Revised

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 86-270

TITLE SAN FRANCISCO ARTS & ATHLETICS, INC. AND THOMAS F. WADDELL, Petitioners V. UNITED STATES OLYMPIC COMMITT AND INTERNATIONAL OLYMPIC COMMITTEE

PLACE Washington, D. C.

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IN THE SUPREME COURT OF THE UNITED STATES

SAN FRANCISCO ARTS & ATHLETICS, INC. :
AND THOMAS F. WADDELL :
Petitioners: No. 86-270
vs. :
UNITED STATES OLYMPIC COMMITTEE AND :
INTERNATIONAL OLYMPIC COMMITTEE :

Washington, D.C.

Tuesday, March 24, 1987

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 12:59 a.m.

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P R O C E E D I N G S

CHIEF JUSTICE REHNQUIST: We will hear argument now in No. 86-270, San Francisco Arts and Athletics, Inc. versus United States Olympic Committee.

Ms. Dunlap, you may proceed whenever you are ready.

MS. DUNLAP: Thank you.

ORAL ARGUMENT OF MARY C. DUNLAP

ON BEHALF OF THE PETITIONERS

MS. DUNLAP: Mr. Chief Justice, and may it please the Court, the United States Olympic Committee in both its statutory and its constitutional position in this case, aims and hits wide of the mark.

Congress, in the enactment of the Amateur Sports Act of 1978 sought to bestow upon the United States Olympic Committee a trademark and, among other things, the word "Olympic".

The legislative history on this matter is plain. In part it states, in a letter from the Commissioner of Patents and Trademarks, and this is at Page 7495 of the Congressional Code and Administrative News for the pertinent Bill,:

"It is our understanding that this sub-section--"

The sub-section at issue in this case.

" -- is intended to make actionable those marks which falsely represent an association with the Olympics."

So, we know at the very least, from the legislative history, that the purpose and the intent of the user of the word "Olympic" does matter under the Statute.

Congress cared whether a user of the word "Olympic" was engaged in an infringement or a confusion or a false association with the U.S. Olympic Committee or not.

It is our position in this case that the very first issue that should have been tried below was whether the "Gay Olympic Games" sponsors' use of the word "Olympic" had any tendency whatsoever to confuse, to cause mistake or to falsely suggest some relationship with the United States Olympic Committee.

A number of facts in the record would have borne upon that question, had the lower Court afforded us a trial. For example, there would have been the fact that San Francisco Arts and Athletics offered to place a disclaimer of an appropriate size and appropriate effectiveness on all of its paraphernalia, claiming "Not associated with the United States Olympic Committee."

Perhaps more important and more to the point

in this case, is the fact that the founders of the "Gay Olympic Games", from the outset, sought to distinguish their activity and sought to make distinctive their activity with relation to the word "Olympic" and I rely, in part, on the factual record created by Dr. Waddell's letter, Dr. Waddell being the primary volunteer and founder of the games, who was also sued as a party Defendant below, to Mr. Miller, who was then the Executive Director of the U.S. Olympic Committee. He wrote him a letter explaining why this particular organization claimed a right and wished to have consent to use the word "Olympic", and he said, I think, in the most important part of that letter:

> "Colonel Miller, these games are very specialized indeed. Our outreach and emphasis differs widely from the traditional Olympic Games, in that we, openly gay people around the world are struggling to produce an image that more closely resembles the facts, rather than same libidinous stereotype generated over decades of misunderstanding and intolerance."

In short, the essence of the "Gay Olympic Games" was a political activity and an associative activity quite distinct in its very nature from the U.S. Olympics, the U. S. Olympic Team and the International

Olympic Games."

There was no confusion, we submit, nor was any proved below in the case of the gay users of the word "Olympic" and Congress cared, again, whether such confusion or false association was shown and it cared enough to put in the statute the language "tending to cause confusion, mistake or the like."

QUESTION: The language referred to, I mean, the full phrase is "the words 'Olympic', 'Olympiad', 'Citius Altius Fortius' or any combination or simulation thereof tending to cause confusion".

MS. DUNLAP. That is, indeed, one reading of the statute. As the Court realizes, what Congress, I think, did not do --

QUESTION: It is reading it without a comma, which is the way it is written.

MS. DUNLAP: Well, it is reading it, it seems to me, also without attention to Congress' purpose, which was to prohibit uses of the word "Olympic", whether or not in combination, which misled people.

QUESTION: well, how do you know that? The best indication of Congress' purpose is what they wrote.

MS. DUNLAP: Yes, and in the Puerto Rico case this Court found that a comma ought not to decide a question of public policy to the grammar, that is to

say, ought not to exclude the other two elements of the trivium, which are logic and rhetoric.

Now, grammar cannot decide the significant public policy question before this Court, for two good reasons.

QUESTION: The Congress should but the Congress writes statutes.

MS. DUNLAP: Congress writes statutes and Congress's grammar, Justice Scalia, is not the primary source of information about Congress' intent.

QUESTION: I'm not talking about its grammar. I am talking about its meaning. I am talking about the words that it wrote and the symbols that it used.

MS. DUNLAP: That's and in that statute, the most important words that it used were the citation to the Lanham Act and the language "tending to cause confusion".

QUESTION: How does it mean anything to say the word "Olympic" or any combination -- the word "Olympic" tending to cause confusion, to cause mistake, to deceive? It makes no sense.

The word "Olympic" tending to cause confusion, to cause mistake, to deceive or to falsely suggest. You can say the word "Olympic" in such fashion but the only way that modifying clause makes any sense is as

referring only to any combination or simulation thereof tending to cause confusion. Not to the words "Olympic".

MS. DUNLAP: Well, I think even the amicus for the U.S. Olympic Committee doesn't go so far as to say that that is the only reading of the statute that makes sense.

The AFofL brief says that one can read that statute either of the two ways that the parties have presented to this Court. That is why I say the question here does not hang upon the absence or presence of a comma.

QUESTION: You think that makes sense? I am not talking about the comma, now. You think it makes sense to say, "the word 'Olympic' tending to cause confusion, to cause mistake", that makes sense to you?

MS. DUNLAP: That's right. It does make sense because it was Congress's purpose, once again, as set forth in the legislative history, to make actionable those marks which falsely represent an association with the Olympics.

Now, we can use some other language in the Statute and suggest that perhaps Congress wasn't perfectly grammatical in the exercise of its legislative verbiage here, when it said combination or simulation thereof. Certainly Congress didn't mean to reach only

combinations of "Olympic" and "Olympiad" or simulations of "Olympic". It meant to reach, for example, a trademark infringer using the following language:

"We are the Official U.S. Olympic Beer." That would imply, of course, that the U.S. Olympic Committee had an involvement, a participation in this particular product and that the product gave support to the U.S. Olympic Committee.

That's a combination or simulation but not "thereof", not in the word "Olympic" but of the word "Olympic" and the word "beer".

QUESTION: Well, a very much easier way to get to that result is simply to say they used the word "Olympic", which is automatically made unlawful, whether it tends to cause confusion or not.

MS. DUNLAP: That is not only not how I believe the statute here should be interpreted but not how Congress, itself, expressed its intent in the legislative history when it said, and this is more legislative history, from the text. This has been heavily briefed but I think this particular segment is helpful:

"The present bill does not make the use of the various designations in Section 110(a) unlawful."

And the Court will note that there was bill that got through the House, that would have given the U.S. Olympic Committee sui generis protection for the word. Not a trademark, but as Judge Kozinski said below, "a crown monopoly" on the use of "Olympic". No one could use it except the U.S. Olympic Committee and anyone, according to that legislative history, who used the word "shall be liable in a Civil Action", and the Lanham Act was nowhere referred to in that bill.

That bill was rejected in favor of the language now before this Court and I think that is powerful evidence that Congress didn't mean, didn't intend and didn't consider putting aside every use of the word "Olympic" by anyone, in favor of the U.S. Olympic Committee's fiat over this unusual form of property.

QUESTION: What do you do about the separate clause that the Corporation shall have exclusive right to use the words "Olympic", "Olympiad" et cetera or any combination thereof?

MS. DUNLAP: Than language replicates language -- I was going tc say simulates -- replicates language in the Lanham Act. That is the kind of recital of a trademark owner's right that one finds in the Trademark Act. That's how we refer to trademark owners, exclusive

use is what they have but it does not mean exclusive use as against a non-infringing user, and it does not mean exclusive use in this case, reaching the Constitutional matter, of a word separate from its trademark value that had a powerful, political and associative value, not only to gay people but, apparently, to police, Armenians and a variety of others permitted their own Olympics with, if not the imprimatur, at least, the tacit consent of the U.S. Olympic Committee.

Congress did not go anywhere near as far in granting the U.S. Olympic Committee a right in the word "Olympic" as the U.S. Olympic Committee contends below and to this Court, and they are, for that reason, wide of the trademark.

Why did San Francisco Arts and Athletics, and the Petitioners in this case, use the word "Olympic"? Couldn't they have avoided this whole exchange about what Congress meant by saying "The Celestial Gays", which is a synonym for the word "Olympic", in its adjectival sense in the O.E.D. Couldn't they just have said the "Gay Just-As-Good-As-If-Not-Better-Than Olympic Games"?

That I think, as I read the U.S. Olympic Committee's brief, something the U.S. Olympic Committee might have more trouble saying was infringing.

QUESTION: Right.

MS. DUNLAP: There's a very good and powerful reason for San Francisco Arts and Athletics having chosen the word, other than the U.S. Olympic Committee's good will and that is this; the word is ancient. It was first used in 776 B.C. and it was used to identify a quadrennial athletic competition in a culture and in a place where some, at least, would argue, depending on your classic scholarship, homosexuality was more widely tolerated than in this culture.

QUESTION: They have also said the Hellenic Games. They were sometimes called that.

MS. DUNLAP. They did.

QUESTION: Do you think that would have had the same effect on those you were -- weren't you really appealing, not the ancient games but the modern revival of the ancient games?

MS. DUNLAP: Not at all. Not at all, and the evidence of record, again, is very strong that --

QUESTION ; You think Hellenic Games would have done just as well?

MS. DUNLAP: No, no, no. I think it would not have done anywhere near as well. I think --

QUESTION: Why not?

MS. DUNLAP: I think it would have been to the

word "Olympic" what Mr. Cohen's word on the back of his jacket was to, I strongly resent. I think Judge Kozinski below was correct when he pointed out that when you take a word out of a vocabulary as powerful as this one, when you withdraw it from the public domain and you bestow it on what we believe, and will contend, is a State actor, even if you bestow it on a private party, you place it in a position where that word starves for lack of enjoyment on the part of the majority, on the part of others.

QUESTION: Only because of the United States Olympic Committee. It was no more powerful in the public domain before that Committee than was the phrase "Hellenic Games".

MS. DUNLAP: Well, I think that, Justice Scalia, is both incorrect and a tryable dispute of material fact. What the Court seems to assume in that question is that there is no other association on the part of the public with the word "Olympic" other than the U.S. Olympic Committee.

Now, I think the record shows, if it doesn't show anything else, and keeping in mind that there was no trial, that there is a vast array and wide variety of uses of the word "Olympic", many of which seem to have no reference whatsoever to the U.S Olympic Committee and

many of which the U.S. Olympic Committee chooses not to sue, that reach back into the depths of this word, into the depths of its history. Perhaps not going to the O.E.D. for their reference but, indeed, understanding that the word "Olympic" has pre-dated in its value, in its linguistic power, the Olympics starting in 1896 by, if not millennia, at least certainly hundreds of years, and it is wrong, I think, in terms of summary judgment and in terms of Federal procedure, to assume that the only value the word "Olympic" has is the value the U.S. Olympic Committee has garnered for it or that Congress has chosen to believe that the U.S. Olympic Committee has garnered for it.

But I think here we have to pause and look at the importance of the purpose of the user because, once again, below, at the trial level, the Court didn't do so.

Congress means when it says in the Amateur Sports Act, "tendency to confuse and the like", that the party using the word is to be shown to have, in some way, impaired the value of the word relative to the USOC. No such showing was ever made below in this case. No such showing was ever required and I think the Court ought to keep in mind that it is the contention of these parties, of these Petitioners, that their use of the word "Olympic" was independent and separate and

distinct from the U.S. Olympic Committee's good will.

So, at the very minimum, the question you raise, I think, Justice Scalia, was a tryable dispute of a material fact.

QUESTION: May I just clear up this one thought of mine, if I may?

MS. DUNLAP: Yes.

QUESTION: If one reads the statute the way Justice Scalia suggested, rather than the way you say, with the words "tending to cause confusion" just applying to Sub-Paragraph 4 -- would you agree that the statute then reads directly on what your client did?

I mean, in other words, they did do it for the purpose of promoting an athletic performance or promotion and so forth?

MS. DUNLAP: If there is no confusion requirement in the statute, then we get to the question, the statutory question, if we stay within the construct of dealing with the statutory questions first, then we get to the statutory question of whether Lanham Act defenses apply. Whether the Lanham Act defense of "fair use and description in good faith" under 1115 before in the Lanham Act applies, for example.

Whether the common law defenses are important.

QUESTION: What is the statutory predicate for

that argument?

MS. DUNLAP: The statutory predicate for that argument is that Congress phrased the statute in terms of Lanham Act remedies and we take the position that Congress, in that reference, in that signal for the boundaries of the statute, meant to impose on this trademark holder a responsibility to keep its trademark within trademark bounds. Congress did not create an antidilution law in this case.

We have a lot of argument in the briefs that somehow Congress really meant to go much further than it did and give the U.S. Olympic Committee an ability to control use, whether confusing or not, and, more than that, to control every use of the word "Olympic" with any element of trade involved, even if the element of commerce was subsidiary and I think once again --

QUESTION: Just to be sure I understand. Your argument is that because Congress specified remedies comparable to those that are provided in the Lanham Act, it follows that they also intended to incorporate the Lanham Act defenses?

MS. DUNLAP: That is our position.

And more than that, Justice Stevens, I think because it is true for legislative history that one has words. One also has context and the context of this

bill, the bill that ultimately passed -- not the sui generis bill but the trademark bill, was trademark language.

We have the U. S. Olympic Committee in this Court contending, apparently, if I understand their brief, that Congress meant, in fact, to give the U.S. Olympic Committee this much broader power to go in and prohibit and enjoin and sanction, I suppose, and get damages in a case where they prove them -- they did not do so here -- any other users' use of the word "Olympic" in promotion of any contest. You'll notice that "athletic" doesn't modify the word "contest", necessarily.

And it our position on this question of antidilution that Congress could have made an antidilution law with relation to the word "Olympic", as a statutory matter. We'll come in a moment to the question of constitutionality.

I would say on the question of constitutionality of an antidilution law, that Congress could make an antidilution law covering the word "Olympic" the way that porcupines make love and that is to say, with painstaking care.

They did nothing of the sort here. They made a law that granted the U.S. Olympic Committee a

trademark. The U.S. Olympic Committee, within the bounds of the trademark, has successfully and without any great resistance, enforced the mark against real infringers.

What it has also done, starting with the Stop the Olympic Prison case is, it has made an argument, based on the statute, that it is essentially entitled to control any use of the word "Olympic" in conjunction with any activity that it finds, as one of its own lawyers put the matter in the record below, not suitable to the U.S. Olympic Committee's purposes and we think Congress didn't go nearly so far in this Statute.

Let me turn to the problem of what it would mean if Congress did go so far, because I think there are questions, there are extremely profound and important Constitutional questions here that have to be raised.

I think the bridge -- there probably are several -- but the conceptual bridge that occurs to me between trademark law and the First Amendment in particular and the Constitution in general, the bridge in this case is the bridge of genericness, classificatory language and as I understand this Court's opinion in Dollar Park and Fly, a generic word is not registrable.

I quote from the Court:

"Generic terms are not registrable and a registered mark may be cancelled at any time on the grounds that it has become generic."

And as I understand it, again, the term generic refers to a genus, such as "Olympic" and, for example, in this case then the phrase "Gay Olympic Games" would refer to a species.

The genus that "Olympic" represents, the generic term that "Olympic" represents cannot be registered as a trademark. So Congress did here as a constitutional matter what Congress cannot do in general with words under the Lanham Act.

QUESTION: Are you relying on Dollar Park and Fly for the proposition that a generic word cannot be subject to that sort of regulation by Congress?

MS. DUNLAP: Marks that constitute a common descriptive name are referred to as generic. Generic terms are not registrable and -- yes, I am.

QUESTION: But that was a statutory case. There was nothing in Dollar Park and Fly that said Congress could not have gone that far, had it wanted to, was there?

MS. DUNLAP: I think there is language in the

case that indicates the Court's sensitivity to the relationship between the commercial element of the generic terms doctrine and the free speech element of that doctrine.

QUESTION: Ms. Dunlap, I'm asking a question.

MS. DUNLAP: Please.

QUESTION: Did the Court's opinion in Dollar Park and Fly refer to any constitutional considerations when it was talking about the generic --

MS. DUNLAP: Only, I think, in dictum dealing with the dissent. That is to say, in saying: be reassured that Congress cannot give away words here because there is a generic terms doctrine and because there is a fair use and description doctrine.

But in so many words, Chief Justice Rehnquist, this Court did not do so there. This Court did not have to do so there. This Court will, if it finds that Congress indeed meant to strip away "tending to confuse" and not apply it to a case like this one, have to reach the question whether the generic words doctrine has a constitutional root and it is our position that it does.

And it's a very simple Constitutional root. It is quite logical.

The idea is this. If Congress, in the best interests of whatever legislation it proposes, decides

that the value of a word is such that to bestow it upon an entity will further that entity's purposes and Congress then withdraws from the common domain or, as some call it, the marketplace of ideas, a word and bestows it upon that entity for that entity's control, there are First Amendment implications to that bestowal if that word is not bestowed within a legal boundary, within a framework.

Judge Kozinski, in dissent from the denial of rehearing en banc below, I think phrased well the problem, which is that when you loose these rights and intellectual property from their conceptual moorings, from their trademark law or other property right boundaries and you set them free, they roam across the First Amendment and take things away from people, such as the right of free speech in a fashion that Congress is surely not free to do.

But let's start at the beginning, I think, of the whole question of whether --

QUESTION: Ms. Dunlap, let me ask you on this point, doesn't it make a difference whether you're using the generic term analogously or whether you're using it literally?

MS. DUNLAP: Comparing it to something as opposed to having it exists on it's own?

QUESTION: That's right. I mean, you can obviously trademark a lot of generic terms. Dove Soap, if you consider a dove just a species, and I'm sure you could make it Bird Soap and that would be trademarkable; wouldn't it?

MS. DUNLAP: Bird Soap?

QUESTION: Sure.

MS. DUNLAP. Yes, I think probably --

QUESTION: Bird is a genus; right?

MS. DUNLAP: Bird is a genus; that's right. But Bird Soap does not have either the history of the word "Olympic" in conjunction with athletic contests.

QUESTION: That's the point.

MS. DUNLAP: Right.

QUESTION: It's being used analogously. You're not saying "this is a bird". Neither is the Olympic Committee saying "these are the Hellenic Games", the original Olympic Games. It's an analogous use and whenever you allow a trademark use, you allow such analogous use of generic terms sometimes.

MS. DUNLAP: I think here's the trouble with that approach, as I see it. The main trouble I see with that approach is that it would sponsor trademark parody at the cost of serious speech.

Take, for example, the Girl Scout Poster. You

have a pregnant Girl Scout in the Personality Posters Case -- it's cited to this Court in the amicus -- and what the Court said there is, is no one in the world who is ever going to associate this with the Girl Scouts because those two things just don't go together. The idea being then, that a trademark parody, an absurdity, a piece of spurious or silly speech can use a generic word outside the trademark context and enjoy the full ambit of First Amendment protection.

A serious use of a generic word outside its expected context, such as "Gay Olympic Games", then deserves under this analysis, less protection than a frivolous use of a generic term and I think that's probably more than dangerous when it comes to affording the drawing of some boundary around the relationship between trademark law and the First Amendment.

QUESTION: I don't entirely understand. Let me go back to Bird Soap again.

You can trademark something "Bird Soap" but you couldn't trademark it "Soap Soap"; right? It's only a matter of taking the generic term and using it literally; right? I assume you could not trademark something called "Soap".

MS. DUNLAP: And call it "Soap Soap"?

QUESTION: That's right.

MS. DUNLAP: I don't believe you could do so as a trademark law matter but --

QUESTION: But you could trademark a shoe polish named "Soap"; I presume.

MS. DUNLAP: I suppose you could.

What I'm trying to do at this point is, move the Court to the consideration of the constitutional implications of permitting the having, not of "Soap Soap" but of a "Gay Olympic Games".

You see, you talking in commercial analogies --

QUESTION: What I'm trying to focus on is whether "Olympic" is being used in that analogous sense, in the sense in which you say "Bird Soap".

MS. DUNLAP: Right.

QUESTION: We don't expect anybody to believe these are the real Olympics but it's an analogous use, or is it being used in the literal sense?

If it were in the literal sense, I might agree with you that Congress can't say "the only thing that can say it's an 'Olympic' is this."

MS. DUNLAP: Well, there's a very strong procedural answer to your question and that is, from this record, without a trial, this Court cannot properly say that my client was using the word analogously as

opposed to literally, by your definition of the distinction.

It is my contention from this record that Dr. Waddell told the U.S. Olympic Committee "we're using the word in an ancient generic sense." In a sense of the word as he put it in his letter "that pre-dated Christ", so for this Court to say, "You really meant it this way.", is, I think, to ignore the fact that there was no trial in this case that would have disposed of that question and the parties' intent was entirely relevant both as a statutory and a constitutional matter.

I wish very quickly to say one thing about State action. One thing.

And that is, that in the very statute that we're looking to for the sake of interpretation in this case, the U.S. Olympic Committee is given power to "organize, finance and control the representation of the United States in the Olympic Games" and that statute goes on, Section 375, to describe a number of powers of the U.S. Olympic Committee that make it plainly different from a private hospital or a private nursing home or a private school, such as were before the Court in Blum and in Rendell-Baker.

This is much more the appearance of a State actor than were present in any of those cases and, once

again, absent a trial, it seems rash for this Court to do what the lower Courts did, throw aside the indicia of State action and say, "But we'll find it wasn't a State actor here."

I'd like to save my remaining time for rebuttal.

Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Ms. Dunlap.

We'll hear now from you, Mr. Kester.

ORAL ARGUMENT OF JOHN G. KESTER

ON BEHALF OF THE RESPONDENT

MR. KESTER: Thank you, Mr. Chief Justice.

May it please the Court, I will deal in a moment, if I may, with the questions of legislative history and purpose of the statute that were raised in the earlier argument but I would say at the beginning, that as we see it, the central issue in this case is a constitutional issue because we think the statute clearly covers and the issue is whether Congress had sufficient basis to pass this very important legislation, which is the foundation of amateur sports in the United States and which imposes a very limited and a very traditional kind of restriction on Petitioners use of a label.

Whether Congress, in short, could prevent them from using the U.S. Olympic Committee's label to label their week-long international athletic games and there are three points that I think centrally bear on that question.

The first is that this was not some kind of whimsical or casual or improvident largesse on the part of Congress. Congress was recognizing, as it had earlier in 1950 -- and I might say, Justice Scalia, that the 1950 Statute sheds light also on the proper interpretation of the 1978 statute. The 1950 statute clearly had no requirement of confusion in it.

Congress was recognizing that the U.S. Olympic Committee and the International Olympic Committee were the creators of the modern Olympic games.

Congress was providing a very limited labeling protection for that very important creation and when people think of the Olympic Games today, the connotation of that word "Olympic", the state of Greek scholarship in this country is not such today that they are thinking of something that happened in valley under Mount Olympus as a religious festival in honor of Olympian Zeus.

They are thinking about the creation of the U.S. Olympic Committee and International Olympic Committee going back to a group of people who got

together in 1896 and thought that they would create something that would be a good thing for the world.

Congress and the States protect creations of all kinds, all the time, under various legal headings and I would say the Lanham Act certainly does not exhaust the constitutional power of Congress.

In fact, trademarks do not even exhaust what the Lanham Act does, as this Court has recognized in the Ives Labs case, Section 43 of the Lanham Act may very well go beyond trademark protection, but we have categories of misappropriation, antidilution, trademark, sometimes copyright and sometimes something even called privacy, as we had in the Zacchini case, and all of those kinds of protection have been recognized by this Court and most of them have been upheld against various kinds of First Amendment challenge.

As this Court said in Friedman against Rogers, which dealt specifically with trade names, this Court said that when there is an adequate State purpose, States can regulate the use of trade names and that this Court is very cautious and very reluctant in approaching First Amendment challenges to commercial economic regulations.

The second main point is that what is at stake here is the life blood of the U.S. Olympic Committee.

There was a very important interest that Congress recognized here. The legislation in 1978 was passed at the culmination of a two-year study by a Presidential Commission, and that Presidential Commission concluded that U.S. amateur sports were in a tremendously difficult and, in fact, decaying situation and that there were two things, two things that were the problem with U.S. amateur sports at that time.

The first was disorganization, which was hurting the athletes themselves, and the second was lack of funding, and it was clear in that report of the Presidential Commission, which came in after two years in 1977, and it is clear throughout the legislative history of the Amateur Sports Act of 1978 -- you cannot escape it -- that one thing that the Commissioners and the Congress were all intent upon was keeping amateur sports well-funded but in the private sector.

Moreover, in order to deal with the problems that that Presidential Commission had recognized and pointed out, Congress did not just hand out a gift here. What Congress created here was a two-way street. Congress said, We will continue as we had in 1950 to protect the word 'Olympic' and the other words and symbols associated with the Olympic Games. We will give civil right of action instead of the criminal offense

that existed in 1950. We will continue all that but USOC has to do something in return. And if you look at Section 104 of the Act, there are fourteen different duties and obligations, a long list of obligations that were imposed upon the U.S. Olympic Committee in return for what it received from the Congress in the way of protection for its mark.

The third point I would make, is that clearly what Petitioners were seeking here was a free ride on the good will of the U.S. Olympic Committee's good name.

What was going on here --

QUESTION: Mr. Kester, how can we be sure that Congress did not intend to incorporate Lanham Act defenses?

MR. KESTER: I think we start as the Dollar Park and Fly case said and as Justice Scalia noted earlier, Justice O'Connor, with the language of the Act.

QUESTION: You think remedies doesn't include defenses?

MR. KESTER: I think clearly it doesn't in case because if Congress had meant that, Congress would have been doing nothing more than it had already done in the Lanham Trademark Act.

QUESTION: That would be doing something, I

guess; wouldn't it?

MR KESTER: It would be doing very little more, Justice O'Connor, because there was a trademark on the word "Olympic".

QUESTION: Just on "Olympic"; wasn't it? It wasn't on all of the words.

MR. KESTER: It was on the word "Olympic" and there were also trademarks on the symbols, and --

QUESTION: Right.

MR. KESTER: -- I think that as a matter of trademark law, Justice Scalia, derivatives are treated by the Trademark Office as being incorporated within a mark. In other words, if you had "Olympic" or "Olympiad", "Olympiad" might well be covered by the word "Olympic".

So there was no question here of the validity of the trademark that USOC already had. It is suggested in the reply brief that somehow that was an unenforceable mark. The fact is, it was enforced before 1978 under the Trademark Laws. There are cases.

There was a case in the Middle District of Florida. A case in the U.S. District Court in Missouri. Many cases in the Trademark Office.

What Congress had in mind here was to something more than provide trademark protection, which,

of course, depends on showings of likelihood of confusion and which usually means that there has to be a trial. It means that there is no simple way to enforce a trademark, and what they were concerned with beyond the cost of a trial, they were interested, of course, in the USOC spending its money on amateur sports and not on lawyers.

What they were interested in was also preventing dilution of the name. This is, we contend, and we think with absolutely clear basis in the legislative history, what is called an Antidilution Statute, such as we have in practically every commercial center as a matter of State law in the United States right now.

We think Congress clearly had adequate and ample basis to pass an Antidilution Statute, in the context of what these people had done, to make something of the word "Olympic" and to give it a meaning and in the context of the U. S. Olympic Committee's willingness to undertake to promote and to enhance amateur sports in the United States.

This law has basically been the Magna Charta of amateur sports in the United States. There has been, since 1978, a real renaissance. When you think of the activities of the U.S. Olympic Committee, and these can

be seen in the record, you should not think that what they do with the money that they get from licensing the name is simply buy airplane tickets for athletes to go to games throughout the world.

QUESTION: How would recognition of a "fair use" defense defeat the goals of Congress?

MR. KESTER: A "fair use" defense would simply lead to more and more litigation, Justice O'Connor, and, simply, what we're saying is, in the context of antidilution there might be some situation where you could imagine, for instance, if someone were saying "We protest the Olympic Games." and there is not an ounce of suggestion in this record that anyone was protesting the Olympic Games here. If it came to the point of discussion, of public controversy, that sort of thing, we don't think the statute would apply because this statute is limited to a very specified and narrow range of uses, which Congress set forth for purposes of trade --

QUESTION: Well, I guess my question is -- I'm sure your client would not want to bother with lawsuits but putting that aside -- how would the application, the proper application of "fair use" defenses defeat Congress' purpose and intent?

MR. KESTER: "Fair use" defenses, Justice

O'Connor, first of all, are a statutory matter under the Lanham Act, under the copyright, whatever. So what the Petitioners are talking about here, I think, is some sort of constitutional privilege rather than a "fair use" defense.

What Petitioners did here, Justice O'Connor, is to essentially stage the modern Olympic Games. In fact, they refer throughout the record to the traditional Olympic Games and they compare themselves to that. At Page 403 of the record, they say "The Modern Olympic Games" is what they are emulating.

In every respect --

QUESTION: Well, your answer is that in this case the application of "fair use" would reach the same result or conclusion.

MR. KESTER: Absolutely, and it would --

QUESTION: My inquiry was directed at what Congress intended when it referred to the Lanham Act and incorporated the remedies.

MR. KESTER: When Congress incorporated the remedies, I think it was simply using a shorthand. It said that if this mark is used in this way, the normal Lanham Act type of remedy shall follow but it was not reenacting the Lanham Act, because it didn't have to. They already had a trademark, and to the extent that

certain uses might be thought to be outside the scope of what Congress intended, I suppose one could say that Congress certainly would not want to get into some fringe area where the Constitution might well be involved, and that could be called "fair use" or it could be called Constitutional Privilege, but what we have here is, in this case, an actual copying of, a virtual reproduction of the modern Olympic Games.

QUESTION: Mr. Kester, supposing that next year Congress were to get a report from a Presidential Commission that says baseball is in a moribund state and so Congress passes a law creating the United States Baseball Commission and, among other things, it gives the Commission the right to the sole use of the word "Baseball", is that strictly a statutory matter? Any constitutional objection to that?

MR. KESTER: Well, it certainly isn't this case, Chief Justice Rehnquist, and I think the first answer that I would give to that -- several to that -- the first is what Justice Scalia pointed out in an argument this morning and that's that we don't expect that Congress is going to do silly things and the Congress, when it passes an Act, it has the benefit of a presumption of constitutionality.

Now, if baseball were, as in this case, a term

which really had no particular significance or only a distant mythological, historical significance and a group of people had done something to improve baseball, had done something to give it some meaning and it was in a moribund state and Congress then said, "Let's ask this group, in return for doing some other things for us, to --

QUESTION: Bringing a franchise to Washington.

(Laughter.)

MR. KESTER: I can't help you there.

QUESTION: It sounds more and more realistic.

MR. KESTER: But another thing that I think should be considered, too, is that there is a Grandfather Clause in the Statute and obviously Congress did reasonably have in mind that the name had been in use in the past in a legitimate way and it didn't intend to upset vested rights but can Congress, in the unique circumstances that we have here, pass what is really a law not very much different -- in fact, it's much more narrow -- in fact, it's much better thought out than the antidilution statutes of many States. Can Congress do that? Of course it can.

QUESTION: Mr. Kester, I am really interested in your answer to the Chief Justice's question.

Supposing they did just as he said, but they

said, of course, you cannot use the word "Baseball" in any commercial sense to promote contests and the like. The same kind of language you have here. Do you think that would be constitutional?

MR. KESTER: In the commercial sense?

QUESTION: Yes. Say just for the purposes you have in the Statute here, "to induce the sale of any goods or services, to promote any theatrical exhibition, athletic performance or competition, you cannot use the word 'Baseball', because that is going to be given to the Major League Players Association.", or something like that, because they are all starving.

MR. KESTER: And are you going to put in a Grandfather Clause?

QUESTION: Put in a Grandfather Clause.

MR. KESTER: And are you going to --

QUESTION: Just talking about the future. You can't form any new leagues that want to play baseball and use the name to promote it.

MR. KESTER: And did the word "Baseball" gain popularity as the result of the efforts of the group to whom you are giving --

QUESTION: It's pretty popular because of all the baseball that has been played up to now; yes.

MR. KESTER: But it was this group that caused

it to become popular?

QUESTION: Yes.

MR. KESTER: Nobody had ever heard of it since Abner Doubleday until this group go together?

QUESTION: Let me ask you a serious question. Do you think that would be constitutional?

And if so, what's the difference between that and the Olympic --

MR. KESTER: I think that what you have at stake, Justice Stevens, in this case as in so many cases that come up here where there is a First Amendment defense asserted, is you have to weigh the scope of the restriction against the substantiality of the State interest and I doubt, in your hypothetical, that the State interest would be nearly so great and it seems to me that the scope of the restriction -- baseball is something that is much more universal than the Olympic Games. The Olympic Games are something very special, they are very simple, they are very unique. We know what they are and --

QUESTION: The answer is no, as to baseball?

MR. KESTER: The answer is, I'd like to hear argument on it. I'm pretty sure it's no but I think that the question has to be put --

QUESTION: And the difference is that baseball

is a much more -- a word of more general application than "Olympics". "Olympics" had a much more --

MR. KESTER: Sure.

QUESTION: Is that the difference or is it that --

MR. KESTER: That's a difference.

QUESTION: -- the word "Baseball" does not primarily refer, as the word "Olympic" nowadays primarily refers to something that has been created by this group to which the special use has been given?

MR. KESTER: Yes. That's --

QUESTION: It primarily refers to quite something else.

Change the hypothetical to Major League Baseball. They could give a monopoly to Major League Baseball.

MR. KESTER: You mean the term "Major League"?

QUESTION No, Major League Baseball.

MR. KESTER: You're adding that --

QUESTION: Make the statute, just substitute the words "Major League Baseball" for "Olympics" wherever it appears.

MR.KESTER: And I assume then that your Statute would give that protection to the Major Leagues?

QUESTION: To the Major Leagues. The National

Association --

MR. KESTER: And they could call their product Major League Baseball and they would do certain things for the Government and the public?

QUESTION: They would move a franchise to Washington and one to New Orleans --

(Laughter.)

QUESTION: Mr. Kester, isn't it your position that the "Olympics" is absolutely different from anything else?

MR. KESTER: It is.

QUESTION: Well, why don't you say so?

MR. KESTER: I've been inadequately primed to say that, sir. They are different.

QUESTION: I mean, what is the difference between the Baseball Commission and -- is that the Olympics is non-profit.

If anybody wants to say that baseball is non-profit, go ahead.

MR. KESTER: The Olympics are certainly a charitable, non-profit, eleemosynary, do-good, if you want, institution in our society and --

QUESTION: Yes, but this is a form of subsidy for the Olympics; is it not?

MR. KESTER: This is a form of subsidy.

QUESTION: And it's not inconceivable that the Government would want to subsidize a national sport of some kind? They do --

MR. KESTER: The Government subsidizes all kinds of things, as we all well know.

QUESTION: That's a distinction of my hypothetical. I'm not sure what your answer is on Major League Baseball. yet.

MR. KESTER: My answer on Major League Baseball is that that gets closer than "Baseball" did but it is certainly nothing, as Justice Marshall pointed out, as unique as the Olympics. There's only one thing called the Olympic Games and everybody knows what the games are and --

QUESTION: There's only one thing called Major League Baseball.

MR. KESTER: -- it's the modern Olympic Games.

QUESTION: I think it's pretty close.

MR. KESTER: Well, that's for another day.

QUESTION: Why don't you say yes?

(Laughter.)

MR. KESTER: I'm trying to leave some room and I don't think Congress is going to pass that law, particularly given the economic aspects of Major League Baseball but I think probably they could. Yes.

I spoke of the First Amendment earlier.

I will say something about the legislative history. I don't think that there is any fair way to read the statute other than the way we suggest. There is no requirement for confusion in that statute and if you go back to the 1950 statute, which was a criminal law, there was nothing about confusion in that, and when this Act was passed -- I will just give you as a sample of the kind of statements that were made in the Congressional Record, Mr. Kindness, one of the sponsors of the bill said:

> "The bill significantly expands the purposes and powers of the U.S. Olympic Committee. In addition, the U. S. Olympic Committee is granted broadened exclusive use protection with respect to the Olympic symbol, emblem and name."

And that kind of language is throughout the history, if there were any doubt.

Clearly, they intended to broaden and to give a civil remedy.

QUESTION: May I ask one other question. I don't remember all the examples Judge Kozinski had in his dissent but things like "Olympic Beer" and "Olympic" this that and the other thing.

Most of those, I guess, are saved by the grandfather clause.

MR. KESTER: Many of them would be. And many of them are de minimis from the point of view of litigating.

USOC doesn't want to litigate against everybody but this is the biggest infringement that ever happened.

QUESTION: I understand that but as to all those, I take it under the statute you, in effect, by just not suing, you have consented to the use.

MR. KESTER: I don't think so. I would not -- if we're talking about non-grant -- there were produced in the lower Court hundreds and hundreds of letters that the Olympic Committee had sent to various people who were infringing the name "Olympic", and the fact is, fortunately, we live in a law-abiding society, and most infringers stop.

QUESTION: It is your position, I take it, if somebody in a town named Olympic wanted to open an Olympic Laundry or a laundromat or something, you would have the right to stop them from doing that?

MR. KESTER: That would be our position. I doubt that we would do it.

QUESTION: I understand that but --

MR. KESTER: We are interested in sports but we are not interested in litigating. I stand before you as a living example of what Congress was trying to avoid and here we are.

QUESTION: Are you going to address the State actor issue at all, Mr. Kester?

MR. KESTER: I will address it to the extent the Court desires, Justice O'Connor. I don't think the Court has to reach the point, because that issue, as I take it, goes to the question of whether there was some sort of selective prosecution. I think the record amply shows that there was no sort of singling out when USOC sued the largest infringer and copier that had ever come along of its name.

QUESTION: Was that issue really resolved in the Courts below? I gather it wasn't.

MR. KESTER: I would say that it was, Justice O'Connor, in the findings that Chief Judge Peckham made on the preliminary injunction. He made a finding that there had been no discrimination.

What happened after that was that there was approximately a year of discovery that went on and nothing, nothing was put into the record. There was nothing, when it got to summary judgment, to support the assertion that was made that there had been some kind of

selective prosecution discrimination, here.

QUESTION: I guess that I had assumed that that issue was open, provided we were to determine somehow that the Olympic Committee is a State actor.

MR. KESTER: I take it that the issue was preliminarily settled on the preliminary injunction motion, that nothing was put in the record on it.

The summary judgement record is before this Court and if this Court looks at the summary judgment record, it will find that there is absolutely nothing in there to show selective prosecution.

They came in and they said, "Well, no one else has ever been sued." The U. S. Olympic Committee put in ample evidence that many people had been sued, even when the statute was as new as it was at that time, and then they said, "Well, you didn't sue non-profit organizations.", and we put in evidence that five (5) non-profit organizations were sued, and they said, "Well, you didn't sue them until you sued us.", and then there was evidence that two of them had been sued before they were sued.

So it is, if I may use the vernacular, simply a "bum rap". There is nothing in this record to support that, and even if there were, I cannot imagine that the doctrine of State action, of governmental action, as it

has been applied in the past by this Court, would possibly extend to this private organization.

Congress said over and over and over again, for example, that they intended to keep amateur sports private and wanted to keep the Government out of it.

So I think that with respect to State action, we just can't get there from here on this record, nor should we.

QUESTION: May I ask you another question?

MR. KESTER: Surely.

QUESTION: About the construction of the statute. Supposing a cereal manufacturer wants to put a picture of a gold medal winner on the box and just recite on it, "Winner of Three Olympic Events", "Three Olympic Gold Medals", you could prohibit that; couldn't you?

MR. KESTER: I think that when you get into -- if you are saying, "I am the winner of three Olympic events -- "

QUESTION: Using the word "Olympics", yes.

MR. KESTER: I think then you are getting kind of into the area of news and we have never contended --

QUESTION: No. It's for a commercial purpose. I'm assuming it is done for advertising.

MR. KESTER: I understand but if it's the

individual and he's saying, "I won three Olympic events." --

QUESTION: It seems to me the statute would literally apply to that situation.

MR. KESTER: It's not this case, obviously.

QUESTION: I understand.

MR. KESTER: And the statute might be we have taken the position since as early as Page 20 of the record in this case, that newsworthiness is something that we regard as constitutionally privileged and if there is --

QUESTION: Newsworthiness in a commercial? I don't understand that.

MR. KESTER: If somebody wants to say, "I won three Olympic events --"

QUESTION: No. The cereal manufacturer wants you to eat my cereal and you'll be as good an athlete as Mr. So-and-so who won three Olympic games. That would be covered by --

MR. KESTER: That might be within the statute.

QUESTION: "Breakfast of Olympic Champions", for example.

(Laughter.)

MR. KESTER: That, I would say, is clearly covered. Clearly covered.

QUESTION: Well, my example is clearly covered, too; isn't it? I mean, seriously.

MR. KESTER: Not quite as clearly as Justice O'Connor's.

QUESTION: Why not? It's exactly the same word, "Olympic", in a commercial thing used for the --

MR. KESTER: The reason I hesitate is this, Justice Stevens, in your example you were saying, "I am the winner of three Olympic -- "

QUESTION: No. I'm saying the cereal manufacturer puts a picture of an athlete on it and says, "This person eats this cereal and he won three Olympic gold medals in the last Olympics."

MR. KESTER: You mean, they are presumably doing it with his consent?

QUESTION: Presumably; yes.

My question is, is it not perfectly clear that the Statute gives you the right to enjoin that use of the word "Olympic"?

MR. KESTER: I think under the Statute, yes, but you'd have to look also at the rights of the athlete in that situation. I mean, he may be like Zacchini, in the Zacchini case --

QUESTION: Well, he may not --

MR. KESTER: I mean, his performance -- he may

have some common law right of his own but I think the statute would cover it.

I would only sum up by saying that a more eloquent lawyer than I was Daniel Webster, who was before this Court in the Dartmouth College case, which also involved a charter of an eleemosynary institution, and he summed up the statute you have before you in one sentence, which says it much better than I can. He said:

"A charter of more liberal sentiments,
of wiser provisions, drawn with more care
or in a better spirit could not be expected
at any time or from any source."

And at that point, he lapsed into Latin, which I shall spare you.

Thank you very much.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Kester.

Ms. Dunlap, you have five minutes remaining.

REBUTTAL ARGUMENT OF MARY C. DUNLAP
ON BEHALF OF PETITIONERS

MS. DUNLAP: I have a little bit of Latin left for the Court and this is not, this time, the Latin of the trivium of grammar, logic and rhetoric, but the Latin that says that in litigation a Court should be concerned with facts.

My opponent has argued to this Court that the Olympics is unique. We won't dispute that, Justice Marshall, and then he has gone on to contend that it is the only thing called the Olympics, and there I think he defies the open record in a rather blatant and important way.

What this Court has before it is a record, granted, again, without a trial, that shows that the word "Olympic" has been used -- continues to be used -- in a variety of contexts to describe, among other things, athletic events held by what some might consider to be minority groups. Among those most vividly and obviously similar to the U.S. Olympic Committee in terms of athletic activity, we have in the record, the Police with their International Olympics and the exhibits show that they are using the five rings. In fact, I understand two of those are handcuffs but they are five rings, all the same.

With the U.S. Olympic Committee in 1982 representing to the Court, "Oh, there's no discrimination here.", we wrote them a letter and in 1984 when the Police continued to use the word "Olympic", no one says anything and they proceed.

With all respect, the question of discrimination here is not a tiny one, it is not small

one, it is not a trivial one because we have an entity funded by the U.S. Government and here I want to say on the point of funding, there has been a little bit of an anomaly, I think, in the USOC's position, because they argue on the one hand, "Congress gave us our most valuable asset in these trademarks. We raised forty (40) million dollars with them." Miller's affidavit shows that.

And then they turn around in the State action realm and they say, "we never got any Government funding.", and that's the mistake that the De Frantz Court made as well. They said, "This entity isn't funded by the Government." Funding alone is not State action. We're well aware of that.

There are a number of other factors here. All the factors this Court has set forth as important to State action, not the least of which is the structural derivative of the U.S. Olympic Committee from Congress. The Board of the U.S. Olympic Committee was named by Congress in the first section of the Amateur Sports Act, 371.

That makes this case dramatically different than Rendell-Baker versus Kohn.

The State action question cannot be lightly set aside here, and in this case, what should happen is

that the case should be remanded for a trial on the factual questions that determine whether this is a State actor.

The reason that's so important is that, otherwise, San Francisco Arts and Athletics, which has set forth some serious and important counter-claims about invasion of its First Amendment and Fourteenth Amendment rights will never have a trial on those counter-claims because the Court will do what the lower Courts have done and depart from its own precedents about what the indicia of State action are.

But I think an even more crucial departure from the factual record occurred in my opponent's argument --

QUESTION: Would you just refresh my recollection.

What if you do win on State action? What constitutional --

MS. DUNLAP: Well, that opens the Bill of Rights to us, in terms of litigation. Surely that doesn't mean we win the discrimination claim, it means we get to litigate..

QUESTION: Say we agreed with him on the -- your opponent -- on the First Amendment, what good would it do you to find State action?

MS. DUNLAP: Well, again, this Court is only in a position to say there should have been a trial on the question. That's the procedural posture of the case. I don't think this Court is about to --

QUESTION: But why would we need a trial on the question if we think he's right on the First Amendment? I'm not saying --

MS. DUNLAP: There's another First Amendment issue that is perhaps deeper than the one as to whether this particular organization, San Francisco Arts and Athletics, can hold an Olympics. and that is, does Congress have the power to give away words in the public domain?

And that constitutional issue is sufficiently fundamental that if this Court finds --

QUESTION: You've got State action there. Congress did it. You don't need to prove these people are State actors.

MS. DUNLAP: Right. But if this Court finds -- right. That State action is plain enough. Congress's action is unambiguously the action of the State.

If this Court were to find that Congress acted outside its constitutional bounds in bestowing the trademark to begin with, then certainly that would be

held unconstitutional.

We've taken the position all along that that's the last issue this Court need reach.

Judge Kozinski, I think, takes a somewhat different position and seems to contend that --

QUESTION: You still haven't explained to me why we should care about whether there is State action.

MS. DUNLAP: Because it is the bridge, it is the gateway to my client's litigation of its counter-claims that it was discriminated against and that its speech was suppressed when the U. S. Olympic Committee chose it, and it alone, among these many users of the word "Olympic" to describe athletic contests to suppress that speech.

There is evidence of record that there was a discriminatory attitude on the part of the USOC toward my client. It is an equal protection claim, Justice White.

And framed so in the counter-claims which are at the very end of Volume I of the Joint Appendix.

QUESTION: How is it left by the lower Court?

MS. DUNLAP: The counter-claims were dismissed. The lower Court said no State action -- in the only case where the Courts ever dealt with State action, meaning DeFrantz, there was no State action found. The Court

never addressed the specific facts of this case as the State action doctrine should have applied to them.

Let me address one more point of Counsel's argument, if I may.

Counsel said to this Court, "When people think of the Olympic Games, they are thinking of the creation of the U.S. Olympic Committee and not of something that happened under a mountain in ancient Greece."

I think at this point we have --

CHIEF JUSTICE REHNQUIST: Thank you, Ms. Dunlap. Your time has expired.

The case is submitted.

(Whereupon, at 1:57 p.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:
#86-270 - SAN FRANCISCO ARTS & ATHLETICS, INC., AND THOMAS F. WADDELL,

Petitioners V. UNITED STATES OLYMPIC COMMITTEE AND INTERNATIONAL OLYMPIC COMMITTEE

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Paul A. Richardson

(REPORTER)