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MISSING THE MARK: HOW LEGISLATIVE ADJUSTMENTS
TO THE DISPARAGEMENT CLAUSE COULD PROMOTE
THE REVOCATION OF TRADEMARKS FOR PROFESSIONAL
SPORTING TEAMS REFERENCING NATIVE AMERICAN
CULTURE

I. INTRODUCTION: SPORTING TEAMS' FINANCIAL RELIANCE ON
TRADEMARK PROTECTIONS

A professional sporting team's name and logo are critical to creating a team brand and further creating long-term relationships with its fan base.¹ A strong team name creates an emotional link with the fan base.² But what happens when teams miss the mark on their name and logo?³ This question has been raised primarily in regard to teams whose names and logos reference Native American culture.⁴ While the majority of teams with such references have elected to forgo their names for a less offensive option, a number of these professional teams continue to stand by their names.⁵

1. See Kenneth Cortsen, *The Importance of a Name and Logo in Sport Branding*, KENNETH CORTSEN (June 7, 2013), <https://kennethcortsen.com/the-importance-of-a-name-and-logo-in-sport-branding/> [<https://perma.cc/5YCY-B2WT>] (“[S]port branding is an essential part of the process when sport entities want to distinguish themselves from competitors. The significance of a name and logo are key assets when sport entities strive to build strong relationships with their fans.”).

2. See *id.* (“Fans generate additional *buzz* around the sport entity and thus facilitate revenue streams through various business stands . . . The ‘emotional equity’ comes into play when the name and/or logo apply the ‘sentiment’ that there is a connection between the sport entity’s name and/or logo and the home area’s story, spirit and nature.”).

3. See Cathryn L. Claussen, *Ethnic Team Names and Logos - Is There a Legal Solution?*, 6 MARQ. SPORTS L. J. 409, 409 (1996) (presenting legal issue as to “whether it is possible for a state or local government to prohibit the use of ethnic team names and logos without running afoul of the First Amendment’s protection of the freedom of speech.”).

4. See *id.* (“Despite the fact that not all Native American groups support the elimination of ethnic team names and symbols, most of the commentary has taken the position that such representations are stereotypically racist and demeaning, and should be eradicated.”).

5. See Sam Hitchmough, *Sports Teams are Finally Scrapping Native American Mascots – On Both Sides of the Atlantic*, CONVERSATION (Feb. 7, 2022, 9:00 AM), <https://theconversation.com/sports-teams-are-finally-scrapping-native-american-mascots-on-both-sides-of-the-atlantic-176083> [<https://perma.cc/A9NH-7NN5>] (stating effects of Washington’s name change on international sport teams, such that teams in United States and United Kingdom began changing or considering changing names referencing Native Americans); see also Tom Lutz, *Indians, Braves and Chiefs: What Now for US Sports’ Other Native American Names?*, GUARDIAN (July 13, 2020, 1:10 PM),

For teams who did change their name, the decision was usually due, in part, to immense public pressure.⁶ Team management now recognizes that fans will no longer put up with offensive or derogatory references.⁷ However, the majority of the name and logo changes have not been influenced by fans alone.⁸ The primary catalyst for these changes has been financial incentives.⁹ In 2021, the National Football League (“NFL”) generated roughly \$17 billion in revenue, Major League Baseball (“MLB”) generated approximately \$9.6 billion in revenue, and the National Hockey League (“NHL”)

<https://www.theguardian.com/sport/2020/jul/13/indians-braves-chiefs-us-sports-teams-name-changes-native-americans> [<https://perma.cc/2RTB-8LZH>] (stating that despite Washington’s franchise change, remaining teams have maintained their intent to retain current names).

6. See Liz Clarke, *In Private Letter to Redskins, FedEx Said it Will Remove Signage if Name Isn’t Changed*, WASH. POST (July 10, 2020, 12:50 PM), <https://www.washingtonpost.com/sports/2020/07/10/private-letter-redskins-fedex-said-it-will-remove-signage-if-name-isnt-changed/> [<https://perma.cc/RQ5J-8KG4>] (discussing financial threats to owner, Dan Snyder, following potential removal of FedEx signage and other sponsorships deals). At that time, FedEx paid Snyder \$205 million in naming rights deal, of which \$45 million was due after 2020 request; meaning threats to pull out sponsorship would have costed Snyder millions in lost revenue. See *id.* (discussing financial power FedEx had over Snyder’s decision making). Additionally, major corporate sponsors, such as Nike, PepsiCo., and Bank of America publicized a need for change, while Nike removed all Redskins merchandise from its online store. See *id.* (describing various outlets of financial risk faced by Redskins organization). This risk of financial loss sparked a near immediate investigation into a potential name change for Washington. See *id.* (describing catalyst for instantaneous changes made by Redskins organization).

7. See Calum Trenaman, *Global Sport’s Problem With the Appropriation of Indigenous Culture*, CNN (Jan. 18, 2021, 5:05 AM), <https://www.cnn.com/2021/01/18/sport/indigenous-culture-in-global-sport-cmd-spt-intl> [<https://perma.cc/JY27-3ZQH>] (discussing key events, such as George Floyd’s death, as catalyst for racial reform which has forced Native American referencing sports teams to reconsider their affiliations); see also Maxwell Cashio, *Why a Name Change for the KC Chiefs Feels Inevitable*, ARROWHEAD ADDICT (July 27, 2021), <https://arrowheadaddict.com/2021/07/27/kc-chiefs-name-change-feels-inevitable/> [<https://perma.cc/GHG5-C466>] (discussing controversy surrounding team name and fan requests to change demeaning and irrelevant name).

8. See Clarke, *supra* note 6 (“[T]he prospect of losing FedEx and facing an exodus of the team’s other corporate sponsors proved more powerful than any number of protests or petitions.”).

9. See *id.* (discussing catalysts of financial threats to Washington and team actions which followed). Following the death of George Floyd, the issues of racial injustice and systemic racism were at the forefront of conversation, influencing major corporations to take public stands in support of these issues. See *id.* (discussing sociological influences on sporting teams). While NFL owners gain value from the shared multibillion-dollar television agreements, individual team wealth is largely made up of outside factors such as corporate sponsorships, stadium naming rights, and other stadium-related revenues. See *id.* (discussing sporting teams’ individual source of wealth). In 2012, the Washington Redskins were the third-most-valuable team in the NFL, but by 2019 the team dropped to seventh place, indicating that the threats and actions from supporting corporations in the face of key sociological issues likely had a drastic effect on the team’s valuation. See *id.* (stipulating causes of Redskin’s falling valuation).

generated roughly \$5.3 billion in revenue; all showing a drastic annual increase in revenue.¹⁰ These leagues are huge financial investments for owners and sponsors, and have traditionally reaped substantial rewards.¹¹ History has shown that nothing will provoke

10. See Christina Gough, *Total Revenue of All National Football League (NFL) Teams From 2001 to 2022*, STATISTA (Sept. 5, 2023), <https://www.statista.com/statistics/193457/total-league-revenue-of-the-nfl-since-2005/> [<https://perma.cc/GM8T-LARN>] (stating year-by-year revenue of entire NFL); see also Christina Gough, *Major League Baseball Total League Revenue from 2001 to 2022*, STATISTA (Sept. 14, 2023), <https://www.statista.com/statistics/193466/total-league-revenue-of-the-mlb-since-2005/#:~:text=Total%20revenue%20of%20Major%20League%20Baseball%202001%2D2021&text=This%20graph%20depicts%20league%20revenue,at%20318.53%20million%20U.S.%20dollars> [<https://perma.cc/EVL4-9E52>] (stating year-by-year revenue of entire MLB); see also Sean Shapiro, *NHL Revenues Reach Record High Thanks to Jump in Sponsorship, Licensing Deals*, ATHLETIC (June 25, 2022), <https://theathletic.com/3382650/2022/06/25/nhl-revenues-reach-record-high-thanks-to-jump-in-sponsorship-licensing-deals> [<https://perma.cc/4TBR-6L7Z>] (stating increased NHL revenue for 2021-2022 season).

11. See Ryan A. Collier, *What Investment Could Beat Owning an NFL Team?*, BEDEL FIN. (June 27, 2022), <https://www.bedelfinancial.com/what-investment-could-beat-owning-an-nfl-team> [<https://perma.cc/S7FZ-2NGX>] (utilizing sale of Denver Broncos to discuss profitability of NFL team ownership). In 1984, Pat Bowlen purchased the Denver Broncos for \$78 million and by 2019, Bowlen's family sold the Broncos for \$4.65 billion. See *id.* (discussing exponential growth in financial valuation of Denver Broncos). This initial investment accrued roughly an 11.35% return per year, a substantial and dependable rate that is mirrored across many other NFL teams. See *id.* (classifying Bowlen's financial gain as status quo of investments for NFL teams); see also Weston Blasi, *Baseball Commissioner Says the Stock Market is a Better Investment Than Owning an MLB Team – Is He Right?*, MKT. WATCH (July 20, 2022, 1:40 PM), <https://www.marketwatch.com/story/mlb-commissioner-manned-says-the-stock-market-is-a-better-investment-than-owning-a-baseball-team-is-he-right-11645118529> [<https://perma.cc/S2MH-W8VX>] (detailing financial benefits of owning MLB teams through team valuations, ticket sales, sponsorship opportunities, and television broadcast contracts). The historical appreciation of MLB teams outperformed that of the S&P 500, increasing 548% between 2002 and 2020, with S&P 500 increasing only 381.4% in that same time. See *id.* (describing ever-increasing profitability of MLB ownership). While these teams are huge investments, they present long-term benefits through yearly profits and eventual sales. See *id.* (describing various sources of wealth in MLB team ownership). For example, in 2002 Jeffrey Loria purchased the Florida Marlins for \$158.5 million and later sold the team in 2017 for \$1.2 billion, equating to a 657% return on investment, a financial gain that does not include the additional annual benefits these teams' owners see. See *id.* (describing Loria's mass financial gain in terms of team valuation alone). From various other sources, like television deals and ticket sales, between Loria's 2002 purchase and 2017 sale, the Marlin's averaged an annual revenue of over \$150 million. See *id.* (describing financial benefits MLB owners garner outside of just team valuation); see also *Big Business: The Finances of Hockey*, CAL. BUS. J., <https://calbizjournal.com/big-business-the-finances-of-hockey/> [<https://perma.cc/3STN-2JAH>] (last visited Oct. 12, 2023) (discussing increased profitability of NHL based on heightened network contracts). In recent years, the NHL has seen substantial financial growth, with rising profitability and investment opportunities. See *id.* (describing consistent financial growth in NHL). The league's net profit increased by over 300% from 2011 to 2018, with 2017 having an increased profit of 39%. See *id.* (describing consistency in league profitability, culminating in record earnings in 2017). While team owners split hockey-related revenues with the players evenly, they still have additional areas for income from large contracts with local television

internal team change like the risk of financial loss.¹² One of the strongest financial incentives faced by teams is their ability to profit off of their name and logo.¹³ Teams protect these financial incentives by registering their names as a trademark with the United States Patent and Trademark Office (“USPTO”), which restricts all other entities from profiting off the marks.¹⁴ However, when teams use potentially-offensive cultural references for financial profit, formal legislation can promote rejection of such trademarks.¹⁵

This Comment reviews the judicial history surrounding trademark restrictions on professional sporting teams’ names and logos, and further proposes legislative solutions to these rising problems.¹⁶ Section II begins with a discussion of the importance of trademarks to sporting teams.¹⁷ Further, it discusses the constitutional implications of trademark revocation and introduces the Disparagement Clause of the Lanham Act, which revoked trademark registrations for marks that may disparage certain groups.¹⁸ This Section further describes the judicial history surrounding the revocation of the

networks and individual sponsors. *See id.* (describing various sources of incomes for NHL team owners, outside of team valuations alone).

12. *See* Clarke, *supra* note 6 (affirming power that financial risk has in promoting organizational change).

13. *See Sport Trademarks: Everything You Need to Know*, UPCOUNSEL (Nov. 6, 2020), <https://www.upcounsel.com/sport-trademarks> [<https://perma.cc/Y8HY-9LLM>] (“Intellectual property rights also let sports celebrities, teams, organizations, and manufacturers protect themselves from abusive and unauthorized uses of their names. Sporting event organizers protect their sport trademarks by: Maintaining the value and integrity of the event; Maximizing revenue from sponsorship, licensing, and merchandising agreements; [and] Inspiring confidence among consumers about the authenticity and quality of a brand”).

14. *See id.* (discussing registration of sports-based trademarks with USPTO and benefits such as restricting “others using terms that include a person’s name or image, even if another entity registered for a trademark before the athlete.”).

15. *See What Are the Limitations of Trademark Law?*, ROCKET LAW., <https://www.rocketlawyer.com/business-and-contracts/intellectual-property/trademarks/legal-guide/limitations-of-trademark-law> [<https://perma.cc/CT6E-VABS>] (last visited Oct. 8, 2023) (discussing trademark law’s limitation for registering entities). While registration of trademarks provides important protections for mark owners, there are numerous registration limitations designed to prevent abuse of the system, most importantly including restrictions on what can actually be federally registered. *See id.* (discussing importance of limitations on federal trademark registration). There are potentially limitless possibilities of what can be restricted from federal trademark protection but generally, trademarks are rejected on the content of the marks or the manner for which they are used. *See id.* (discussing statutory basis for rejection of federal trademark registration).

16. For further discussion of previous judicial decisions involving trademark restrictions and their effects on modern-day trademark registrations, see *infra* notes 31–219 and accompanying text.

17. For further discussion of the effects of trademarks on sporting teams, see *infra* notes 31–51 and accompanying text.

18. For further discussion of restrictions under the Disparagement Clause, see *infra* notes 52–71 and accompanying text.

Disparagement Clause.¹⁹ Section III analyzes the inadequacies of the Disparagement Clause which made it unconstitutional and it later proposes amendments which would allow for trademark restrictions in certain situations.²⁰ This Comment closes with remarks on how an amended law would impact the remaining teams with Native American references.²¹

II. TRADEMARK LAW HISTORY AND LITIGATION BACKGROUND OF DISPARAGING MARKS

This Section provides the necessary background to understand the judicial history and justifications for the current state of trademark law.²² Subsection A introduces the requirements of trademarks, while stressing their importance in modern day industries.²³ Subsection B discusses the benefits of trademark protection for professional sporting teams.²⁴ Subsection C discusses constitutional difficulties faced when imposing trademark restrictions.²⁵ Subsection D discusses the case of *Pro-Football v. Blackhorse*,²⁶ the first judicial decision that hinted towards the courts' acceptance of trademark restrictions for offensive marks.²⁷ Subsection E discusses the subsequent case of *Matal v. Tam*,²⁸ which rejected the ideals set forth in *Blackhorse*, thus allowing for the registration of disparaging trademarks.²⁹ Finally, Subsection F discusses the Washington Football Team's name change in spite of protections granted by *Matal v. Tam*,

19. For further discussion of the case history leading to revocation of the Disparagement Clause, see *infra* notes 72–144 and accompanying text.

20. For further discussion of the Disparagement Clause's unconstitutional restrictions and proposed adjustments, see *infra* notes 150–219 and accompanying text.

21. For further discussion of the effects of recommended legislative adjustments on modern-day sporting teams, see *infra* notes 220–237 and accompanying text.

22. For further discussion of the relevant judicial history of trademark law, see *infra* notes 31–144 and accompanying text.

23. For further discussion of trademark history and modern-day benefits, see *infra* notes 31–39 and accompanying text.

24. For further discussion of financial benefits of trademark protections for professional sporting teams, see *infra* notes 40–51 and accompanying text.

25. For further discussion of constitutional implications on trademark rights, see *infra* notes 52–68 and accompanying text.

26. *Pro-Football, Inc. v. Blackhorse*, 112 F. Supp. 3d 439 (E.D. Va. 2015).

27. For further discussion of *Pro-football v. Blackhorse's* effects on trademark rights for sporting teams, see *infra* note 69–93 and accompanying text.

28. *Matal v. Tam*, 582 U.S. 218 (2017).

29. For further discussion of *Matal v. Tam's* effect on current trademark law, see *infra* notes 95–132 and accompanying text.

implying that the team would forgo constitutionally protected rights to minimize financial risks.³⁰

A. Requirements for Federal Trademark Registration

A trademark is any word, slogan, phrase, symbol, design, or combination of these things that identifies a good or service.³¹ To be considered a trademark, the symbol in question needs to be used in commerce and must be distinctive.³² While a mark does not need to be registered to qualify as a valid trademark, registration with the USPTO ensures full protection of intellectual property rights.³³ Once registered, a trademark can be protected forever, so long as its owner actively uses it in commerce and renews its registration every ten years with the USPTO.³⁴

To federally register a mark, the owner must submit an application to the USPTO, usually through a trademark attorney.³⁵ The USPTO will then assign an examining attorney to determine if the minimum filing requirements have been met.³⁶ Once this step is

30. For further discussion of power of financial threats to sporting team's decisions, see *infra* notes 133–144 and accompanying text.

31. See *What is a Trademark?*, USPTO, <https://www.uspto.gov/trademarks/basics/what-trademark> [<https://perma.cc/KMX6-UUJQ>] (last visited Sept. 25, 2023) (defining terms and requirements of trademarks, as analyzed for federal registration).

32. See Jason Gordon, *Distinctiveness Requirement for Trademark - Explained*, BUS. PROFESSOR (Apr. 8, 2023), https://thebusinessprofessor.com/en_US/property-law/distinctiveness-requirement-for-trademark [<https://perma.cc/PJ6L-U53D>] (stating that distinctiveness requirement entails that marks cannot be so similar to another mark such that it causes confusion amongst consumers about brand or entity associated).

33. See *Why Register Your Trademark?*, USPTO, <https://www.uspto.gov/trademarks/basics/why-register-your-trademark#:~:text=How%20you%20choose%20to%20protect,federal%2C%20or%20international%20trademark%20registration> [<https://perma.cc/K5UU-KLDH>] (last visited Oct. 6, 2023) (stating registration of trademarks, while not necessary, determines scope of rights granted within common law, state, federal, or international system).

34. See *Keeping Your Registration Alive*, USPTO, <https://www.uspto.gov/trademarks/maintain/keeping-your-registration-alive> [<https://perma.cc/W9AC-JKVX>] (last visited Oct. 6, 2023) (stating requirements for maintenance of federally registered trademarks). To maintain trademark protection, the mark must be continually used in commerce and maintain proper documentation. See *id.* (describing statutory requirements for federal trademark registration). Failure to do these will result in cancellation or expiration of the registration, thus stripping the mark of federally granted protections. See *id.* (describing various situations that bar or cancel federal registration).

35. See *Trademark Process*, USPTO, <https://www.uspto.gov/trademarks/basics/trademark-process#step3> [<https://perma.cc/N5EU-X3PY>] (last visited Oct. 6, 2023) (describing first step in trademark application process in which applicants submit application and monitor status).

36. See *id.* (stating subsequent step in which USPTO member reviews application); see also Michael Kondoudis, *The Four Requirements for a Trademark: AN*

completed, the mark will either be registered or rejected.³⁷ The regulatory scheme used by the USPTO for trademark registration review is found in the Lanham Act.³⁸ This Act, also known as the Trademark Act of 1946, is a federal statute that lays out the procedure for registering a trademark, the situations in which trademark owners are granted federal protection, and the remedies available for trademark infringement.³⁹

B. Trademark's Expansive Ability to Regulate Sporting Teams

To garner full trademark rights, a sporting team needs to register their name and logo with the USPTO.⁴⁰ Sporting teams and leagues depend on the security of trademarks to build confidence, trust, and loyalty within their fan base.⁴¹ Additionally, an approved

EASY GUIDE, L. OFF. MICHAEL E. KONDOUDIS, <https://www.mekiplaw.com/the-four-requirements-for-a-trademark/> [<https://perma.cc/55HG-8YHL>] (last visited Sept. 25, 2023) (stating major requirements for mark to be considered trademark and for federal registration of mark). To qualify as a trademark, the mark must be distinctive and must be used in commerce. *See id.* (describing main requirements for classification of trademarks). Additionally, the USPTO will consider whether the mark conflicts with other registered or pending trademarks and can identify the source of the product or service. *See id.* (describing possible sources of trademark rejection). Further, when applying for federal registration, the USPTO will review the application to confirm that it contains the identification of the trademark owner, clarification of whether the trademark owner is a businessperson, determination of real intent to use the trademark, drawings of the trademark, lists of products or services rendered, and determination of distinctiveness. *See id.* (describing USPTO review of application content).

37. *See Trademark Process*, *supra* note 35 (stating that if no objections to registration are raised, USPTO will register mark; however, any denial of registration can be appealed for further review).

38. *See* 15 U.S.C.A. § 1052 (1946) (outlining content requirements for registration of trademarks).

39. *See Lanham (Trademark) Act*, NOLO, [https://www.nolo.com/legal-encyclopedia/content/lanham-act.html#:~:text=The%20Lanham%20Act%20\(also%20known,effect%20on%20July%205%2C%201947](https://www.nolo.com/legal-encyclopedia/content/lanham-act.html#:~:text=The%20Lanham%20Act%20(also%20known,effect%20on%20July%205%2C%201947) [<https://perma.cc/7UHD-QW7U>] (last visited Sept. 25, 2023) (detailing sections and protections granted under Lanham Act); *see generally Overview of Trademark Law*, HARV., <https://cyber.harvard.edu/metaschool/fisher/domain/tm.htm> [<https://perma.cc/27XJ-UNKW>] (last visited Sept. 25, 2023) (differentiating development of state and federal trademark protections in past century). While both state and federal law govern trademark protections, state common law was the basis for regulation up until the late 1800s when Congress began making federal trademark regulations, which have expanded vastly over the last 100 years. *See id.* (describing historical development of trademark law, which was adjusted to comply with changing societal standards). This changing system culminated in the Lanham Act of 1946, and its subsequent amendments, which expanded federal protections and laid the groundwork for all trademark protections. *See id.* (describing sociological need for federal trademark legislation and its effects on current trademark law).

40. *See Lanham (Trademark) Act*, *supra* note 39 (last visited Sept. 25, 2023) (stating registration requirements for obtaining federal trademark registration).

41. *See Sport and Branding*, WIPO, <https://www.wipo.int/sports/en/branding.html> [<https://perma.cc/5P9E-SRWC>] (last visited Sept. 25, 2023) (discussing

trademark registration prevents other teams and companies from using the name or logo in unauthorized manners.⁴² For example, the NFL owns the trademark on the name “Super Bowl.”⁴³ This means that the NFL is the sole owner of that name and anyone who uses it without the NFL’s consent will either be sent cease and desist letters or will be sued in court.⁴⁴ These enforcement provisions not only protect the millions (and possibly billions) of dollars the NFL has spent on the Super Bowl, but also ensure prolonged financial security through exclusive usage.⁴⁵

In the last century, dozens of professional and amateur sporting organizations whose trademarks reference Native American culture have changed their respective logos and mascots.⁴⁶ In doing this,

financial and commercial benefits for sports teams obtaining federal trademark rights); *see also Intellectual Property and Sports: Tracing the Connections*, WIPO, https://www.wipo.int/ip-outreach/en/ipday/2019/ip_sports.html [<https://perma.cc/P3UE-ANTM>] (last visited Sept. 25, 2023) (discussing who is entitled to trademark protections and advantages of trademarks in sports).

42. *See Sport Trademarks: Everything You Need to Know*, *supra* note 13 (detailing sports-based trademark rights, including protection from unauthorized uses, maximization of revenue, and maintenance of consumer loyalty).

43. *See* James Leggate, *NFL’s Super Bowl Trademark is Why Some Companies Call It ‘The Big Game’*, Fox Bus. (Jan. 28, 2020, 6:33 PM), <https://www.foxbusiness.com/markets/nfl-super-bowl-trademark-why-some-companies-call-big-game> [<https://perma.cc/UK7R-8J8M>] (stating financial benefits NFL has retained in its “Super Bowl” trademark since its 1969 registration, including requirement that any company using phrase must pay NFL directly, which can cost companies upwards of \$50 million).

44. *See id.* (discussing repercussions NFL has taken against trademark infringers). Some companies have attempted to get around using the term “Super Bowl” by referring to it as “the big game.” *See id.* (discussing loopholes utilized by companies to profit off Super Bowl references). While this reference is loose enough to pass scrutiny, other companies have gotten too close to the name and suffered various consequences, such as the USPTO denying registrations for dozens of marks, including a website called “Super Bowl 53 Info,” the phrase “Super Bowl Sale,” and a television show called “The Super Bowl of Trivia.” *See id.* (listing various trademarks which were rejected by USPTO based on their substantial similarity to pre-existing “Super Bowl” trademark). No matter what the intended use of these marks were, the USPTO determined that these were too similar to the NFL’s mark and risked dilution or confusion to the “Super Bowl” mark, thus requiring rejection to preserve the NFL brand. *See id.* (highlighting USPTO concern of dilution of popular marks, by competitors promoting similar references).

45. *See id.* (stating importance of Super Bowl for NFL, as it is “something that they’ve built up equity in . . . [t]hey’ve invested millions and millions and, at this point, probably close to a billion dollars in the game, the event.”).

46. *See* Brian Welk, *Washington Commanders and 14 Other Sports Teams That Dumped Racist Names and Mascots (Photos)*, WRAP (Feb. 2, 2022, 7:47 AM), <https://www.the-wrap.com/sports-teams-dumped-racist-names-mascots-indians-redskins/> [<https://perma.cc/RD9L-QPTE>] (detailing fifteen teams who changed their names in last fifty years and elaborating on reasoning behind those changes). Professional teams like the Philadelphia Warriors, whose logo contained a Native American playing basketball, changed their logo due to public criticism. *See id.* (detailing reasoning for team name change). Additionally, collegiate teams have also succumbed to public pressure, with schools like Dartmouth College changing their “Indians”

these sporting organizations have foregone their expansive protections under federal trademark registrations due to public criticism about the offensive nature of their mascots.⁴⁷ Other teams have taken less extreme steps to limit traditions reflecting Native American culture.⁴⁸ However, many have questioned what legal remedies exist to prevent teams with offensive references from keeping their names and logos.⁴⁹ Though no direct financial regulations can be passed, restricting trademark registration for offensive team names seems to be the best option.⁵⁰ If a team's ability to trademark its name and

name and logo, St. John's University replacing their Native American cartoon logo, and the University of Illinois removing their Chief Illiniwek logo and mascot as well as ending their ceremonial dances. *See id.* (detailing collegiate changes following public pressure to avoid Native American references).

47. *See* Erik Brady, *The Real History of Native American Team Names*, USA TODAY (Aug. 25, 2016, 10:41 AM), <https://www.usatoday.com/story/sports/2016/08/24/real-history-native-american-team-names/89259596/> [<https://perma.cc/S9PH-UFQ3>] (detailing teams' refusal to change names and history behind Native American references that leads to offensive nature); *see also* James Dator, *What Made the Cleveland Indians Finally Change Their Name?*, SB NATION (Dec. 15, 2020, 11:33 AM), <https://www.sbnation.com/mlb/22176074/cleveland-baseball-team-name-change> [<https://perma.cc/QA6X-NW4H>] (depicting Cleveland Indians' name change following years of lobbying by Native Americans as well as fears of backlash, similar to that felt by Washington).

48. *See* Luke X. Martin, *Kansas City Chiefs Removed Their Offensive Mascot, But Have No Plans to Change Name*, NPR (July 27, 2021, 4:44 PM), <https://www.npr.org/2021/07/27/1021373125/kansas-city-chiefs-removed-their-offensive-mascot-but-have-no-plans-to-change-na> [<https://perma.cc/CJ6C-HK73>] (discussing Kansas City Chiefs decision to retire longtime on-field personality "Warpaint the Horse" due to its reference to Native American culture); *see also* *Kansas City Chiefs to Prohibit Native American Imagery at Arrowhead*, GUARDIAN (Aug. 20, 2020, 6:54 PM), <https://www.theguardian.com/sport/2020/aug/20/kansas-city-chiefs-native-american-imagery> [<https://perma.cc/5LWR-SVDB>] (discussing Chief's prohibition of Native American headdresses, face paint, and clothing at home stadium); *see also* Emily Kaplan, *Chicago Blackhawks Ban Costume Headdresses at United Center Games, Team Events*, ESPN (July 29, 2020, 2:05 PM), https://www.espn.com/nhl/story/_/id/29559336/chicago-blackhawks-ban-costume-headaddresses-united-center-home-games-team-events [<https://perma.cc/S4W9-XEGL>] (discussing Blackhawk's ban on use of Native American headdresses in home stadium); *see also* Jeremy Engle, *Is It Offensive for Sports Teams and Their Fans to Use Native American Names, Imagery and Gestures?*, N.Y. TIMES (Oct. 29, 2021), <https://www.nytimes.com/2020/01/31/learning/is-it-offensive-for-sports-teams-and-their-fans-to-use-native-american-names-imagery-and-gestures.html> [<https://perma.cc/5DNA-TBUF>] (discussing Native American's negative views of Kansas City Chief's tomahawk chop tradition).

49. *See* *More Than Mascots: It's Time to End Cultural Appropriation of Native Americans in Sports*, NIELSEN (May 2021), <https://www.nielsen.com/insights/2021/more-than-mascots-its-time-to-end-cultural-appropriation-of-native-americans-in-sports/> [<https://perma.cc/BP77-SES4>] (discussing prevalence of Native American references in sports and justifying public concern with it).

50. *See* Josh Gerben, *What are the Economic Benefits of a Registered Trademark?*, GERBEN L., <https://www.gerbenlaw.com/blog/what-are-the-economic-benefits-of-a-registered-trademark/> [<https://perma.cc/ANS7-TSKA>] (last visited Sept. 28, 2023) (detailing financial benefits of federal trademark registration, including protection from infringement, growth beyond region, appreciating valuable assets over time, strengthened marketing, and advantages in licensing agreements).

logo is restricted, their subsequent inability to maintain sole profitability would provoke rapid change.⁵¹

C. Constitutional Implications of Trademark Revocation

While revocation of trademark registration seems like an easy solution for problematic marks, constitutional implications blur the line between commercial commerce regulation and First Amendment speech infringement.⁵² The case *Central Hudson Gas & Elect. v. Public Serv. Comm'n of N.Y.*⁵³ initially resolved the issue of unconstitutional free speech restrictions.⁵⁴ There, the Supreme Court created a four-part test (“*Central Hudson* test”) for establishing the scope of protection for commercial speech.⁵⁵ Commercial speech is granted less protection than other speech and its protection is determined by evaluating the nature of the expression and of the government interest served by the regulation.⁵⁶ In analyzing the constitutionality of speech restrictions, the first question courts must answer is whether the expression is protected by the First Amendment; to be protected, it must concern lawful activity that is not misleading.⁵⁷ The second question facing the courts is whether the asserted government interest is substantial.⁵⁸ If the first two parts are satisfied, the court must then

51. See Davidson Heath & Christopher Mace, *The Strategic Effects of Trademark Protection*, CATO INST. (Nov. 13, 2019), <https://www.cato.org/research-briefs-economic-policy/strategic-effects-trademark-protection> [https://perma.cc/5YU8-WLB5] (discussing additional financial benefits of trademarks, including longevity of protection, strengthening of market power, and ability to restrict competition).

52. See Gene Markin, *Matal and Brunetti: When Derogatory isn't Derogatory*, NAT'L L. REV. (Sept. 26, 2018), <https://www.natlawreview.com/article/matal-and-brunetti-when-derogatory-isn-t-derogatory#:~:text=Trademarks%2C%20Like%20In%20Matal%20Case%2C%20Are%20Not%20Commercial%20Speech> [https://perma.cc/5KXM-G4NE] (discussing historically raised questions of constitutional protections granted to trademarks).

53. *Central Hudson Gas & Elect. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980)

54. See *id.* at 588–63 (stating facts of case leading to constitutional analysis for commercial speech infringement). In *Central Hudson*, an electricity shortage led to the Public Service Commission imposing a ban on all advertising that promoted the use of electricity. See *id.* at 558–59 (describing statute at issue in *Central Hudson*). After the electricity shortage ended, the Commission decided to continue the ban, causing Central Hudson to file suit claiming, inter alia, that the regulation by the Commission violated its First Amendment right to free speech. See *id.* at 559 (describing plaintiff's original cause of action). In a groundbreaking decision, the Supreme Court held that the ban was an unconstitutional restriction on the First Amendment. See *id.* at 571–72 (stating Supreme Court holding).

55. See *id.* at 566 (introducing four-part test for deciding constitutionality of commercial speech restrictions).

56. See *id.* at 563 (stating classification of speech is critical in constitutional analysis since commercial speech garners less protection than government speech).

57. See *id.* at 566 (stating first requirement of constitutional analysis).

58. See *id.* (stating second requirement of constitutional analysis).

determine whether the regulation directly advances the government interest.⁵⁹ Finally, to pass the constitutional analysis, the law must not be more extensive than is necessary to serve that interest.⁶⁰ The *Central Hudson* test remains good law to this day and is used to determine the constitutionality of restrictions on commercial speech.⁶¹

One of the major components of a trademark is its use in commerce, a facet sourced in the constitutionally granted congressional power to regulate interstate commerce.⁶² This right is granted under the Commerce Clause and was designed to create a free trade zone among states by giving economic power to the federal government.⁶³ The Supreme Court's opinion on what is considered commerce has fluctuated in the last century, however, recently it has broadly construed commerce to allow Congress to regulate any activity that has a "substantial economic effect."⁶⁴ This classification incapsulates the work done by professional sporting teams within the United States.⁶⁵

Further, trademark revocation implicates First Amendment speech infringement concerns.⁶⁶ The Supreme Court has held

59. *See id.* (stating third requirement of constitutional analysis).

60. *See id.* (stating fourth requirement of constitutional analysis).

61. *See* David L. Hudson Jr., *Central Hudson Test*, FREE SPEECH CTR., <https://www.mtsu.edu/first-amendment/article/1536/central-hudson-test#:~:text=In%20recent%20years%2C%20the%20Court,and%20is%20still%20good%20law> [<https://perma.cc/8GZK-N33S>] (last visited Oct. 10, 2023) (clarifying that despite Supreme Court's increased protection for commercial speech, *Central Hudson* test has yet to be minimized or overturned).

62. *See Trademark*, CORNELL L. SCH., <https://www.law.cornell.edu/wex/trademark> [<https://perma.cc/QF83-2LXH>] (last visited Oct. 10, 2023) (detailing "use in commerce" as one of two basic requirements that all marks must meet to be eligible for federal trademark protection).

63. *See* Randy E. Barnett & Andrew Koppelman, *Common Interpretation*, NAT'L CONST. CTR., <https://constitutioncenter.org/the-constitution/articles/article-1/clauses/752> [<https://perma.cc/B79L-L3VX>] (last visited Oct. 10, 2023) ("Moving the power to regulate interstate commerce to Congress would enable the creation of a free trade zone among the several states; removing the power to regulate international trade from the states would enable the president to negotiate, and Congress to approve, treaties to open foreign markets to American-made goods.").

64. *See Commerce Clause*, CORNELL L. SCH., https://www.law.cornell.edu/wex/commerce_clause [<https://perma.cc/44X9-A7P4>] (last visited Oct. 10, 2023) (discussing historical development of "commerce" definition, as described by Supreme Court).

65. *See* Christopher Beam, *Interference! Why is Congress Always Meddling with Sports?*, SLATE (Dec. 9, 2009, 6:55 PM), <https://slate.com/news-and-politics/2009/12/why-is-congress-always-meddling-with-sports.html#:~:text=Because%20sports%20are%20considered%20interstate,they%20operate%20across%20state%20borders> [<https://perma.cc/32GD-472S>] ("Because sports are considered interstate commerce. Article 1, Section 8 of the U.S. Constitution gives Congress the power to regulate commerce among the states. The Supreme Court has interpreted that power to include sports leagues—with some notable exceptions—since they operate across state borders.").

66. *See* Robert Denicole, *Trademarks as Speech: Constitutional Implications of the Emerging Rationales for the Protections of Trade Symbols*, 1982 WIS. L. REV. 158, 190–95

the view that trademarks qualify as constitutionally protected free speech.⁶⁷ However, opponents argue that revocation of trademarks does not truly restrict speech in a manner qualifying as a constitutional infringement.⁶⁸

D. *Pro-Football v. Blackhorse* Gives Hope for the Revocation of Offensive Trademarks

Trademark registration was originally determined through one of the major provisions of the Lanham Act, the Disparagement Clause.⁶⁹ This clause prohibited the registration of any trademark which “may disparage or falsely suggest a connection with persons, living or dead, institutions, beliefs or national symbols, or bring them

(1982) (discussing trademark implications on commercial speech). Trademarks have generally been considered a form of commercial speech, such that their intended purpose is to induce prospective consumers in commercial transactions for financial gains. *See id.* (discussing historical classification of trademarks as commercial speech). Lawful speech, being constitutionally protected under the First Amendment, must be free from government intrusion unless certain situations apply. *See id.* (describing default protection of lawful speech). If the government chooses to interfere with protected speech, it must do so based on the promotion of a substantial interest, that is not unnecessarily broad and is used for the direct advancement of the regulatory issue. *See id.* (describing heightened scrutiny faced by government when attempting restrictions of protected speech).

67. *See Supreme Court Rules Trademarks are Protected by First Amendment's Free Speech Clause*, BEST BEST & KRIEGER (July 6, 2017), <https://www.bbklaw.com/news-events/insights/2017/legal-alerts/07/supreme-court-rules-trademarks-are-protected-by-fi> [<https://perma.cc/86ZF-LFXP>] (clarifying trademark classification as free speech, thus garnering more protections than previously considered government speech).

68. *See Unregistered Trademarks Under Federal and State Laws*, JUSTIA, <https://www.justia.com/intellectual-property/trademarks/unregistered-trademarks/> [<https://perma.cc/Q9VX-D3Y7>] (last visited Oct. 10, 2023) (discussing limited benefits of registering trademarks). While federal registration of trademarks garners additional protections, it is not required for general use of the mark. *See id.* (stating federal registration merely grants additional benefits on top of already retained benefits). Trademarks not formally registered at the federal level still garner protections at the common law level, either through common law or statutes concerning unfair competition. *See id.* (describing additional sources of protection mark owners receive outside of federal rights granted through registration). Trademarks are created once the distinctive mark is used in commerce, meaning that once it is created, nobody can truly prevent the owner from using it in any legal manner. *See id.* (stating that trademark protections exist at point of inception, thus furthering argument against classification of trademark rejection as free speech infringement). Even if the mark is rejected for federal registration, the rights of the trademark owner stand, limited only in remedies for breach or other federally granted benefits. *See id.* (listing additional benefits trademark owners confer when registering their marks federally). For further discussion of the controversy surrounding classification of trademark revocation as speech infringement, see *infra* note 150 and accompanying text.

69. *See* 15 U.S.C. § 1052(a) (repealed in 2017) (listing factors which USPTO used to reject trademark registrations).

into contempt or disrepute.⁷⁰ The Disparagement Clause remained unquestioned since its inception and only began to face legal questions in 2015 with the case of *Pro-Football v. Blackhorse*.⁷¹

The original cause of action in *Blackhorse* occurred when a group of five Native Americans (“Blackhorse Defendants”) sought to cancel the registration of six trademarks approved for the Washington Redskins.⁷² The Trademark Trial and Appeal Board (“TTAB”) is an independent administrative tribunal within the USPTO that is authorized to determine registrability of trademarks.⁷³ The TTAB ordered the registration of the marks to be cancelled on the grounds that they violated the Disparagement Clause since the term “Redskins” may disparage a substantial composite of Native Americans.⁷⁴ The owner and operator of the Washington Redskins brought action against the Blackhorse Defendants, seeking review of the decision to cancel the trademark registrations.⁷⁵ Specifically, their claims requested a declaration of non-disparagement and a determination that the Disparagement Clause violated their First Amendment right to free speech.⁷⁶

70. *See id.* (stating factors within Disparagement Clause which USPTO used as means for rejection of trademark registrations).

71. *See* Chris Cochran, *It’s “Fuct”: The Demise of the Lanham Act*, 59 IDEA 333, 336-37 (2019) (discussing historical longevity of Disparagement Clause and its resilience against claims since its inception). The USPTO frequently rejected trademarks under the Disparagement Clause, creating disagreement for rejection of marks such as “Squaw Valley,” “HEEB,” and “STOP THE ISLAMISATION OF AMERICA.” *See id.* (discussing popular trademark rejections which began string of litigation against Disparagement Clause).

72. *See* *Pro-Football, Inc. v. Blackhorse*, 112 F. Supp. 3d 439, 450 (E.D. Va. 2015) (stating Blackhorse Defendants’ cause of action and specifying trademarks at issue); *see also* *Pro-Football Inc. v. Blackhorse*, GLOB. FREEDOM EXPRESSION COLUM. UNIV., <https://globalfreedomofexpression.columbia.edu/cases/pro-football-inc-v-blackhorse/> [<https://perma.cc/HH2Y-EXEZ>] (last visited Oct. 14, 2023) (discussing general points and holding of *Blackhorse*).

73. *See* *Media Fact Sheet: Trademark Trial and Appeal Board (TTAB) Decision in Blackhorse v. Pro Football, Inc. (TTAB Cancellation No. 92046185)*, USPTO (June 18, 2014), https://www.uspto.gov/sites/default/files/news/USPTO_Official_Fact_Sheet_on_TTAB_decision_in_Blackhorse_v_Pro_Football_Inc.pdf [<https://perma.cc/H8TN-77X9>] (clarifying TTAB’s power is to determine trademark registrability and not to determine whether that trademark is allowed to be used in general). The limitations of the TTAB decisions are clear; their rejections do not revoke all the mark owner’s rights since common law protections exist without federal registration, their rejections simply mean that federal registration, and the benefits that exist within them are barred. *See id.* (describing limitations of federal registration restrictions by TTAB).

74. *See* *Blackhorse*, 112 F. Supp. 3d at 450 (describing TTAB’s application of Disparagement Clause as rationale for rejection of “Redskins” mark).

75. *See id.* at 451 (discussing *de novo* review request of TTAB’s decision).

76. *See id.* (discussing *Blackhorse*’s seven causes of action, including declaration of non-disparagement and constitutional violations by Disparagement Clause). The *de novo* review request brought forth seven causes of action which included a request for declaration of non-disparagement, a claim of First Amendment speech violation,

In July of 2015, the United States District Court for the Eastern District of Virginia (the “District Court”) found for the Blackhorse Defendants on the substantive claims.⁷⁷ Specifically, it found that based on dictionary evidence; literary, scholarly, and media references; and statements of individuals and groups in the Native American communities attesting to the disparaging nature of the remarks, the term “Redskins” and the trademarks associated with it contained matter which “may disparage” a substantial composite of Native Americans.⁷⁸ The parties also agreed to the TTAB test which determines whether a mark “may disparage.”⁷⁹ This test asks:

1. What is the meaning of the matter in question, as it appears in the marks and as those marks are used in connection with the goods and services identified in the registrations?
2. Is the meaning of the marks one that may disparage Native Americans?⁸⁰

When determining whether a term may disparage Native Americans, courts look to the opinions of the Native Americans and not to the opinions of the general public.⁸¹ Additionally, the court stated that the defendants only needed to show that the marks may disparage a “substantial composite” of Native Americans, not a majority.⁸² The threshold for “substantial” cannot be determined by a calculation, but it is determined through evaluation of secondary sources such as editorial designations, media references, and statements from the referenced group.⁸³ It was not contested that the

a void for vagueness concern, a Due Process Clause violation, and a Takings Clause violation. *See id.* (stating Pro Football’s claims against both evidence of disparagement and validity of Disparagement Clause).

77. *See id.* at 453 (stating District Court’s holding against Defendants on all substantive counts).

78. *See id.* at 472–73, 475–80 (utilizing dictionary definition of “Redskins,” twenty-seven literary works, and direct statements from Native American leaders to show disparaging nature of “Redskins”).

79. *See id.* at 468 (stating parties’ agreement to requirements for determining disparaging marks).

80. *See id.* (detailing standard applied for determining disparaging matter within trademarks).

81. *See id.* (clarifying requirement of consideration of Native American viewpoints, as determining factor of disparaging classification of “Redskins” usage in this particular forum).

82. *See id.* (clarifying lesser requirement of disparagement towards substantial composite rather than majority composite).

83. *See id.* at 485 (stating factors considered to meet threshold for “substantial composite”).

term “Redskins” was used as a reference to Native Americans.⁸⁴ This was due to the teams’ consistent association with Native American imagery and the inclusion of Native American culture in their traditions.⁸⁵ Further, the language of the statute, “may disparage,” indicates a legislative desire to not require an intent to disparage when considering the cancellation of a trademark.⁸⁶

Additionally, the court held that the Disparagement Clause did not implicate the First Amendment.⁸⁷ The definition of trademark is “any word, name, symbol, or device or any combination thereof used by any person to identify and distinguish his or her goods, including a unique product, from those manufactured or sold by others and to indicate the source of the goods.”⁸⁸ Nothing in this definition requires the object to be registered to the USPTO to be considered a trademark.⁸⁹ The District Court stressed this point, stating that “[n]othing about Section 2(a) impedes the ability . . . to discuss a trademark that was not registered by the USPTO.”⁹⁰ By simply cancelling the registration of a trademark, the trademark still exists on a state or common law level, it merely lacks certain federal rights.⁹¹ In this case, the cancellation of Pro-Football’s trademark did not burden, restrict, or prohibit its ability to use or discuss the mark.⁹² Consequently, the liberal holding in *Blackhorse* gave the Native

84. *See id.* at 469 (stating that not only did court find that all six trademarks referenced Native Americans, but that Pro-Football also conceded that “Redskins” referenced Native American culture).

85. *See id.* at 469–71 (describing how use of Native American profile, spears, headdresses, cheerleaders named Redskinettes dressed in stereotypical black braided-hair wigs, and other Native American imagery proved to be references to their culture).

86. *See id.* at 472 (indicating that plain language of statute precluded requirement of intent to discriminate from analysis).

87. *See id.* at 452 (stating court’s holding that Section 2(a) of Lanham Act did not implicate First Amendment protections as it only applied to certain usage of marks rather than their complete expressive ability).

88. *See id.* at 453 (stating content which could be considered trademark for registration purposes).

89. *See id.* (clarifying that federal law does not create trademarks, it merely grants certain protections following registration by USPTO). Trademarks are created at the time the mark owner uses them in respect to their goods and services. *See What is a Trademark?*, *supra* note 31 (discussing formulation requirements for trademarks). Though limited, trademark rights are initiated at this time of use and do not require additional federal implementation. *See id.* (describing limited rights granted to mark owners at time of creation).

90. *See Blackhorse*, 112 F. Supp. 3d at 455 (discussing court’s rationale for restricting trademark registrations).

91. *See id.* at 456 (stating that trademark owner’s ability to use its unregistered trademark is unaffected by cancellation of trademark registration).

92. *See id.* at 455 (supporting conclusion that First Amendment is not implicated when ability to use and express trademark is not affected, as is case in federal registration rejections).

American community hope for eliminating offensive sporting names and logos.⁹³

E. *Matal v. Tam* Strips the Rights Granted Under *Blackhorse*

While the holding in *Blackhorse* was grounded in substantial case law, the Federal Circuit Court of Appeals' decision in *In re Tam*⁹⁴ disrupted this holding just months after the Supreme Court decided *Blackhorse*.⁹⁵ In that case, Tam was the front-man for an Asian-American band called "The Slants."⁹⁶ Tam claimed to have chosen that name to reclaim and take ownership of Asian stereotypes he experienced throughout his life.⁹⁷ He wanted to help Asian-Americans be proud of their heritage and ignore these stereotypes.⁹⁸ The band utilized their performances and lyrics as well to help push this narrative.⁹⁹ In 2011, Tam filed an application to register the mark "The Slants."¹⁰⁰ The examiner refused to register Tam's trademark, finding that it violated the Disparagement Clause since it likely disparaged persons of Asian descent.¹⁰¹ Following the Patent and Trademark Office's TTAB approval of this decision, Tam appealed to a panel of the United States Court of Appeals for the Federal Circuit.¹⁰² The Court of Appeals vacated and remanded this decision based on their determination that the Disparagement

93. See Paul Whitnui, *Washington Redskins Finally Agree: Dismantling Racist Team Mascots is Long Overdue*, CONVERSATION (July 14, 2020, 9:11 AM), <https://theconversation.com/washington-redskins-finally-agree-dismantling-racist-team-mascots-is-long-overdue-142618> [<https://perma.cc/8LP6-TY94>] (stating Blackhorse Defendant's belief of offensive nature of "Redskins" and their approval of court's initial holding).

94. *In re Tam*, 808 F.3d 1321 (Fed. Cir. 2015), *aff'd sub nom.* *Matal v. Tam*, 582 U.S. 218 (2017).

95. See *A Brief Look at the Effects of the Decision of In Re Tam on the Washington Redskins*, GARCIA-ZAMOR (Jan. 26, 2016), <https://garcia-zamor.com/2016/01/26/the-washington-redskins-and-their-fans-receive-a-special-gift-this-christmas-from-the-us-court-of-appeals-a-brief-look-at-the-effects-of-the-decision-of-in-re-tam-on-the-national-football-league-w/> [<https://perma.cc/R9TZ-9ZGQ>] (discussing perceived unlikelihood of *Blackhorse*'s holding and its direct contradiction by *Tam*).

96. See *In re Tam*, 808 F.3d at 1331 (stating Mr. Tam's connection with his band).

97. See *id.* (stating Tam's motivation behind band name).

98. See *id.* (depicting Tam's intent to discuss cultural and political issues concerning race and society that are fundamental to issues of free speech).

99. See *id.* (detailing Tam's inspiration for albums such as "The Yellow Album" and "Slanted Eyes, Slanted Hearts").

100. See *id.* (clarifying Tam's intent to register for "[e]ntertainment in the nature of live performances by a musical band").

101. See *id.* (discussing examiner's view that mark likely referenced people of Asian descent in disparaging ways since "slants" had been used commonly to reappropriate and mock physical features of people of Asian descent).

102. See *id.* at 1332-33 (discussing Tam's argument that TTAB's approval erred in finding his mark disparaging and further contending unconstitutional nature of Disparagement Clause).

Clause was facially unconstitutional due to its violation of the Free Speech Clause of the First Amendment.¹⁰³

Though the majority holding set a problematic precedent on appeal, this case also set forward key concepts in the dissents.¹⁰⁴ Specifically, Circuit Judge Reyna detailed why refusal to register disparaging marks under the Disparagement Clause is an appropriate remedy which directly advances the government's substantial interest to maintain the orderly flow of commerce.¹⁰⁵ Judge Reyna elaborated that Supreme Court precedent concedes trademarks are a form of commercial speech and the purpose of trademarks is to further commercial transactions.¹⁰⁶ Specifically, the nature of the trademarks seeking federal registration were for use in interstate commerce, an indisputably commercial use.¹⁰⁷ Since commercial speech is afforded less protections than other forms of speech, there is greater acceptance of governmental interference or restriction.¹⁰⁸ The dissent also noted that the purpose of the Disparagement Clause, along with the Lanham Act as a whole, was not to suppress speech, but rather "[t]he intent of this chapter is to regulate commerce."¹⁰⁹ In situations where the government's purpose is not to suppress speech, but to address a harmful secondary effect of that speech, the law is considered content-neutral and an intermediate scrutiny analysis is appropriate for determining constitutionality.¹¹⁰ In order to pass this intermediate scrutiny test, the law needs to serve an important government objective and be substantially related to achieving the objective.¹¹¹ Judge Reyna applied the intermediate

103. *See id.* at 1358 (detailing holding that, even though Tam's mark was clearly disparaging to those of Asian descent, rationale for restrictions under Disparagement Clause is not closely tied with any substantial government interest and thus infringed on Tam's First Amendment right to free speech).

104. *See id.* at 1376–82 (Lourie, J., dissenting and Reyna, J., dissenting) (depicting two dissenting opinions).

105. *See id.* at 1376 (Reyna, J., dissenting) (discussing key dissenting argument for upholding constitutionality of Disparagement Clause even under strict scrutiny review).

106. *See id.* (citing Supreme Court holding that trademarks are "a form of commercial speech and nothing more.").

107. *See id.* at 1378 (Reyna, J., dissenting) (stating that when determining which scrutiny level to apply, nature of speech needs to be taken into consideration).

108. *See id.* at 1376 (Reyna, J., dissenting) (citing Supreme Court precedent lowering protections for commercial speech).

109. *See id.* at 1378 (Reyna, J., dissenting) (discussing government's opposition to suppress speech via Disparagement Clause and its longstanding intent to regulate commerce).

110. *See id.* at 1378–79 (Reyna, J., dissenting) (stating Supreme Court's application of "Secondary Effects" doctrine in upholding regulations on time, place, manner, and content of certain expressions).

111. *See id.* at 1376 (Reyna, J., dissenting) (stating that government's decision to grant or deny restrictions in this case is based on intermediate scrutiny standard).

scrutiny test and determined the important government objective was to maintain the orderly flow of commerce.¹¹² He further argued that use of a demeaning mark in commerce indicates a discriminatory intent which is thus harmful to the overall flow of commerce.¹¹³ Judge Reyna concluded by stating that the law was narrowly tailored to the important governmental interest of maintaining the orderly flow of commerce since the restriction on speech is merely incidental and is outweighed by the purpose of the law.¹¹⁴

Following the holding of the Court of Appeals, the Supreme Court of the United States granted certiorari to review the Court of Appeals' decision.¹¹⁵ In affirming the holding of the Court of Appeals, the Supreme Court determined that the Disparagement Clause was a violation of the First Amendment.¹¹⁶ Specifically, the Court clarified that trademarks were private speech and not government speech.¹¹⁷ It refuted the government's contention that trademarks are government speech, on the grounds that the government is not required to be neutral on its own speech, but it is required to be neutral on trademark registration.¹¹⁸ A trademark examiner is required to approve any trademark that meets the standards set forth in the Lanham Act.¹¹⁹ The USPTO is also highly restricted in what it can do with the registered trademarks, in that it cannot remove registrations unless a party specifically requests them to do so.¹²⁰ The Court also categorized the Disparagement Clause as

and that when commercial content of trademarks threaten substantial interest in maintaining orderly flow of commerce, regulations may be appropriate).

112. *See id.* at 1379 (Reyna, J., dissenting) (noting that government would be powerless to implement trademark registry without infringing some form of commercial speech).

113. *See id.* at 1380 (Reyna, J., dissenting) (clarifying that commercial speech which brings reproach to groups of Americans, particularly in regard to their race, has lasting discriminatory impacts on commercial activity).

114. *See id.* at 1381 (Reyna, J., dissenting) (clarifying that since statute applies only to commercial speech and not private speech, and does not strictly burden Tam since it only restricts government benefits, furtherance of government interests far outweigh secondary incidental restrictions on free speech).

115. *See Matal v. Tam*, 582 U.S. 218, 218 (2017) (detailing procedural background leading to Supreme Court review).

116. *See id.* at 218–22 (depicting main point for Supreme Court's affirmation of Court of Appeals holding).

117. *See id.* at 238 (refuting government's contention that trademarks are government speech and are thus only restricted by appropriate government regulations).

118. *See id.* at 219 (discussing Court's concern to extend government-speech precedents due to government's ability to silence disfavored viewpoints).

119. *See id.* (clarifying examiner's requirement to remain viewpoint-neutral in registration determination).

120. *See id.* (supporting Court's view that it is far-fetched to classify registered trademarks as government speech).

a form of viewpoint discrimination which is strictly forbidden.¹²¹ It came to this conclusion by arguing that classifying marks as potentially offensive is based on the viewpoint of the examiner.¹²² The Court further drew on the *Central Hudson* test to show that the Disparagement Clause was unconstitutional.¹²³

In *Matal*, the Supreme Court applied the *Central Hudson* test, in part, to determine the constitutionality of the Disparagement Clause.¹²⁴ It refused to actually determine if trademarks were commercial speech, which are granted relaxed scrutiny, since the Court believed the Disparagement Clause as a whole would not pass the *Central Hudson* test.¹²⁵ The Court stated that the second prong of the test, requiring the assertion of a “narrowly drawn . . . substantial interest” was not satisfied.¹²⁶ It found that the government interest of preventing speech which expressed offensive ideas, “strikes at the heart of the First Amendment.”¹²⁷ A fundamental principle of the First Amendment is that the government cannot suppress speech based solely on disapproval of the content of the speech.¹²⁸ This viewpoint discrimination is determined if the government singles out a subset of messages based on a disagreement of the views expressed.¹²⁹ Here, since the law reflects the government’s disapproval of derogatory marks, but not of positive or benign ones, the discrimination is based on what it deems to be derogatory.¹³⁰ It also refuted the argument that protecting the orderly flow of commerce was a substantial interest and concluded that a clause which reaches any trademark that disparages any person is not narrowly drawn.¹³¹

121. *See id.* at 220 (confirming that public expression of ideas cannot be prohibited solely on premise of ideas themselves being offensive to some people).

122. *See id.* (stating that Disparagement Clause’s denial of registrations to offensive marks is considered restricted form of viewpoint discrimination).

123. *See id.* (stating Court’s consideration of *Central Hudson* test). For further discussion of the historical importance of *Central Hudson* test, see *supra* notes 52–65 and accompanying text.

124. *See Matal*, 582 U.S. at 220 (discussing Court’s limited application of *Central Hudson* test).

125. *See id.* (discussing Court’s refusal to apply *Central Hudson* test in procedurally binding manner).

126. *See id.* (stating Court’s rejection of constitutionality under *Central Hudson* test).

127. *See id.* (discussing Court’s refusal to restrict speech based on offensive nature alone).

128. *See id.* at 220–21 (discussing basis for restricting viewpoint discrimination).

129. *See id.* at 221 (describing test for determining viewpoint discrimination).

130. *See id.* (describing clause’s identification of relevant subjects as “persons . . . beliefs, or national symbols” and inability to register only those marks which disparage particular groups).

131. *See id.* at 220 (describing Court’s argument that protecting orderly flow of commerce from disruptions caused by invidiously discriminatory trademarks reaches too far to be deemed “narrowly drawn”).

Because of this, the Court was not willing to distinguish between private speech and commercial speech and instead used the *Central Hudson* test as a blanket analysis for both.¹³²

F. Financial Threats Forced Teams to Go Against Their Affirmed Constitutional Rights and Give up Trademarks

Matal reflected a triumph for teams, like the Washington Redskins, who were facing restrictions on their trademark registrations.¹³³ However, despite this win, the Washington Redskins decided in 2020 to forgo their affirmed constitutional right to maintain their trademarks, and changed their name and logo.¹³⁴ Though team owner, Dan Snyder, had previously stated the team would never change their name, long-term public pressure and threats from sponsors ultimately forced him to make the decision.¹³⁵ FedEx, who has the naming rights to Washington's stadium, pressured the team to change their name.¹³⁶ Further pressure came when talks of building a new stadium for the team on federal land were quashed by representatives who raised concerns of using federal land for a team with an offensive name.¹³⁷ Additionally, Tom Wheeler, FCC Chairman,

132. See *id.* at 244–47 (discussing Court's unwillingness to distinguish between private and commercial speech, and preference to reject Disparagement Clause as whole).

133. See *Matal v. Tam*, 131 HARV. L. REV. 243, 243 (2017) (stating that Court's holding "signaled a willingness to continue the deregulatory trend in commercial speech jurisprudence" thus continuing views of commercial speech freedom).

134. See Homero De la Fuente & Wayne Sterling, *NFL's Washington Redskins Will Change Name and Logo, Team Says*, CNN (July 13, 2020, 2:32 PM), <https://www.cnn.com/2020/07/13/us/washington-redskins-nickname-change-spt/index.html> [<https://perma.cc/W627-YL64>] (discussing thorough review conducted by Washington team personnel, leading to name change decision).

135. See Rosa Sanchez, *NFL's Washington Redskins to Change Name Following Years of Backlash*, ABC NEWS (July 13, 2020, 11:34 AM), <https://abcnews.go.com/US/washington-redskins-change-years-backlash/story?id=71744369> [<https://perma.cc/CJ82-A4CJ>] (discussing effects of Black Lives Matter movement on cultural awakening which ultimately incited change in 100-year-old name and logo).

136. See *Stadium Sponsor FedEx Asks Redskins to Change Nickname*, ESPN (July 2, 2020, 6:08 PM), https://www.espn.com/nfl/story/_/id/29401445/stadium-sponsor-fedex-asks-redskins-change-nickname [<https://perma.cc/2GME-JU22>] (describing letters from eighty-seven investment firms and shareholders, who contributed a combined \$620 billion to team, which asked FedEx, Nike, and PepsiCo to sever their decades-long relationship with Washington, all culminating in FedEx's formal request to Washington for name change); see also Neil Vigdor, *FedEx Joins Push for Washington Redskins to Be Renamed*, N.Y. TIMES (July 16, 2020), <https://www.nytimes.com/2020/07/02/sports/Redskins-name-FedEx.html#:~:text=The%20shipping%20giant%20paid%20%24205,deal%20that%20began%20in%201999> [<https://perma.cc/V6J5-DDKM>] (citing FedEx's influence following \$205 million sponsorship deal as major financial incentive for Washington's name change).

137. See John Bowden, *Key Dem Lawmaker Objects to Building New Redskins Stadium on Federal Land*, HILL (Dec. 11, 2018, 2:53 PM), <https://thehill.com/homenews/house/420836-incoming-dem-panel-chief-raises-objections-to-redskins-stadium-on->

considered a petition to revoke the broadcasting license for the word “Redskins” on TV.¹³⁸ This means that every time the name was used on air, it would be censored the same way as a swear word.¹³⁹ It was clear that the decision to change Washington’s name was not due to public requests, but was subsequent to the threats to their economic stability going forward.¹⁴⁰

Washington’s rename sparked public discussion and instituted pressure on other teams to re-evaluate their Native American references.¹⁴¹ Months after Washington’s name change, MLB’s Cleveland Indians decided to review their name and logo.¹⁴² By the end of 2021, the team announced it would be changing their name to the

federal-land/ [https://perma.cc/XQ4C-KF29] (discussing representative Betty McCollum’s adamant opposition of use of federal money and land for teams with offensive references); *see also* Mike DeBonis, Liz Clarke, & Fenit Nirappil, *D.C. Bid for RFK Site as New Home for Redskins Stadium Dealt Blow in Federal Spending Bill*, WASH. POST (Dec. 21, 2019, 10:25 PM), https://www.washingtonpost.com/sports/redskins/redskins-bid-for-rfk-stadium-land-dealt-blow-in-last-weeks-federal-spending-bill/2019/12/21/8cc21c02-242d-11ea-86f3-3b5019d451db_story.html [https://perma.cc/58NW-S82E] (discussing failed attempt to sign long-term lease extension in district which was subsequently omitted from federal spending bill).

138. *See* Brooks Boliek, *FCC Chair: Redskins Name ‘Offensive’*, POLITICO (Sept. 10, 2014, 5:04PM), <https://www.politico.com/story/2014/09/tom-wheeler-washington-redskins-name-110823> [https://perma.cc/7D66-J5UR] (discussing proposal likening use of term “Redskins” to obscene pornographic language and widespread request to push for name change).

139. *See* Ty Schalter, *Government, Media, Fans Can Force Dan Snyder into Changing Washington Team Name*, BLEACHER REP. (Oct. 2, 2014), <https://bleacherreport.com/articles/2218182-government-media-fans-can-force-snyder-into-changing-washington-team-name> [https://perma.cc/T57K-8CJL] (discussing potential impact of broadcasting license restrictions including censorship during game broadcasts, pregame shows, halftime shows, postgame highlights, and mid-week analysis).

140. *See* Scott Allen, *A Timeline of the Washington Football Team Name Change Debate*, WASH. POST (Feb. 2, 2022), <https://www.washingtonpost.com/graphics/sports/dc-sports-bog/2020/07/13/amp-stories/timeline-redskins-name-change-debate/> [https://perma.cc/9RFD-XH6J] (discussing key events leading up to and following Washington’s decision to change their name and logo).

141. *See* Jodi Heckel, *What Has Been the Impact of the Washington Football Team’s Name Change?*, ILL. NEWS BUREAU (Sept. 20, 2021, 11:00 AM), <https://news.illinois.edu/view/6367/1393930482> [https://perma.cc/74T2-CLQ4] (discussing effects of name change in following years, including passage of laws prohibiting Native American mascots in state schools, businesses dropping Native American imagery, and steps by fellow professional teams to limit Native American references).

142. *See* Jacob Lev & Eric Levenson, *Cleveland Indians Manager Says It’s Time to Change the Team Name*, CNN (July 5, 2020, 4:27 PM), <https://www.cnn.com/2020/07/05/us/cleveland-indians-mascot-trnd/index.html> [https://perma.cc/3NF7-LY28] (discussing changes made to Cleveland’s mascot in months following Washington’s name change). While initially, following public pressure, the Cleveland Indians decided to only remove their “Chief Wahoo” logo, this movement eventually culminated in the decision to revoke all of the team’s Native American imagery via a formal name and logo change. *See id.* (discussing Cleveland’s ongoing efforts to limit Native American references).

Cleveland Guardians.¹⁴³ This name came about after 40,000 fans were surveyed to determine that it properly appealed to the community and history of the city.¹⁴⁴

III. TRADING VIEWPOINT DISCRIMINATION FOR CONTENT
NEUTRALITY: PROPOSED LEGISLATIVE AMENDMENTS
THAT WOULD CREATE CONSTITUTIONAL
TRADEMARK RESTRICTIONS

This Section presents a proposed legislative adjustment to the Disparagement Clause that would allow for a constitutional rejection of offensive sporting trademarks.¹⁴⁵ Subsection A lays out the requirements for constitutional speech restrictions, namely a content neutral approach.¹⁴⁶ Subsection B utilizes Supreme Court precedent to suggest a need for a narrowly drawn statute.¹⁴⁷ Subsection C presents the proposed language adjustment that would transform the Disparagement Clause into a constitutionally-permissive restriction.¹⁴⁸ Finally, Subsection D applies this proposed legislation to professional sporting teams whose marks reference Native American culture.¹⁴⁹

A. Content Neutrality is Key for Constitutional Content
Discrimination

There has been disagreement as to a trademark's classification as commercial speech, with some arguing that rejection of a trademark's registration is not an actual restriction of speech, as it does

143. See *Cleveland Indians Officially Changing Name to Guardians on Friday*, ESPN (Nov. 17, 2021, 4:14 PM), https://www.espn.com/mlb/story/_/id/32655434/cleveland-indians-officially-changing-name-guardians-friday [<https://perma.cc/Z223-3QG9>] (discussing rationale behind new team name while highlighting challenges faced with changing century-old name to one reflecting community values).

144. See Mandy Bell, *New for '22: Meet the Cleveland Guardians*, MLB (July 23, 2021), <https://www.mlb.com/news/cleveland-indians-change-name-to-guardians> [<https://perma.cc/RV7A-7F8W>] (discussing team's effort to create new name and logo which accurately represents surrounding community's views and ideals).

145. For further discussion of the inequalities of the Disparagement Clause along with proposed legislative adjustments, see *infra* notes 150–219 and accompanying text.

146. For further discussion of the constitutional requirements for free speech restrictions, see *infra* notes 150–164 and accompanying text.

147. For further discussion of the statutory requirements of narrowly drawn restrictions, see *infra* notes 165–183 and accompanying text.

148. For further discussion of the proposed legislative adjustments to Disparagement Clause, see *infra* notes 184–211 and accompanying text.

149. For further discussion of the application of proposed legislation to professional sporting teams, see *infra* notes 212–219 and accompanying text.

not prevent an owner from utilizing it in a commercial manner.¹⁵⁰ Nevertheless, a growing group has considered trademark revocation an infringement on the First Amendment.¹⁵¹ In assuming this, there has been concern over the government's ability to discriminate against trademarks by rejecting their registrations.¹⁵² Content discrimination occurs when the government regulates a particular speech due to the topic discussed, the idea, or the expressed message.¹⁵³ Content discrimination commonly infringes on the First Amendment right to free speech and requires special qualifications in order to pass constitutional muster.¹⁵⁴ The most egregious form of content discrimination is viewpoint discrimination, which occurs when the government attacks the speaker's particular views on the subject, rather than the subject matter itself.¹⁵⁵ Viewpoint discrimination is generally unconstitutional as it goes against the bedrock principal that the government may not restrict speech solely because society finds it offensive or disagreeable.¹⁵⁶ In order to maintain constitutionality, a restriction should be viewpoint-neutral, meaning that it regulates the time, place, and manner of speech without regard to the substance or message of the expression.¹⁵⁷ Viewpoint-neutral content discrimination is permissible in discretionary government

150. See *Iancu v. Brunetti*, 139 S. Ct. 2294, 2305 (2019) (stating that Supreme Court failed to determine whether trademark restrictions are regulation of pure commercial speech).

151. See Robert C. Cumbow, *First Amendment Beats Trademark Rights Three Times in One Day*, MILLER NASH (Apr. 13, 2020), <https://www.millernash.com/industry-news/first-amendment-beats-trademark-rights-three-times-in-one-day> [<https://perma.cc/S7QU-65X2>] (discussing multiple court cases supporting view that trademark revocation infringes on First Amendment rights).

152. See *The Popular Brand That Had Their Trademarks Revoked by Law*, BENTLEY UNIV. (Mar. 10, 2018), <https://www.bentley.edu/news/popular-brands-had-their-trademarks-revoked-law> [<https://perma.cc/XK6S-E597>] (stating that when trademarks are revoked, it is "essentially a death sentence for the original product" since its revocation makes it fair game for competing companies to utilize mark).

153. See *Iancu*, 139 S. Ct. at 2313 (Sotomayor, J. and Breyer, J., concurring in part and dissenting in part) (stating definition of content discrimination).

154. See Lackland H. Bloom Jr., *The Rise of the Viewpoint-Discrimination Principle*, 72 SMU L. REV. F. 20, 21 (2019) (discussing troublesome nature of content discrimination which requires courts to apply strict scrutiny analysis).

155. See *Iancu*, 139 S. Ct. at 2313 (Sotomayor, J. and Breyer, J., concurring in part and dissenting in part) (defining categorization of viewpoint discrimination).

156. See Kevin Francis O'Neill, *Viewpoint Discrimination*, FIRST AMEND. ENCYCLOPEDIA (Sept. 19, 2023), <https://firstamendment.mtsu.edu/article/viewpoint-discrimination/> [<https://perma.cc/YV3T-MYWC>] (discussing government's restriction from regulating speech when motivating ideology is restriction's rationale); see also *Iancu*, 139 S. Ct. at 2299 (stating importance of First Amendment bedrock principle).

157. See David L. Hudson Jr., *Content Neutral*, FIRST AMEND. ENCYCLOPEDIA (Sept. 19, 2023), <https://www.mtsu.edu/first-amendment/article/937/content-neutral> [<https://perma.cc/MLH6-YUYX>] (defining viewpoint-neutral laws by distinguishing them from viewpoint-based discrimination).

programs or limited forum types, such as the trademark-registration system.¹⁵⁸ It has also been noted that a regulation is not viewpoint discrimination simply because it has the incidental effect of limiting a subset of views.¹⁵⁹

The neutrality of a law is critical in its constitutional analysis as it also affects the level of scrutiny applied.¹⁶⁰ A viewpoint-based law is subject to strict scrutiny.¹⁶¹ This is the highest standard of review and requires the government to show the law was passed to further a compelling government interest in a narrowly tailored way.¹⁶² Conversely, a content-neutral law only needs to pass the intermediate scrutiny test.¹⁶³ This is a substantially easier standard to meet, as it only requires the government to prove that the law was designed to further an important government interest and that the law is substantially related to that interest.¹⁶⁴

B. Supreme Court's Decision in *Iancu v. Brunetti* Indicates Need for Narrowly Drawn Statute to Achieve Viewpoint Neutrality

Following the holding in *Matal*, the Supreme Court limited other parts of the Lanham Act, using the same content-neutrality rationale.¹⁶⁵ Specifically, in *Iancu v. Brunetti*, the Supreme Court was faced with the question of how to deal with immoral or scandalous trademarks.¹⁶⁶ Section 1052(a) of the Lanham Act had an additional clause which barred the registration of trademarks deemed

158. See *Iancu*, 139 S. Ct. at 2313 (detailing certain situations where Supreme Court has admitted to content discrimination).

159. See *id.* (clarifying that while distinction between forms of content discrimination can be difficult, incidental effects of discrimination are not dispositive of viewpoint-based discrimination).

160. See Hudson Jr., *supra* note 157 (clarifying viewpoint discrimination laws are subject to strict scrutiny, while viewpoint-neutral laws only have to pass intermediate scrutiny test).

161. See *id.* (detailing viewpoint-based laws test as highest form of judicial review).

162. See *Strict Scrutiny*, CORNELL L. SCH., https://www.law.cornell.edu/wex/strict_scrutiny#:~:text=Strict%20scrutiny%20is%20a%20form,sues%20the%20government%20for%20discrimination [https://perma.cc/CV34-9NZ8] (last visited Oct. 14, 2023) (discussing highest standard test for viewpoint-based discrimination).

163. See Hudson Jr., *supra* note 157 (stating lowered standard needed for analyzing viewpoint-neutral discrimination).

164. See *Intermediate Scrutiny*, CORNELL L. SCH., https://www.law.cornell.edu/wex/intermediate_scrutiny#:~:text=Intermediate%20scrutiny%20is%20a%20test,-detail%20in%20the%20next%20section [https://perma.cc/74TR-4VMA] (last visited Oct. 14, 2023) (describing less rigorous standard to protect regulations against certain protected classes).

165. See *Iancu v. Brunetti*, 139 S. Ct. 2294, 2297 (2019) (stating similarities between holdings in *Matal* and *Iancu*).

166. See *id.* (discussing Supreme Court's main consideration in *Iancu*).

immoral or scandalous.¹⁶⁷ In *Iancu* the government conceded that the statute could be viewpoint discrimination, but argued that the issue could be rectified if the Court were to evaluate it using a limiting construction.¹⁶⁸ The majority ultimately declined to utilize this narrowed view, arguing that this interpretation was outside the scope of the statute and that by adopting it, the majority would be fashioning a new statute, going beyond their constitutional power.¹⁶⁹ The majority paired both immoral and scandalous together and concluded that they represented viewpoint discrimination, similar to that in *Matal*.¹⁷⁰

Even though *Iancu* was a facial loss for the restriction of offensive trademarks, the court's split rationale gave hopeful insight to possible future actions.¹⁷¹ *Matal* was a unanimous decision with multiple concurrences concerning minor aspects of the decision.¹⁷² *Iancu*'s later decision contained four concurring opinions whose justifications varied greatly.¹⁷³ Justice Alito's concurrence stated that Congress could and should adopt a more carefully structured statute which precludes the registration of vulgar terms which do not reflect

167. *See id.* at 2298–99 (classifying material as immoral if it was “inconsistent with rectitude, purity, or good morals”; ‘wicked’; or ‘vicious’” and, further, material was classified as scandalous if it gave “offense to the conscience or moral feeling”; ‘excite[s] reprobation’; or ‘call[s] out condemnation.’”).

168. *See id.* at 2299 (confirming government's contention that, taken on its face, Disparagement Clause's plain language appeared to be viewpoint-discrimination and recommending evaluating statute under limiting construction). Under the government's contention, the Supreme Court would narrow the statute to bar only marks which were offensive or shocking due to their mode of expression, specifically, those that were lewd, sexually explicit, or profane. *See id.* (describing government's justification for requesting limiting view of statute).

169. *See id.* at 2302 (discussing Supreme Court's concern over scope of their power to restrict application of Lanham Act). The immoral and scandalous bar stretches far beyond the government's reinterpretation. *See id.* (describing court's concern with adjusting statute interpretation). The statute does not discuss the general categorizations or the mode of expression, therefore the Court may only apply these narrowed interpretations when there is ambiguity in the language of the statute, but that does not exist here. *See id.* (describing court's justification for rejecting narrowed interpretation).

170. *See id.* at 2298 (stating USPTO's general contention to treat immoral and scandalous matter as unitary provision, rather than treating them as two separate provisions).

171. *See* Peter S. Menell, Mark A. Lemley, Robert P. Merges, & Shyamkrishna Balganesh, *INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE: 2022 1026* (2022) (comparing difference in unanimity between *Matal* and *Iancu* and concluding differing needs for narrowness).

172. *See Matal v. Tam*, 528 U.S. 218, 247–54 (2017) (Kennedy, J., concurring and Thomas, J., concurring) (dictating concurring opinions in *Matal*).

173. *See Iancu*, 139 S. Ct. at 2302–18 (Roberts, C.J., Breyer, J., and Sotomayor, J., concurring in part and dissenting in part; Alito, J., concurring) (dictating concurrences and dissents in *Iancu*).

the main point of the trademark.¹⁷⁴ Three other Justices disagreed with the majority, concurring in part and dissenting in part.¹⁷⁵ Specifically, the Justices concurred on the majority's revocation of the "immoral" portion of the statute.¹⁷⁶ However, they dissented on the revocation of "scandalous" trademarks.¹⁷⁷ These Justices felt that "scandalous" could be evaluated with the narrow interpretation recommended by the government.¹⁷⁸ The word "scandalous" is a facially ambiguous word which can be viewed broadly to cover offensive ideas and manners of expression, or can be viewed narrowly to only cover the offensive modes of expression.¹⁷⁹ This limited construction would not be considered an improper rewriting of law by the Supreme Court.¹⁸⁰ Rather, this reasonable reading of the statute would help the Court save a statute and avoid further legislative action.¹⁸¹ The Justices clarified that a properly narrowed definition of the restricting term would maintain its constitutionality since it would then be a viewpoint-neutral form of discrimination.¹⁸² These opinions clearly show the Court's preference to preserve legislation when possible, by limiting the scope in a constitutional manner; a concept which should be applied when reviewing the Disparagement Clause.¹⁸³

174. *See id.* at 2303 (Alito, J., concurring) (confirming best practice would be to forgo questioned clauses and convince Congress to create new, narrowly crafted statute).

175. *See id.* at 2303–18 (Roberts, C.J., Breyer, J., and Sotomayor, J., concurring in part and dissenting in part) (referencing concurring and dissenting opinions of Justice Sotomayor, Justice Breyer, and Justice Roberts).

176. *See id.* at 2309 (Roberts, C.J., Breyer, J., and Sotomayor, J., concurring in part and dissenting in part) (concluding "immoral" could only be logically read such that it would show preference for rectitude and morality over contrary views).

177. *See id.* (depicting dissenting opinion on matter of scandalous trademarks).

178. *See id.* (depicting dissenting rationale that while "scandalous" could be read to mean something similar to "immoral," it nevertheless could also reference matter which is simply indecent, shocking, or offensive generally).

179. *See id.* (confirming that facially ambiguous words raise possibility of applying limiting construction).

180. *See id.* at 2313 (confirming that intended use of limiting construction is not to allow judiciary to rewrite unfavorable laws).

181. *See id.* (stating Supreme Court's obligation to save statutes which can be reasonably saved).

182. *See id.* at 2317 (Roberts, C.J., Breyer, J., and Sotomayor, J., concurring in part and dissenting in part) (concluding dissenting view that by rejecting registration of obscene, profane, or vulgar trademarks, Court would be applying reasonable, viewpoint-neutral content-based discrimination).

183. For further discussion of the application of *Iancu's* standard to the Disparagement Clause, see *infra* note 209 and accompanying text.

C. Narrowed Definition of Disparaged Class Would Transform Disparagement Clause into Constitutional Viewpoint-Neutral Content Discrimination

When considering the constitutionality of the Disparagement Clause in *Matal*, the Court was concerned with the vagueness of the statute.¹⁸⁴ Overall, the Court stated that the Disparagement Clause was not narrowly drawn to drive out trademarks that support invidious discrimination.¹⁸⁵ It was concerned with the scope of the protected class since it included every person and institution, living or dead.¹⁸⁶ The definition of “persons” as depicted in that statute unambiguously included racial or ethnic groups, or any other group whose members share political, ideological, or religious beliefs.¹⁸⁷ The Court also noted that the Clause would restrict trademarks that disparaged any surviving person or group of people.¹⁸⁸ The specific example the Court gave was that “Down with racists” would be rejected on the grounds that it disparaged a specific group, racists.¹⁸⁹ This failed to reach the anti-discrimination goal that the government contended.¹⁹⁰

The court’s vagueness concern in *Matal* reflects the later points made in *Iancu*.¹⁹¹ It is clear that the Supreme Court wanted to maintain trademark rights and limit attempts to restrict them.¹⁹² Due to this, it seems the Court would prefer a narrowly tailored statute

184. *See Matal v. Tam*, 582 U.S. 218, 230–34 (2017) (discussing majority’s void for vagueness argument in concluding scope of Disparagement Clause reaches too far beyond its intended purpose).

185. *See id.* at 245–46 (stating Court’s concern over scope and reach of Disparagement Clause beyond its intended purpose).

186. *See id.* at 246 (using example of James Buchanan slander to exemplify inconceivability to disparage deceased people and its limited effect on commerce).

187. *See id.* at 231–32 (discussing vagueness argument on grounds that both broad and narrow interpretations of “people” would clash with breadth of Disparagement Clause).

188. *See id.* at 245–46 (clarifying that whether singular form “person” or plural form “persons” was used, scope of original Disparagement Clause would affect too many people).

189. *See id.* at 246 (discussing Courts concern over Disparagement Clause reaching any person, group, or institution regardless of its intended purpose or effect).

190. *See id.* (confirming viewpoint that Disparagement Clause is not anti-discrimination clause, it is merely “happy-talk clause”).

191. *See Iancu v. Brunetti*, 139 S. Ct. 2294, 2297 (2019) (paralleling issues with Disparagement Clause to those in Scandalous and Immoral Clause while confirming their denial for same reasons).

192. *See* Supreme Court Rules Trademarks are Protected by First Amendment’s Free Speech Clause, *supra* note 67 (elaborating on Supreme Court’s conclusion that while government’s interest in preventing offensive speech is constitutionally valid, it cannot promote this interest by infringing on First Amendment rights).

which attacks the core concern without risk to other groups.¹⁹³ The Supreme Court was attempting to limit the risk of restricting otherwise non-problematic trademarks.¹⁹⁴

The plain language of the Disparagement Clause is admittedly vague and can reach beyond its intended goal.¹⁹⁵ Having been untouched for over seventy-five years, the original drafters of the Lanham Act could not predict how extensive the trademark process would become and the critical developments it would face.¹⁹⁶ The Clause simply states that no trademark may be registered “which may disparage . . . persons, living or dead, institutions, beliefs, or national symbols.”¹⁹⁷ With key limitations, the Disparagement Clause could be narrowed as to reach the intended goal only.¹⁹⁸

In order to restructure the Disparagement Clause as to maintain its constitutionality, the *Central Hudson* test needs to be applied.¹⁹⁹ The amended statute would need to be narrowly tailored to promote a substantial government interest, such that it extends only as far as the interest it serves.²⁰⁰ As the Supreme Court concluded in *Matal*, the government interest boils down to the intent “to drive out trademarks that support invidious discrimination.”²⁰¹ Invidious discrimination is defined as the “unequal treatment of a person because of their membership in a protected class when that unequal treatment has no reasonable relation to a legitimate purpose.”²⁰² In order for the statute to be narrowly drawn to this issue, it needs to expressly

193. For further discussion of the Court’s concern over expansiveness of the statute, see *supra* notes 178–183 and accompanying text.

194. For further discussion of the Court’s concern of overly inclusive protected groups, see *supra* notes 165–170 and accompanying text.

195. See 15 U.S.C. §1052(a) (1946) (stating plain language of Disparagement Clause).

196. See Brief for Respondent at 48–51, *Matal v. Tam*, No. 15-1293, 2016 WL 7229149 (U.S. 2016) (stating that USPTO knew of Lanham Act’s standing issues and chose not to resolve them).

197. See 15 U.S.C. §1052(a) (1946) (stating registration restrictions under Disparagement Clause).

198. See *Iancu v. Brunetti*, 139 S. Ct. 2294, 2304 (2019) (Breyer, J., concurring in part and dissenting in part) (stating opinion that law safeguarding narrowly defined group of protected people would pass constitutional analysis).

199. See *Hudson Jr.*, *supra* note 61 (stating required use of *Central Hudson* test for determining constitutionality of regulations on commercial speech).

200. See *id.* (discussing three-prong requirement to pass *Central Hudson* test).

201. See *Matal v. Tam*, 582 U.S. 218, 246 (2017) (discussing government’s second major statutory goal of limiting trademarks which support invidious discrimination).

202. See *Invidious Discrimination Definition*, L. INSIDER <https://www.lawinsider.com/dictionary/invidious-discrimination> [<https://perma.cc/58ZP-JGCH>] (last visited Oct. 15, 2022) (defining factors for “invidious discrimination”).

state the issue and solution.²⁰³ The expansion of disparagement to “persons living or dead” was a major concern for the Supreme Court and should be abandoned.²⁰⁴ Instead, the statute should only focus on disparagement of living persons within a protected class.²⁰⁵ This protected class would include people of a particular race, gender, ethnicity, national origin, religion, or sexual orientation.²⁰⁶ By limiting the protected classes, the statute can remove protections for institutions, beliefs, and national symbols; concepts which drew much criticism from the Supreme Court.²⁰⁷

The Disparagement Clause was justifiably rejected due to its broad restrictions beyond its original intent.²⁰⁸ Had the Clause contained slightly different language, the Court could have interpreted it using the narrowing approach discussed in *Iancu*.²⁰⁹ This interpretation of the statute as it was originally drafted would be too far of a change from the plain language of the Disparagement Clause and would amount to the Supreme Court creating a new statute; an overreach of their constitutionally granted powers.²¹⁰ Therefore, the best solution would be to amend the Lanham Act and include a clause restricting the disparagement of people within a protected class as to restrict their invidious discrimination through the government approved trademark system.²¹¹

203. See Ruth Ann Strickland, *Narrowly Tailored Laws*, FIRST AMEND. ENCYCLOPEDIA, (Sept. 19, 2023), <https://www.mtsu.edu/first-amendment/article/1001/narrowly-tailored-laws#:~:text=The%20Supreme%20Court%20has%20ruled,possible%20on%20First%20Amendment%20liberties> [https://perma.cc/A9SJ-MLPW] (describing “narrowly tailored” laws as those which are precisely worded as to restrict as few First Amendment liberties as possible).

204. See *Matal*, 137 S. Ct. at 246 (describing concern over Disparagement Clause’s expansion of protection to overly wide group of protected people).

205. See *id.* (inferring statute restriction is necessary to be considered narrowly drawn).

206. See *id.* 246–47 (listing groups who, when disparaged against in trademarks, have adverse effects on commerce).

207. See *id.* (reiterating need for narrowed statutory restrictions).

208. See *id.* at 247 (concluding Court’s view of dangers of broad interpretations of already-vague Disparagement Clause).

209. See *Iancu v. Brunetti*, 139 S. Ct. 2294, 2308 (2019) (Breyer, J., concurring in part and dissenting in part) (discussing opinion that narrowed constructions would make Disparagement Clause restrictions viewpoint-neutral restriction on speech since statute’s plain language allowed for it).

210. See *id.* at 2301–02 (describing Court’s repudiation of rewriting laws to conform to constitutional requirements).

211. See *Matal*, 582 U.S. at 218 (stating that if “Congress wanted to confine the reach of the clause,” it could have used more restrictive language).

D. Application of Narrowed Statute Would Allow Revocation of Sporting Teams Whose Trademarks Reference Native American Culture

If Congress were to enact these changes, the door would be open to restrict professional sporting teams whose names and logos offensively reference Native American culture.²¹² Native Americans have been subject to immense discrimination throughout American history.²¹³ Their culture has also been subject to offensive stereotyping through movies and pop culture.²¹⁴

In following the court's mentality in *Blackhorse*, the views of Native Americans should be considered; showing a subsequent aversion for any reference to their culture in sporting events.²¹⁵ The National Congress of American Indians, the largest and oldest representation of American Indians, has consistently expressed the organization's continued efforts to end "Indian mascots."²¹⁶ This clearly shows that Native American references in sporting events would "disparage a substantial composite" of Native Americans.²¹⁷ If the statute contained specific language restricting trademarks for the protected class of people within certain races or national origins, Native Americans would be considered part of the protected class

212. *See id.* (stating Congress' ability to formulate narrowly construed statutes).

213. *See United States of America: Native Americans*, MINORITY RTS., <https://minorityrights.org/minorities/native-americans/> [<https://perma.cc/E8N9-CYQG>] (last visited Oct. 15, 2023) (describing history of Native American discrimination from United States' inception, through socio-economic and political issues, as means for expressing concerns of longstanding effects in modern-day discrimination of Native Americans).

214. *See* Arlene Hirschfelder & Paulette F. Molin, *I is for Ignoble: Stereotyping Native Americans*, FERRIS STATE UNIV. (Feb. 22, 2018), <https://www.ferris.edu/HTMLS/news/jimcrow/native/homepage.htm> [<https://perma.cc/DYA7-5HUK>] (discussing in-depth history of Native American stereotyping, commonly referring to them as violent savages).

215. *See* Jared Wadley, *Native American Mascots, Names, Chants: More Offensive Than Previously Reported*, UNIV. MICH. (Feb. 4, 2020), <https://news.umich.edu/native-american-mascots-names-chants-more-offensive-than-previously-reported/> [<https://perma.cc/3W4M-TV76>] (referencing findings of recent study that roughly two-thirds of Native Americans take offense to gestures, chants, mascots, and team names that reference Native American culture).

216. *See Ending the Era of Harmful Native "Themed" Mascots*, NAT'L CONG. AM. INDIANS, <https://archive.ncai.org/proudtobe> [<https://perma.cc/HJ6V-KW2X>] (last visited Oct. 15, 2023) ("[The NCAI] shar[es] the unified voice of hundreds of Tribal Nations representing millions of Native people, and that voice has been consistent and clear for decades: unsanctioned sports mascots are symbols of disrespect that degrade, mock, and harm Native people . . . For decades, NCAI largely focused its efforts on ending Native "themed" mascots at the professional level . . .").

217. *See id.* (discussing general Native American aversion to cultural references in sporting events); *see also* *Pro-Football, Inc. v. Blackhorse*, 112 F. Supp. 3d 439, 469 (E.D. Va. 2015) (referencing court's specification that trademarks need to "disparage a substantial composite" in order to fall within scope of Disparagement Clause).

with which the government has an interest to protect from invidious discrimination.²¹⁸ This would allow the USPTO to reject registrations of these names and logos.²¹⁹

IV. CONCLUSION: THE APPLICATION OF A NARROWLY DRAWN STATUTE TO REMAINING PROFESSIONAL TEAMS WHOSE TRADEMARKS REFERENCE NATIVE AMERICAN CULTURE

To date, three of the major professional leagues in the United States have teams whose names and traditions reflect Native American culture.²²⁰ Following the Redskins name change to the Commanders, the only remaining Native American-referencing NFL team is the Kansas City Chiefs.²²¹ The Chiefs were originally named after Harold Bartle, also referred to as “Chief Lone Bear,” a white man who claimed to be inducted into a local tribute of Arapaho people.²²² The Chiefs logo has changed twice since its

218. See *EEOC Enforcement Guidance on National Origin Discrimination*, U.S. EQUAL EMP. OPPORTUNITY COMM’N, (Nov. 18, 2016), <https://www.eeoc.gov/laws/guidance/eeoc-enforcement-guidance-national-origin-discrimination> [<https://perma.cc/CUSD-5DVG>] (classifying Native Americans as national origin for basis of discrimination).

219. See *Introduction*, USPTO, <https://www.uspto.gov/web/offices/pac/mpep/mpep-0020-introduction.html> [<https://perma.cc/UTH9-7AT7>] (last visited Oct. 15, 2023) (stating that statutes passed by Congress cannot be waived or changed in any way by USPTO).

220. See Mike Freeman, *The Cleveland Indians Changed Their Nickname, Now What Happens to Chiefs, Braves, Blackhawks? (And Let’s Talk Fighting Irish)*, USA TODAY (Dec. 14, 2020, 3:57 PM), <https://www.usatoday.com/story/sports/2020/12/14/cleveland-indians-chiefs-braves-blackhawks-team-nicknames/6539783002/> [<https://perma.cc/7SZR-8RRE>] (discussing implications of Cleveland Indians’ name change on remaining professional sporting teams with Native American references, specifically referencing its effects on Kansas City Chiefs, Atlanta Braves, and Chicago Blackhawks).

221. See Jeff Fedotin, *Name Scrutiny Extends from Redskins to Chiefs, But Kansas City’s Mascot Has a Different Origin Story*, FORBES (July 14, 2020, 8:00 AM), <https://www.forbes.com/sites/jefffedotin/2020/07/14/why-the-kansas-city-chiefs-team-name-may-not-actually-be-racist/?sh=6fbdaa442e1a> [<https://perma.cc/SU8T-WKBU>] (discussing increased pressure placed on Kansas City Chiefs to forgo Native American references following Redskins’ name change).

222. See Leah Asmelash, *How the Kansas City Chiefs Got Their Name, and Why It’s So Controversial*, CNN (Feb. 1, 2020, 2:15 PM), <https://www.cnn.com/2020/02/01/us/kansas-city-chiefs-name-race-trnd/index.html> [<https://perma.cc/7XNJ-XL47>] (discussing Chiefs’ name as having limited historical ties to Native American culture, such that “the Chiefs’ are named after a white man who impersonated Native American culture.”). When Bartle became the mayor of Kansas City, he used his popularity to convince Lamar Hunt, owner of the Dallas Texans to bring the team to Kansas and name the team after him. See *id.* (describing events leading up to Bartle’s acquisition of Kansas City Chiefs). This reference seems lighthearted to some, however, Bartle’s weak connection to the Native American culture, as well as potentially offensive traditions, raise significant concerns over the mark. See *id.* (discussing growing concern over history of Kansas City Chiefs name)

inception and now is an arrowhead with “KC” inside.²²³ However, the Chiefs have made a few institutional changes in the past years out of respect for Native American culture.²²⁴ One point of contention was their pre-game tradition of having a cheerleader ride a horse named “Warpaint” across the field, while hitting a Native American-style drum; a tradition the team eliminated in 2021.²²⁵ The Chiefs have also banned the use of Native American-style headdresses and face paint at Arrowhead Stadium.²²⁶ While this has been a positive change, team president, Mark Donovan, has remained adamant that he will not consider changing the team’s name or logo.²²⁷ He claims that the name reflects their respect and admiration of Native Americans.²²⁸ He also continues to allow the tomahawk chop as a game-day celebration, as well as promotion of the “Drum Deck,” a large native-style drum fans are allowed to hit.²²⁹ This persistence has caused increased controversy within the Native

223. See *Chiefs Logo and Its History*, LOGOMYWAY, <https://blog.logomyway.com/chiefs-logo/> [<https://perma.cc/2GBV-R783>] (last visited Oct. 15, 2023) (detailing changes to Chiefs’ logo from gun-wielding cowboy, to tomahawk-brandishing Native American, to its present day logo). While the name “Chiefs” has remained consistent since its inception, the logo has changed several times for several reasons. See *id.* (describing three major changes to Kansas City Chiefs’ logo with varying justifications for each).

224. See David Close & Nicole Chavez, *Kansas City Chiefs to Ban Fans from Wearing Headdresses and Native American-Themed Face Paint*, CNN (Aug. 20, 2020, 8:37 PM), <https://www.cnn.com/2020/08/20/sport/kansas-city-chiefs-ban-native-american-headdresses/index.html> [<https://perma.cc/TDQ4-ZLNM>] (explaining Chiefs’ decision to discuss changes with local tribal leaders as means of understanding issues faced by Native American communities, was intended to support community needs and prevent further discrimination).

225. See Eduardo Medina, *Still Chiefs, Kansas City Team Will Retire the Mascot Warpaint*, N.Y. TIMES (July 26, 2021), <https://www.nytimes.com/2021/07/26/sports/kansas-city-chiefs-warpaint-mascot.html> [<https://perma.cc/2E88-6ATA>] (discussing Chiefs’ decision to abandon certain traditions, following Cleveland Guardians’ name change).

226. See Nick Shook, *Chiefs Ban Headdresses at Arrowhead Stadium as Part of New Policies*, NFL (Aug. 20, 2020, 5:06 PM), <https://www.nfl.com/news/chiefs-ban-headdresses-at-arrowhead-stadium-as-part-of-new-policies> [<https://perma.cc/U4VJ-5SSG>] (detailing Chiefs’ set of policies geared towards raising awareness and celebrating Native American’s culture and traditions).

227. See Charles Goldman, *Chiefs Staying Course Despite Cleveland Indians’ Name Change*, USA TODAY SPORTS (July 26, 2021, 3:50 PM), <https://chiefswire.usatoday.com/2021/07/26/kansas-city-chiefs-cleveland-indians-team-president-mark-donovan-warpaint-retired/> [<https://perma.cc/W76K-KTJT>] (detailing Mark Donovan’s insistence that team’s name is promoting education and awareness of Native American culture to surrounding community).

228. See *id.* (discussing organization’s education program, designed to inform fans and community members).

229. See Close & Chavez, *supra* note 224 (discussing team’s intent to review various traditions).

American community, and the general population, about the team's insistence in appropriating Native American culture.²³⁰

History has shown that congressional influence can restrict benefits for discriminating teams.²³¹ Some have found other ways to force institutional change; primarily through pressure from sponsors.²³² However, these modes are not concrete and leave room for inaction.²³³ This issue leads fans to wonder what can actually be done to restrict these offensive references.²³⁴ In limiting a team's ability to solely profit off of their name and logo, teams would face a substantial financial burden which would inadvertently force change.²³⁵ While it is clear that the original Disparagement Clause was not equipped to ensure cultural protection, legislature can step in to fill these gaps.²³⁶ By introducing a new law which only removes trademark registrations for those which disparage a specific protected class, the USPTO would be equipped to revoke the trademark

230. See Heidi Schmidt, *Petition Seeks to Change Chiefs Logo Amid Playoff Run*, Fox 4 (Jan. 27, 2022, 11:13 AM), <https://fox4kc.com/sports/chiefs/petition-seeks-to-change-chiefs-logo-amid-playoff-run/> [<https://perma.cc/M7S4-Q3N6>] (discussing public petition requesting updated logo); see also *Change the Name and Imagery of the Kansas City Chiefs Football Team*, ACTION NETWORK, https://actionnetwork.org/petitions/change-the-name-and-imagery-of-the-kansas-city-chiefs-football-team?source=direct_link&referrer=group-not-in-our-honor [<https://perma.cc/P5C5-RJEW>] (last visited Oct. 15, 2023) (depicting public petition with tens of thousands signatures, pleading for Chiefs name change).

231. See Clyde McGrady, *Does Congress Have the Leverage to Force a Name Change For Washington's Football Team?*, ROLL CALL (June 24, 2020, 6:00 AM), <https://rollcall.com/2020/06/24/does-congress-have-the-leverage-to-force-a-name-change-for-washingtons-football-team/> [<https://perma.cc/TX26-L3EQ>] (discussing congressional requests to Roger Goodell to force name changes and further referencing legislation's act of stripping NFL's tax exempt status for offensive team names which NFL later decided to pay).

232. See Clarke, *supra* note 6 (confirming financial pressures as primary reason for Washington's name change).

233. See Stephanie Apstein, *Why Does MLB Still Allow Synchronized, Team-Sanctioned Racism in Atlanta?*, SPORTS ILLUSTRATED (Oct. 28, 2021), <https://www.si.com/mlb/2021/10/28/atlanta-braves-tomahawk-chop-daily-cover> [<https://perma.cc/3TF7-VMGL>] (discussing major Atlanta Braves sponsors, such as Truist, Delta, Nike, State Farm, and Miller Coors, who have refused to take specific action on forcing name change).

234. See Victoria Phillips & Erik Stegman, *Missing the Point: The Real Impact of Native Mascots and Team Names on American Indian and Alaska Native Youth*, CTR. FOR AM. PROGRESS (July 22, 2014), <https://www.americanprogress.org/article/missing-the-point/> [<https://perma.cc/3FCJ-K3QX>] (discussing public's repeatedly failed attempts to gain congressional or NFL support to change offensive team names).

235. See Gerben, *supra* note 50 (detailing expansive financial effects of trademark revocation on commercial profits of professional sporting teams).

236. For further discussion on the inefficiencies of the original Disparagement Clause language, see *supra* note 208 and accompanying text.

registrations of Native American-referencing teams, such as the Chiefs, the Blackhawks, and the Braves.²³⁷

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²³⁷ For further discussion of the proposed amended statute's potential effects on sporting teams' trademark registrations, see *supra* notes 209–211 and accompanying text.

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