and defenses such as "fair use." See, e.g., Sony Corp. v. ***25** Universal City Studios, Inc., 464 U.S. 417, ____, 104 S. Ct. at 784 (fair use defense applied to defeat copyright owners' action). According to the Court of Appeals, however, such limitations do not apply to the USOC's monopoly rights in the word "olympic."

Given the above fundamental differences between copyrights and trademarks, on the one hand, and the USOC's monopoly rights, on the other it was erroneous for the Court of Appeals to base its conclusion on the results or reasoning of copyright or trademark cases.

2. The Court of Appeals Incorrectly Relied on Rendall-Baker v. Kohn.

Rendell-Baker v. Kohn, supra, seized on by the Court of Appeals as a ***26** second ground for finding lack of state action, also fails to justify the Court of Appeals' holding. In Rendell-Baker, petitioners, school teachers employed by a private school, challenged the school's right to discharge them from employment without procedural due process. As demonstrated infra, Rendell-Baker entailed circumstances that differed markedly from the instant case.

The private school in Rendell-Baker did not have a governmentally-granted monopoly. Further, while the private entity in Rendell-Baker was subject to a certain degree of state regulation, the school was not a creation of the state. As such, the regulatory role of the state was relatively passive, in contrast to the close statutory control that Congress exercises over the USOC. ***27** See discussion infra. Indeed, the Court noted in Rendell-Baker that the discharges were not compelled, or even influenced, by any state regulation. [7]

For the reasons discussed infra, the instant case is distinguishable from Rendell-Baker and the other cases finding an absence of state action. Under the facts of the instant case, the USOC engaged in state action when it ***28** exercised its congressionally-created monopoly power to invidiously discriminate against petitioners in connection with their use of the word "olympic."

III.

A PROPER ANALYSIS SHOWS THAT THE USOC ENGAGED IN STATE ACTION IN PROHIBITING PETITIONERS FROM USING THE WORD "OLYMPIC."

A. Because Petitioners Attempted To Exercise Their Right To Freedom Of Expression When They Chose To Use The Word "Olympic," The Appropriate Examination Into The USOC's Conduct Favors A Finding Of State Action.

The preferred nature of the constitutional rights at stake requires a close and sensitive examination into whether the USOC engaged in state ***29** action, and renders a finding of state action more likely. See Weise v. Syracuse University, 522 F.2d 397, 406-08 (2d Cir. 1975). In using the word "olympic" in connection with their desire to promote the public's understanding of gay persons, petitioners were undoubtedly exercising their rights of free speech, a right preferred under the Constitution. See e.g., Saia v. New York City, 334 U.S. 558, 562 (1948); Marsh v. Alabama, 326 U.S. at 509. Indeed, the very purpose of the use of the word "olympic" by petitioners was to educate the general public on "the vitality, variety and versatility of the gay movement." As the dissent from the denial of the Petition for Rehearing en banc below noted: "What [petitioners] propose to do . . . lies at the very heart of the ***30** first amendment: the wish to hold a public event to promote socio-political views some may find offensive." (Dissenting opinion of Kozinski, J.) (see Appendix C to Petition For Writ of Certiorari, at 49)

Here, the USOC consented to the use of the word "olympic" by Special, Junior, and Explorer Olympics, and tacitly approved of other entities' (including an International Police Olympics) use of the word. (See discussion in Brief for Petitioners) Yet, when petitioners wanted to use the word "olympic" for their event, they were prohibited from doing so. The approval given to other groups, combined with the USOC's total suppression of petitioners' use of the word "olympic," would constitute a prima facie case of discrimination in violation of the equal ***31** protection guarantees of the Fifth Amendment if the USOC's conduct were found to be "state action."

Therefore, in finding the absence of state action, the Court of Appeals erred. The Court of Appeals failed to recognize that discrimination in connection with a fundamental right -- here, petitioner's First Amendment right to freedom of speech -- requires a closer and more sensitive inquiry into whether the ostensibly private actor in fact engaged in state action. As discussed below, an appropriately close examination of the USOC's conduct establishes beyond doubt that the USOC engaged in state action.

B. Congress Chartered And Provided For Close Supervision Of The USOC In Order To Further A Strictly National Interest.

***32** The Congressional intent and motivation for enacting legislation that vests substantial and overriding power in the USOC demonstrates that the USOC's exercise of its power to deprive petitioners of the right to use the word "olympic" constituted governmental action for purposes of the equal protection component of the Fifth Amendment. The Act, 36 U.S.C. § 371 et seq., was passed in 1978 in response to a report of the President's Commission on Olympic Sports (the "Commission"), which found amateur sports in the United States to be in a chaotic condition and totally without regulation. See The Final Report of the President's Commission ("Commission Report"), at ix, 1-4, 11-13, 17-21 (U.S. Govt. Printing Office, Washington, D.C., 1977). [8] The ***33** Commission concluded that this chaotic condition, together with inadequate funding for American amateur athletics, harmed the performance of American athletes in international competitions. Commission Report, at 11, 17.

As an outgrowth of recommendations of the President's Commission, Congress enacted the Amateur Sports Act of 1978. 1978 U.S. Code Cong. and Adm. News, at 7482. The USOC was chartered under the Act to

> "establish national goals for amateur athletic activities and encourage the attainment of these goals; promote and support amateur athletic activities involving the United States and foreign nations; promote and encourage physical fitness and public participation and amateur athletic activities; and assist organizations and ***34** persons concerned with sports and the development of amateur athletic programs for amateur athletes."

36 U.S.C. § 374.

In furtherance of these strictly national goals, Congress vested in the USOC the power to serve as the coordinating body for amateur athletic activity in the United States directly relating to international amateur athletic competition. 36 U.S.C. § 375(a)(1). Moreover, 36 U.S.C. § 375(a)(2) empowers the USOC to represent the United States as its national Olympic committee

in relationships with international bodies, while 36 U.S.C. § 375(a)(3) gives the USOC power to control the representation of the United States in certain amateur competitions.

Significantly, as one way of achieving the national goal of improving ***35** America's performance in international competition, Congress included in the Act section 380, which, according to the USOC, gives the USOC the right to prevent any person or entity it chooses from using the word "olympic." Section 380 was intended to enable "the USOC to safeguard the USOC's ability to use financial resources that are a critical component of America's capacity to send world class amateur athletes into international competition without the massive government subsidies enjoyed by competitors from other nations." United States Olympic Committee v. Intelicense Corp., 737 F.2d 263, 264 (2nd Cir.), cert. denied, 469 U.S. 982 (1984). In effect, section 380 is the federal government's supplement to its initial direct financial subsidies. In addition to the revenue provided by section 380, ***36** Congress also granted a direct subsidy authorizing a grant of $16,000,000 to finance the construction, improvement and maintenance of facilities for programs of amateur athletic activity and for other costs. 36 U.S.C. § 384. Further, as another way to satisfy these governmental objectives, the statutory scheme of the Act provides for close governmental supervision and regulation of the USOC. [9]

***37** The legislative history of the USOC further demonstrates how the USOC in its present configuration was established to serve a national interest. The Committee on the Judiciary concluded that the reorganization of the USOC "should provide the needed coordination of effort with all the interested sports organizations which best promotes amateur athletic activity relating to ***38** international athletic competition." 1978 U.S. Code Cong. and Adm. News, at 7491. Moreover, the governmental interest in improving American performance in international athletic competitions pervaded the Congressional debate on the Act. For instance, Representative Michel, speaking in support of the legislation, stated:

> "American athletes will go into these same games as products of a way of life. I do not believe that it is the purpose of the games to set one way of life against another. But it cannot be denied that spectators, both in Moscow and all over the world, certainly will have such a thought in mind when the events take place. So it would be good for our nation and for the athletes who represent us if the cooperation, spirit of individuality, and personal freedom that are the great virtues of our system are allowed to exert their full influence in the games. Too often, in fact, for ***39** 50 years these virtues have been buried beneath the bickering between and among various amateur groups who claim to speak for the athletes."

Cong. Record, at 31662 (House Debates, September 26, 1978).

Finally, the federal government and the USOC have engaged in joint activities intended to support the USOC's activities. For example, in connection with the 1984 International Olympic Games, held by the City of Los Angeles, the federal government and the USOC jointly marketed Olympic coins. (See Joint Appendix to Petitioners' Brief, at II-190)

Given the elaborate statutory scheme governing the USOC, the expressly national objectives of the Act, and the joint participation of the USOC and the government in furthering those goals, the inescapable conclusion is that the ***40** USOC engaged in state action. Indeed, by virtue of the expressed common national goals of the USOC and the government, the close federal supervision, and the cooperative marketing program designed to fund the USOC, the USOC and the federal government enjoy a symbiotic relationship sufficient to render the USOC's conduct here state action. See Burton v. Wilmington Parking Authority, 365 U.S. 715, 725 (1961).

In light of all these factors, the USOC engaged in state action when it exercised its control over the word "olympic" on a discriminatory basis to the detriment of petitioners' rights of free expression. The Court of Appeals erred in ruling otherwise.

C. The USOC Is Endowed With A Federally-Granted Monopoly, Without ***41** Which The USOC Could Not Have Prohibited Petitioners From Using The Word "Olympic."

The USOC enjoys an absolute monopoly over the word "olympic" only by virtue of 36 U.S.C. §380. While the existence of a monopoly may not be sufficient in and of itself to constitute state action (see Jackson v. Metropolitan Edison Co., 419 U.S. at 351-352), where, as here, a preferred right is involved, state action exists where the state-granted monopoly is directly related to the challenged act of the ostensibly private entity. Cf. Smith v. Allwright, supra.

The relationship between the conduct challenged here and the USOC's monopoly over the word "olympic" could not be closer. In fact, the USOC's ***42** ability to engage in the challenged conduct depended on its monopoly.

Before Congress enacted 36 U.S.C. § 380 and its predecessor, the word "olympic" had been in the public domain and therefore not subject to trademark protection. See Park 'N Fly v. Dollar Park 'N Fly, 469 U.S. 189, _____, 105 S. Ct. 658, 661-62 (1985) (no trademark protection for generic term). Accord, Canal Co. v. Clark, 80 U.S. 311, 323 (1871). Quite simply, therefore, but for the Congressional grant of a complete monopoly over the word "olympic," the USOC could not have discriminated against petitioners in the exercise of their right of free expression at all, and petitioners could have used the word in connection with their athletic event. Because the USOC's ability to discriminate against ***43** petitioners derives solely from Congress' grant of monopoly rights, its conduct in using that monopoly to impair petitioners' freedom of speech in a discriminatory fashion constitutes state action. Cf. Smith v. Allwright, supra (but for the Democratic Party's monopoly over the State's elections, black voters could not have been excluded from elections).

The rationale used in Jackson v. Metropolitan Edison Co., supra, Public Utilities Commission v. Pollak, 343 U.S. 451 (1952), and Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972), supports this concept. Indeed, in Jackson, 419 U.S. at 352, this Court implicitly recognized that, where a sufficiently close relationship exists between the challenged conduct and the monopoly, a finding of state action is proper. ***44** Comparing the particular facts which were at issue in Pollak (in which the Court in fact found or assumed the existence of state action), and in Moose Lodge, the Court in Jackson concluded: "In [Moose Lodge and Pollak], there was an insufficient relationship between the challenged actions of the entities involved and their monopoly status [to find state action on the basis of the entity's monopoly]. There is no indication of any greater connection here." Jackson, 419 U.S. at 352.

The instant case presents a stark contrast to Jackson, Pollak, and Moose Lodge. In Jackson, the petitioner challenged the respondent's termination of her electrical service on the ground that the utility failed to accord her procedural due process. This Court assumed that the utility had at least a ***45** partial monopoly. [10] Significantly, the challenged act -- the termination of plaintiff's utility service -- had only an attenuated relationship to the respondent's monopoly; i.e., even if the respondent utility company had had no monopoly whatsoever, it nonetheless would have had the ability to terminate petitioner's utility service without notice and hearing. The challenged act therefore in no way depended on the utility's monopoly.

Likewise, in Public Utilities Commission v. Pollak, supra, respondent challenged a public utility's right to pipe music into its buses. The Court disclaimed any intent to predicate its ***46** finding of state action on the utility's monopoly. 343 U.S. at 462. As in Jackson, the challenged act (piping in music) had little or no relationship to the utility's monopoly: even absent the monopoly, the utility had the ability to pipe music into its buses.

Finally, in Moose Lodge, this Court found an absence of state action in connection with a private club's discriminatory conduct in refusing to serve black guests, although the private club had obtained its liquor license from the State. The Court noted that, even though liquor licenses were limited in number, no actual monopoly existed, since the plaintiff had other alternative locations in which he could consume alcoholic beverages in the same neighborhood. 407 U.S. at 177. Again, moreover, even if a monopoly had ***47** existed, the relationship between the challenged act of discrimination and the monopoly would have been attenuated; i.e., even without a liquor license, the private club had the ability to exclude black guests.

By contrast, the nexus between the challenged act here -- the USOC's discrimination against petitioners by denying them the right to use a word in the English language -- and the USOC's monopoly over that word could not be any closer or more direct. But for Congress' grant to the USOC of a monopoly over the word "olympic," the USOC could not have denied petitioners

the right to use the word. On the highly specific facts of the instant case, it is therefore appropriate to find that the USOC engaged in state action. Because the Court of Appeals ***48** below failed to inquire into whether the monopoly that Congress granted the USOC over the word "olympic" was sufficiently related to the act complained of (namely, the USOC's invidious discrimination against petitioners by virtue of their exercise of their right to free expression) to give rise to state action, the Court of Appeals committed reversible error.

D. The USOC Performs A "Public Function."

Congress established the USOC in its present form, and endowed it with substantial powers, in order to fulfill a Presidential mandate. By its very terms, the Act expressly confers a "public function" on this technically private entity. In appointing the USOC to represent the United States, sections 375(a)(2) and (3) make the USOC an agent ***49** of the United States government in connection with international amateur athletic competition. The governmental delegation of a public function could hardly be more explicit. In its capacity as the government's agent, the USOC engaged in state action in exercising its statutorily created control.

Although the most recent cases have indicated that a public function exists only where a private actor engages in a function "traditionally the exclusive prerogative of the State" (see, e.g., Rendell-Baker v. Kohn, 457 U.S. at 842 (emphasis in original)), those cases arose in a markedly different context from the one here. In previous cases, the function under scrutiny could have been performed either by a private actor or by a public actor, and was, in fact, ***50** traditionally performed by one sector or another. E.g., Rendall-Baker, 457 U.S. at 842 (education for maladjusted youth); Blum v. Yaretsky, 452 U.S. at 1004-05 (private nursing homes); Jackson v. Metropolitan Edison Co., 419 U.S. at 352-53 (electrical utility). Under those circumstances, it made sense to inquire whether the function was traditionally the exclusive prerogative of the state.

The focus here necessarily differs. Since 1978, the USOC has performed a national function that was not performed by anyone. The very reason for passing the Act was to fill this vacuum through the instrumentality of a state-created organization that would be able to perform this intrinsically public function. An analysis into the "traditional" nature of the function is ***51** simply irrelevant; as will be shown below, since 1978 the USOC has performed a new function.

The legislative history of the Act demonstrates that the function could not exist absent in-depth governmental intervention and involvement. The goal of the Act was to enhance the ability of the United States to participate in international amateur athletic events by eliminating the "chaotic" situation enveloping American amateur athletes and athletics. Thus, before the enactment of the Legislation, regulation of American athletics was, Congress determined, in reality nonexistent. See 1978 Cong. Record, at 31663 (House Debates, September 26, 1978) (remarks of Rep. Michel); Commission Report, at 12-13. The function of centrally organizing American amateur sports was ***52** not performed by anyone until the President and Congress took control and vested in the USOC the exclusive power to oversee amateur athletics in the United States. See 1978 U.S. Code Cong. and Adm. News, at 7485. For these reasons, the USOC performs an indisputably "public function" made possible only by virtue of the governmental intervention.

A simple fact underscores the USOC's clear performance of a public function: the USOC in fact performs no private function. It is not, in contrast to the utilities in Jackson and Pollak, or the private nursing homes in Blum v. Yaretsky, in the business of generating profits. It is not a private nonprofit institution like the private schools in Rendell-Baker, but is instead federally chartered. It is not a social ***53** club, like the petitioner in Moose Lodge. The USOC exists solely to further national objectives mandated by federal law. It was chartered so that the United States, through the performance of its amateur athletes, could enhance its stature internationally. And it is explicitly appointed to represent the United States.

The Court of Appeals failed to recognize the public purpose behind the USOC. As set forth above, given the absence of a private raison d'etre, the USOC necessarily performs a public function made possible only by virtue of federal intervention and regulation. The USOC's conduct in this case therefore constituted state action. [11]

***54 IV.**

THE USOC'S CHALLENGED CONDUCT CONSTITUTED STATE ACTION FOR THE SEPARATE AND INDEPENDENT REASON THAT CONGRESS REMOVED THE WORD "OLYMPIC" FROM THE PUBLIC DOMAIN AND VESTED ABSOLUTE CONTROL OVER THIS MEANS OF EXPRESSION IN THE USOC.

Petitioners' Brief conclusively demonstrates that the word "olympic" was in the public domain. It is also incontrovertible that the word would have remained in the public domain in the absence of Congress' alleged grant to the USOC of an exclusive monopoly in the word. Where a private entity assumes control of a resource formerly within the public domain, courts have ***55** readily found "state action" in the private entity's exercise of that control. In Evans v. Newton, 382 U.S. 296 (1966), for instance, a city, pursuant to a will containing a "whites only" provision, had served as the trustee of a park. Notwithstanding the "whites only" provision in the will, the city had previously maintained the park as a previously maintained the park facility. The city then resigned as trustee, and a state court appointed new, private trustees. Black citizens of the city feared that the private trustees would segregate the park under the mandate of the will. This Court stated that "[m]ass recreation through the use of parks is plainly in the public domain . . . ." Evans v. Newton, 382 U.S. at 302. Hence, under the facts of Evans, this Court held that "the ***56** public character of this park requires that it be treated as a public institution subject to the command of the Fourteenth Amendment, regardless of who now has title under state law." Id.

In the case at hand, the use of the word "olympic," like the use of the park in Evans, was "plainly in the public domain" until Congress passed legislation conferring on the USOC the exclusive right to the word. With this legislation, Congress removed a public resource from the free use by all and endowed the USOC with the right and power to pick and choose which persons would be allowed to use it. Under the circumstances of the instant case, as in Evans, the public character of the resource in issue "requires that it be treated as a public institution subject to the command of the [Fifth] Amendment, ***57** regardless of who now has title" to or control of the public resource. Therefore, state action exists under the facts of this case.

The standard of the Court's inquiry into the "state action" issue is even more demanding where the public resource implicates a preferred right, such as the right of free expression under the First Amendment. See discussion supra. It is well established that words that are in the public domain implicate First Amendment rights of free expression. This is clearly demonstrated by the constitutional parameters of copyright protection. The Copyright Act protects First Amendment rights by refusing to extend copyright protection to that which is in public domain. ***58** Harper & Row Publishers v. Nation Enterprises, 471 U.S. 539, _____, 105 S. Ct. 2218, 2224 (1985). Similarly, in Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 840 (1978), this Court recognized that the First Amendment grants the press the right to use information within the public domain. Moreover, the public's right to information within the public domain is coextensive with that of the press. Nixon v. Warner Communications, 435 U.S. 589, 609 (1978). The Court has left no room for doubt that the public's use of words within the public domain is protected by the First Amendment. See Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 495 (1975).

If the USOC indeed has received, by dint of federal legislation, exclusive control over the word "olympic" (and assuming that such control were held to be constitutionally justifiable), then ***59** the USOC's exercise of that control in granting and withholding consent to the use of the word constitutes "state action" for purposes of equal protection analysis. Not only does the USOC control a public resource, as did the private trustee in Evans v. Newton, but the public resource involved in the instant case is of vital First Amendment concern. The combination of these two factors, together with the other indicia of governmental action discussed supra, compels a finding of "state action" on the part of the USOC in this case.

This Court's opinion in Columbia Broadcasting Sys., Inc. v. Democratic Nat. Comm., 412 U.S. 94 (1973), supports the conclusion that a finding of state action is warranted where a private entity pursuant to government fiat exercises exclusive control over a ***60** segment of the public domain which is protected by the First Amendment, unless a countervailing Constitutional right compels the court to find otherwise. In Columbia Broadcasting, the Court of Appeals below had held that, in refusing to accept editorial advertisements, television and radio broadcast licensees engaged in governmental action violative of the First Amendment. 450 F.2d 642, 651 (1971). This Court reversed that decision, but recognized that the Court of Appeals'

characterization of broadcasters as "instrumentalities of the Government" was "not without validity" because the broadcasters are "granted use of part of the public domain." Columbia Broadcasting, 412 U.S. at 115. (Opinion of Burger, C.J., Rehnquist, J. and Stewart, J.).

***61** Under the particular facts of Columbia Broadcasting, however, this Court declined to find governmental action with respect to the broadcaster's refusal to accept editorial advertising because the challenged conduct in that case was itself protected by the First Amendment. A plurality of this Court in Columbia Broadcasting stated that to hold that the broadcaster's conduct was governmental action would be "anomalous" and "contradictory" to the First Amendment, since it would offend the "concept of private, independent journalism," which is itself rooted in the First Amendment. Id. at 2095. The Court distinguished the private transportation utility in Public Utilities Commission v. Pollak, supra, whose conduct in playing music on its buses was held to be state action for ***62** purposes of the First Amendment, from the private broadcaster which refused to relinquish its discretion over the context of its broadcast. The plurality explained that the "basic distinction, perhaps, between Pollak and this case is that Pollak was concerned with a transportation utility that itself derives no protection from the First Amendment." Columbia Broadcasting, 412 U.S. at 120. The compelling First Amendment interests of the broadcaster in controlling the content of its broadcasts vitiated what otherwise would have been a finding of state action.

Like the transportation utility in Pollak, the USOC derives no protection from the First Amendment. In contrast to the journalistic privacy and independence threatened in Columbia Broadcasting, there exists no ***63** countervailing constitutional interest at stake to counteract a finding of state action in the instant case. The USOC's denying petitioners, but not many other groups, the right to use the word "olympic" in connection with their athletic competition therefore unequivocally demands a finding of state action.

V.

CONCLUSION

The Court of Appeals failed to conduct any meaningful examination whatsoever into the question whether the USOC engaged in state action. Under either of the state action analyses discussed in Parts III and IV above, the particular facts of the instant case lead to the inevitable conclusion that the USOC engaged in state action when it discriminated against petitioners in ***64** connection with the use of the word "olympic." The holding of the Court of Appeals therefore must be reversed and the case remanded.

Respectfully submitted,

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***A1 APPENDIX**

INTEREST OF AMICUS CURIAE

Bay Area Lawyers for Individual Freedom (BALIF) is a professional organization of more than 400 gay and lesbian attorneys, law students and legal workers in Northern California. BALIF works to increase the representation and input of lesbians and gay men in the judiciary, local and state Bar organizations, and other policy-making agencies and commissions. The organization also takes action on questions of law and the administration of justice as they affect the lesbian and gay community, including the filing of amicus curiae briefs.

Lambda Legal Defense and Education Fund, Inc. ("Lambda"), is a New York nonprofit corporation, and is the oldest and largest national gay and lesbian ***A2** legal organization in the country. Lambda has appeared as counsel of record or as amicus curiae in numerous cases involving the legal rights of gay men and lesbians in state and federal courts throughout the country, including major challenges to statutes which restrict the constitutional rights of lesbians and gay men, and in cases that have challenged laws, regulations or private actions which discriminate against or restrict the basic civil rights of gay men and lesbians. Lambda has a strong interest in this case, and is particularly concerned with the denial of equal protection consistently experienced by gay individuals and organizations when exercising their constitutional rights.

Lesbian Rights Project is a nonprofit, public interest law firm, ***A3** organized to protect and defend, through legal action and legal education, the rights of lesbians and gay men. The Project provides representation in both individual and impact cases, conducts community education programs designed to inform lesbians and gays of their legal rights, holds education programs for lawyers to improve the quality of advocacy done on behalf of lesbians and gay men and produces articles, bibliographies and litigation manuals for use by attorneys throughout the country. The Project has appeared as counsel and has filed amicus briefs in the United States Supreme Court, the Circuit Courts of Appeal, and the courts of California.

The Mexican American Legal Defense and Educational Fund ("MALDEF") is a national civil rights organization ***A4** established in 1967. Its principal objective is to secure, through litigation and education, the civil rights of Hispanics living in the United States. Among these rights is the Constitutional right to free speech under the First Amendment.

The National Council of Teachers of English is an educational organization of 114,000 members and subscribers, most of whom teach English in elementary and secondary schools, and in colleges and universities throughout the United States and Canada. The Council supports First Amendment rights to free expression. The Council recently passed a Sense-of-the-House Motion at its annual business meeting opposing exclusive use of the historic word "olympic" by any group.

National Gay Rights Advocates (NGRA) is a non-profit, public interest ***A5** law firm dedicated to the protection and futherance of the civil rights of lesbians and gay men. NGRA's litigation program has taken it into 20 states, 7 of the U.S. Courts of Appeals and the U.S. Supreme Court.

Because of NGRA's special expertise and successes in the emerging field of gay rights law it has earned the praise of a U.S. District Court Judge and the Mayor of San Francisco. On three occasions NGRA has been invited to present oral argument in the U.S. Court of Appeals as an amicus curiae.

NGRA has more than 10,000 members and contributors from the fifty states and the District of Columbia. Many of these persons participated in the athletic event that was to be called the "Gay Olympic Games I". Many others were deterred from participating because of ***A6** this litigation. On behalf of these people NGRA asserts its interest herein as an amicus curiae.

Public Advocates, Inc. is a nonprofit public interest law firm. Since its inception in 1971, Public Advocates, Inc. has represented organizations of minorities, the poor, the handicapped, the disabled and the aged. Public Advocates, Inc. appeared as amicus curiae in the Court of Appeals in this case, and has appeared before the California Supreme Court on issues involving gay rights.

Footnotes

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1 36 U.S.C. §380, in relevant part, prohibits, without the consent of the USOC, the use of "the words 'Olympic,' 'Olympiad,' 'Citius Altius Fortius,' or any combination or simulation thereof tending to cause confusion, to cause mistake, to deceive, or to falsely suggest a connection with the Corporation or any Olympic activity."

2 The interpretation and constitutionality of 36 U.S.C. §380 are discussed in other briefs.

3 Although the Fifth Amendment does not explicity contain an equal protection clause, this Court has consistently held that the Fifth Amendment forbids discrimination which is "so unjustifiable as to be violative of due process." Bolling v. Sharpe, 347 U.S. 497, 499 (1954). See also Schneider v. Rusk, 377 U.S. 163, 170 (1964). The equal protection analysis used in the context of the Fifth Amendment (which applies to the federal government) is the same as that used in the context of the Fourteenth Amendment (which applies to the states). Buckley v. Valeo, 424 U.S. 1, 93 (1976).

4 Under the "state action" requirement, the Fifth Amendment protects only against governmental, and not against private, conduct. Lugar v. Edmondson Oil Co., 457 U.S. 922, 936 (1982), quoting Flagg Brothers v. Brooks, 436 U.S. 149, 156 (1978).

5 As discussed in other briefs, an appropriately narrow interpretation of 36 U.S.C. § 380 would render the inquiry into this constitutional issue unnecessary.

6 As discussed below, while the existence of only one of these factors may not, in a particular case, be sufficient to find state action (see, e.g., Rendell-Baker v. Kohn, 457 U.S. 830 (1982); Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972)), where all of the factors are present, a finding of state action is compelled.

7 Likewise, Blum v. Yaretsky, 457 U.S. 991 (1982), a companion case to Rendell-Baker, is distinguishable. In Blum, the decisions whether to transfer Medicaid patients to different hospitals without notice and hearing ultimately turned on a medical judgment made by private parties and according to professional standards that were not established by the State. Blum, 457 U.S. at 1009. In Blum, the decision thus in no way depended on state authority. Id. Here, the actions of the USOC are all designed to serve the federal government's interest. See discussion infra. Moreover, Blum involved neither a monopoly nor the impairment of a fundamental right.

8 The Commission was established "to determine what factors impede or tend to impede the United States from fielding its best teams in international competition." Commission Report, at ix.

9 For example, 36 U.S.C. § 375(b) provides that the USOC shall adopt and may amend its constitution and bylaws not to be inconsistent with the laws of the United States or of any State and that the USOC may amend its constitution only if it provides notice and hearing to the general public. 36 U.S.C. § 376 provides for rules relating to membership and dictates certain provisions that the USOC's constitution must contain. 36 U.S.C. § 382(a) requires that the USOC on an annual basis transmit to the President and to each House of Congress a detailed report of its financial operations for the preceding calendar year. 36 U.S.C. § 382(b) provides regulations for dispute resolution. 36 U.S.C. §§ 391-96 provide detailed regulations concerning the USOC's role and jurisdiction over the national governing body of each specific amateur sport. In a number of places in the Act, the USOC is directed not to discriminate based on race, religion, color or national origin with respect to certain activities not relevant here (e.g., 36 U.S.C. § 391(b)), and is directed to encourage and provide assistance to amateur athletic activities for women, handicapped individuals, and racial and ethnic minorities in amateur athletic activities in which they are underrepresented. Id. § 370.

10 The Jackson opinion noted, however, that the monopoly was a natural one that had initially arisen, not by virtue of government action, but as a result of prevailing economic conditions. 419 U.S. at 352 & n.8. The exact opposite is true here.

11 In this respect, the USOC is similar to the Texas Democratic Party in Smith v. Allwright, supra, which existed only for a public reason -- to participate in the electoral process -- and not for any truly private reason.

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