NON-CITIZENS, THE FIRST AMENDMENT, AND STADIUM SPEECH

TARLAN CHAHARDOVALI[*]
NEAL C. TERNES[†]
JOHN HOLDEN[^]

With the history of political speech at sporting events and the United States becoming a part of a multinational coalition to host the 2026 World Cup that will bring a large wave of international tourists to the country, it is important to discuss the application of constitutionally protected speech to non-citizens. While much has been written on American citizens' right to freedom of speech, the discussion around the speech of foreign nationals in the U.S. is very limited. We address this need for discussion by using an incident which took place at the Rio 2016 Olympics as a hypothetical model to provide an examination of the rights of non-citizens inside American sporting venues. We provide a history of the connection between sport stadium speech and the First Amendment in the United States and revisit some of the most influential legal battles impacting future First Amendment claims by non-U.S. citizens before providing an analysis of how our hypothetical plaintiff may fare in court.

∗ T*arlan Chahardovali is a doctoral candidate at Florida State University.*

† *Neal Ternes is a visiting instructor in the Department of Kinesiology at Miami University.*

^ *John Holden is an Assistant Professor in the Department of Management in the Spears School of Business at Oklahoma State University.*

I. INTRODUCTION

During the 2016 Rio Olympics, Iranian activist Darya Safai was asked by Olympic security staff to leave a preliminary volleyball match between Iran and Egypt for holding a protest banner that read "*Let Iranian women enter their stadiums*."[1] Safai burst into tears but continued to hold the sign.[2] Security staff eventually allowed her to stay, in spite of the International Olympic Committee policy which prohibits "demonstration or political, religious[,] or racial propaganda" in Olympic sites or venues.[3] Safai said she cried because "it hurts to explain again and again that this peaceful action is not a political message, but a positive message of peace and human rights."[4]

---

1. *Iran Olympic protest: Woman asked to take down sign*, BBC NEWS (2016), http://www.bbc.com/news/world-middle-east-37075735. Safai, the founder of the "Let Iranian Women enter their Stadiums" campaign, initiated the movement following a decision by the Iranian leadership to ban women from attending stadiums, which were hosting sporting events between teams composed of only men. *See* Daisy Wyatt, *Darya Safai: A strong woman can change history – Iranian media are scared to show that*, INEWS (Aug. 24, 2016), https://inews.co.uk/news/world/iranian-woman-human-rights-darya-safai/. While Safai is often seen as the public face of the movement she often travels with a group of supporters and has also seen others organically support the movement at other high-profile events including the Euro 2016 soccer tournament. *Id.*

2. Wyatt, *supra* note 1.

3. Int'l Olympic Comm. [IOC], Olympic Charter, art. 50, ¶ 2 (Aug. 2, 2015), *available at* https://stillmed.olympic.org/Documents/olympic_charter_en.pdf. The ban on political speech within the Olympic charter is likely a paper tiger of an idealized Olympic movement, which has not existed for many decades. The Olympics have been used as political propaganda in and of themselves since at least 1936. *See generally* SUSAN D. BACHRACH, THE NAZI OLYMPICS: BERLIN 1936 82–84 (2000); *see also* AMY BASS, NOT THE TRIUMPH BUT THE STRUGGLE: THE 1968 OLYMPICS AND THE MAKING OF THE BLACK ATHLETE 6 (2002); *see also* Anne-Marie Brady, *The Beijing Olympics as a Campaign of Mass Distraction*, 197 CHINA Q. 1, 1 (2009). In 2014, International Olympic Committee President Thomas Bach stated "that no athlete would be denied 'freedom of speech' . . . [while] in Sochi" for articulating their displeasure with the Russian government's laws attacking the freedoms of homosexuals. Ben Rumsby, *Winter Olympics 2014: IOC president Thomas Bach says competitors will not be gagged at Sochi Games*, TELEGRAPH (Jan. 27, 2014, 7:28 PM), https://www.telegraph.co.uk/sport/othersports/winter-olympics/10600110/Winter-Olympics-2014-IOC-president-Thomas-Bach-says-competitors-will-not-be-gagged-at-Sochi-Games.html.

4. *Iran Olympic protest: Woman asked to take down sign*, *supra* note 1.

With the announcement on June 13, 2018 that North America (Canada, the United States, and Mexico) would jointly host the 2026 World Cup, and with the majority of the games being played across the United States, examples like Safai's are likely to test U.S. law.[5] The World Cup and international events of its scale have often come with strings attached, including the requirements that hosting countries change laws, at least temporarily, for the "benefit" of the event.[6] While the Constitution remains beyond reproach, even from the diamond-encrusted claws of an organization like FIFA, the upcoming event is likely to raise concerns amongst visitors to the U.S. regarding their rights while in the country.

Though much has been written on speech concerns of American citizens, comparatively little discussion exists about the speech of foreign nationals in U.S. sporting venues.[7] Given the present political climate of protest and the number of policy initiatives targeting foreign nationals, we believe a discussion of the First Amendment and its applicability in cases involving foreign nationals at American sporting events is overdue.[8] Using Darya Safai's protest as a model, we discuss the relevant

---

5. *See* Kevin Baxter, *2026 World Cup is awarded to North America*, L.A. TIMES (June 13, 2018, 2:55 PM), http://www.latimes.com/sports/soccer/la-sp-2026-world-cup-20180613-story.html.

6. Kathleen Tang, *The World Cup: Changing Country's Laws, One Tournament at a Time*, BERKELEY J. INT'L L. BLOG (Oct. 26, 2013), http://berkeleytravaux.com/world-cup-changing-countrys-laws-one-tournament-time/.

7. For an overview of the literature on stadiums as public forums, *see* Ryan M. Rodenberg, John T. Holden & Asa D. Brown, *Real-Time Sports Data and the First Amendment*, 11 WASH. J.L. TECH. & ARTS 63, 72–73 (2015); *see also* Christopher J. Kaufman, *Unsportsmanlike Conduct: 15-Yard Penalty and Loss of Free Speech in Public University Sports Stadiums*, 57 U. KAN. L. REV. 1235 (2009); *see also* Howard M. Wasserman, *If You Build It, They Will Speak: Public Stadiums, Public Forums, and Free Speech*, 14 NINE: A J. BASEBALL HIST. & CULTURE 15 (2006)[hereinafter *If You Build It, They Will Speak]*; *see also* Gerhardt A. Gosnell II, *Banner Policies at Government-Owned Athletic Stadiums: The First Amendment Pitfalls*, 55 OHIO ST. L. J. 1143 (1994).

8. The context within which we frame our First Amendment analysis is following the announcement on January 27, 2017 by President Donald Trump that visitors from Libya, Sudan, Yemen, Somalia, Syria, Iraq, and Iran would be banned (except in limited circumstances) from entering the United States for ninety days. *Protecting the Nation from Foreign Terrorist Entry into the United States*, Exec. Order No. 13,769, 82 Fed. Reg. 8,977, 8,978 (Jan. 27, 2017) (citing 8 U.S.C.1187 (a)(12)).The executive order also cancelled previously issued visas leaving many on arriving flights

constitutional and statutory law and remedies which may restrict her protest if it were conducted in an American sporting venue. Part II of this article reviews the First Amendment and applicable cases concerning fan protests involving signs in U.S. stadiums to determine whether attempts to limit Safai's speech, like the ones she experienced at the 2016 Rio Olympics, could potentially result in litigation. Part III analyzes the status of foreign nationals under the Constitution, and raises a number of concerns as to how non-citizenship status may impact potential litigation stemming from speech restrictions at sport stadiums.

II. SPORT AND THE FIRST AMENDMENT

The scope of free speech protection for non-citizens in sporting contexts is largely an issue of first impression in the United States. Sport-related First Amendment complaints have historically primarily concerned the Free Exercise and Establishment clauses of the Constitution.[9] However, several academic legal analyses examining First Amendment actions are available to provide insight on our hypothetical plaintiff.

For example, during the San Diego Chargers' final preseason game in 1989, a fan-created banner that read "Fire Ortmayer"[10] was removed

---

scared they would be trapped in airports, arrested, and/or subject to deportation. *Trump's Executive Order: Who Does Travel Ban Affect?* BBC NEWS (Feb. 10, 2017), http://www.bbc.com/news/world-us-canada-38781302. Almost immediately challenges in the forms of protests and injunctions were formed or filed. *Id.* Interestingly, while the legal challenges to the travel ban did not raise the First Amendment issue, an order by the Supreme Court of the United States instructed the parties to brief the issue of whether the most recent iteration of the travel ban violates the Establishment Clause of the First Amendment. Garrett Epps, *The Supreme Court's Travel Ban Dilemma*, ATLANTIC (Jan. 28, 2018), https://www.theatlantic.com/politics/archive/2018/01/travel-ban-supreme-court/551669/.

9. See, e.g., Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 294 (2000). Both clauses refer to the government's ability to interfere with or endorse particular religious beliefs. J. Morris Clark, *Guidelines for the Free Exercise Clause*, 83 HARV. L. REV. 327, 327 (1969); John C. Jr. Jeffries & James E. Ryan, *The Political History of the Establishment Clause*, 100 MICH. L. REV. 279, 279 (2001).

10. "Steve Ortmayer [was] the Chargers' director of football operations" from 1988 to 1989, whom many of the fans blamed for making trades that hurt the team and also for the team's overall poor performance. Michael Granberry, *ACLU Hoists Free-*

from the lower level of San Diego's Jack Murphy Stadium.[11] Though no lawsuit was filed, the regulation of banners within the publicly-owned Jack Murphy Stadium drew considerable dissent from advocacy groups.[12] The American Civil Liberties Union ("ACLU") launched an investigation which concluded that, "[w]hether fans are right or not in their opinion of Ortmayer . . . they have a right to express such views in a publicly owned stadium, either verbally or through the use of banners."[13] According to an ACLU spokesperson, the broad censorship of signs in order to limit public criticism to the Chargers' leadership constituted a violation of Constitutional principles.[14]

In another 1989 incident, New York Yankees fans protested owner George Steinbrenner with banners reading "George Must Go," "Fire George," and "George, YOU Are the Problem," which were confiscated by Yankees stadium security.[15] Norman Siegel, executive director of the New York Chapter of the ACLU said: "[s]elective confiscation of banners based upon the content of the message cannot be tolerated in a free society."[16] Additional legal analysis concluded that "no compelling interest justifies banner prohibitions, whether viewpoint-based or viewpoint-neutral."[17]

Following the terrorist attacks of September 11, 2001, the Yankees began playing "God Bless America" during the seventh-inning stretch and using chains and guards to keep fans in their seats so they would

---

Speech Banner in Stadium Sign Ban, L.A. TIMES (Sept. 17, 1989), http://articles.latimes.com/1989-09-17/local/me-248_1_free-speech.

11. *Id.*

12. *See e.g., id.*

13. *Id.*

14. *Id.* An ACLU representative is quoted as saying that a prohibition on banners "would seem antithetical to what sports in America are all about. As long as they don't interfere with a fan's ability to enjoy the game, I don't see why anyone would mind. To not be able to express yourself at a game with a banner or with your own mouth, well, it's nothing less than un-American." *Id.*

15. David Margolick, *Peanuts and Censors at Yankee Stadium*?, N.Y. TIMES (Sept. 9, 1989), http://www.nytimes.com/1989/09/09/nyregion/peanuts-and-censors-at-yankee-stadium.html.

16. *Id*.

17. Lawrence A. Israeloff, *The Sports Fan v. The Sports Team Owner: Does a Franchise's Prohibition of Spectators' Banners Violate the First Amendment?,* 24 COLUM. J. L. & SOC. PROBS. 419, 423 (1991).

stand and participate in a show of patriotism.[18] When one fan in 2008 attempted to leave his seat and use the restroom, he was thrown out of the stadium by New York City police officers.[19] The New York Civil Liberties Union filed a lawsuit on behalf of the fan claiming a violation of his First and Fourteenth Amendment rights. The case was ultimately settled out of court.[20] However, legal commentary on the issue noted that attempts to compel patriotism in this matter fosters potential violations of the First Amendment by both restricting the free speech of individual fans as well as establishing and enforcing a state religion.[21]

Another discussion of First Amendment rights of fans at Yankees' games has emerged over the implementation of a policy banning the use of vuvuzelas in the stands.[22] Vuvuzelas—plastic horn instruments popularized in the United States following the 2012 World Cup in South Africa—came under scrutiny after a Yankees fan using the instrument to heckle the visiting Philadelphia Phillies was asked to leave a game in 2010.[23] While no lawsuit was filed on behalf of the fan, legal scholarship investigating the issue has contended that the use of a vuvuzela constitutes protected expressive speech and that the fan would likely be able to successfully sue the Yankees for prohibiting him from playing the instrument during a game.[24]

First Amendment issues affecting fans are not relegated to actions taken outside of stadiums. For example, in soliciting bids for the Super Bowl, the NFL has routinely requested governmental protections for

---

18. Nick DeSiato, *Silencing the Crowd: Regulating Free Speech in Professional Sports Facilities* 20 MARQ. SPORTS L. REV. 411, 411 (2010).

19. *Id.*

20. Kevin Underhill, *Yankees Fans Now Free to Move About During "God Bless America"*, LOWERING THE B. (July 7, 2009), https://loweringthebar.net/2009/07/yankees-fans-now-free-to-move-about-during-god-bless-america.html.

21. *See generally* DeSiato, *supra* note 18, at 411–13.

22. Shane Kotlarsky, *What's All the Noise About: Did the New York Yankees Violate Fans' First Amendment Rights by Banning Vuvulezas in Yankee Stadium?*, 20 JEFFREY S. MOORAD SPORTS L.J. 35, 36 (2013).

23. Jeremy Olshan, *Yanks ban vuvuzela pests' instrument of torture*, N.Y. POST (June 17, 2010, 4:00 AM), http://www.nypost.com/p/news/local/bronx/bronx_blowhards_v3yRWOSPKLLHaIUNFaus1I.

24. Kotlarsky, *supra* note 22, 66–67.

sponsors in the area surrounding the stadium.[25] These "Clean Zones" are intended to prevent ambush marketing—a practice of entities who are not sponsors of a major sporting event using proximity and subtle references to imply a relationship and boost sales.[26] In practice, "Clean Zones" serve as a government enforcement of speech protections to guarantee the sanctity of private sponsorship agreements between the NFL and its sponsors.[27] Legal author Ari Sliffman argues that even though these restrictions target commercial speech, they still do not amount to a clear constitutional violation.[28]

Similarly, legal analysis by another legal scholar questioned the enforceability of sign policies implemented during ESPN's popular College Football GameDay program.[29] While the show rarely broadcasts from inside of stadiums, each broadcast draws hundreds of fans who typically stand behind the set waving flags, banners, and signs.[30] ESPN policies prohibit signs which depict political, religious, or profane language and are normally enforced, at least in part, by local campus police officers.[31] According to Ternes, the restriction of speech on the public fora of college campuses, even by a private entity like ESPN, represents an illegal restriction of individual speech based on its content.[32] Again, while lawsuits aimed at the ESPN GameDay policy have only been mentioned, there is substantial evidence to suggest that such a case would likely succeed.[33]

These incidents raise two considerations in discussing potential First Amendment litigation in our hypothetical case: first, the applicability of

25. Ari J. Sliffman, *Unconstitutional Hosting of the Super Bowl: Anti-Ambush Marketing Clean Zones' Violation of the First Amendment*, 22 MARQ. SPORTS L. REV. 257, 258–59 (2011).

26. *Id.* at 260.

27. *Id.* at 258–59.

28. *Id.* at 283–84.

29. Neal Ternes, *Everywhere a Sign: ESPN College GameDay and the First Amendment*, 17 TEX. REV. ENT. & SPORTS L. 159, 159 (2017).

30. Sean Rossman, *Does ESPN's GameDay control free speech?,* TALLAHASSEE DEMOCRAT (Oct. 23, 2014, 2:18 PM), http://www.tallahassee.com/story/news/local/2014/10/22/espns-gameday-control-free-speech/17721195/.

31. *Id.*

32. *See* Ternes, *supra* note 29, at 160.

33. *Id.* at 163–65.

the First Amendment to the forum in which the speech and restriction take place, and second, whether the restriction is content-specific or merely a restriction based on time, place, and manner.

In order for the First Amendment to apply to any potential claim by our hypothetical non-citizen plaintiff, the restricting party must first be shown to be a state actor.[34] This would include any sporting venue that is publicly owned,[35] any venue with significant government ties,[36] and speech restrictions enforced by public police forces.[37] Given that most modern stadiums in the United States are publicly financed,[38] and many major sporting events take place either directly on public property (such as those between public universities), in conjunction with significant state support, and with the help of public law enforcement, it is

---

34. *See* U.S. CONST. amend. I, cl. 1 (stating "Congress shall make no law . . . ."). This power is extended to include action by state governments via the 14th Amendment. *See*, *e.g.*, Gitlow v. New York, 268 U.S. 652, 654 (1925); Griswold v. Connecticut, 381 U.S. 479, 494 (1965).

35. Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713, 1765 (1987). Though the analysis of when a stadium is publicly owned is a separate analysis and one of degrees when considering the structure of modern stadium financing arrangements, this discussion is largely beyond the scope of this paper. For further discussion on the issue of stadium financing and the Gordian knot of public and private financing, *see generally* Christopher M. McLeod & John T. Holden, *Ecological Economics and Sport Stadium Public Financing*, 41 WM. & MARY ENVTL. L. & POL'Y REV. 581 (2017).

36. *See* Burton v. Wilmington Parking Auth., 365 U.S. 715, 725–26 (1961); Kaitlin Shire, *You Can't Sit with Us: Limiting Free Speech in Sports Arenas and How the Tampa Bay Lightning Took Home Ice Advantage Too Far*, 24 JEFFREY S. MOORAD SPORTS L.J. 81, 82 (2017).

37. *See* Griffin v. Maryland, 378 U.S. 130, 135 (1964). There remains something of an open question regarding the use of private police or security and whether by performing the functions of a state-actor often through public-private police partnerships constitutional rights may be triggered. *See generally* M. Rhead Enion, *Constitutional Limits on Private Policing and the State's Allocation of Force*, 59 DUKE L.J. 519, 519 (2009).

38. *See generally* Clay Calvert & Robert D. Richards, *Fans and the First Amendment: Cheering and Jeering in College Sports*, 4 VA. SPORTS & ENT. L.J. 1 (2004); David Uberti, *How American sports franchises are selling their cities short*, THE GUARDIAN (Sept. 22, 2014, 7:15 PM), https://www.theguardian.com/cities/2014/sep/22/-sp-how-american-sports-franchises-sell-cities-short; Richard Florida, *The Never-Ending Stadium Boondoggle*, CITYLAB (Sept. 10, 2015), https://www.citylab.com/equity/2015/09/the-never-ending-stadium-boondoggle/403666/.

reasonable to conclude that the number of sporting venues satisfying the criteria for a public forum is meaningful.[39]

Forum analyses distinguish between three types of publicly held spaces with differing degrees of protection afforded for First Amendment claims.[40] Public fora are spaces owned and operated by the government for the purpose of peaceable assembly and speech with restrictions limited to strict scrutiny,[41] such as public parks or most sidewalks.[42]

Limited public fora are publicly operated spaces set aside for expressive activities but where the government may put reasonable limitations on who may use the forum.[43] Examples of a limited public fora would include public school buildings, municipal auditoriums, and sports stadiums,[44] as they are typically constructed with a specific intended function, but can be made available to the public for a number of different activities.[45] While it is acceptable to limit speech which may disrupt the functioning of events in these spaces (such as dress codes in public schools or rules prohibiting signs that obstruct views of other fans at a sporting event), these limits are almost always content neutral and relative to the intended function of the space during an event.[46]

---

39. Howard M. Wasserman, *Fans, Free Expression, and the Wide World of Sports*, 67 U. PITTSBURGH L. REV. 525, 550 (2006).

40. *See* Post, *supra* note 35, at 1750–51.

41. *See, e.g.*, Hague v. Comm. for Indus. Org., 307 U.S. 496, 515-16 (1939); *see also* Grayned v. City of Rockford, 408 U.S. 104, 115–16 (1972).

42. United States v. Kokinda, 497 U.S. 720, 727 (1990).

43. *See, e.g.*, Widmar v. Vincent 454 U.S. 263, 270–71 (1981); Rosenberger v. Rector and Visitors of the Univ. of Va., 515 U.S. 819, 829–30 (1995). For an extensive overview of the limited public forum doctrine *see* Michael Stokes Paulsen, *A Funny Thing Happened on the Way to the Limited Public Forum: Unconstitutional Conditions on "Equal Access" for Religious Speakers and Groups*, 29 U.C. DAVIS L. REV. 653 (1996).

44. *See* Calvert *supra* note 38, at 4; Wasserman *supra* note 39, at 550–51. *See generally* Ludtke v. Kuhn 461 F. Supp. 86, 95 (S.D.N.Y. 1978).

45. *See* Kotlarsky *supra* note 22, at 56–57. For example, while open to the public, sports stadiums still require a ticket for access (and continued access for duration of the event can be conditioned to adherence of content-neutral behavioral restrictions), and thus, unlike a public park or sidewalk, which any one can access without fee, stadiums maintain some limitations on access. *See, e.g.*, *id*.

46. *See, id*. at 52.

Finally, non-public fora, which are publicly owned spaces like military bases or airports that traditionally are not set aside for expressive activities.[47] These spaces have the most restrictions on free speech in order to protect the safety of the public and to facilitate the utility of the public space for its intended function.[48]

Content-based restrictions to free speech in a designated public forum are subject to strict scrutiny,[49] meaning there must be a compelling government interest in a speech restriction that is content-specific.[50] Outside of speech content—normally seen as beyond the scope of First Amendment protection, such as fighting words[51] or incitement[52]—there is little that stadium managers can do to implement content-based speech restrictions in their public facilities.[53] Given that Safai's banner read, "Let Iranian women enter their stadiums" [54] – a political message which does not fall into a category of speech outside of constitutional protection—any content-based restriction of her speech would likely violate the First Amendment.

Limited public fora can, however, regulate speech based on time, place, and manner, so long as the restrictions remain content-neutral.[55] This would be most applicable to Safai's case if a stadium were to have

---

47. *See, e.g.*, Greer v. Spock, 424 U.S. 828, 838 (1976).

48. *See Greer*, 424 U.S. at 854–56.

49. Christian Legal Soc'y Chapter v. Martinez, 561 U.S. 661, 741 n.11 (2010). Strict scrutiny can be best understood as the Court determining through a normative judgement whether a government interest is important enough to justify a speech restriction and an empirical judgement as to whether the means of restriction are narrowly tailored to achieve those means. *See* Eugene Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U. PA. L. REV. 2417 (1997).

50. For a discussion on the applicability of the First Amendment, *see generally* Ashcroft v. ACLU, 535 U.S. 564, 573 (2002) (stating "'the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.'") (Quoting Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 65 (1983)); *see generally* New York Times Co. v. Sullivan, 376 U.S. 254 (1964); Virginia v. Black, 538 U.S. 343 (2003); Nat'l Socialist Party of Am. v. Vill. of Skokie, 432 U.S. 43 (1977); Snyder v. Phelps, 131 S. Ct. 1207 (2011).

51. *See* Chaplinsky v. New Hampshire 315 U.S. 568, 571–72 (1942).

52. *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

53. *If You Build It, They Will Speak*, *supra* note 7, at 19.

54. *See* sources cited *supra* note 1.

55. See Ward v. Rock Against Racism, 491 U.S. 781, 792–93 (1989).

instituted a general prohibition on signs and banners during games—a policy that has previously been implemented by several sports teams.[56] The rationale behind such policies—that signs and similar communicative devices both pose safety hazards and create viewpoint obstructions—has been upheld in a court ruling upholding a ban on flag sticks at the University of Mississippi.[57] However, such policies are not infallible and could face legal challenges for being overbroad for banning all sizes and materials of signs from sporting venues.[58]

In our hypothetical case involving non-citizen speech, a stadium policy prohibiting signs and banners could be challenged for being overly broad, but it is unlikely that such a challenge would be successful given that time, place, and manner restrictions only face an intermediate scrutiny standard in limited public fora.[59] Such a ban would not prevent a non-citizen plaintiff from wearing, as Safai did, a shirt bearing a similar political message or for verbally expressing her political position in the stands.[60]

Attempts to remove Safai or her banner from a U.S. stadium, like the ones she encountered at the 2016 Rio Olympics, would likely be found unconstitutional. Barring a stadium policy that prohibits signs out of a general safety or viewpoint obstruction concern, Safai would have grounds for a First Amendment claim if attempts were made to curb her speech in a U.S. venue. While the International Olympic Committee

---

56. *See e.g.*, Paul Kimbrough, *UVA Dropped Ball on Sign Ban*, MISS. ST. U. WIRE REFLECTOR, Sep. 12, 2008; *see also Dodgers to Review Stadium Flag Ban*, ASSOCIATED PRESS, June 20, 2007 (the review by the Dodgers came after members of the Canadian expatriate group were ejected from a game for waiving a Canadian flag in support of Canadian-born Dodger's player Russel Martin).

57. Barrett v. Khayat, No. CIV.A. 397CV211BA, 1999 WL 33537194, at *3, *7 (N.D. Miss. Nov. 12, 1999). The Mississippi ban was highly contentious as it was viewed as an effort by University Chancellor Robert Khayat to eliminate the waving of the confederate flag at football games. *Id.* at *2–*4. *See also* Brian Cabell, *Flag bans tugs on Ole Miss traditions*, CNN (Oct. 25, 1997, 10:44 PM), http://www.cnn.com/US/9710/25/ole.miss/.

58. *See* Kaufman, *supra* note 7, at 1266.

59. Time, place, and manner restrictions must be "'narrowly tailored' in order to survive First Amendment challenge," but the court stops short of applying a strict scrutiny standard. *See Ward*, 491 U.S. at 799 n.6.

60. *See* Kaufman, *supra* note 7, at 1267.

policy[61] may prohibit political speech, IOC policy does not override Constitutional protections.[62]

III. FIRST AMENDMENT CLAIMS FOR NON-U.S. CITIZENS

While Darya Safai would likely be able to claim that speech restrictions placed on the display of her sign violated her First Amendment right to free speech if she were a citizen, there is still a question about the applicability of the First Amendment claims made by non-citizens.[63] Many legal scholars have taken the positions that foreign nationals are "persons" and therefore share all constitutional protections not expressly reserved to citizens.[64] From this perspective, the only rights not held by foreign nationals are the right to vote and the right to hold elective office.[65] On the opposite end of the debate, there are a number of court rulings which argue that foreign nationals have limited, if any, constitutional rights.[66] For those advocating such positions, the different treatment of citizens and non-citizens (often referred to in such contexts as "aliens")[67] is justified because if they were to be treated

---

61. IOC, *supra* note 3.

62. "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding" U.S. CONST. art. VI., cl. 2.

63. David Cole, *Are Foreign Nationals Entitled To The Same Constitutional Rights As Citizens?*, 25 T. JEFFERSON L. REV. 367, 368–69 (2003) [hereinafter *Foreign Nationals*].

64. *Id.* at 368.

65. David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 978 (2002) [hereinafter *Enemy Aliens*].

66. *Id.* at 970; *see also, e.g.*, Galvan v. Press, 347 U.S. 522, 531–32 (1954); Yamataya v. Fisher, 189 U.S. 86, 101 (1903); Chae Chan Ping v. United States, 130 U.S. 581, 596–97, 603 (1889).

67. "By definition, aliens are outsiders to the national community. Even if they have lived in this country for many years, have had children here, and work and have deep community ties in the United States, noncitizens remain aliens, an institutionalized 'other,' different and apart from 'us.' The classification of persons as aliens, as opposed to citizens, has significant legal, social, and political importance." Kevin R. Johnson, *"Aliens" and The U.S. Immigration Laws: The Social and Legal Construction of Nonpersons*, 28 U. MIAMI INTER-AM. L. REV. 263, 264 (1996).

equally, the concept of citizenship itself would be meaningless.[68] In this section, we focus on the history of legal precedent concerning the constitutional protections afforded to non-citizens in order to outline the inconsistent legal terrain facing potential international litigants in First Amendment proceedings.

The Chinese Exclusion Act, adopted in 1882, was the first statute in U.S. history to specifically prohibit immigration based on nationality.[69] Wong Wing and three other Chinese men were determined to be unlawful Chinese immigrants and were sentenced to sixty days of hard labor at the Detroit House of Labor before being deported back to China.[70] In *Wong Wing v. United States*, the court voided their imprisonment and ruled that the Fifth, Sixth, and Fourteenth Amendments protect non-citizens who are charged with crimes.[71] This case is important because it established that non-citizens subject to criminal proceedings are protected by the same constitutional protections given to citizens.[72] While previous rulings stemming from the Chinese Exclusion Act reinforced the power of Congress to exclude and expel aliens from the country,[73] the decision put forth in *Wong Wing* balanced those decisions by also guaranteeing non-citizens in the country constitutional protections during immigration proceedings.[74]

Similarly, the Court has acknowledged that the Equal Protection Clause is "universal in [its] application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality."[75] This ruling was the result of *Yick Wo v. Hopkins*, where Wo, a Chinese laundry owner, challenged a San Francisco city ordinance that prohibited the operation of laundry facilities in wooden buildings.[76] While not explicit in the statute, the ordinance targeted many Chinese laundry owners who tended to operate out of wooden

68. *See Foreign Nationals*, *supra* note 63, at 367.
69. *See Chae Chan Ping*, 130 U.S. at 597.
70. Wong Wing v. United States, 163 U.S. 228, 234 (1896).
71. *Id.* at 238.
72. *Id.*
73. *See, e.g.*, Fong Yue Ting v. United States, 149 U.S. 698, 732 (1893) (discussing The Chinese Exclusion Act and several different cases).
74. *Wong Wing*,163 U.S. at 238.
75. Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886).
76. *Id.* at 369.

buildings[77]. When Wo, a non-citizen, was jailed for refusing to pay a fine stemming from the ordinance, he argued that his constitutional right to Equal Protection had been violated.[78] The Court ruled that Wo was entitled to equal protection under the Fourteenth Amendment, and that the California-based ordinance that was prohibiting the operation of laundry businesses in wooden buildings was discriminatory despite the lack of any explicit language in the statute targeting Chinese businesses.[79]

On the other hand, there are also cases where non-citizens have been denied full or partial constitutional rights by the courts. For example, in *Porterfield v. Webb* and *Terrace v. Thompson* the courts in both Washington and California affirmed that it was illegal for Japanese people to buy and own land in the United States—a decision predicated on ethnic grounds.[80] Porterfield was a citizen of the United States and a resident of California who desired to lease his land to Mizuno, a Japanese citizen, for a term of five years.[81] However, because of a treaty between the United States and Japan that did not grant Japanese citizens the privilege to acquire or lease land for agricultural purposes,[82] the court announced that Mizuno was ineligible to enter a contract with Porterfield.[83] Similarly, in *Terrace v. Thompson* the Court ruled that the Terraces, who were American citizens, had no right by the Fourteenth Amendment to lease their land to aliens who, according to the Constitution of Washington were prohibited to own lands unless they had, in good faith, declared the intention to become American citizens.[84]

In *Bridges v. California*, the court recognized the rights of Harry Bridges, an Australian and outspoken socialist working as a longshoreman in California, to free speech protections under the

77. *Id*. at 373–74.

78. *Id*. at 365–66.

79. *Id*. at 374.

80. Porterfield v. Webb, 263 U.S. 225, 233 (1923); Terrace v. Thompson, 263 US 197, 223–24 (1923). Notably, the Supreme Court similarly upheld the internment of Japanese-American U.S. citizens during World War II. Korematsu v. United States, 323 U.S. 214, 222–24 (1944).

81. *Porterfield*, 263 U.S. at 231.

82. *Id*. at 232.

83. *Id*. at 233.

84. WASH. CONST. art. II, § 33 (repealed 1966); *Terrace*, 263 U.S. at 221.

Constitution after Bridges helped publish an opinion in the Los Angeles Times threatening a union strike, ostensibly to influence ongoing legal proceedings.[85] Bridges' status as a non-citizen was not addressed by the majority, but Justice Frankfurter, writing in dissent, noted that only the Due Process clause granted constitutional rights to resident aliens, but the limitations to which protections are granted to non-citizens in such cases are non-specific.[86] Simply, Justice Frankfurter's dissent raises the question of whether the Fourteenth Amendment actually extends First Amendment protections to non-citizens or whether their civil liberties are more limited.[87]

Following this case, the state of California attempted to have Bridges deported for his communist sympathies.[88] However, the Supreme Court ruled in *Bridges v. Wixon* that Bridges' sympathies or beliefs were not enough evidence to prove a direct tie to the Communist Party, and the previous rulings favoring deportation were thrown out.[89] Writing in concurrence, Justice Murphy acknowledged that "this Court has previously and expressly recognized that Harry Bridges, the alien, possesses the right to free speech," and that "the very provisions of the Constitution negative the proposition that Congress, in the exercise of a 'plenary' power, may override the rights of those who are numbered among the beneficiaries of the Bill of Rights."[90]

In cases of individuals with a legal status in the country, in *Kwong Hai Chew v. Colding*, the Court stated that rights that are "protected by the First and the Fifth Amendments and by the due process clause of the Fourteenth Amendment" do not acknowledge "any distinction between

85. Bridges v. California, 314 U.S. 252, 277–78 (1941).

86. *Id.* at 280–81.

87. *Id*. It is worth noting that Justice Frankfurter's dissent also mentions the limited scope of protections granted to corporations under the Due Process Clause, stating that such protections only exist for their property. *Id.* In light of the court's decision in *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 371 (2010), where the Court held that corporations do indeed possesses First Amendment rights, it is worth questioning whether the present Court would be willing to deny the "person-hood" of non-citizens under the Constitution in First Amendment cases while simultaneously granting this status to international corporations.

88. Bridges v. Wixon, 326 U.S. 135, 137–38 (1945).

89. *Id.* at 156–57.

90. *Id.* at 161–62 (Murphy, J., concurring).

citizens and resident aliens."[91] Kwong Hair Chew was a Chinese seaman who was admitted to permanent residency in the United States but was "temporarily excluded" under 8 CFR § 175.57(b) upon his arrival from a ship voyage that included calls at several foreign ports in Asia. [92] In this case, the Supreme Court held that a lawful permanent resident who departs and returns to the country as a seaman on an American ship retains procedural due process rights and shall not be deported without a hearing.[93]

Contrary to Section 10 of the Act of March 3, 1891, which suggests unlawful aliens shall immediately be deported,[94] there are examples of the courts stating that "once an alien enters the country, the legal circumstance changes [in that] the Due Process Clause applies to all 'persons' within the United States, including aliens, [whose] . . . presence here is lawful, unlawful, temporary, or permanent."[95] This ruling was specifically mentioned in *Zadvydas v. Davis*, after Kestutis Zadvydas, a resident alien, was ordered deported in 1994 because of his criminal record.[96] In that case, the Court ruled that a statute authorizing "indefinite detention of [an alien] would raise serious constitutional" problems, stating that "aliens who have once passed through [the country's] gates, even illegally, may be expelled only after conforming to traditional standards of fairness encompassed in due process of law."[97]

More recently, the courts have relied on a 'substantial connection' standard for determining whether a non-citizen would be granted constitutional protections.[98] In *United States v. Verdugo-Urquidez* the court asserted that "aliens receive constitutional protection when they have come within the territory of the United States and developed

---

91. Kwong Hai Chew v. Colding, 344 U.S. 590, 596 n.5 (1953) (quoting *Bridges*, 326 U.S. at 161 (Murphy, J., concurring)).

92. *Id.* at 592, 594.

93. *Id.* at 601–02.

94. Immigration Act of 1891, ch. 551, § 10, 26 Stat. 1084, 1086.

95. Zadvydas v. Davis, 533 U.S. 678, 693 (2001); *see also* Plyler v. Doe, 457 U.S. 202, 210 (1982); Mathews v. Diaz, 426 U.S. 67, 77 (1976).

96. *Zadvydas*, 533 U.S. at 684.

97. *Id.* at 682; *id.* at 695 (quoting Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 212 (1953)).

98. Michael Kagan, *Do Immigrants Have Freedom of Speech?* 6 CAL. L. REV. CIR. 84, 89 (2015).

substantial connections with this country."[99] The Court has also held that an alien extradited to the United States with no previous voluntary connection cannot claim Fourth Amendment rights to challenge the extraterritorial search of their property.[100] This standard would almost certainly exclude a non-citizen who has illegally entered the country; however, it is unclear exactly how long of a stay would be necessary for a foreign national to show proof of substantial connection, and therefore acquire First Amendment protection, and whether constitutional protection would stay in place if the person remained in the country past the exact expiration date of a visa.[101]

For example, in *U.S. v. Tehrani*, the Court ruled that the search and seizure of two non-citizens who had crossed the U.S. border from Canada and were arrested at the Burlington (Vermont) International Airport for the possession of counterfeit credit cards was illegal under the Fourth Amendment.[102] The Court upheld the Fourth Amendment rights of the non-citizens since their "presence in the United States was voluntary, and they had gained admission, [although] surreptitiously, for a temporary visit as tourists."[103] In the opinion of the Court, "[s]uch connections are thus distinguishable from those in Verdugo–Urquidez and constitute the type of connections which would vest in aliens the protections afforded by the Fourth Amendment."[104]

Quite similarly, in *Ibrahim v. Department of Homeland Securit*y, the Court asserted that the plaintiff had "established a substantial voluntary connection with the United States through her . . . studies at a distinguished American university" on a student visa.[105] Ibrahim was a Malaysian citizen and a Ph.D. student at Stanford from 2001 to 2005 but was not permitted to return back to the United States after traveling to a Stanford-sponsored conference in Malaysia to present her academic research.[106] Allegedly, Ibrahim was prevented from flying back to the

99. United States v. Verdugo-Urquidez, 494 U.S. 259, 271 (1990).
100. *Id*. at 261–62.
101. Kagan, *supra* note 98, at 86 n.16.
102. U.S. v. Tehrani, 826 F. Supp. 789, 794–95, 804 (D. Vt. 1993).
103. *Id.* at 804 n.1.
104. *Id.* at n.1.
105. Ibrahim v. Dep't of Homeland Sec., 669 F.3d 983, 996 (9th Cir. 2012).
106. *Id.* at 986.

United States because her name was on a terrorist watchlist.[107] "Ibrahim brought suit in federal district court seeking . . . injunctive relief under the First and Fifth Amendments, with the . . . aim of having her name removed from the government's watchlist," arguing that the U.S. government had mistakenly placed her name on the watchlist.[108] Ibrahim was therefore granted the right to "assert claims against the federal defendants for prospective relief under the First and Fifth Amendments."[109]

The decisions in both *Tehrani* and *Ibrahim* are significant for potential future litigations concerning the substantial connection criteria. If there are instances of non-citizens on tourist and student visas passing the substantial connection test and hence receiving constitutional rights, it seems likely that an international tourist visiting for major sporting events like the Olympics or World Cup will also be afforded such a status.

Nevertheless, based on the inconsistent legal terrain facing potential international litigants in First Amendment proceedings, it is fair to say that non-citizen speakers, irrespective of their legal or illegal status, may still face challenges to claim that their First Amendment rights were violated by speech restrictions in a U.S. sports venue.[110] The Supreme Court has affirmed the right of the federal government to deny a person entry to the country because of their speech.[111] There have also been a number of instances where foreign nationals have been deported for

---

107. *Id.*

108. *Id.*

109. *Id.* at 999.

110. *See* sources cited *supra* notes 63, 99, and 98, at 86 n.16.

111. *See* Kleindienst v. Mandel, 408 U.S. 753, 770 (1972). A recent announcement from U.S. Homeland Security, the agency that operates the country's borders, has suggested that visitors in the future may be required to turn over their electronics and be subjected to a review of the content on their social media profiles. *See* Olivia Blair, *US Customs: Visitors May Have to Hand Phones and Social Media Passwords to TSA Agents*, INDEPENDENT (Apr. 05, 2017, 10:16 AM), https://www.independent.co.uk/travel/news-and-advice/us-customs-visitors-phones-social-media-passwords-tsa-extreme-vetting-donald-trump-immigration-a7667516.html. The implication being that those with views, which run contrary to the Trump administrations ideals may be subjected to additional screening, or even denied entry. *See generally id*.

expressing their political beliefs,[112] reasoning that Congress held the power to determine which individuals are allowed to be in the country.[113] For our hypothetical plaintiff, this raises the possibility that not only would her possible First Amendment claim against the sport venue fail, but also that her legal status in this country could be threatened if her political ideas were seen as threatening.

Moreover, the history of legal decisions regarding the rights of immigrants have demonstrably been relative to the political climate, such as the recent Supreme Court decision in *Trump v. Hawaii*, upholding a travel ban which had originally been presented as a religious-based restriction for entry.[114] The Court held that outside commentary of the President referring to the policy as a "Muslim ban" was not relevant to its application.[115] This ruling would seemingly overturn *Yick Wo v. Hopkins*, potentially signaling a more open atmosphere towards policies which are implicitly discriminatory in the name of protecting executive authority. Furthermore, given that the present political moment is fraught with images of asylum seekers being separated from their children and placed into camps along the Southern U.S. border,[116] it would be naïve to conclude that the precedents set forth in cases like *Tehrani* and *Ibrahim* would be capable of completely safeguarding non-citizen visitors from being deprived of constitutional safeguards.

---

112. *See e.g.*, U.S. *ex rel.* Turner v. Williams 194 U.S. 279, 281–82 (1904); Galvan v. Press, 347 U.S. 522, 524 (1954); Reno v. Am.-Arab Anti-Discrimination Comm., 525 U.S. 471, 473 (1999).

113. Kagan, *supra* note 98, at 88–89.

114. Trump v. Hawaii, 138 S. Ct. 2392, 2423 (2018).

115. *Id.* at 2401–02.

116. Mica Rosenberg, *Exclusive: Nearly 1,800 families separated at U.S.- Mexico border in 17 months through February*, REUTERS (June 08, 2012, 4:40 PM), https://www.reuters.com/article/us-usa-immigration-children-exclusive/exclusive-nearly-1800-families-separated-at-us-mexico-border-in-17-months-through-february-idUSKCN1J42UE.

IV. CONCLUSION

Political speech receives the highest level of protection under the First Amendment[117]. Darya Safai's political commentary on her banner and shirt were not violating any reasonable, narrowly constructed stadium regulations on banners or flags, and her speech was not an abnormal disruption to the activities occurring within the sporting arena. Further, her speech, had it occurred in the U.S., would have more than likely taken place in a publicly owned forum with rules enforcement conducted by public police. Her status as a non-citizen would not, under the precedent set forth in cases such as *Tehrani* and *Ibrahim*, preclude her speech from constitutional protection. For these reasons, we believe that political protests by non-citizens, such as the one Darya Safai engaged in during the 2016 Rio Olympic games, at U.S. sporting events (including at the 2026 World Cup) would be protected by the First Amendment.

While the political climate has often led to shifts in the status of non-citizen rights, the current case law provides a clear framework for recourse, should political speech during a U.S. sporting event be halted. This issue is particularly relevant given recent news that the U.S. is a part of a multinational coalition to host the 2026 World Cup,[118] and the general proliferation of national and international sporting events in the country which attracts tourists every year. Sport has long served as a locus for political discourse, and international sporting events in particular have the capacity to spotlight political discussion. The First Amendment guarantees that even non-citizens who attend such events in the United States may use these stages to add their voice to the global political discourse.

---

117. *See e.g.*, Roth v. United States, 354 U.S. 476, 484 (1957) ("All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the guaranties, unless excludable because they encroach upon the limited area of more important interests.").

118. Tariq Panja & Andrew Das, *World Cup 2026: United States, Canada and Mexico Win Bid to Be Host*, N. Y. TIMES (June 13, 2018), https://www.nytimes.com/2018/06/13/sports/world-cup/fifa-2026-vote-north-america-morocco.html.