

MLS Blurs Free Speech Line With Ban Of 'Political' Signs

By **Zachary Zagger**

Law360 (August 28, 2019, 6:33 PM EDT) -- Major League Soccer's recent ban on political signs in the stands has drawn the ire of fans and others who argue it is a form of censorship, raising the question of whether the First Amendment protects fans' right to free speech in sports stadiums.

The issue came to a head this month after the Portland Timbers of MLS told fans that they were no longer permitted to fly flags bearing the Iron Front symbol, which features three arrows sloping downward and was used by groups opposing Nazism and communism in pre-World War II Germany. The symbol has more recently been associated with the controversial anti-fascist movement known as antifa.

The ban outraged many Timbers fans who, along with other MLS fans across the country, use the symbol to show their opposition to fascism, racism and sexism. The Timbers fans argue the issue is not political but a matter of human rights and that the league ban and the Timbers' crackdown are an attempt to censor fans' free speech.

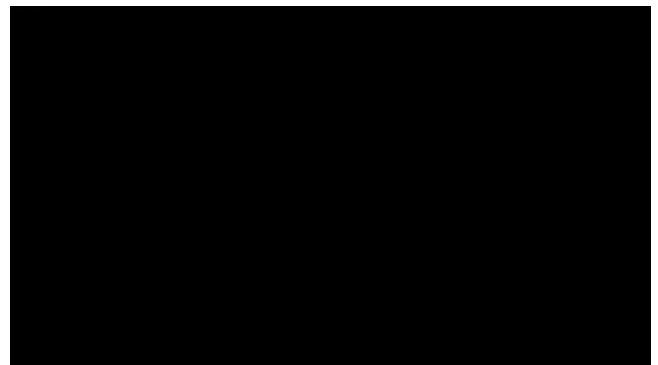
The controversy prompted a series of protests against the policy from MLS fans across the country last weekend and has raised questions about the extent of all sports fans' free speech rights in stadiums.

While the First Amendment, which prohibits the government from blocking free speech, does not typically apply to private entities, legal experts say some sports could be an exception because stadiums are often owned by local governments or have been heavily subsidized with tax money. That means the implementation of the MLS policy prohibiting political signs that led to the Oregon team's ban on Iron Front flags could be a basis for free speech claims by aggrieved fans.

"Entities that are deeply intertwined with the government can be subject to the First Amendment," said Nicole Ligon, the supervising attorney of the First Amendment Clinic at Duke University School of Law. "It is important to look at factors like how much funding stadiums are getting from taxpayer dollars."

Ligon said other factors could include whether a team pays local police departments to have uniformed officers secure stadiums or pays for a private security force.

A team or league could also be deemed a state actor if it bans a particular message at the direction of the government. Such a question was raised by legal experts last year when the National Football League tried to stop players from kneeling during the national anthem after President Donald Trump openly urged the league to put a stop to the protests.



The Portland Timbers supporters group the Timbers Army has taken issue with the MLS and team's efforts to ban displays of the Iron Front symbol, shown here, under league policy against "political" signs. First Amendment experts agree the policy could violate fans' free speech rights.

Whether a stadium is government-owned and leased to a team or whether it is heavily subsidized by taxes are other key factors. For example, an Illinois federal court last year allowed a Green Bay Packers fan to move forward with claims targeting a Chicago Bears policy banning him from wearing Packers gear on the field at the Windy City's Soldier Field because the Bears lease the stadium from a public entity.

The Packers fan eventually settled the case, but his initial success in moving forward with his claims suggests that a fan may have a viable First Amendment claim against a team that plays in a government-owned stadium.

In the Timbers case, the soccer team's stadium, Providence Park, is owned by the city of Portland and leased to Peregrine Sports LLC, the entity behind the Timbers, potentially opening the team and its implementation of the MLS political ban to First Amendment scrutiny.

"The second you can get past that state actor hurdle, then you are golden," Ligon, who represented the Packers fan in his case, said with regard to the MLS political ban. "Especially because political speech is the greatest protection. That is so core to the First Amendment. If you are going to broadly ban that, then you run into some real issues."

MLS implemented the new Fan Code of Conduct at the beginning of the current season. The ban prohibits "political ... or otherwise inappropriate language or behavior" on "any sign or other visible representation." In addition to the Timbers crackdown, MLS has also issued a warning to Seattle Sounders fans not to use the Iron Front symbol, citing the Fan Code of Conduct.

But the board of the 107 Independent Supporters Trust, the group behind the Timbers Army and the Rose City Riveters supporters groups, argue the policy represents "the ability to arbitrarily, unilaterally, and subjectively interpret symbols and ideas as 'political,' something we've already seen happening across the league in recent weeks."

"What I think [the MLS and its teams] are actually doing is banning fans from displaying their political beliefs while the team and the league is allowed to display theirs," said First Amendment attorney Ricardo P. Cestero of Greenberg Glusker Fields Claman & Machtinger LLP. "That is problematic in itself, and then there is this inherent vagueness on what is 'political' speech."

"Clearly, the league doesn't ban all political speech because the league itself engages in political speech," he said. "The league does, like all sports leagues do, military appreciation activities. They have the players wear camouflage outfits or do Fourth of July ceremonies. Those all could potentially be deemed political speech."

The league did not respond to a request for comment by Law360, but MLS Commissioner Don Garber told ESPN last month that the Iron Front is a "political organization" that makes it unlike waving a rainbow LGBTQ flag and that the league wants fans to attend games without being confronted with issues that make them uncomfortable.

But it may be too late for that, according to one expert.

"This idea of sports trying to be nonpolitical, I think at this point has just become silly," said Howard M. Wasserman, a professor at the Florida International University College of Law who teaches the First Amendment. "Politics is absolutely wrapped up in sports, and if everyone is being honest, they would acknowledge that. So that means political speech about anti-fascism or anti-racism, especially in that particular community, is important."

But the ban on political messages comes in the context of the growing "supporters culture" that MLS has fostered, where fans are organized into independent groups dedicated to rooting for a team similar to so-called Ultras groups that are prominent in Europe and Latin America.

That fan culture, which is an outlier in U.S. and Canadian professional sports, has helped expand the popularity of MLS. However, some of those groups in other countries have adopted extreme political, religious or ideological affiliations that have led to violence.

The Timbers issued a statement last week clarifying that it is opposed to fascism and that fans may wear shirts or pins with the Iron Front symbol or wave flags denouncing fascism. What they may not do, the team said, is "wave a banner or any larger display that includes the Iron Front symbol," as such displays are caught on TV cameras.

"Major League Soccer believes the Iron Front symbol is inherently political because it has been co-opted by Antifa," the Timbers statement said. "The solution that allows for the specific denouncement of fascism on banners (as well as continued acceptance of personal apparel choices), in lieu of the Iron Front symbol, is more than fair."

But whether the Iron Front symbol is or is not political, the MLS' blanket ban and even the Timbers' attempts to tailor it raise concerns under the First Amendment.

"The league and the teams have a compelling and legitimate interest in making sure there isn't violence in the stadium or among the fans," Cestero said. "But to the extent that the First Amendment applies, they have to narrowly tailor the policy to that issue and be very particular about how they are crafting the policy to prevent violence and not to simply ban all political speech or all speech of a certain content. As I read the policy, I don't think it can possibly survive that scrutiny."

--Editing by Jill Coffey and Brian Baresch.