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You Can't Sit with Us: Limiting Free Speech in Sports Arenas and How the Tampa Bay Lightning Took Home Ice Advantage Too Far

Kaitlin Shire

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YOU CAN'T SIT WITH US:¹ LIMITING FREE SPEECH IN
SPORTS ARENAS AND HOW THE TAMPA BAY
LIGHTNING TOOK HOME ICE
ADVANTAGE TOO FAR

“[A]ny time you get in front of that home fan base, there’s an edge. . . . Statistics show it but you can sense it in the field, you can sense it as you compete. It’s an advantage every team wants to have.”²

I. INTRODUCTION

Professional sports entail a variety of speech.³ Every season, thousands of fans flood arenas throughout the nation to cheer for their favorite teams.⁴ Teams encourage such expression at their arenas through the incorporation of cheerleaders, interactive scoreboards, and loud music.⁵ But what happens when teams only invite support from home fans, or worse, suppress the support of away fans?

In Amalie Arena, home of the Tampa Bay Lightning (“Lightning”), only supporters are welcome to show their support.⁶ Last spring, the Lightning made the National Hockey League playoffs.⁷ The Lightning banned visiting team apparel in the club sections,

1. MEAN GIRLS (Paramount Pictures 2004).

2. See Phil Rogers, *Winning Series Home-Field Advantage Is Important*, MLB.COM (July 15, 2014), <http://m.mlb.com/news/article/84750574/phil-rogers-all-star-game-victory-brings-important-edge-to-world-series> [https://perma.cc/UG7W-7V6X] (quoting St. Louis Cardinals manager, Mike Matheny).

3. See Howard M. Wasserman, *Fans, Free Expression, and the Wide World of Sports*, 67 U. PITT. L. REV. 525, 525–26 (2006) (noting that people talk about professional sports and use professional sports as forums for speech).

4. See *id.* at 526 (determining fans’ cheers are expected part of game).

5. See *id.* Due to such forms of encouragement, fans become participants in the game and their cheers can help decide games. See *id.*

6. See Dan Carson, *Tampa Bay Lightning Ban on Visiting Team Apparel Sparks Concern in Chicago*, BLEACHER REP. (last updated June 4, 2015), <http://bleacherreport.com/articles/2485185-tampa-bay-lightning-ban-on-visiting-team-apparel-sparks-concern-in-chicago> [https://perma.cc/4U9C-2KNZ] (noting that in reference to ban and Chicago Fans, Tampa Bay Mayor said, “you are not coming into my house”).

7. See *id.* The Lightning made it all the way to the Stanley Cup Finals but ultimately lost in the championship series to the Chicago Blackhawks. See also Joe Smith, *Lightning Shut Out as Blackhawks Win Stanley Cup*, TAMPA BAY TIMES (June 15, 2015, 11:03 PM), <http://www.tampabay.com/sports/hockey/lightning/lightning-shut-out-as-blackhawks-win-stanley-cup/2233847> [https://perma.cc/2VS5-7YJJ] (highlighting Lightning’s 2015 Stanley Cup Finals series).

taking home ice advantage to a whole new level.⁸ If the Lightning was simply a private entity, this ban would amount to nothing more than bad sportsmanship.⁹ However, while the United States Constitution does not normally apply to private entities, it will if the entity is functioning as a state actor.¹⁰ Courts have found that private entities receiving government funds can be state actors.¹¹ Amalie Arena, the Lightning's home ice arena, was constructed, and is currently maintained, using public funds; therefore, the Lightning's restrictive policy may be subject to a First Amendment claim.¹²

This Comment examines the constitutional issues that arise when professional sports teams attempt to suppress fan speech in their arenas. Part II provides a background on the importance of fan speech in professional sports and discusses what compels a

8. See Carson, *supra* note 6 (surmising that \$600 ticket does not include being able to wear jersey of choice). Upon purchasing tickets, Chase Club and Lexus Lounge Ticket Holders were informed: "Please note that for all 2015 NHL Playoff Games at Amalie Arena only Tampa Bay Lightning team apparel (or neutral) will be permitted in these club and adjoining seat areas. Fans wearing visiting team apparel will be asked to remove them while in these areas." Kavitha A. Davidson, *Tampa Bay's Hockey Dress Code Insults Lightning Fans*, BLOOMBERGVIEW (Jun. 1, 2015, 3:54 PM), <https://www.bloomberg.com/view/articles/2015-06-01/tampa-bay-s-hockey-dress-code-insults-lightning-fans> [<https://perma.cc/Y2LV-V9MW>] (discussing visitor apparel ban); accord Paul Munsey & Cory Suppes, *Amalie Arena*, BALLPARKS.COM, <http://hockey.ballparks.com/NHL/TampaBayLightning/index.htm> [<https://perma.cc/R9ZX-MDYD>] (last visited March 7, 2016) (reporting there are approximately 3,300 club seats, out of 19,500 total seats, in Amalie Arena).

9. See Shannon Ryan & Phil Thompson, *Lightning Impose Apparel, Ticket Restrictions on Blackhawks Fans*, CHICAGO TRIB. (June 15, 2015, 4:31 PM), <http://www.chicagotribune.com/sports/hockey/blackhawks/ct-lightning-fan-restrictions-spt-0603-20150602-story.html> [<https://perma.cc/C66W-VJRJ>] (discussing how other professional teams handle visiting fans). Many professional teams have policies that instead welcome fans to their stadiums. See *id.* For example, Major League Soccer requires all of its teams to reserve tickets for the opposing team's fans. See *id.* Further, some teams even reserve entire parking lot sections so visiting fans have spots to park and tailgate. See *id.*

10. See Christopher J. McKinny, Comment, *Professional Sports Leagues and the First Amendment: A Closed Marketplace*, 13 MARQ. SPORTS L. REV. 223, 228 (2003) (noting Constitution only applies to federal government and states).

11. For a discussion of courts' state actor analyses, see *infra* notes 64–93 and accompanying text.

12. See Munsey & Suppes, *supra* note 8 (providing facts and figures on Amalie Arena). It cost \$139 million to construct Amalie Arena. See *id.* 124 million dollars of that came from state sales tax bonds with the rest coming from private bonds, city tourist tax bonds, city parking bonds, county ticket surcharges and city ticket surcharges. See *id.* Amalie Arena's landlord is Tampa Sports Authority, a public agency created under Florida law. See *Tampa Sports Authority*, TAMPA SPORTS AUTHORITY, <http://www.tampasportsauthority.com/about-tsa> [<https://perma.cc/7MK5-GKE8>] (last visited March 7, 2016) (noting agency created as public agency under Florida law in 1965).

team, like the Lightning, to promote home fan speech while curbing opposing fan speech.¹³ Part III discusses the relevant constitutional standards and examines whether the Free Speech Clause applies to privately owned teams playing in publicly funded arenas.¹⁴ Part IV argues that the Lightning's policy violates visiting fans' First Amendment rights.¹⁵ Finally, Part V analyzes the detrimental effect such a policy can have on professional sports and recommends that the NHL and other professional sports leagues address the matter to protect the future of fan expression in the game.¹⁶

II. SPECTATOR SPEECH AND HOME ADVANTAGE

Most athletes, fans, and officials believe that home teams have an advantage over visiting teams.¹⁷ Such an advantage is not merely a myth, as teams do win more games at home.¹⁸ For example, during the 2014–2015 season, the Lightning won seventy-eight percent of their home games at Amalie Arena but only forty-three percent of their away games.¹⁹ Researchers have tried to pinpoint the rea-

13. For a discussion of a fan's role in home advantage, see *infra* notes 17–51 and accompanying text.

14. For a discussion of state actors and public forums, see *infra* notes 52–129 and accompanying text.

15. For a discussion of how the Lightning would fair against a First Amendment claim, see *infra* notes 133–238 and accompanying text.

16. For a discussion of how the Lightning's policy will affect the future of fan expression and fairness in professional sports, see *infra* notes 240–248 and accompanying text.

17. See K. Durham, *Does the Phenomena of Home Advantage Really Exist?*, UNIV. OF MICH., <http://www-personal.umich.edu/~kdurham/> [<https://perma.cc/8N62-NXDG>] (last visited March 6, 2016) (noting that in every professional sport, teams with “best records are rewarded with more home playoff games than their opponent”).

18. See John Bois, *Home Advantage in Sports: A Scientific Study of How Much it Affects Winning*, SB NATION (Jan. 19, 2011, 10:39 AM), <http://www.sbnation.com/2011/1/19/1940438/home-field-advantage-sports-stats-data> [<https://perma.cc/Y9BY-Z6EX>] (concluding that “home . . . advantage is real”).

19. See Craig Bennett, *Lightning vs. Blackhawks: Records and Stanley Cup Preview*, HEAVY (June 1, 2015, 10:35 AM), <http://heavy.com/sports/2015/05/lightning-vs-blackhawks-season-records-stats-stanley-cup-final-preview-head-to-head/> (reporting Lightning record was 32-8-1 at home and 18-16-7 on road). If an NHL team played all of its games at home it would, on average, win 5.22% more games each season. See Bois, *supra* note 18 (analyzing average number of games NHL teams won at home in 2015). Other professional sports leagues have also witnessed an advantage at home. See Rogers, *supra* note 2 (discussing Major League Baseball home advantage). For example, teams with a home advantage have won twenty-three of the past twenty-eight World Series. See *id.* (concluding statistic shows why All-Star Game victor is rewarded with home advantage in World Series).

son for the advantage.²⁰ Theories have cited crowd support amongst the reasons why teams tend to perform better at home.²¹ In fact, in defending the Lightning's policy, the organization's Executive Vice President for Communications, Bill Wickett, echoed this idea, stating that the team's goal was to "create as much of a hometown environment for the Lightning players and season-ticket holders as we can."²² Thus, the team sought to block opposing fans' access to the game while filling the arena with Lightning fans.²³

The Lightning's goal was not groundless; research has shown that fans can directly influence a game's outcome.²⁴ For instance, studies indicate that the greater the number of fans in a stadium, the greater the home team advantage.²⁵ The Lightning's performance over the past several seasons supports this finding.²⁶ In 2008–2009, one of the Lightning's lowest scoring seasons on record, the team only averaged approximately 16,500 fans per

20. For a discussion of such studies, see *infra* notes 25–41 and accompanying text.

21. See Stephen J. Dubner, "Football Freakonomics": *How Advantageous Is Home-Field Advantage? And Why?*, FREAKONOMICS (Dec. 11, 2011, 9:05 AM), <http://freakonomics.com/2011/12/18/football-freakonomics-how-advantageous-is-home-field-advantage-and-why/> [<https://perma.cc/VV2Y-B98W>] (studying how and why teams have home advantage).

22. Tom Spousta, *Tampa Bay Takes Extreme Measures to Ensure Home-Ice Advantage*, N.Y. TIMES (May 20, 2015), http://www.nytimes.com/2015/05/21/sports/hockey/tampa-bay-lightning-limit-wearing-of-opponents-colors.html?_r=0 (interviewing Wickett).

23. See *id.* (explaining reason for team's policy). Wickett explained, "[w]e wanted to do anything we could to make sure the building is blue and fans inside are Lightning fans." *Id.* (reasoning that policy may be unpopular with visiting fans, but Lightning fans come first). See also Davidson, *supra* note 8 (quoting and interpreting Wickett interview).

24. See generally Dan Shaw, *Crowd and the Home Advantage*, BELIEVEPERFORM, <http://believeperform.com/education/crowd-and-the-home-advantage/> [<https://perma.cc/UV27-7R7S>] (last visited Mar. 4, 2016) (citing psychological studies that have specifically focused on spectators' effect on home advantage).

25. See *id.* (noting that, for instance, research has found that when baseball stadium is at greater than forty percent capacity, home team's advantage increases to fifty-seven percent compared to forty-eight percent in stadium at less than twenty percent capacity).

26. See *NHL Attendance Report*, ESPN, <http://espn.go.com/nhl/attendance> [<https://perma.cc/HSY4-AZAL>] (last visited June 14, 2016) (providing attendance report, which indicated that Lightning's record and fan attendance has continued to improve within past few seasons).

game.²⁷ In comparison, in the 2014–2015 season, the team averaged 19,000 fans a game and reached the Stanley Cup finals.²⁸

Fans, therefore, can directly influence athletic performance.²⁹ Their presence and support “have an energizing effect” on an athlete.³⁰ While such energy may be detrimental to an athlete in sports where fine motor skills are required, such as sports like golf or gymnastics, it may actually improve athletic performance in sports that involve team play and endurance, such as ice hockey.³¹ An athlete can use the energy emanating from fans to push himself or herself harder than normal.³² Positive fan support in the form of applause and cheers can also improve athletic performance.³³ For instance, when fans are supportive, home teams score more points and have fewer violations.³⁴ On the other hand, visiting teams will commit more infractions in response to the home fans’

27. *NHL Attendance Report - 2008-09*, ESPN, http://www.espn.com/nhl/attendance/_/year/2009 [<https://perma.cc/A45J-BN8U>] (showing one of lowest attendances on record); *see also NHL Standings - 2009-09*, ESPN, http://www.espn.com/nhl/standings/_/year/2009 [<https://perma.cc/U8DD-PWVY>] (last visited Sept. 19, 2016) (reporting Lightning only scored a total of 66 points in the 2008–2009 season).

28. *NHL Attendance Report - 2014-15*, ESPN, http://www.espn.com/nhl/attendance/_/year/2015 [<https://perma.cc/22F3-SZSH>] (showing one of highest attendances on record); *see also NHL Standings - 2014-15*, ESPN, http://www.espn.com/nhl/standings/_/year/2015 [<https://perma.cc/WA77-8AHS>] (last visited Sept. 19, 2016) (reporting Lightning went 50-24-8 in its 2014–2015 season).

29. *See* Hilary E. MacGregor, *For Athletes, the Crowd's Roar Is Double-Edged*, *LA TIMES* (Aug. 23, 2004), <http://articles.latimes.com/2004/aug/23/health/he-crowds23> [<https://perma.cc/U4YH-QBLX>] (noting crowds can get athlete’s “adrenaline pumping”).

30. *Id.* (stating sports psychologists have dubbed effect as “social facilitation”).

31. *See id.* (emphasizing fans can be particularly helpful in sports where events are long and athletes tend to get tired).

32. *See id.* (comparing crowd energy to food, but also acknowledging athlete can receive so much energy from fans that he or she cannot control body and makes mistakes).

33. *See* Durham, *supra* note 17 (explaining athletes’ interpretations of fans’ feelings and thoughts can influence their performance). *See also* Shaw, *supra* note 24 (noting home teams generally commit more infractions when crowd is not positive).

34. *See* Shaw, *supra* note 24 (citing Donald L. Greer, *Spectator Booming and the Home Advantage: A Study of Social Influence in Basketball Arena*, 46 *SOC. PSYCHOL. Q.* 252 (1983)) (finding during normal crowd behavior, home team performed better and when crowd grew especially hostile towards away team, home team’s “superiority” grew even greater).

cheering.³⁵ Away athletes generally receive negative feedback, which can impair their performance.³⁶

The impact of fans is not limited to athletes though—it can also influence game officials.³⁷ A crowd can influence an official to “subconsciously favo[r] the home team.”³⁸ For instance, officials may favor the home team when the home team is losing in response to the whims of home fans.³⁹ Additionally, a loud crowd may cause an official to make fewer calls that penalize home players.⁴⁰ It is not only the volume of the home fans’ cheers that influence officials, but also the pro-home message they are projecting, as home bias lessens when the number of visiting fans and, consequently, pro-visiting messages increase.⁴¹

The Lightning may have been inclined to protect this great advantage because, as sports analysts have surmised, home advantage is actually dwindling across all sports.⁴² One explanation for this modern trend is lower noise levels.⁴³ With the creation of bigger stadiums, cheers from fans are simply not as loud or ominous as

35. See *id.* (citing Joel Thirer & Mark S. Rampey, *Effects of Abusive Spectators’ Behavior on Performance of Home and Visiting Intercollegiate Basketball Teams*, 48 PERCEPTUAL AND MOTOR SKILLS 1047 (1979)) (noting cheering constitutes normal crowd behavior and when fans disengage from this normal behavior, home team is affected).

36. See Durham, *supra* note 17 (citing R.B. Zajonc, *Social Facilitation*, 149 SCIENCE 269, 269–74 (1965)) (assuming that home crowd does not cheer visiting team).

37. See *id.* (concluding this provides evidence for social forces having effect on individual’s decision-making).

38. Shaw, *supra* note 24 (citing A.M. Nevill and R.L. Holder, *Home Advantage in Sport: An Overview of Studies on the Advantage of Playing at Home*, 28 SPORTS MED. 221 (1999)) (admitting that while officials may favor home team, they do not penalize away team more).

39. See *id.* (citing Thomas J. Dohmen, *The Influence of Social Forces: Evidence from the Behavior of Football Referees*, 46 ECON. INQUIRY 411 (2008)) (determining when home team is losing, crowds have greater than ever interest in decisions affecting their team).

40. See *id.* (citing A.M. Nevill, N.J. Balmer & A. Mark Williams, *The Influence of Crowd Noise and Experience upon Refereeing Decisions in Football*, 3 PSYCHOL. OF SPORT AND EXERCISE 261 (2002)). The study found that soccer referees called 15.5% “fewer fouls against the home team when [crowd noise] was present.” *Id.* (finding advantage disappears when crowd is quiet).

41. See *id.* (citing Dohmen, *supra* note 39) (concluding this is further support on effect of social forces on officials’ decisions).

42. See Tom Haberstroh, *Home-Court Advantage? Not So Much*, ESPN (Jan. 28, 2015), http://espn.go.com/nba/story/_/id/12241619/home-court-advantage-decline [<https://perma.cc/S75V-L7EZ>] (concluding home court advantage “not . . . as valuable as it once was”).

43. See *Home-Ice Edge Vanishes from Playoffs*, FOXSPORTS (Apr. 11, 2012, 1:00 AM), <http://www.foxsports.com/nhl/story/playoff-hockey-home-ice-advantage-long-gone-041112> [<https://perma.cc/RDD6-UE7Y>] (citing dwindling advantage in ice hockey).

they are in smaller stadiums.⁴⁴ Additionally, with the popularity of social media, fans are more focused on their phones than on the games, further muting fan cheers.⁴⁵ These lower noise levels affect both athletic performance and fan influence on referees.⁴⁶ Specifically, in the NHL, referees are now also less susceptible to fan intimidation and influence due to the NHL's recent "crackdown" on referee performance.⁴⁷

Due to the great influence fans can hold over players, officials, and games, the Lightning was indeed keen to bolster its home advantage.⁴⁸ However, the Lightning's policy is ultimately detrimental to the game and sports in general.⁴⁹ From a sportsmanship standpoint, if teams restrict fans' ability to cheer for their own teams, then the fairness of the game is in great jeopardy.⁵⁰ Further, from a legal standpoint, the policy's infringement on fans' constitutional rights, discussed below, raises even more serious concerns.⁵¹

III. PUBLICLY FUNDED ARENAS AND THE FIRST AMENDMENT

While it is clear that the Tampa Bay Lightning restricted visiting fans' speech by banning all visiting team apparel in the club section, it is not as clear whether the team, in doing so, violated the fans' First Amendment right to speech.⁵² Because the Lightning is a privately owned team, it is not facially evident that it is even subject to a Free Speech claim.⁵³ The Constitution does not protect

44. *See id.* (determining that while arenas can now fit more fans, they are so large that the fan's cheers "dissipate into the higher roofs"). Amalie Arena is the seventh largest NHL arena in terms of seating capacity. *See NHL Arenas*, STATSHOCKEY.NET, <http://statshockey.homestead.com/info/nhlarenas.html> (last updated Jan. 23, 2016) (noting Amalie Arena sits 19,204 spectators).

45. *See Haberstroh*, *supra* note 42 (declaring Facebook and players are vying for fans' attention and Facebook is winning).

46. For a discussion of crowd influence over officiating, see *supra* notes 37–41 and accompanying text.

47. *See Home-Ice Edge Vanishes from Playoffs*, *supra* note 43 (noting now every play is on computer and referees are more intimidated by their supervisors than crowd).

48. For a discussion of the Tampa Bay ban on visiting team jerseys, see *supra* notes 6–8 and accompanying text.

49. For a discussion of fan influence over players, officials, and game outcome, see *supra* notes 17–41 and accompanying text.

50. For a discussion of how fans can provide teams an advantage based on the fans' presence and support, see *supra* notes 17–41 and accompanying text.

51. For a discussion of the constitutional implications of the Lightning's policy, see *infra* notes 133–239 and accompanying text.

52. *See* U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech.").

53. *See Lightning Ownership, Executive, and Front Office Team*, TAMPA BAY LIGHTNING, <https://www.nhl.com/lightning/team/front-office> [<https://perma.cc/>

citizens from the actions of private entities.⁵⁴ However, the Constitution will apply if the private entity is held as a state actor.⁵⁵ Therefore, the Lightning may be subject to a claim if it meets this standard.⁵⁶ Section A discusses and applies the tests courts have traditionally used to determine whether a private entity is working as a state actor.⁵⁷ Given the close financial relationship between the city of Tampa Bay and the Lightning, it is almost certain that the Lightning is a state actor.⁵⁸

Even if the state actor standard is met, courts also require that the area where the speech is being restricted (here, the Arena) is a forum open to speech.⁵⁹ Section B discusses the forums that the Supreme Court has determined are subject to a First Amendment claim.⁶⁰ Amalie Arena fulfills the forum requirement because it is a forum that has been opened for fans to watch and cheer on their teams.⁶¹

A. The Tampa Bay Lightning Is a State Actor

While the Tampa Bay Lightning is privately owned, its home venue, Amalie Arena, was built using both private and public funding.⁶² Because of the public aspect, this funding model warrants an

S4GD-5MSP] (last visited Feb. 28, 2016) (reporting Jeff Vinik, a private owner, currently owns Lightning); *see also* Nick DeSiato, *Silencing the Crowd: Regulating Free Speech in Professional Sports Facilities*, 20 MARQ. SPORTS L. REV. 411, 413–14 (2010) (noting all but of one America's professional teams are privately owned).

54. *See* DeSiato, *supra* note 53, at 416 (noting private entity must be deemed state actor to fall under constitutional scrutiny); *see also* McKinny, *supra* note 10, at 228 (noting that while Constitution was only intended to apply to Federal Government, Fourteenth Amendment extended it to states and consequently to state actors).

55. *See* DeSiato, *supra* note 53, at 416–17 (noting some state constitutions provide for speech protection against private entities, meaning state actor requirement would not be needed).

56. For a discussion of state actor analysis, *see infra* notes 62–109 and accompanying text.

57. For a discussion of state actor analysis, *see infra* notes 62–109 and accompanying text.

58. For a discussion of the public funding used to construct and maintain Amalie Arena, *see infra* notes 79–81 and accompanying text.

59. *See* DeSiato, *supra* note 53, at 422 (emphasizing forum analysis is critical in determining whether team is subject to Constitution).

60. For a discussion of public forums, *see infra* notes 111–137 and accompanying text.

61. For a discussion of designated public forums, *see infra* notes 116–119 and accompanying text.

62. For a discussion of Amalie Arena's funding, *see supra* note 12 and accompanying text.

analysis of the state action element.⁶³ Courts have traditionally used three tests to determine the presence of state action: “[(1)] symbiotic relationship, [(2)] entwinement, and [(3)] public function.”⁶⁴ Because no one test has prevailed over the others, this Comment will apply each test to Amalie Arena.⁶⁵

1. *Symbiotic Relationship Test*

The United States Supreme Court has held that when a public and private entity confer mutual benefits, the private entity becomes a state actor under the “symbiotic relationship test.”⁶⁶ In *Burton v. Wilmington Parking Authority*, a government parking authority leased space in a parking garage to a private restaurant.⁶⁷ The restaurant refused entry to black patrons, sparking an Equal Protection claim.⁶⁸ The Court found state action because both entities benefitted financially from the other: the restaurant provided financial benefit for the parking garage, while the garage’s authority maintained the premises, covered utilities, and made parking available for the restaurant’s customers.⁶⁹ The *Burton* court emphasized that such a symbiotic relationship was not based solely on the landlord-tenant relationship created through the lease.⁷⁰ Rather, the arrangement constituted a partnership.⁷¹ Therefore, under *Burton*, a publicly funded arena, such as Amalie Arena, needs more

63. See DeSiato, *supra* note 53, at 413 (noting that through funding scheme, arena escapes pure public or pure private model and acts more so as a private-public hybrid).

64. *Id.* at 417 (citing Wasserman, *supra* note 3, at 542–53).

65. See *id.* at 417 n.36 (citing *Philips v. Pitt Cty. Mem'l Hosp.*, 572 F.3d 176, 182 (4th Cir. 2009)) (noting that few jurisdictions have adopted a particular test).

66. See generally *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961) (finding private restaurant to be state actor when it leased its premises from government and conferred mutual benefits with its governed landlord). See also DeSiato, *supra* note 53, at 418 n.40 (discussing that while “symbiotic relationship” test is accredited to *Burton*, mention of such test is nowhere in opinion).

67. See *Burton*, 365 U.S. at 719 (reporting publicly owned parking garage had to lease to five tenants in order to cover construction costs and “debt-service” requirements).

68. See *id.* at 716, 724 (arguing that allowing African Americans into restaurant would hurt business).

69. See *id.* at 725 (noting that two entities’ “interdependence” made it impossible for challenged discrimination to be considered “purely private”). Additionally, the restaurant benefited from the parking authority’s tax-exempt status when making its own building improvements. See *id.* at 724.

70. See *id.* at 725 (explaining every state action problem based on leasing must be decided on case-by-case basis).

71. See *id.* at 724 (determining “restaurant . . . operated as integral part of . . . public building”).

than a lease with the city to satisfy the symbiotic relationship test; it needs a more unified relationship to exist.⁷²

At least one district court has found that a publicly funded stadium does satisfy this requirement.⁷³ In *Ludtke v. Kuhn*, the New York Yankees banned female reporters from the clubhouse.⁷⁴ The United States District Court for the Southern District of New York ruled that a symbiotic relationship existed between the stadium and the City of New York not only because the Yankees leased the stadium from the city, but also because the city invested large amounts of money into the stadium to improve it and draw in more fans.⁷⁵ Furthermore, the district court noted that even if the Yankees wanted to retain its private entity character, “an institution’s interest in retaining its private character may be outweighed by harm to the public interest flowing from particularly offensive conduct.”⁷⁶ Therefore, the public’s interest in terminating the sexual discrimination would have outweighed the Yankee’s interest in remaining private, even if a symbiotic relationship did not exist.⁷⁷

A court could easily find mutual benefits conferred between the city of Tampa Bay and the Lightning.⁷⁸ The arena was constructed using approximately \$124 million of public funds.⁷⁹ Additionally, more than \$60 million, consisting of both public and private funds, funded the Arena’s renovations from 2011 to 2015. Further, the city benefits from having a professional ice hockey team.⁸⁰ Thus, the conferring of such benefits between both entities

72. *See id.* at 726 (noting such can only be determined by “peculiar facts and circumstances present[ed]”). The Court emphasized that its holding was that the Fourteenth Amendment must be complied with when the State leases property in the manner and the purpose shown in this particular case. *See id.* at 726.

73. *See Ludtke v. Kuhn*, 461 F. Supp. 86, 93 (S.D.N.Y. 1978) (finding New York Yankee’s stadium functioned as state actor). *See generally* DeSiato, *supra* note 53, at 418.

74. *See id.* at 91–92 (describing while male reporters were permitted into the clubhouse after games, female reporters were excluded to protect players’ privacy, preserve baseball’s image as a family sport, and preserve notion of decency).

75. *See id.* at 94 (determining city benefits because its profits escalate when game attendance increases).

76. *Id.* at 95 (citing *Weise v. Syracuse Univ.*, 522 F.2d 397, 407–08 (2d Cir. 1975)).

77. *See id.* at 95–96 (addressing discrimination as compelling reason for making Yankees state actor).

78. *See* DeSiato, *supra* note 53, at 419 (describing mutual benefits often conferred between cities and their stadiums).

79. For a discussion of Amalie Arena’s funding, see Munsey & Suppes, *supra* note 8.

80. *See id.*; *see also Ludtke*, 461 F. Supp. at 94 (noting city benefits from having team and high attendance).

should be enough for a court to deem the Lightning to be a state actor.⁸¹

2. *Entwinement Test*

The entwinement test looks to whether a private entity is so intertwined with a public entity that its conduct takes on a public character.⁸² The Supreme Court created the test in *Brentwood Academy v. Tennessee Secondary School Athletic Association*⁸³ where it determined that a private association created to regulate public school athletics was a state actor.⁸⁴ The Court found that the association was so “pervasive[ly] entwine[d]” with schools that the association must be considered a state actor.⁸⁵ The Court noted that public schools composed eighty-four percent of the association’s membership and also accounted for most of the association’s funding.⁸⁶ Additionally, the association’s officers were from the public schools and the association acted through public school representatives.⁸⁷ Together these factors established the association as a clear state actor.⁸⁸

81. See DeSiato, *supra* note 53, at 419 (determining that courts using symbiotic relationship test would likely find professional sports teams to be state actors if they lease stadium from city).

82. See *id.* at 420 (describing entwinement test). While a professional sports team receiving public funds would most likely be considered a state actor under the symbiotic relationship test, some scholars argue employing such a test is not appropriate in First Amendment cases since the test was created in a discrimination case. See Shane Kotlarsky, *What’s All the Noise About: Did the New York Yankees Violate Fans’ First Amendment Rights by Banning Vuvuzelas in Yankee Stadium?*, 20 MOORAD SPORTS L.J. 35, 63–64 (2013) (explaining that *Burton* was decided during Civil Rights era and was, therefore, more related to Equal Protection).

83. *Brentwood Acad. v. Tenn. Secondary Sch. Ass’n*, 531 U.S. 288 (2001).

84. See *generally id.* at 291 (holding non-profit association that regulated high school sports in Tennessee to be state actor due to presence of state school officials in organization).

85. See *id.* at 298 (concluding that while association was private, its status was “overborne” by the large presence of public school officials in its inner workings).

86. See *id.* (concluding association would not exist without public school officials); see also DeSiato, *supra* note 53, at 420.

87. See *Brentwood Acad.*, 531 U.S. at 291 (noting membership was limited to principals, vice principals, superintendents, and public school administrators). Further, the association’s staff members were eligible to receive a state pension. See *id.*

88. See *id.* at 302 (finding entwinement to be “unmistakable” and “overwhelming”). Further considerations used by other lower courts include “whether state officials are the primary-decisions makers in the organization, whether the private actor is state-funded, and whether it is doing a job usually done by a state actor.” Kotlarsky, *supra* note 82, at 64 (citing *Villegas v. Gilroy Garlic Festival Ass’n*, 541 F.3d 950, 955 (9th Cir. 2008)).

There is no precedent specifically addressing professional sports arenas and state action under the entwinement test.⁸⁹ However, according to at least one scholar, “a court would likely look at the title of the facility’s ownership, who controls the facility operations, who maintains the authority to establish free speech . . . rules in the facility, and whether the government provides police and other security officials to enforce the club-created rules in the facility.”⁹⁰

Regardless of strong evidence to support entwinement, courts can and have declined to label private entities as state actors under the test.⁹¹ For instance, the Fifth and Ninth Circuit Courts of Appeals have declined to deem associations as state actors, even though the associations were hosting festivals on city-owned public parks and the cities provided police officers to patrol the events.⁹² Ultimately, a court must be convinced that the private actor and state “are working so closely together [that they] cannot be separated.”⁹³

There is strong evidence to support a claim that Amalie Arena is a state actor under this standard.⁹⁴ First, Tampa Sports Authority, a state-created authority, actually owns and maintains Amalie Arena.⁹⁵ The authority is state-funded and responsible for any decisions made concerning the facility.⁹⁶ Additionally, Amalie Arena employs public safety officials for games.⁹⁷ Thus, both the police

89. See DeSiato, *supra* note 53, at 420 (concluding there is no case law on entwinement test and sports arenas).

90. *Id.* (citing Wasserman, *supra* note 3, at 549) (referring to continued relationship in which city provides officers to stadium). One scholar has concluded that having city police officers to regulate fan conduct would entwine the city and the team, making the team a state actor. See Kotlarsky, *supra* note 82, at 65 (citing Wasserman, *supra* note 3, at 549) (noting lack of precedent and predicting what court would do).

91. See Kotlarsky, *supra* note 82, at 64–65 (noting that test is also described as “‘close nexus’ test”).

92. See *id.* at 65 (citing Villegas v. Gilroy Garlic Festival Ass’n, 541 F.3d 950, 955 (9th Cir. 2008); Rundus v. City of Dallas, 634 F.3d 309 (5th Cir. 2011)).

93. *Id.* at 65–66 (concluding more than police presence at private event is needed to fulfill entwinement test).

94. For a discussion of the entwinement test, see *supra* notes 82–93 and accompanying text.

95. For a discussion of Tampa Sports Authority, see *supra* note 12.

96. See Kotlarsky, *supra* note 82, at 64 (citing Villegas v. Gilroy Garlic Festival Ass’n, 541 F.3d 950, 955 (9th Cir. 2008)).

97. See Scott Viau, *Blackhawks Fan Booted from Tampa Arena After Cheering for ‘Wrong’ Team*, PATCH: JOLIET PATCH (June 7, 2015, 3:27 PM), <http://patch.com/illinois/joliet/former-joliet-resident-asked-leave-blackhawks-game-0> [<https://perma.cc/BKK7-7RHE>] (discussing how police removed Blackhawks fan from Lightning playoff game for cheering “too loud”).

presence at games and the Authority's title over the arena and its control over facility operations are sufficient to lead a court to reasonably conclude that the government is so pervasively entwined with Amalie Arena and its operations that it is a state actor.⁹⁸

3. *Public Function Test*

Courts have also employed the “public function” test to assess state action.⁹⁹ When considering such a test, courts ask whether “the private entity exercise[s] powers which traditionally are exclusively reserved to the state.”¹⁰⁰ In *Marsh v. Alabama*, the Supreme Court found a company-owned town to be a state actor because the town performed a traditional state function: civic operation.¹⁰¹ Additionally, the Sixth Circuit Court of Appeals, in *United Church of Christ v. Gateway Economic Development Corporation of Greater Cleveland*,¹⁰² found that a sidewalk along the Cleveland Indians' stadium operated like a normal sidewalk where anyone could use it; therefore, it performed a public function, making its owners state actors.¹⁰³ However, the Sixth Circuit declined to determine whether the owners' state actor status extended beyond the sidewalk and into the stadium.¹⁰⁴

Accordingly, for a court to find that Amalie Arena performs functions traditionally reserved for the government, it would have to find that the Arena performs the function where the speech was banned: the club seats.¹⁰⁵ Unlike the sidewalk along the Cleveland Indians' stadium, the club seats in Amalie Arena do not perform a public function; rather, they are only available to fans who have

98. For a discussion of the entwinement test, see *supra* notes 84–88 and accompanying text.

99. See *Marsh v. Alabama*, 326 U.S. 501, 508–09 (1946) (finding company that owned and controlled town to be state actor due to it performing role traditionally performed by state).

100. DeSiato, *supra* note 53, at 421 (quoting *Wolotsky v. Huhn*, 960 F.2d 1331, 1335 (6th Cir. 1992)) (internal quotation marks omitted) (alteration in original).

101. See *Marsh*, 326 U.S. at 507–08 (noting town functioned as any other state-operated town).

102. 383 F.3d 449 (6th Cir. 2004).

103. See *id.* at 453 (noting Indians' sidewalk was distinguishable from private sidewalk). See generally Wasserman, *supra* note 3, at 551.

104. See *id.* at 455 (failing to determine whether team was state actor in any other area at the stadium because it concluded it did not need to analyze other areas for the present claim).

105. See *id.*; see also DeSiato, *supra* note 53, at 422 (noting it would be unlikely for court “to find state action for an entire facility”). For a discussion of the ban and the seats affected, see Munsey & Suppes, *supra* note 8.

paid for and reserved them.¹⁰⁶ Therefore, it would be unlikely for a court to find the Arena to be a state actor under this test.¹⁰⁷ However, as already stated, a court would likely conclude that Tampa Bay is a state actor under the symbiotic relationship test due to the funding it receives from the city and the benefits the city receives from having a professional ice hockey team.¹⁰⁸ Further, the arena would likely be found to be a state actor under the entwinement test due to the intertwinement between the Lightning and the city in operating and maintaining the arena.¹⁰⁹ Therefore, this Comment will proceed under the assumption that the arena is a state actor in order to continue this constitutional inquiry.¹¹⁰

B. Amalie Arena is a Designated Public Forum

Once a court finds that a private entity acts as a state actor, it must then determine in what type of forum the speech occurred.¹¹¹ The Supreme Court has determined that there are three types of public forums: (1) traditional public forums, (2) designated public forums, and (3) nonpublic forums.¹¹² The type of forum “sets the boundaries for how a club may limit activity protected by the First Amendment in and around its facility.”¹¹³

106. See *Gateway Econ. Dev. Corp.*, 383 F.3d at 452 (citing sidewalk is available for any individual passing through area).

107. See *supra* notes 105–106 and accompanying text (concluding club seats do not perform public function).

108. For a discussion of the symbiotic relationship test, see *supra* notes 66–80 and accompanying text.

109. For a discussion of the entwinement test, see *supra* notes 82–98 and accompanying text.

110. For a discussion of state actors, see *supra* notes 62–109 and accompanying text. For a discussion of whether Amalie Arena is a public forum and whether the Lightning have any constitutional defenses, see *infra* notes 111–248 and accompanying text.

111. See DeSiato, *supra* note 53, at 422 (concluding forum analysis is critical in determining team’s liability and is often outcome determinative in team’s ability to impose regulations).

112. See *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45–46 (1983) (defining traditional public forum as government property devoted to assembly and debate and designated public forum as government property that state has opened up for expressive activity); see also *Int’l Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678–79 (1992) (defining nonpublic forums as all other government property that is not traditional or designated public forum); see generally DeSiato, *supra* note 53, at 422.

113. DeSiato, *supra* note 53, at 422 (determining that public forum doctrine is less applicable to teams and therefore provides them with more autonomy is restricting speech).

Traditional public forums are areas customarily held for assembly and debate, such as parks.¹¹⁴ In this forum, content-based restrictions are only allowed if they are narrowly tailored and serve a compelling government interest, while reasonable time, place, and manner restrictions are permitted so long as they serve an important government interest and permit “ample alternative[s]” for the speech.¹¹⁵

Designated public forums are areas that are not traditional spaces for speech, but the government has nevertheless opened them for that purpose.¹¹⁶ While the government is not required to open up a forum for speech, if it does, its regulations must “bear a heavy burden of justification.”¹¹⁷ Like traditional public forums, designated public forums may only impose content-based restrictions that meet strict scrutiny or reasonable time, place, and manner restrictions.¹¹⁸ Additionally, no viewpoint discrimination is permitted in traditional public or designated public forums.¹¹⁹

Finally, nonpublic forums are areas the government has not opened for speech because of their function.¹²⁰ Regulations in this forum only have to be reasonable and viewpoint neutral.¹²¹ Courts have determined that government offices, such as post offices and airports, are non-public forums.¹²²

114. See *Perry Educ. Ass'n*, 460 U.S. at 45 (describing such areas as places that have long been used to communicate ideas, discuss public issues, and assemble).

115. See *id.* (describing time, place, manner restrictions are content neutral). See generally *Ward v. Rock Against Racism*, 491 U.S. 781 (1989) (allowing noise restriction for concert in Central Park when restriction was in place so neighboring residents would not be disturbed).

116. See *Perry Educ. Ass'n*, 460 U.S. at 45–46 (noting that while government did not have to open property up for speech, it is still bound to uphold constitution in these areas).

117. *Kotlarsky*, *supra* note 82, at 55 (internal quotation marks omitted) (quoting *City of Madison, Joint Sch. Dist. #8 v. Wis. Emp't Relations Comm'n*, 429 U.S. 167, 175 (1976)).

118. See *id.* (acknowledging government is not required to keep forum open to speech).

119. See *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828–29 (1995) (regarding viewpoint discrimination as “egregious form of content discrimination”).

120. See *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 679–80 (1992) (noting government “does not create a public forum [through] inaction;” rather, forums are nonpublic unless government intentionally opens it for speech).

121. See *id.* at 683 (determining restriction must only be reasonable, not “most reasonable” or “only reasonable” restriction).

122. See *id.* at 683–85 (1992) (finding airport to be nonpublic forum); see also *United States v. Kokinda*, 497 U.S. 720, 730 (1990) (finding post office to be non-public forum).

In determining whether Amalie Arena is a public forum, a court would examine “the purpose of the facility’s construction, the commercial nature of the stadium’s operation, any written policies regarding the stadium’s purpose[,] . . . how consistently any regulations limiting expressive activities are enforced[,]” and whether “expressive activity is consistent with” the forum’s primary function.¹²³ Because a forum can have areas with different designations, it is unnecessary to consider Amalie Arena as a whole.¹²⁴ Rather, the analysis needs to only focus on the area affected by the speech regulation: the club seats in the grand stands.¹²⁵ A sports arena is not a traditional public forum, such as a park, that has been customarily reserved for assembly and debate.¹²⁶ Rather, the primary purpose of the arena is to provide a forum for teams to play and fans to watch.¹²⁷

While the Lightning does not have to allow any sort of speech during its games, it has allowed it and actually encourages speech, albeit only from home fans.¹²⁸ Therefore, a court would likely find that the seats are a designated public forum because the arena has opened those areas for speech for only certain people during certain periods of time.¹²⁹

IV. TAMPA BAY’S VISITING APPAREL RESTRICTION AGAINST A FIRST AMENDMENT CLAIM

Tampa Bay’s visiting apparel restriction is subject to a First Amendment challenge.¹³⁰ First, Tampa Bay is a state actor due to

123. DeSiato, *supra* note 53, at 423 (acknowledging different areas of arena can have different public forum designations).

124. *See id.* (noting different areas within forum can have different designations).

125. *See* Davidson, *supra* note 8 (explaining ban only affected fans seated in club sections of arena).

126. *See* Perry Educ. Ass’n v. Perry Local Educator’s Ass’n, 460 U.S. 37, 45, 55 (1983) (defining traditional public forum as one traditionally reserved for such purposes).

127. *See generally* AMALIE ARENA, <http://www.amaliearena.com> [<https://perma.cc/H6VC-ASY8>] (last visited July 12, 2016) (describing arena as venue for Lightning and explaining ticket policies for fans to watch games).

128. *See* Davidson, *supra* note 8 (quoting Lightning’s vice president’s wish to fill arena with Lightning fans to support team).

129. *See* Kotlarsky, *supra* note 82, at 56 (determining Yankee Stadium is designated public forum). The grandstands are only open to speech when events are occurring and are only open to fans with tickets. *See id.* (distinguishing grandstands from sidewalk or park, which are always open to speech).

130. For a discussion of the requirements Tampa Bay must meet in order to be liable to a constitutional claim, see *supra* notes 62–129 and accompanying text.

the close relationship it has with the city of Tampa Bay.¹³¹ Further, Amalie Arena is a designated public forum since it has been opened up for fan speech.¹³² Therefore, a visitor has standing to bring a First Amendment claim.¹³³ In this part, Section A discusses the content distinction principle in a designated public forum.¹³⁴ Since Amalie Arena is a designated public forum, the content distinction principle is a critical element in determining what level of constitutional scrutiny Tampa Bay's restriction must pass.¹³⁵ Section B discusses unprotected speech and examines whether visiting fans' speech is constitutionally protected or not in Amalie Arena.¹³⁶ Finally, Section C explores whether Tampa Bay may zone visiting fans in order to protect their home fans from being exposed to speech with which they disagree.¹³⁷

A. The Content Distinction Principle: Tampa Bay's Restriction is Viewpoint Based

To determine whether the Lightning's regulation is permissible, a court would use the content distinction principle.¹³⁸ The content distinction principle is a judicial mechanism for determining whether a regulation is content-based or content-neutral.¹³⁹ A content-based regulation is aimed at the subject or content of the speech in question.¹⁴⁰ It is presumed to be unconstitutional.¹⁴¹ Additionally, a content-based regulation may discriminate on the basis

131. For a discussion of state actor requirements, see *supra* notes 52–109 and accompanying text.

132. For a discussion of public forum requirements, see *supra* notes 111–129 and accompanying text.

133. See *supra* notes 111–129 and accompanying text (concluding Lightning are state actor and Amalie Arena is a public forum).

134. For a discussion of content-based and content-neutral regulations in designated public forums, see *infra* notes 138–162 and accompanying text.

135. See Kotlarsky, *supra* note 82, at 44 (noting content-based regulations must pass strict scrutiny, while content-neutral regulations must only be reasonable).

136. For a discussion of unprotected speech, see *infra* notes 163–195 and accompanying text.

137. For a discussion of zoning and the First Amendment, see *infra* notes 197–239 and accompanying text.

138. See Kotlarsky, *supra* note 82, at 43 (noting principle allows court to determine whether government is justified in its speech-based regulation).

139. See *id.* at 44 (explaining content distinction principle dictates whether court will analyze regulation under strict scrutiny or intermediate scrutiny).

140. See *id.* (deeming content-based restrictions “most at odds” with First Amendment).

141. See *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 828 (1995) (determining “government may not regulate speech based on . . . content or . . . message”).

of viewpoint.¹⁴² Viewpoint discrimination is a more flagrant violation of the First Amendment; therefore, the government must abstain from such regulations.¹⁴³ In order to be constitutionally permissible, any content-based regulation must pass strict scrutiny.¹⁴⁴ Under this standard, the state actor needs to show a compelling interest for the regulation and that no less restrictive means are available to meet that interest.¹⁴⁵

Alternatively, a content-neutral restriction is normally characterized as a “time, place, or manner” restriction that regulates speech by determining when, where, or how the speaker may engage in the speech.¹⁴⁶ A content-neutral regulation is constitutionally permissible if it meets intermediate scrutiny, meaning it serves an important government interest, is narrowly tailored to promote that interest, and leaves open ample alternative channels for communication.¹⁴⁷ Unlike content-based restrictions, content-neutral restrictions do not have to be the least restrictive means available.¹⁴⁸

The Tampa Bay restriction is content-based as it is aimed at visiting fans’ speech.¹⁴⁹ The regulation could pass strict scrutiny if Tampa Bay shows a compelling interest for the regulation, such as fan safety.¹⁵⁰ However, Tampa Bay would not escape so easily, as they would inevitably face an even greater hurdle since designated public forums are prohibited from imposing viewpoint discriminatory regulations.¹⁵¹ In other words, a team functioning as a state actor must allow fans to either root for the home team or the away

142. *See id.* at 829 (finding viewpoint discrimination to be “egregious form of content discrimination”).

143. *See id.* (determining viewpoint discrimination is never allowed in public and designated public forums).

144. *See Sable Commc’ns of California Inc. v. F.C.C.*, 492 U.S. 115, 126 (1989) (noting government may normally not enforce a content-based restriction on speech).

145. *See id.* (explaining if government can show both requirements, it may regulate constitutionally protected speech).

146. *See Kotlarsky, supra* note 82, at 44 (noting restriction is unconcerned with speech’s message).

147. *See Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983) (classifying these restrictions as time, place, and manner regulations).

148. *See Ward v. Rock Against Racism*, 491 U.S. 781, 783 (1989) (noting restriction simply must not be “substantially broader than necessary”).

149. *See Davidson, supra* note 8. This regulation was obviously focused on content as Lightning fans were permitted to wear their jerseys in the club sections. *See id.*

150. *See Sable Commc’ns*, 492 U.S. at 421 (explaining content-based restrictions must pass strict scrutiny).

151. *See Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 828–29 (1995) (explaining that viewpoint discrimination cannot occur in designated public forum).

team.¹⁵² Clearly, the Lightning did not allow visiting fans to cheer for their teams through wearing their team's apparel in the club sections.¹⁵³ Rather, they silenced visiting fans by refusing them access to club seats if they expressed support for their team by simply wearing jerseys.¹⁵⁴

Tampa Bay is not the first team to impose viewpoint discriminatory regulations onto fans.¹⁵⁵ For example, in 2003, Pennsylvania State University ordered employees at the Jordan Center, the university's basketball arena, to confiscate signs and posters fans brought to games.¹⁵⁶ The signs bore "negative" messages about Penn State's then-head coach, Jerry Dunn.¹⁵⁷ The confiscation was a viewpoint discriminatory practice, as signs with unrelated or positive messages were allowed to remain in the stadium.¹⁵⁸

Unfortunately, while such regulations of fan speech would likely fail a First Amendment challenge, few are actually contested.¹⁵⁹ For instance, there has been no known challenge to the Lightning's regulation as of the date of this publication.¹⁶⁰ If, however, they were to continue such an anti-visitor practice and face a constitutional challenge, they would not automatically lose because

152. See Wasserman, *supra* note 3, at 525–26, 529–30 (extending such principle to include rooting for team or making critical statements against other teams).

153. See Spousta, *supra* note 22 (noting fans who wore visiting teams' jerseys to game were asked to either remove jersey or put on Lightning-colored apparel).

154. See Wasserman, *supra* note 3, at 583 (noting team may not promote own viewpoint by silencing or removing fans from stadium if they advocate another viewpoint).

155. See Clay Calvert & Robert D. Richards, *Fans and the First Amendment: Cheering and Jeering in College Sports*, 4 VA. SPORTS & ENT. L.J. 1, 40 (2004) (citing lack of case law). While teams have imposed such regulations, this is more so of a "speculative problem" as few regulations are constitutionally challenged. See *id.* (discussing discriminatory regulations that have gone unchallenged).

156. See *id.* at 40 (recalling 2002–2003 Penn State men's basketball team was suffering through "disastrous" season).

157. See *id.* (describing negative signs as bearing messages: "Fire Dunn," "Jerry Dunn, Living on a Prayer").

158. See *id.* (noting signs also did not include profane language, such as "Fuck Jerry Dunn").

159. See *id.* (describing restrictions on speech in college sports that have been successful because they have never been challenged in court).

160. There is no record of any litigation over the policy. Instead, the Lightning have actually once again instituted the same policy during the 2015–2016 season. See Emma Mason, *Pens Fans Check Your Jersey at the Door*, THE HOCKEY WRITERS (May 27, 2016), <http://thehockeywriters.com/pens-fans-check-your-jersey-at-the-door/> [<https://perma.cc/6AF8-MMMV>] (reporting Lightning enforced policy during 2016 NHL Stanley Cup Playoffs).

the regulation is viewpoint discrimination.¹⁶¹ Rather, the Lightning could have two defenses: (1) the prohibited speech was not constitutionally protected, or (2) the ban was merely a content-neutral zoning restriction, as it zoned visiting fans and allowed them to speak in other sections of the arena.¹⁶²

B. Unprotected Speech: Visitors' Speech Does Not Fall into a Constitutionally Unprotected Category

While the Constitution states that “no law [shall be made] abridging the freedom of speech,” the Supreme Court has recognized that “[t]he protections afforded by the First Amendment . . . are not absolute” and “the government may regulate certain categories of expression consistent with the Constitution.”¹⁶³ Unprotected categories “form[] ‘no essential part of any exposition of ideas’ and possessed ‘such slight social value as a step to truth that any benefit that may be derived from [their expression is] clearly outweighed by the social interest in order and morality.’”¹⁶⁴ Content-based regulations, including viewpoint discriminatory regulations, may target such unprotected categories.¹⁶⁵ While the Court has recognized multiple categories of speech that do not deserve First Amendment protection, the unprotected categories that could possibly serve as defenses to the Lightning in a First Amendment challenge are indecent speech, fighting words and true threats.¹⁶⁶ The following subsections will analyze whether these three categories apply in the case of the Lightning.¹⁶⁷

161. See *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995) (discussing ban of viewpoint discrimination regulations in designated public forums).

162. For a discussion of speech that is not constitutionally protected, see *infra* notes 163–195 and accompanying text. For a discussion of zoning, see *infra* notes 198–241 and accompanying text.

163. U.S. CONST. amend. I; *Virginia v. Black*, 538 U.S. 343, 358 (2003) (finding statute banning cross burning performed for purpose to intimidate to be constitutional).

164. Genevieve Lakier, *The Invention of Low-Value Speech*, 128 HARV. L. REV 2166, 2174 (2015) (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)).

165. See *id.* at 2211 (citing *United States v. Stevens*, 559 U.S. 460, 485 (2000)).

166. See generally *Black*, 538 U.S. at 359 (finding true threats not protected by constitution); *FCC v. Pacifica Found.*, 438 U.S. 726, 759–60 (1978) (finding indecent speech where audience is captive to not be protected by constitution); see also *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) (concluding fighting words are not protected by constitution). But see *Cohen v. California*, 403 U.S. 15 (1971) (allowing indecent speech to be constitutionally protected when audience is not captive).

167. For a discussion of indecent speech, fighting words, and true threats, see *infra* notes 168–196 and accompanying text.

1. *Indecent Speech*

Tampa Bay could argue that visiting fans' speech is indecent and thus unprotected.¹⁶⁸ For instance, visitors may wear apparel or shout cheers that contain certain, derogatory four-letter words.¹⁶⁹ In *FCC v. Pacifica Foundation*, the Supreme Court found indecent speech is not protected by the First Amendment when it includes "patently offensive" references to excretory or sexual activities or organs and listeners have no other option but to listen to the speech.¹⁷⁰ Such showings of support for the visiting team could contain such "patently offensive" references.¹⁷¹

Tampa Bay could argue that Lightning fans, being in a tightly packed, enclosed arena, are captives and are unable to avoid the indecent speech.¹⁷² However, such a defense would likely fail, as the captive-audience doctrine has never been extended to individuals in recreational spaces.¹⁷³ It is unlikely that a court would extend the doctrine to an arena because fans voluntarily go to games and are free to leave at any time.¹⁷⁴ Therefore, fans can either not attend the games, leave the games, or simply tolerate offensive cheers from visiting fans.¹⁷⁵ The ruling would not likely change even if Tampa Bay pointed out that young, impressionable children were part of the audience.¹⁷⁶ Speech cannot be reduced to what is appropriate for children to hear.¹⁷⁷ Thus, it is inevitable and ac-

168. See *Pacifica*, 438 U.S. at 740 (rejecting that indecent has same meaning as obscene and instead explaining indecent words to be words that do not conform with "accepted standards of morality").

169. See *id.* at 739 (noting words in question included: "shit, fuck, piss, cunt, cocksucker, motherfucker, and tits").

170. See *id.* at 748–50 (mentioning words that depict sexual activities can be indecent depending on setting).

171. See *id.* at 748 (upholding FCC censoring radio broadcast containing profane words because indecent words may be constitutionally unprotected depending on situation).

172. See *Cohen v. California*, 403 U.S. 15, 21 (1971) (discussing individuals are often "'captives' outside of . . . home and subject to objectionable speech").

173. See Wasserman, *supra* note 3, at 570 (noting Supreme Court has only extended doctrine to home, workplace, public schools, and reproductive health facilities).

174. See *id.* at 570–71 (comparing stadium to walking on city street).

175. See *id.* at 572 (finding it unlikely since Court has protected "Fuck the draft" message in courthouse, that it would find "Fuck Duke" or any other offensive team message to be unprotected).

176. See *Pacifica*, 438 U.S. at 750 (finding one reason statute was indecent partially because children could hear broadcast). See generally Wasserman, *supra* note 3, at 570–71 (explaining government's ability to protect children from speech is inhibited due to adults also being in audience).

177. See *Pacifica*, 438 U.S. at 750; see also Wasserman, *supra* note 3, at 571 (claiming this would result to being what is suitable for sandbox).

cepted that children will hear some inappropriate speech in public places.¹⁷⁸ Finally, even if a court were to extend the captive-audience doctrine to Amalie Arena, it could only allow for the limitation of oral expression, as fans have the ability to avert their eyes from an indecent jersey or sign.¹⁷⁹ Therefore, an indecent speech defense is likely to fail.¹⁸⁰

2. *Fighting Words*

The Lightning could also argue that the ban on visiting team apparel is justified because it is aimed to prevent Lightning fans from attacking visiting fans.¹⁸¹ Over sixty years ago, in *Chaplinsky v. New Hampshire*, the Supreme Court defined the unprotected category of fighting words as “those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.”¹⁸² Tampa Bay could argue that cheers and apparel in support of the opposing team could lead Lightning fans to inflict injury upon visiting fans.¹⁸³ However, the Supreme Court has limited the category to only direct, personal insults.¹⁸⁴ Hence, a visiting fan would have to yell words to a Lightning fan that would provoke such imminent violence.¹⁸⁵ It is unlikely that a court would agree with such an argument, as visiting fans’ apparel or support for the opposing team

178. See *Pacifica*, 438 U.S. at 759–60 (pointing that speech would not be restricted simply because it is not acceptable to sensitive adults).

179. See *Cohen v. California*, 403 U.S. 15, 21 (1971) (finding outside home, audience has different privacy interests and could simply “avert[] their eyes from indecent speech”).

180. See *id.* In *Cohen*, the petitioner wore a jacket in public that read “Fuck the draft” and was consequently charged with disturbing the peace. See *id.* at 16. The Court found that this was an impermissible restriction because viewers who found the speech disturbing were not captive to viewing it, but could simply look the other way to avoid it. See *id.* at 21–22. Therefore, like the audience in *Cohen*, Lightning fans could look the other way to avoid pro-visiting team messages.

181. See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 573 (1942) (recognizing some words are likely to cause fight).

182. *Id.* at 572 (determining such words are not proper tools of communication and therefore criminally punishing their utterances is constitutionally permissible).

183. See Stu Hackel, *From Fiery Riots to Shoe-Beatings, There’s an Ugly Side to Hockey Fans*, THE HOCKEY NEWS (Dec. 30, 2014), <http://www.thehockeynews.com/news/article/from-fiery-riots-to-shoe-beatings-theres-an-ugly-side-to-hockey-fans> [<https://perma.cc/6Z9L-LKLP>] (describing fans attacking one another and referees).

184. See *Calvert & Richards*, *supra* note 155, at 27 (citing *Gooding v. Wilson*, 405 U.S. 518, 523 (1972)) (limiting fighting words to speech that has “direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed”) (internal quotation marks omitted).

185. See *id.* at 28 (predicting fighting words situation would happen when one fan gets in face of opposing fan).

is normally not directed at individual fans.¹⁸⁶ Therefore, the unprotected category has extremely limited use and would likely not help the Lightning.¹⁸⁷

3. *True Threats*

The Lightning could also argue that visiting fan speech is composed of true threats.¹⁸⁸ True threats are “those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.”¹⁸⁹ The speaker does not need to “actually intend to carry out the threat;” rather, mere intimidation is sufficient.¹⁹⁰ Courts generally employ a “reasonable person” standard to determine whether speech could be interpreted as a serious expression of the intent to commit an act of unlawful violence.¹⁹¹ However, courts have varied in whether to apply the reasonable person standard to the speaker or to the recipient.¹⁹² Such uncertainty is trivial in this context because Tampa Bay’s argument here would be inherently flawed.¹⁹³ It is almost impossible that a player, referee, or home fan would interpret a visiting fan’s cheers as an “expression of an intent to commit an act of unlawful violence.”¹⁹⁴ Rather, most cheers directed towards the opposing team or referees usually consist of heckling rather than threats of imminent vio-

186. See SHOP NHL, <http://shop.nhl.com/> [<https://perma.cc/K5MG-9ZUG>] (last visited June 12, 2016) (showing most NHL apparel simply bears the name of team and the name of player and his number).

187. See Calvert & Richards, *supra* note 155, at 28 (finding fighting words doctrine unhelpful in dealing with rowdy fans in stadiums).

188. See *Virginia v. Black*, 538 U.S. 343, 363 (2003) (finding burning of cross on person’s yard to constitute true threat).

189. *Id.* at 359 (citing *Watts v. United States*, 394 U.S. 705, 708 (1969); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388 (1992)).

190. *Id.* at 359–60 (determining that “prohibition on true threats ‘protect[] individuals from the fear of violence’ and . . . ‘from the possibility that the threatened violence will occur’”) (quoting *R.A.V.*, 505 U.S. at 388).

191. See Calvert & Richards, *supra* note 155, at 28 (citing *Doe v. Pulaski Cty. Special Sch. Dist.*, 306 F.3d 616, 622 (8th Cir. 2002)).

192. See *id.* at 28–29 (quoting *Doe*, 306 F.3d at 622) (noting some appellate courts look at whether speaker would view speech as threat while other courts look at whether recipient would view speech as threat).

193. See *id.* at 29 (finding true threat standard unhelpful in regulating spectator speech).

194. See *id.* (claiming most cheers towards opposing teams do not constitute threats but are more so heckling).

lence.¹⁹⁵ Therefore, the ban on apparel is not justified under the true threat doctrine.¹⁹⁶

C. A Zoning Defense: Can Tampa Bay Zone Visiting Fans to Protect Season Ticket Holders from Disagreeable Speech?

While Tampa Bay's executive vice president of communications, Bill Wickett, stressed that the Lightning's visiting team apparel ban was created to maintain a hometown environment, he also explained that the team instituted the ban as a customer service effort in response to season-ticket holders complaining that too many visiting fans were in the arena's exclusive seating areas, such as the club seating section.¹⁹⁷ Tampa Bay club season ticket holders pay a premium price for their tickets to Lightning games.¹⁹⁸ Thus, it is understandable that the Lightning wish to please their top-tier guests and honor their wishes to not see visiting fans in the club sections.¹⁹⁹

The Lightning ban only affects approximately 1,400 seats in Amalie Arena, an arena that seats about 19,204 fans.²⁰⁰ Hence, visiting fans had the opportunity to sport their team's apparel in about ninety-three percent of the arena.²⁰¹ Therefore, the Lightning could respond to a First Amendment claim by arguing that the visiting apparel ban was not a blanket ban against visitor speech, but rather a mere zone for unpopular speakers so that the Lightning's higher paying customers would not have to see such disagreeable speech.²⁰²

195. *See id.* (acknowledging that athletes and referees know they must put up with such taunts).

196. *See* *Virginia v. Black*, 538 U.S. 343, 359, 363 (2003) (determining threat must "communicate a serious expression of intent to commit . . . violence").

197. For a discussion of Tampa Bay's ban and home advantage, see *supra* note 22 and accompanying text; *see also* Spousta, *supra* note 22 (explaining many of these visiting fans wore their team's apparel in these exclusive sections).

198. *See* *Season Ticket Pricing*, TAMPA BAY LIGHTNING, http://lightning.nhl.com/v2/ext/2016-17_AllPlans_OneSheeter.pdf—high%20paying (last visited Mar. 18, 2016) (reporting Chase Club and Lexis Lounge season ticket holders pay between \$6200-\$12,500 a season); *see also* Davidson, *supra* note 8 (determining Lightning ban amounts to "separate but equal" seating because it promises only wealthier fans zone without visiting fans).

199. *See* Spousta, *supra* note 22 (reporting some season-ticket holders complained about number of visiting fans in club seating).

200. *See id.* (explaining only two sections of seats are affected: Chase Club and Lexis Lounge).

201. *See id.* (noting ban only affects 7.2% of arena seating).

202. For a discussion of zoning policies and arguments, see *infra* notes 203–238 and accompanying text.

It is not uncommon for sports arenas to zone different categories of fans into different sections of the arena where their speech is less likely to cause harm.²⁰³ For instance, many universities seat their bands and student sections away from visiting teams in order to protect the teams from interference, intimidation, and confrontation with home fans.²⁰⁴ Additionally, many arenas have created family sections where the use of profanity is banned.²⁰⁵ These “buffer” sections have never been constitutionally challenged.²⁰⁶ However, the Supreme Court has examined ordinances intended to zone speakers from certain audiences.²⁰⁷ These zoning ordinances have been content-neutral.²⁰⁸ In *Hill v. Colorado*, a statute made it illegal to “‘knowingly approach’ within eight feet of another person, without that person’s consent, ‘for the purpose of passing a leaflet or handbill to, displaying a sign, to, or engaging in oral protest, education, or counseling with such other person’” within 100 feet of any healthcare facility.²⁰⁹ Although the zoning statute was aimed at abortion protesters, the Court found it to be content-neutral because it did not regulate the content of the protestor’s speech, but merely where the speech occurred.²¹⁰ Further, the Court determined that the statute did not take aim at any particular viewpoint, since it applied to all demonstrators.²¹¹ Therefore, even though the law seemingly took aim at anti-abortion protesters, the Court upheld the ordinance.²¹²

The Supreme Court recently found another zoning statute affecting anti-abortion protesters to be content-neutral in *McCullen v.*

203. See Calvert & Richards, *supra* note 155, at 43 (mentioning this is common in college sports).

204. See *id.* (explaining National Collegiate Athletic Association (NCAA) has “lauded” schools that have adopted such policy).

205. See *id.* at 44–45 (noting alcohol is also banned from section).

206. See *id.* (discussing collegiate regulations that have gone unchallenged).

207. See generally *Hill v. Colorado*, 530 U.S. 703 (2000) (upholding zone outside of healthcare facility); *McCullen v. Coakley*, 134 S.Ct. 2518 (2014) (finding zone outside of reproductive healthcare facility to be content-neutral but not narrowly tailored); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976) (upholding zone affecting adult movie theaters).

208. For a discussion of content-neutral restrictions, see *supra* notes 146–147 and accompanying text.

209. *Hill*, 530 U.S. at 707–08 (finding statute placed no restriction on content of message).

210. See *id.* at 708, 725 (inquiring as to whether statute was simply time, place, manner restriction).

211. See *id.* at 725–32 (looking to state legislative history and Colorado Supreme Court’s holding).

212. See *id.* at 735. The dissent determined the statute was content-based because it set forth impermissible content: protesting, educating, and counseling. See *id.* at 744 (Scalia, J., dissenting).

Coakley.²¹³ Unlike the Colorado statute in *Hill*, however, the statute in *McCullen* only applied to areas outside reproductive care facilities.²¹⁴ Nonetheless, the Supreme Court determined the statute was content-neutral because it did not matter what individuals said, but where they said it outside of the facilities.²¹⁵ The statute's purpose was to ensure public safety, allow unrestricted access to the healthcare facilities, and keep sidewalks and walkways from congestion.²¹⁶ However, the Court made it clear that simply being content-neutral will not make a zoning ordinance constitutionally permissible.²¹⁷ Rather, a content-neutral zoning ordinance must be narrowly tailored, meaning "it must not 'burden substantially more speech than is necessary to further the government's legitimate interests.'"²¹⁸ The Court recognized that while the government had a legitimate interest in protecting public safety and preventing harassment and intimidation of patients and facility employees, the statute burdened "substantially more speech than necessary."²¹⁹ The Court pointed that other states have criminalized harassment and intimidation outside of abortion facilities, rather than establishing no-speech zones.²²⁰

Finally, the Court has acknowledged that establishing speech zones for the speech's "secondary effects" is a content-neutral, con-

213. See *McCullen v. Coakley*, 134 S.Ct. 2518, 2531 (2014). The zoning statute made it illegal to "knowingly enter or remain on a public way or sidewalk adjacent to a reproductive health care facility within a radius of 35 feet." *Id.* (quoting MASS. GEN. LAWS ANN. ch. 266, § 120E1/2(b) (West 2012)).

214. See *id.* at 2525, 2531 (noting Massachusetts's legislature created statute to "address clashes between abortion opponents" and pro-choice advocates).

215. See *id.* at 2531–32, 2538–39 (explaining statute would be content-based if it required police to examine content when determining whether violation occurred).

216. See *id.* at 2531, 2538–39 (noting Court had previously found such reasons to be content-neutral).

217. See *id.* at 2534 (holding statute was unconstitutional because it was not narrowly tailored). For a discussion of content-neutral regulations and intermediate scrutiny, see *supra* notes 146–147 and accompanying text.

218. *McCullen*, 134 S.Ct. at 2535 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989)).

219. *Id.* at 2537 (concluding there are less restrictive alternatives).

220. See *id.* (noting at least dozen other states had such laws). The law the Supreme Court offered as an example for Massachusetts subjected anyone who "by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been . . . obtaining or providing reproductive health services" to criminal and civil penalties. *Id.* (quoting Freedom of Access to Clinic Entrances Act of 1994, 18 U.S.C. § 248 (a)(1)) (internal quotation marks omitted).

stitutionally permissible restriction.²²¹ In *Young v. American Mini Theatres, Inc.*, the Supreme Court upheld an ordinance requiring adult movie theaters to not be within 500 feet of any residential area, nor be within 1000 feet of any other adult theater.²²² The Court found the ordinance was not content-based because it was not concerned with the content of the movies being shown, rather it was aimed at the secondary effects of having adult theaters in the community, such as an increase in crime, a decline in property values, and the exodus of homeowners and businesses.²²³

The Court has rejected that the impact of speech on listeners is a secondary effect of speech.²²⁴ In *Boos v. Barry*, the statute at issue made it illegal to

display any flag, banner, placard, or device designed or adapted to intimidate, coerce, or bring into public odium any foreign government, party, or organization . . . within 500 feet of any building . . . used or occupied by any foreign government . . . as an embassy . . . or to congregate within 500 feet of any such building.²²⁵

The government claimed the law was content-neutral because it was aimed at the secondary effects of such speech: “shield[ing] diplomats from speech that offends their dignity.”²²⁶ The Court rejected that emotive impact constituted a content-neutral secondary effect.²²⁷ Rather, it explained that such a regulation was content-based because it focused on the direct impact of the speech on its audience.²²⁸ Supporting *Boos’s* holding, *McCullen* determined that if the reproductive healthcare facility zoning ordinance was concerned with the “[l]isteners’ reactions to speech” it would not be

221. See *Young v. American Mini Theatres*, 427 U.S. 50, 66, 69–71 (1976) (finding city’s interest in preventing crime, preserving property values, and protecting businesses to be secondary effects that justified zoning ordinance).

222. See *id.* at 52 (mentioning ordinance also barred theaters from being within 1000 feet of ten other unnamed “regulated uses”).

223. See *id.* at 54, 71–73 (noting real estate experts and urban planners came up with these secondary effects).

224. See *Boos v. Barry*, 485 U.S. 312, 321 (1988) (rejecting emotive impact as legitimate secondary effect).

225. *Id.* at 315 (quoting D.C. CODE § 22-1115 (1981)).

226. *Id.* at 322 (claiming protection of diplomats’ dignities to be obligation of international law).

227. See *id.* at 320–21 (clarifying that regulations for secondary effects have nothing to do with content of speech).

228. See *id.* at 321 (explaining if adult movie theater ordinance was created to prevent psychological damage, then it would have been content-based).

content-neutral.²²⁹ In his concurrence in *McCullen*, Justice Scalia explained, “[p]rotecting people from speech they do not want to hear is not a function that the First Amendment allows the government to undertake.”²³⁰ Rather, the First Amendment guarantees “the right to attempt to persuade others to change their views.”²³¹

Based on Tampa Bay’s rationale for the Lightning’s ban on visitor apparel, the restriction is obviously in place to protect club fans from hearing speech that they simply do not wish to hear.²³² As Justice Scalia explained in *McCullen*, the First Amendment does not allow such a defense.²³³ Tampa Bay could attempt to argue that the restriction is like the zoning in *Hill* and is content-neutral because it does not restrict visiting fans to silence, but merely regulates where they are allowed to speak.²³⁴ Further, the team could argue that like the statute in *McCullen*, it is permissible to exempt certain categories of individuals from the restriction, here being the Lightning’s own fans.²³⁵

Regardless of Tampa Bay’s zoning defense, it is evident that the ban is not content-neutral.²³⁶ The team enacted it because season ticket holders did not want to see the pro-visiting team message.²³⁷ Like the restriction in *Boos*, the ban is in place to protect

229. *McCullen v. Coakley*, 134 S.Ct. 2518, 2531–32 (2014) (quoting *Boos*, 485 U.S. at 321) (alteration in original). The Court went on to explain that Massachusetts would not be able to justify the statute by offering that the speech occurring outside abortion clinics made listeners uncomfortable. *See id.*

230. *Id.* at 2546 (Scalia, J., concurring). Justice Scalia disagreed with the majority that the statute was content-neutral and instead found it to be content-based and subject to strict scrutiny. *See id.* at 2544–46 (Scalia, J., concurring) (determining that content-based restriction failed strict scrutiny because protecting an audience from disagreeable speech is not compelling interest); *see also* *Cohen v. California*, 403 U.S. 15, 21 (1971) (finding that allowing government to “shut off discourse solely to protect others from hearing it” without evidence of a substantial privacy interest would “effectively empower a majority to silence dissidents simply as a matter of personal predilections”).

231. *Hill v. Colorado*, 530 U.S. 703, 716 (2000); *see also* *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949) (finding “function of free speech . . . is to invite dispute”).

232. *See* Spousta, *supra* note 22 (explaining policy was put into effect after season ticket holders complained about number of visiting fans in these exclusive sections).

233. *See* *McCullen*, 134 S.Ct. at 2546 (Scalia, J., concurring) (refusing to find that protecting audience from disagreeable speech was compelling interest).

234. *See* *Hill*, 530 U.S. at 707–08 (allowing zoning was not shutting down speech, but restricting it to certain areas).

235. *See* *McCullen*, 134 S.Ct. at 2526, 2531–32 (acknowledging that certain classes of individuals were exempt from zoning restrictions).

236. For a discussion of content-neutral zoning restrictions, *see supra* notes 208–231 and accompanying text.

237. *See* Spousta, *supra* note 22; *see also* Davidson, *supra* note 8 (noting Lightning never justified ban with safety concerns).

loyal Tampa Bay fans from being subjected to speech that they do not wish to hear.²³⁸ The ban clearly is in conflict with the First Amendment's guarantee to have the ability to attempt to persuade others to change their views. Consequently, it is a viewpoint-based restriction that cannot stand a constitutional challenge.²³⁹

V. CONCLUSION

Because the Tampa Bay Lightning is a state actor and Amalie Arena is a designated public forum, the Lightning can be subject to a First Amendment claim, should a visiting fan bring one in the future.²⁴⁰ The Lightning infringed upon visiting fans' speech by banning the fans from sporting their own team's apparel while allowing Lightning fans to continue to support their home team.²⁴¹ Further, the Lightning do not have a valid defense as the First Amendment protects the fans' speech and the ban is not a content-neutral zoning restriction.²⁴² Creating the ultimate home environment and pleasing season ticket holders are simply not sufficient justifications for the infringement.²⁴³ Therefore, if a visiting fan were to challenge such a restriction, a court would likely find the ban to be unconstitutional.²⁴⁴

First and foremost, in order to avoid any time-consuming and costly litigation, Tampa Bay should not have this policy in future seasons.²⁴⁵ However, this seems unlikely to occur as the Lightning instituted the same policy during its 2016 Stanley Cup playoff run.²⁴⁶ Therefore, the NHL and other professional sports leagues should take the lead and ban teams from instituting such policies, not only to protect teams from litigation, but also to protect the

238. See *Boos v. Barry*, 485 U.S. 312, 321 (1988) (rejecting emotive impact as legitimate secondary effect).

239. For a discussion of viewpoint-based regulations in designated public forums, see *supra* notes 116–119 and accompanying text.

240. For a discussion of state action, see *supra* notes 62–109 and accompanying text. For a discussion of public forums, see *supra* notes 111–129 and accompanying text.

241. For a discussion of how visiting fans' speech is constitutionally protected, see *supra* notes 133–239 and accompanying text.

242. For a discussion of content-distinction principle and how it applies to the Lightning, see *supra* notes 138–149 and accompanying text.

243. For a discussion of the Lightning's justifications for the ban, see *supra* notes 22 and 197 and accompanying text.

244. For a discussion of how visiting fans' speech is constitutionally protected, see *supra* notes 133–239 and accompanying text.

245. For a discussion of the potential constitutional arguments fans have against the Lightning, see *supra* notes 53–239 and accompanying text.

246. See Mason, *supra* note 160 (reporting Lightning enforced same policy in 2016 when it played Pittsburgh Penguins in semifinals).

integrity and fairness of their games.²⁴⁷ Due to the effect fans can have on games, if other teams and sports adopt policies similar to the Lightning's, the fairness of games could be seriously compromised.²⁴⁸ Further, the popularity of sports may diminish as visiting fans continue to be excluded from the teams and games that they know and love.²⁴⁹ For these reasons, Tampa Bay should simply stop enforcing this policy.²⁵⁰

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247. For a discussion of home advantage, see *supra* notes 17–51 and accompanying text.

248. See *id.* (determining home advantage is real phenomenon).

249. See Carson, *supra* note 6 (discussing Lightning ban in place so visiting fans will not attend games). Commissioners in professional sports have the duty to protect the integrity of their leagues. See NAT'L HOCKEY LEAGUE, CONSTITUTION OF THE NATIONAL HOCKEY LEAGUE art. VI § 6.1; NAT'L FOOTBALL LEAGUE, CONSTITUTION AND BYLAWS OF THE NATIONAL FOOTBALL LEAGUE art. VIII § 8.3, available at http://www.nfl.com/static/content/public/static/html/careers/pdf/co_.pdf [<https://perma.cc/R4QA-KHHZ>]; NAT'L BASKETBALL ASS'N, CONSTITUTION AND BYLAWS OF THE NATIONAL BASKETBALL ASSOCIATION art. 24 § a.; MAJOR LEAGUE BASEBALL, MLB COLLECTIVE BARGAINING AGREEMENT 2012–2016 art. XI § A(1)(b), available at http://mlbplayers.mlb.com/pa/pdf/cba_english.pdf [<https://perma.cc/QY8W-XMNN>] (providing commissioners with power to preserve integrity of their respective games). For a discussion of how the Lightning's policy threatens the fairness of games, see *supra* notes 17–51 and accompanying text.

250. For a discussion of the unconstitutionality and unfairness of the Lightning's visitor jersey policy, see *supra* notes 17–239 and accompanying text.

* J.D. Candidate, May 2017, Villanova University Charles Widger School of Law; University of Pittsburgh, 2014. I would like to thank my parents and sisters for their constant love and support. I dedicate this comment to my grandmother, Shirley Carvelli.