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Calculating the Harms of Political Use of Popular Music

JAKE LINFORD[†] & AARON PERZANOWSKI^{††}

When Donald Trump descended the escalator of Trump Tower to announce his 2016 presidential bid, Neil Young’s “Rockin’ in the Free World” blared from the loudspeakers. Almost immediately, Young’s management made clear that the campaign’s use of the song was unauthorized. Neil Young was not alone. Trump drew similar objections from dozens of artists during his first two presidential bids. But as a matter of copyright law, it is unclear whether artists can prevent their songs from being played at campaign rallies.

Putting the intricacies of copyright licensing aside, what motivates artists to object to the use of their songs by political campaigns? This Article identifies and measures three types of harm artists may reasonably fear. First, an artist may worry that campaign use of their song will harm its market value and popularity. To test that theory, we examine a novel set of industry streaming data to identify any meaningful shifts in streaming consumption after well-publicized campaign uses. Second, campaign use may falsely lead the public to believe that an artist supports or endorses a candidate. And third, an artist may fear a tarnishment effect. That is, consumers may negatively associate the artist or their music with an unpopular candidate even in the absence of any perceived endorsement. We test the endorsement and tarnishment theories through an experimental design that measures consumer reactions to a set of hypothetical campaign uses.

Our data paint a complicated picture. We find some evidence that songs used by the Trump campaign suffered a drop in streaming consumption, but we cannot conclude that campaign use drove that reduced popularity. We also find strong

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evidence that an artist's perceived support or endorsement of a candidate is material to consumers. But consumers do not appear to infer that an artist endorses a candidate when their campaign uses that artist's song. Finally, we found that less well-established artists are most likely to suffer from tarnishing associations when their songs are used by divisive politicians. Our results do not fully resolve the thorny doctrinal and normative questions at the heart of these controversies, but they do offer a crucial empirical grounding for a recurring policy debate.

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INTRODUCTION

Like clockwork, campaign season prompts a predictable set of phenomena—breathless horserace coverages of the polls, wall-to-wall television ads, barrages of fund-raising emails, and garish yard sign installations. But for copyright lawyers, there is another reliable harbinger of an impending election—famous musicians objecting to the use of their songs at political rallies. Press coverage of these skirmishes follows a predictable pattern. A story mentions a candidate taking the stage to the stirring chords of a Rolling Stones classic or the rousing beat of a Rihanna hit. The artist issues a statement expressing their disappointment and frustration that their work is being used without their express permission. And perhaps, if deadlines and column inches permit, reporters will include some passing reference to the inscrutable details of copyright licensing. Eventually, most campaigns stop using the song and substitute another.

As with other aspects of U.S. politics, this trend has intensified in recent election cycles. During his first two presidential campaigns, dozens of artists, from Adele to the Village People, objected to former President Trump’s use of their songs.¹ But controversies of this sort predate the Trump era by decades. Although these objections overwhelmingly target Republican politicians, high profile candidates on both sides of the aisle have faced similar complaints from artists.

This Article sets out to illuminate the legal status of campaign use of popular music and to explore the motivations of artists who object to it. When political campaigns play recordings at events without artists’ explicit permission, are they violating copyright law? The answer to that question, it turns out, is more complicated than the unequivocal demands of some artists might suggest. Public performance rights for musical works are typically licensed by organizations like the American Society of Composers, Authors and Publishers (“ASCAP”) and Broadcast Music, Inc. (“BMI”), which control catalogs of tens of millions of songs.² The blanket licenses issued by these performing rights organizations (“PROs”) historically granted licensees the legal right to perform any songs within their respective repertoires.³ In recent years, new PROs have emerged that give artists more say over public performances.⁴ At the same time, legacy PROs have adjusted their license terms to address the recurring and particularly troublesome question of campaign use.⁵

1. *A Look at Artists Who’ve Objected to Trump Using Their Songs*, ASSOCIATED PRESS (Oct. 27, 2020, 10:30 AM), <https://apnews.com/article/donald-trump-ronald-reagan-hip-hop-and-rap-phil-collins-bruce-springsteen-394ddb622b30a718f1b4621a316a78c3>.

2. See Milana Vinn & Anirban Sen, *Exclusive: Music Rights Giant BMI in Renewed Talks to Sell Itself*, REUTERS (July 26, 2023, 1:09 PM), <https://www.reuters.com/markets/deals/music-rights-giant-bmi-renewed-talks-sell-itself-sources-2023-07-25>; *infra* Part II.B.

3. See *infra* Part II.B.

4. See *infra* Part II.B.

5. See *infra* Part II.B.

In both cases, artists appear happy to forgo performance royalties in exchange for exercising greater control over the use of their works.

If artists are happy to indiscriminately license their songs for radio airplay, wedding receptions, and sporting events, what makes campaign rallies so different? This Article identifies and empirically tests three types of harm artists may reasonably fear. First, an artist may be concerned that the popularity and paid consumption of their music will suffer if it is associated with a particular candidate. Second, an artist may worry that a campaign's use may falsely lead consumers to believe that the artist supports or endorses the candidate. And third, even in the absence of any false endorsement, an artist may fear a tarnishment effect—the artist's reputation may be harmed as consumers associate the artist or their music with an unpopular or controversial candidate.

Part I of this Article examines the history of campaign music in the United States, tracing the emergence of disputes over copyrighted songs in the 1960s and their explosion in recent years.

Part II considers campaign use as a matter of copyright law. Here, we outline the basic structure of public performance rights before considering the evolving terms of blanket licenses for campaign uses that shape the infringement analysis.

Regardless of whether campaigns are technically infringing, artists may worry that demand for their works could be weakened by association with a candidate, particularly in our highly polarized political environment. To determine whether that is the case, Part III examines a novel, albeit limited, set of industry streaming data to identify any meaningful shifts in consumption for three representative songs used by the 2016 Trump campaign. A difference-in-difference analysis indicates that streams of those songs dropped compared to the market as a whole after Trump's campaign use and the artist's objection. However, our data reveal no simple explanation for this apparent decrease in popularity. We observed no discernible difference between the popularity of these songs in heavily Republican and Democratic markets.

In light of this inconclusive market data, we turn to two other theories of potential harm in Part IV—the first, rooted in the law of false endorsement and the second, rooted in trademark's controversial notion of tarnishment. We test these two theories through an experimental design that measured consumer reactions to a set of uses by the Biden and Trump campaigns of songs from both popular and fictional artists. We found that perceived endorsement was material to respondents in predictable ways. Respondents were less likely to listen to artists who supported candidates they opposed. While respondents in test conditions were somewhat more likely to conclude the artist supported or endorsed a candidate, very few identified the campaign's use of the song or the artist's objection as the basis for any perceived endorsement. However, we found some evidence that association with an unpopular candidate can reduce consumption of an artist's music, particularly when that artist is not well-established.

In Part V, we consider the implications of our findings. Assuming campaign uses are unlicensed, copyright claims will likely need to overcome largely untested fair use arguments, which turn in part on evidence of market harm. When it comes to false endorsement claims, we found little evidence that campaign use creates confusion among consumers. Beyond that hurdle, other doctrines rooted in First Amendment concerns may further limit artists' potential recovery. While we did uncover some evidence of tarnishment, the circumstances where it is likely to occur are limited. Finally, we conclude by considering a set of dignitary and moral concerns that fall outside the scope of our data but may nevertheless be important motivators for artists.

I. CAMPAIGN MUSIC IN THE UNITED STATES

Campaign music has been a feature of U.S. presidential politics nearly from the beginning. The election of 1800 pitted the incumbent John Adams against challenger Thomas Jefferson. The Adams campaign adopted "Adams and Liberty," a song penned by Robert Treat Paine, Jr. in 1798.⁶ The Jefferson campaign featured its own song, "The Son of Liberty," which boasted of the candidate's accomplishments in considerable detail.⁷ Bespoke campaign songs were common throughout the nineteenth century. James Madison,⁸ John Quincy Adams,⁹ and Andrew Jackson each deployed them.¹⁰ And when William Henry Harrison defeated Martin Van Buren in 1840, contemporary accounts claimed that the song "Tippecanoe and Tyler Too" "sang [him] into the presidency."¹¹ Over time, purpose-written campaign songs became less popular, but they persisted well into the twentieth century.¹²

6. BENJAMIN S. SCHOENING & ERIC T. KASPER, DON'T STOP THINKING ABOUT THE MUSIC: THE POLITICS OF SONGS AND MUSICIANS IN PRESIDENTIAL CAMPAIGNS 33–35 (2012).

7. *Id.* at 36.

8. Chris Willman, *A Short History of 200 Years of Campaign Music, From the Apt to the Weird to the WTF*, VARIETY (Aug. 17, 2020, 5:58 PM), <https://www.variety.com/2020/music/news/campaign-songs-history-political-convention-music-republicans-democrats-1234737713>.

9. Claire Suddath, *A Brief History of Campaign Songs*, TIME (Sept. 18, 2008), https://content.time.com/time/specials/packages/article/0,28804,1840981_1840998_1840894,00.html.

10. "The Hunters of Kentucky": A Popular Song Celebrates the Victory of Jackson and His Frontier Fighters over the British, 1824, HIST. MATTERS, <http://www.historymatters.gmu.edu/d/6522> (last visited Feb. 15, 2024).

11. IRWIN SILBER, SONGS AMERICA VOTED BY: WITH THE WORDS AND MUSIC THAT WON AND LOST ELECTIONS AND INFLUENCED THE DEMOCRATIC PROCESS. COMPILED AND EDITED WITH HISTORICAL NOTES 37 (1971) (internal citations omitted).

12. Irving Berlin's "I Like Ike" celebrated Dwight Eisenhower and was adopted by his 1952 campaign. An earlier version of the song, "They Like Ike," first appeared in the Broadway show *Call Me Madam* in 1950. David Haven Blake, *The Broadway Song That Nominated a President*, OXFORD UNIV. PRESS: OUPBLOG (June 23, 2016), <https://blog.oup.com/2016/06/broadway-eisenhower-presidential-nomination>. Later examples were somewhat less memorable. They included "Go with Goldwater" (1964), "Nixon's the One" (1968), "Nixon Now" (1972), and "Why Not the Best?" from Jimmy Carter's 1976 campaign. Post-War American Political Songs, *Otis Clements & Tom McDonnell — Go with Goldwater*, YOUTUBE (May 4, 2017), <https://www.youtube.com/watch?v=I4IFO3Uo2cU>; Chiefboyscout, *The Vic Caesar Orchestra & Chorus -*

Other campaigns relied on existing popular songs. Abraham Lincoln's reelection bid in 1864 adopted George F. Root's "Battle Cry of Freedom."¹³ That song, written two years earlier, was wildly popular, with upwards of 700,000 copies of sheet music printed.¹⁴ Similarly, New York Governor Al Smith's presidential campaigns in 1924 and 1928 adopted "Sidewalks of New York"—a hit song first published decades earlier.¹⁵ And in 1932, Franklin D. Roosevelt chose a recent hit, "Happy Days Are Here Again," as an expression of the optimistic vision of his campaign.¹⁶

The modern trend of politicians communicating through pop music firmly took hold during the second half of the twentieth century. Although his campaign failed miserably, George McGovern demonstrated solid musical instincts with his choice of campaign song—Simon and Garfunkel's "Bridge Over Troubled Water."¹⁷ Since then, politicians have often been closely associated with their campaign's musical selections—Bill Clinton with Fleetwood Mac's "Don't Stop," Barack Obama with Stevie Wonder's "Signed, Sealed, Delivered (I'm Yours),"¹⁸ and Donald Trump with Lee Greenwood's "God Bless the U.S.A."¹⁹ Perhaps the most inspired pairing was Ross Perot's use of "Crazy," the Willie Nelson-penned classic made famous by Patsy Cline, during his unconventional 1992 run as an independent candidate.²⁰

Some campaigns attempted a third strategy, modifying existing popular numbers to better fit the candidate. Frank Sinatra's rerecording of his hit "High

Nixon's the One, YOUTUBE (Aug. 28, 2012), <https://www.youtube.com/watch?v=MtCeBws4jpA>; Chuckcollins, *Nixon 1972 Election Ad (Nixon Now Campaign Song)*, YOUTUBE (July 9, 2010), <https://www.youtube.com/watch?v=dpl0iFDIRE4>; Kunal Yu, *Jimmy Carter — "Why Not the Best?" — Campaign Song 1976*, YOUTUBE (Dec. 2, 2017), https://www.youtube.com/watch?v=XUqn3o9_hhk.

13. See IRWIN SILBER, *SONGS OF THE CIVIL WAR* 8–9, 90 (Dover Publ'ns ed., 1995) (1960) (noting the song's popularity and Union-Confederate revisions, as well as Lincoln's need for a political tune); Christian McWhirter, *Birth of the 'Battle Cry'*, N.Y. TIMES (July 27, 2012, 2:24 PM), <https://archive.nytimes.com/opinionator.blogs.nytimes.com/2012/07/27/birth-of-the-battle-hymn>.

14. McWhirter, *supra* note 13.

15. WILLIAM MILES, *SONGS, ODES, GLEES, AND BALLADS: A BIBLIOGRAPHY OF AMERICAN PRESIDENTIAL CAMPAIGN SONGSTERS* xxx, xlv (1990). Similarly, Truman used "I'm Just Wild About Harry" from the musical *Shuffle Along*. Ashawnta Jackson, *When the Truman Campaign Used a Song from an All-Black Show*, JSTOR DAILY (July 25, 2020), <https://daily.jstor.org/when-the-truman-campaign-used-a-song-from-an-all-black-show>.

16. *Happy Days Are Here Again*, VOICES ACROSS TIME, <https://voices.pitt.edu/TeachersGuide/Unit%206/HappyDaysAreHereAgain.htm> (last visited Feb. 15, 2024). In at least one case, a candidate seems to have sung himself into office with his own song. Jimmie Davis cowrote the now-classic "You Are My Sunshine" and frequently sang the tune during his successful bid to become Governor of Louisiana. Davis's claim of authorship is disputed, it should be noted, by both Oliver Hood and Paul Rice, each of whom claimed to have written the song. Theodore Pappas, *The Theft of an American Classic*, CHRON.: A MAG. OF AM. CULTURE (Nov. 1990), <https://www.chroniclesmagazine.org/vital-signs/the-theft-of-an-american-classic>.

17. SCHOENING & KASPER, *supra* note 6, at 148.

18. *Id.* at 175, 215.

19. Charles Passy, *Long Before It Became a Rittenhouse Trial-Interrupting Ringtone, 'God Bless the U.S.A.' Was a Political Musical Staple – And a Trump Favorite*, MARKETWATCH (Nov. 11, 2021, 4:23 PM), <https://www.marketwatch.com/story/long-before-it-became-a-trial-interrupting-ringtone-god-bless-the-u-s-a-was-known-as-a-political-and-patriotic-musical-staple-and-a-trump-favorite-11636661089>.

20. John M. Broder, *Perot Winds up Campaign with a New Theme: 'Crazy'*, L.A. TIMES (Nov. 3, 1992, 12:00 AM), <https://www.latimes.com/archives/la-xpm-1992-11-03-mn-1248-story.html>.

Hopes” awkwardly inserted references to John F. Kennedy for Kennedy’s 1960 run.²¹ And in 1964, both the Lyndon Johnson and Barry Goldwater campaigns unveiled competing takes on the title number from the hit musical, “Hello, Dolly.” While the show’s composer Jerry Herman and star Carol Channing both contributed to “Hello, Lyndon,” its producers threatened Goldwater with a \$10 million lawsuit over “Hello, Barry,” marking the first copyright skirmish over a presidential campaign song.²²

Far more common than complaints about rewritten lyrics are objections to campaigns playing songs at rallies and other public events—either before the event kicks off, as the candidate takes the stage, or during the post-speech rope line as the candidate meets with supporters. When Ronald Reagan’s campaign sought Bruce Springsteen’s permission to use “Born in the U.S.A.” in 1984—in apparent indifference to the song’s lyrics—Springsteen refused.²³ Perhaps adhering to the adage that it is better to seek forgiveness than to ask permission, other politicians, including Bob Dole and Pat Buchanan, played “Born in the U.S.A.” in the decades that followed, eventually drawing successful objections from Springsteen.²⁴ George H. W. Bush used the same strategy when his campaign began using Bobby McFerrin’s unlikely a cappella hit “Don’t Worry, Be Happy” in 1988.²⁵ After McFerrin voiced his disapproval, the Bush campaign opted for Woody Guthrie’s “This Land Is Your Land,” perhaps assuming that a dead man, whatever his politics, could not easily object.²⁶

You may be noticing a trend. In the vast majority of cases, artists object to the use of their songs by Republican candidates while remaining silent or

21. “*High Hopes*” (*John F. Kennedy Presidential Campaign Song*), JOHN F. KENNEDY PRESIDENTIAL LIBR. & MUSEUM, <https://www.jfklibrary.org/learn/about-jfk/life-of-john-f-kennedy/fast-facts-john-f-kennedy/high-hopes> (last visited Feb. 15, 2024).

22. John P. Shanley, ‘*Hello, Lyndon!*’ Joins Campaign at Democratic Parley Next Week; Herman, Composer, to Play Song for Carol Channing at Atlantic City Meeting, N.Y. TIMES (Aug. 21, 1964), <https://www.nytimes.com/1964/08/21/archives/hello-lyndon-joins-campaign-at-democratic-parley-next-week-herman.html> [<https://web.archive.org/web/20210602062343/https://www.nytimes.com/1964/08/21/archives/hello-lyndon-joins-campaign-at-democratic-parley-next-week-herman.html>]; ‘*Hello, Barry*’ Thwarted By ‘*Dolly*’ Named Lyndon, N.Y. TIMES (July 18, 1964), <https://www.nytimes.com/1964/07/18/archives/hello-barry-thwarted-by-dolly-named-lyndon.html>. Decades later, Bob Dole’s 1996 campaign faced similar legal threats after inserting the cringeworthy line “I’m a Dole Man” into Sam & Dave’s 1967 classic “Soul Man.” *Dole’s Campaign Shelving ‘Soul Man,’ Song’s Publisher Says*, CHI. TRIB. (Sept. 15, 1996), <https://www.chicagotribune.com/news/ct-xpm-1996-09-15-9609150261-story.html> [<https://web.archive.org/web/20210919024833/https://www.chicagotribune.com/news/ct-xpm-1996-09-15-9609150261-story.html>].

23. Josh Terry, *Politicians Have Always Misunderstood Springsteen’s ‘Born in the U.S.A.’*, VICE (Oct. 5, 2020, 1:30 PM), <https://www.vice.com/en/article/pkyjvn/misunderstood-bruce-springsteens-born-in-the-usa-trump>.

24. Eveline Chao, *Stop Using My Songs: 35 Artists Who Fought Politicians over Their Music*, ROLLING STONE (July 8, 2015), <https://www.rollingstone.com/politics/politics-lists/stop-using-my-song-35-artists-who-fought-politicians-over-their-music-75611/bobby-mcferrin-vs-george-h-w-bush-28857>. Springsteen objected to Dole’s use of “Born in the U.S.A.” via an open letter, prompting Dole to instead adopt Eddie Rabbitt’s “American Boy,” for which he was given the artist’s permission. *Id.*

25. *Id.*

26. *Id.*; see also Will Kaufman, *The Radicalism of Woody Guthrie*, JACOBIN (Aug. 26, 2020), <https://www.jacobinmag.com/2020/08/woody-guthrie-socialism-radical-kaufman>.

actively encouraging their use by Democrats. During the 2000 presidential cycle, for example, Sting demanded that George W. Bush stop using “Brand New Day,” but had not objected to Al Gore’s campaign using the same song.²⁷ Similarly, Tom Petty threatened to sue the Bush campaign if it didn’t stop playing “I Won’t Back Down” at events, but later performed the song at a private event at Gore’s home, with Al’s wife, Tipper, sitting in on drums.²⁸ And when the Gore campaign began to play his song “Praise You” at events, Fatboy Slim told reporters, “Thank God it wasn’t the Republicans. I would have had to sue.”²⁹

The 2008 presidential campaign saw two notable shifts in the typical pattern of campaign music controversies. First, a Democratic candidate received a rare objection when Sam Moore of the group Sam & Dave asked Barack Obama to stop playing “Hold On, I’m Comin’” at campaign events.³⁰ Although Moore didn’t write the song and thus held no copyright interest, Obama’s team pulled the song from its event playlist. Second, John McCain’s campaign bucked the trend of giving in to artists’ demands. When the Foo Fighters objected to McCain’s use of “My Hero,” the campaign responded that it “respects copyright [and] . . . obtained and paid for licenses from performing rights organizations, giving us permission to play millions of different songs, including ‘My Hero.’”³¹ The McCain campaign offered similar rebuffs to Van Halen, Bon Jovi, and Heart, whose song “Barracuda” became a favorite of McCain’s running mate, Sarah Palin.³²

Things have only intensified in the years since. In 2015, the Dropkick Murphys tweeted at presidential hopeful Scott Walker, “please stop using our music in any way . . . we literally hate you!!!”³³ After Mike Huckabee played

27. Jake Tapper, *Spinning Records*, SALON (Sept. 15, 2000, 7:58 PM), https://www.salon.com/2000/09/15/music_40 (reporting that Sting’s manager stated that the Gore campaign would soon be asked to stop as well); see also Chao, *supra* note 24.

28. Suddath, *supra* note 9.

29. Alona Wartofsky, *Al Gore, Drawing on Fatboy Slim’s ‘Praise’*, WASH. POST (Apr. 30, 2000), <https://www.washingtonpost.com/archive/lifestyle/style/2000/04/30/al-gore-drawing-on-fatboy-slims-praise/975bc46b-14de-4310-a055-9538170704a8>.

30. Stephen Davis, *Do Rock Stars Dislike Democrats, Too?*, SLATE (June 30, 2011, 4:15 PM), http://www.slate.com/blogs/browbeat/2011/06/30/has_a_rock_star_ever_sued_a_democrat_for_using_a_song_in_a_campa.html. Cyndi Lauper also objected to the Obama campaign using her version of the song “True Colors” in a negative campaign ad. Lauren Effron, *Cyndi Lauper Upset ‘True Colors’ Was Used in Romney Attack Ad*, ABC NEWS (Jan. 17, 2012), <https://www.abcnnews.go.com/blogs/politics/2012/01/cyndi-lauper-upset-true-colors-was-used-in-romney-attack-ad>. And in 2016, Bikini Kill’s Tobi Vail, a Bernie Sanders supporter, objected to the use of “Rebel Girl” in an online ad supporting Hillary Clinton. Jamie Peck, *Tobi Vail Issues Copyright Infringement Notice to Hillary Clinton ‘Rebel Girl’ Video*, DEATH AND TAXES (Feb. 25, 2016, 3:12 PM), <http://www.deathandtaxesmag.com/282210/tobi-vail-copyright-infringement-notice-hillary-clinton-rebel-girl-video> [<https://web.archive.org/web/20160503112643/http://www.deathandtaxesmag.com/282210/tobi-vail-copyright-infringement-notice-hillary-clinton-rebel-girl-video>].

31. Chao, *supra* note 24.

32. *Id.* McCain, an avid ABBA fan, did agree to stop using the band’s song “Take a Chance on Me” after they sent his campaign a cease-and-desist letter. *Id.*

33. Elahe Izadi, *A Band Told Scott Walker: ‘We Literally Hate You.’ This Is Not a New Trend*, WASH. POST (Jan. 26, 2015, 4:16 PM), <https://www.washingtonpost.com/news/the-fix/wp/2015/01/26/a-band-told-scott-walker-we-literally-hate-you-here-are-the-other-times-musicians-told-politicians-to-stop-using-their-songs>.

Survivor's "Eye of the Tiger" at a rally, songwriter and guitarist Frankie Sullivan filed a copyright infringement lawsuit that eventually settled for \$25,000.³⁴ More recently, Eminem demanded that Republican presidential primary hopeful Vivek Ramaswamy stop playing "Lose Yourself" at campaign events after the candidate was filmed rapping along to the 2002 hit.³⁵

More than any other candidate, Donald Trump has emerged as artists' prime target. Over the course of his political career, he has racked up dozens of objections, denunciations, cease and desist letters, and lawsuits from artists over the use of their music.³⁶ The problems started on day one. When Trump descended the golden escalator of the Manhattan tower that bears his name to announce his presidential bid, he chose Neil Young's "Rockin' in the Free World" as the soundtrack.³⁷ In a statement released soon after, Young's management clarified that "Donald Trump was not authorized to use 'Rockin' [i]n [t]he Free World' in his presidential candidacy announcement. Neil Young, a Canadian citizen, is a supporter of Bernie Sanders for President of the United States of America."³⁸ Nonetheless, Trump continued to use Young's songs at campaign events, even expanding his selections to include "Devil's Sidewalk."³⁹ In 2020, after repeated public objections, Young filed an infringement suit against Trump.⁴⁰ But as discussed below, that lawsuit was eventually dismissed.⁴¹

The Trump campaign's initial song choice was an inauspicious start, but it was just getting warmed up. Denunciations and cease and desist letters from artists became a consistent byproduct of Trump's frequent rallies. A partial list

34. Jose Pagliery, *Mike Huckabee Paying \$25,000 for Playing 'Eye of the Tiger'*, CNN MONEY (June 27, 2016, 12:30 PM), <https://www.money.cnn.com/2016/06/27/news/mike-huckabee-eye-of-the-tiger>.

35. Bill Donahue, *Eminem Demands GOP Candidate Ramaswamy Stop Using 'Lose Yourself' at Campaign Stops*, BILLBOARD (Aug. 28, 2023), <https://www.billboard.com/business/legal/eminem-demands-vivek-ramaswamy-stop-using-music-1235402309>.

36. See ASSOCIATED PRESS, *supra* note 1.

37. Rebekah Metzler, *Probably Not a Lot More Rocking in Donald Trump's Free World*, CNN (June 17, 2015, 3:50 PM), <https://www.cnn.com/2015/06/16/politics/donald-trump-2016-neil-young-song>.

38. *Id.*

39. Andy Greene, *Flashback: The Other Neil Young Song in His Lawsuit Against Donald Trump*, ROLLING STONE (Aug. 6, 2020), <https://www.rollingstone.com/music/music-news/neil-young-donald-trump-lawsuit-devils-sidewalk-1040370>.

40. *Id.*

41. Marina Pitofsky, *Neil Young Ends Lawsuit over Music Played at Trump Rallies*, THE HILL (Dec. 7, 2020, 6:32 PM), <https://thehill.com/blogs/in-the-know/in-the-know/529137-neil-young-ends-lawsuit-over-music-played-at-trump-rallies>. See Andrew Flanagan, *After Pittsburgh, Pharrell Demands Trump Never Play 'Happy' Again*, NPR (Oct. 30, 2018, 2:25 PM), <https://www.npr.org/2018/10/30/662168950/after-pittsburgh-pharrell-demands-trump-never-play-happy-again>; Megan McCluskey, *Rihanna Sends Trump Cease-and-Desist Letter over Rally Music*, TIME (Nov. 6, 2018, 12:05 PM), <https://www.time.com/5446094/rihanna-trump-cease-and-desist>; see also Complaint at 1, 3–4, *Young v. Donald J. Trump for President, Inc.*, No. 1:20-cv-06063 (S.D.N.Y. Aug. 4, 2020).

of artists who objected to Trump's use of their songs at campaign events includes:

- Adele, "Rolling in the Deep" and "Skyfall"
- Aerosmith, "Dream On" and "Living on the Edge"
- The Beatles, "Here Comes the Sun"
- Laura Branigan, "Gloria"
- Leonard Cohen, "Hallelujah"
- Phil Collins, "In the Air Tonight"
- Creedence Clearwater Revival, "Fortunate Son"
- Guns N' Roses, "Live and Let Die"
- Elton John, "Rocket Man" and "Tiny Dancer"
- Panic! at the Disco, "High Hopes"
- Luciano Pavarotti, "Nessun Dorma"
- Tom Petty, "I Won't Back Down"
- Prince, "Purple Rain"
- Pharrell Williams, "Happy"
- Queen, "We Are the Champions"
- R.E.M., "Everybody Hurts," "Losing My Religion," and "It's the End of the World as We Know It (And I Feel Fine)"
- Rihanna, "Don't Stop the Music"
- The Rolling Stones, "Brown Sugar," "Sympathy for the Devil," and "You Can't Always Get What You Want"
- Bruce Springsteen, "Born in the U.S.A.," and
- Village People, "Macho Man" and "Y.M.C.A."⁴²

In many cases, the 2016 Trump campaign continued using these artists' songs over their objections.⁴³ Despite the stack of cease-and-desist letters, the many threatened lawsuits, and at least two copyright infringement complaints, courts have not had the opportunity to clarify the legality of these uses.⁴⁴

42. See ASSOCIATED PRESS, *supra* note 1. In the case of the Village People, the group originally consented to Trump's use, but later called on him to stop playing their songs after the government's violent response to Black Lives Matter protests. Ariana Bacle & Dana Getz, *Musicians Who Banned Presidential Candidates from Using Their Songs*, ENT. WKLY. (Jan. 8, 2021), <https://www.ew.com/gallery/presidential-campaign-music>.

43. See, e.g., Greene, *supra* note 39.

44. In one recent suit over the use of Eddy Grant's hit "Electric Avenue" in a campaign advertisement, a court denied Trump's motion to dismiss on fair use grounds. Order Denying Motion to Dismiss, *Grant v. Trump*, 563 F. Supp. 3d 278, 282, 290 (S.D.N.Y. 2021); Aaron Katersky, *Donald Trump Versus 'Electric Avenue's Eddy Grant*, ABC NEWS (Oct. 19, 2021, 10:56 AM), <https://abcnews.go.com/Politics/donald-trump-versus-electric-avenues-eddy-grant/story?id=80664068>.

II. COPYRIGHT AND CAMPAIGNS

Copyright law offers the most obvious set of tools for artists who want to choose which candidates, if any, make use of their songs. Nonetheless, for a variety of reasons, copyright may not always afford artists the degree of control they desire. For example, the artist may not hold the relevant copyright interest. Even if they do, they may have included the song within a blanket public performance license.

A. COPYRIGHT OWNERSHIP

When it comes to popular music, there are two distinct copyright interests to consider. Under the Copyright Act, the composition, usually consisting of a song's music and lyrics, is categorized as a musical work.⁴⁵ The copyright in a musical work is typically held by the songwriters or their publishing company.⁴⁶ In contrast, a sound recording consists of the "series of musical, spoken, or other sounds" captured by performers in the studio.⁴⁷ The copyright in a sound recording is normally held by the performer or their record label.⁴⁸

This distinction has important implications for campaign use. Copyright holders are afforded a suite of exclusive rights, but the specific collection of rights varies between types of works. While both copyright holders of musical works and of sound recordings enjoy the exclusive rights to reproduce, distribute, and create derivatives, their rights differ considerably when it comes to public performances.⁴⁹ The Copyright Act's broad exclusive right to publicly perform a work applies to musical works, but not to sound recordings.⁵⁰ That explains, among other things, why songwriters are paid when their songs are played by terrestrial radio stations, but recording artists are not.⁵¹

When campaigns play songs at rallies and other events, they are engaged in public performances. That means, as a matter of copyright law, songwriters and other owners of musical works are potentially positioned to assert their copyright to prevent unauthorized use of those works. On the other hand, recording artists who did not write a particular song—or otherwise don't own the relevant copyright in the underlying musical work—have no plausible copyright claim to bring against a campaign for merely playing a song at a public

45. Copyright Act of 1976, 17 U.S.C. § 102(a)(2); see U.S. COPYRIGHT OFF., CIRCULAR 56A: COPYRIGHT REGISTRATION OF MUSICAL COMPOSITIONS AND SOUND RECORDINGS 1 (2021).

46. See 17 U.S.C. § 201 (noting that copyright "vests initially in the author or authors of the work"); see also *How Songwriters, Composers, and Performers Get Paid*, U.S. COPYRIGHT OFF. 3, 5, 7, 10 (Nov. 2020), <https://www.copyright.gov/music-modernization/educational-materials/musicians-income.pdf>.

47. 17 U.S.C. § 101.

48. 17 U.S.C. § 201; U.S. COPYRIGHT OFF., *supra* note 46, at 8, 10.

49. 17 U.S.C. § 106; see also Jake Linford, *The Institutional Progress Clause*, 16 VAND. J. ENT. & TECH. L. 533, 576 (2014).

50. Compare 17 U.S.C. § 106(4) (conferring the right to publicly perform copyrighted musical works) with § 106(6) (conferring the right to publicly perform sound recordings through digital audio transmissions).

51. A more limited public performance right that applies to digital audio transmissions was extended to sound recordings in 1995. See § 106(6).

event. So, when Guns N' Roses complained about Trump's use of their recording of Paul McCartney's "Live and Let Die," or when Sam Moore objected to Obama's use of "Hold On, I'm Comin'," copyright afforded them no remedy.⁵² But even when the objection comes from the appropriate copyright holder, industry practice complicates the question of infringement.

B. BLANKET LICENSING

Owners of copyrights in musical works enjoy the exclusive right of public performance.⁵³ For the vast majority of popular musical works, public performance rights are collectively licensed by organizations ASCAP, BMI, SESAC (formerly the Society of European Stage Authors and Composers), and most recently Global Music Rights ("GMR").⁵⁴ Typically, licensees—ranging from radio stations to sports arenas—obtain blanket licenses from one or more of these PROs, entitling them to publicly perform any song in the organizations' respective catalogs.⁵⁵

When it comes to political campaigns, there are two potential licensees to consider. First, venues like convention centers and arenas obtain blanket PRO licenses as a matter of course.⁵⁶ However, those licenses sometimes exclude third-party events like political rallies.⁵⁷ It's unclear how typical those exclusions are. One expert claims that venue licenses "usually exclude conventions and rallies,"⁵⁸ but venue licenses appear to have been a stumbling block for copyright holders pursuing litigation over campaign uses.⁵⁹

Second, the campaigns could obtain their own blanket licenses. At the presidential level, this appears to be standard procedure.⁶⁰ In 2008, for example, the McCain campaign expressly relied on blanket licenses to overcome artist objections.⁶¹ However, consistent with its unorthodox approach, it is unclear whether the Trump campaign bothered obtaining its own licenses in 2016 or

52. The latter song was written by David Porter and Isaac Hayes. *Hold On, I'm Comin'*, SONGFACTS, <https://www.songfacts.com/facts/sam-dave/hold-on-im-comin> (last visited Feb. 15, 2024). The Hayes estate objected to the Trump campaign's use of the song in 2022. Melissa Sanchez, *Isaac Hayes' Estate to Trump 'Hold On, I'm Comin'... to Court*, SOURCE (Nov. 17, 2022), <https://www.thesource.com/2022/11/17/isaac-hayes-estate-to-trump-hold-on-im-comin-to-court>.

53. 17 U.S.C. § 106(4).

54. See DANA A. SCHERER, CONG. RSCH. SERV., R43984, MONEY FOR SOMETHING: MUSIC LICENSING IN THE 21ST CENTURY 18–19 (2021).

55. *Id.* at 18.

56. U.S. COPYRIGHT OFF., COPYRIGHT AND THE MUSIC MARKETPLACE 33 (2015), <https://www.copyright.gov/policy/musiclicensingstudy/copyright-and-the-music-marketplace.pdf>.

57. Raisa Bruner, *Rihanna Said She Wants to Stop Donald Trump from Playing Her Music at Rallies. Can She?*, TIME (Nov. 5, 2018, 1:42 PM), <https://www.time.com/5444926/rihanna-trump-legal>.

58. *Id.*

59. Eriq Gardner, *Neil Young Ends Copyright Suit Against Donald Trump*, HOLLYWOOD REP. (Dec. 7, 2020, 1:39 PM), <https://www.hollywoodreporter.com/business/business-news/neil-young-ends-copyright-suit-against-donald-trump-4101281>.

60. Ben Sisario, *Can Neil Young Block Trump from Using His Songs? It's Complicated*, N.Y. TIMES (Aug. 12, 2020), <https://www.nytimes.com/2020/08/12/arts/music/neil-young-donald-trump-lawsuit.html>.

61. See Chao, *supra* note 24.

simply relied on existing venue licenses. For at least part of the 2020 cycle, there is evidence that the Trump campaign failed to obtain appropriate PRO licenses.⁶² In June 2020, ASCAP stated: “At this time, the 2020 Trump campaign has not applied for an ASCAP license and therefore currently is not authorized by ASCAP to perform any songs in the ASCAP repertory (unless they have licensed those works directly).”⁶³

Even if a campaign pays for a license, rights holders can choose to exclude particular songs from the scope of current campaign “blanket” licenses.⁶⁴ Under BMI’s Music License for Political Entities or Organizations, “a specific work may be excluded . . . if notice is received from a BMI songwriter or publisher objecting to the use of their copyrighted work for the intended uses” by the political entity or organization licensing the music.⁶⁵ ASCAP includes a similar provision in its political license. It provides “a blanket license to perform any or all of the millions of compositions in the ASCAP repertory. However, ASCAP members may ask ASCAP to exclude specific songs from a particular political campaign’s license.”⁶⁶ According to ASCAP, campaigns are informed of the exclusions only after the license is executed.⁶⁷

These licenses and their opt-out provisions complicate artists’ objections to campaign uses. Artists often use language that suggests campaigns were acting without a license. But on closer inspection, they may merely be suggesting that the campaign lacked direct permission from the artist. For example, Pharrell Williams’ letter to the Trump campaign claimed, “no permission was granted for your use of this song [“Happy”] for this purpose . . . Pharrell has not, and will not, grant you permission to publicly perform or otherwise broadcast or disseminate any of his music.”⁶⁸ Likewise,

62. David Robb, *ASCAP Says Donald Trump Campaign Can’t Use Any Rolling Stones Songs in Its Repertory, Following BMI’s Lead*, DEADLINE (June 29, 2020, 6:31 PM), <https://www.deadline.com/2020/06/donald-trump-campaign-rolling-stones-songs-ascap-1202973371>.

63. *Id.*

64. It’s unclear exactly when these exclusions were created. They were likely prompted by the McCain campaign’s refusal in 2012 to suspend the use of several songs. In 2016, a story about Queen noted: “Last week, BMI sent letters to the Trump campaign and to the RNC, detailing Queen’s objections and asked them to sign its Political Entities license. By doing so, they acknowledge that Queen’s music is no longer part of BMI’s blanket license and the campaign can no longer use it.” Melinda Newman, *Updated: Queen Is the Champion over Donald Trump and the RNC (Sort Of)*, FORBES (July 26, 2016, 7:01 PM), <https://www.forbes.com/sites/melindanewman/2016/07/26/queen-is-the-champion-over-trump-and-the-rnc-sort-of/?sh=cfdeeb172957>.

65. *Music License for Political Entities or Organizations*, BMI (Aug. 2016), https://www.rstreet.org/wp-content/uploads/2016/08/Political-Entities-Org_POL1.2016_1.pdf [https://web.archive.org/web/20200628123519/https://www.rstreet.org/wp-content/uploads/2016/08/Political-Entities-Org_POL1.2016_1.pdf].

66. *Using Music in Political Campaigns: What You Should Know*, ASCAP 2, https://www.ascap.com/~media/files/pdf/advocacy-legislation/political_campaign.pdf (last visited Feb. 15, 2024); see also Debra Cassens Weiss, *Can Recording Artists Stop Trump from Playing Their Music at Rallies? Legal Theories Are Untested*, ABA J. (Nov. 6, 2018, 8:15 AM), https://www.abajournal.com/news/article/can_recording_artists_stop_trump_from_playing_their_music_at_rallies_some_1.

67. ASCAP, *supra* note 66.

68. Flanagan, *supra* note 41 (internal quotations omitted).

Rihanna's letter said, "As you are or should be aware, Ms. Fenty has not provided her consent to Mr. Trump to use her music. Such use is therefore improper."⁶⁹ These sorts of claims, which are written at least in part as public relations documents, hint at the absence of a public performance license without clearly alleging infringing behavior. But in 2020, Neil Young filed an infringement complaint alleging that Trump had no license, presumably because of the political use exclusion.⁷⁰ ASCAP later confirmed that Young requested exclusions for "Rockin' in the Free World" and "Devil's Sidewalk."⁷¹ Nonetheless, the case was voluntarily dismissed with prejudice months later.⁷²

Young's complaint and the many informal objections that preceded it raise several questions. Chief among them, for our purposes, is what sorts of harms motivate artists to oppose the use of their songs by political campaigns. As the pattern outlined above suggests, the mere failure to pay blanket licensing fees is, at best, an incomplete explanation. In the Parts that follow, we will try to disentangle the overlapping questions of market and reputational harms that may flow from campaign use of popular songs to uncover what harm, if any, campaign uses inflict on artists.⁷³

III. DOES CAMPAIGN USE HARM MARKET DEMAND?

The most obvious harm artists may suffer when their songs are used by political campaigns without permission is financial. Market harm could take several forms. The artist could fear a boycott or backlash from fans who oppose the candidate. They might worry about overexposure, loss of credibility, negative associations with divisive figures, or some combination of these risks.

In practice, the market impact of campaign uses is unpredictable. The band Nickelback complained about use of its song "Photograph" in a doctored clip retweeted by President Trump.⁷⁴ After the video was taken down, downloads of

69. McCluskey, *supra* note 41.

70. See Complaint, *supra* note 41, at 3–4.

71. Amy X. Wang, *Can Neil Young Sue Donald Trump into Silence?*, ROLLING STONE (Aug. 5, 2020), <https://www.rollingstone.com/pro/news/neil-young-donald-trump-lawsuit-outcome-1039452>.

72. Ben Beaumont-Thomas, *Neil Young Drops Lawsuit Against Donald Trump*, GUARDIAN (Dec. 8, 2020, 5:15 AM), <https://www.theguardian.com/music/2020/dec/08/neil-young-drops-lawsuit-against-donald-trump>. Existing venue licenses may have limited the Trump campaign's liability. See Gardner, *supra* note 59.

73. We note one preliminary empirical finding. When we tested their understanding of copyright public performance licensing, we found our respondents predictably confused. A majority (62%) incorrectly thought a campaign that plays a song at an event needs to obtain permission from the recording artist. See 17 U.S.C. § 106(4). And 40% believed the recording artist had to be compensated, which is likewise mistaken. *Id.* Although songwriters typically hold the composition copyright, only 53% of respondents believed the campaign needed their permission, and just 37% thought compensation was necessary. To the extent recording artists are losing revenue or suffering reputational harm as a result of campaign use, a better understanding of the admittedly complicated rules of copyright law might help mitigate that damage.

74. Zack Guzman, *Nickelback Sees 569% Surge in Song Downloads After Trump's 'Photograph' Tweet*, YAHOO! FIN. (Oct. 7, 2019), <https://www.yahoo.com/video/nickelback-sees-569-surge-in-song-downloads-after-trumps-deleted-tweet-144908576.html>.

the song surged by 569 percent over a two-day period.⁷⁵ It is not clear whether the flood of attention stemmed more from Trump's use or Nickelback's response, but it suggests that use by a divisive figure could drive increased consumption of a song.⁷⁶ Conversely, artists may shore up support among partisans by rebuffing uses by unpopular politicians. This example, however, is likely not representative. To better understand the typical market impact of unauthorized campaign uses, we acquired and analyzed a unique set of music industry data. This Part describes that data and our findings.

A. MARKET DATA

We secured industry streaming data from Luminate for three songs that were the subject of disputes over former President Trump's campaign use.⁷⁷ Rihanna objected on November 4, 2018, to the use of "Don't Stop the Music" ("Don't Stop") at a Trump rally. Panic! at the Disco objected on June 24, 2020, to Trump's use of "High Hopes" at a rally on the previous night. Trump used The Rolling Stones song "You Can't Always Get What You Want" ("You Can't") at least twice—once on May 3, 2016, during his first campaign, and once on June 27, 2020—during his second campaign. In both instances, the band objected within days. Each objection was covered widely by the entertainment and political news media. For each song, we acquired daily streaming data covering the period roughly one month prior to and after each incident.⁷⁸ The data include streams sorted geographically by Designated Media Area ("DMA"), enabling us to track their popularity both nationally and across more than 200 local submarkets.⁷⁹

We hypothesized that the songs in question would experience a statistically significant decrease in streaming volume after use at a Trump rally and the artist's subsequent public complaint. To explore this first hypothesis, we analyzed the data for difference-in-differences. The difference-in-differences method is a quasi-experimental approach that compares changes in outcomes

75. *Id.*

76. See generally Jeanne C. Fromer, *Market Effects Bearing on Fair Use*, 90 WASH. L. REV. 615 (2015) (arguing that courts can eliminate conclusory reasoning by appreciating that both market harms and benefits can matter in fair use).

77. Luminate, formerly P-MRC Data, Nielsen SoundScan, is a firm that tracks music industry data. Todd Spangler, *Luminate Is the New Name of P-MRC Data, Source of Music and Entertainment Industry Data*, VARIETY (Mar. 16, 2022, 5:00 AM), <https://www.variety.com/2022/digital/news/luminate-p-mrc-data-music-entertainment-1235205741>. The data we obtained include Amazon, Napster, Pandora, Spotify, and Tidal along with a number of smaller providers, but do not include Apple Music or YouTube.

78. We secured market-wide daily data in the national market and 210 Designated Market Areas, or DMAs, for the following dates: October 12, 2018, through December 13, 2018, and May 22, 2020, through July 30, 2020. We also secured daily data for streams of Rihanna's "Don't Stop the Music" for October 12, 2018, through December 13, 2018, Panic!'s "High Hopes" for May 22, 2020, through July 23, 2020, and The Stones "You Can't Always Get What You Want" for May 22, 2020, through July 30, 2020.

79. Designated Market Areas ("DMAs") are geographic regions created by Nielsen to track television ratings. There are 210 DMAs in the United States. *DMA Regions*, NIELSEN, <https://www.nielsen.com/dma-regions> (last visited Feb. 15, 2024).

over time between a treatment group and a control group.⁸⁰ Here, we tested whether our three target songs deviated from market wide streaming trends after the artist complained about Trump’s use of the song. Although our approach was constrained by the available data,⁸¹ the difference-in-difference analysis, which compares the performance of specific songs to the market as a whole, is consistent with event studies in intellectual property and other contexts.⁸²

A detailed accounting of our regression analysis is included in Appendix A, but we summarize the key findings here. We observed downward trends for each of our three songs after their use by the Trump campaign and the artists’ objections. These drops varied in size but were each statistically significant at the 0.01 level.⁸³ Compared to market wide consumption, streams of Rihanna’s “Don’t Stop” dropped by more than 18 percent. Streams of “High Hopes” dropped by more than 6 percent, and streams of “You Can’t” dropped by over 2 percent.⁸⁴ Table 1, below, shows the results of our analysis, analyzing all media markets simultaneously. The post use by treated song values are the estimated consumption drop after the artist complained about Trump’s use, compared to

80. The regression used for this type of dynamic difference-in-difference event study is: $Y = \beta_0 + \beta_1[\text{Time}] + \beta_2[\text{Intervention}] + \beta_3[\text{Time} \times \text{Intervention}] + \epsilon$. β_0 is a measure of the baseline—here, the streams of all songs in the market during the measured time period. $\beta_1[\text{Time}]$ measures the time trend for all songs in the market. Market-wide streams were sorted into two groups, pre- and post-intervention. In each case, the intervention date was the date of the first reported public complaint about Trump’s use by the recording artist. $\beta_2[\text{Intervention}]$ compares the market to the target songs in the period prior to the intervention. And $\beta_3[\text{Time} \times \text{Intervention}]$ compares the change in the market post-intervention to the change in the target songs post-intervention.

81. With unlimited access to data, we might have compared each song’s popularity to similar tracks that were not used by the Trump campaign. We attempted to acquire probative data about comparable songs from publicly available sources. We compiled evidence of streaming data from YouTube collected by the Internet Archive’s Wayback Machine. Unfortunately, the data were relatively sparse. We gathered 40 impressions of the streaming count of “Don’t Stop” between September 5, 2018, and January 1, 2019 (roughly four weeks before and after the story broke about Trump’s use of “Don’t Stop”). We also gathered data for two other 2008 Billboard Top 20 pop hits by female performers: 29 snapshots of stream counts for Katy Perry’s “I Kissed a Girl” and 95 for Sara Bareilles’ “Love Song.” Unfortunately, dates of these impressions did not completely overlap, leaving us with a lack of comparative precision. The resulting analysis had high statistical uncertainty and we could neither confirm nor reject the hypothesis.

82. See, e.g., Imke Reimers, *Can Private Copyright Protection Be Effective? Evidence from Book Publishing*, 59 J.L. & ECON. 411, 416–17 (2016) (comparing sales of pirated e-book titles before and after anti-piracy interventions to the market for books generally); Brett Danaher, Michael D. Smith, Rahul Telang & Siwen Chen, *The Effect of Graduated Response Anti-Piracy Laws on Music Sales: Evidence from an Event Study in France*, 62 J. INDUS. ECON. 541, 541–42, 544–45 (2014) (comparing sales of iTunes songs in multiple European countries to test the effect of a change in French copyright law); Cynthia J. Campbell & Charles E. Wasley, *Measuring Abnormal Daily Trading Volume for Samples of NYSE/ASE and NASDAQ Securities Using Parametric and Nonparametric Test Statistics*, 6 REV. QUANTITATIVE FIN. & ACCT. 309, 311 (1996) (comparing empirical properties between NASDAQ securities and NYSE/AYSE securities).

83. Unless otherwise noted, we define significance as $p < 0.05$ throughout this Article.

84. Although a 2% drop in streams compared to the market may not seem significant in the colloquial sense, the likelihood of that shift occurring by chance was less than 1 in 100. For instance, in the measured period before the complaint against Trump, May 29 to June 21, 2020, “You Can’t” averaged 53,255 daily streams, but only 51,695 in the post complaint period, June 22 to July 30, 2020. That amounts to a reduction of 1,559 streams per day. Over the same period, market wide streams increased from an average of 415,138,158 to 417,714,266, an increase of 2,576,107 streams per day. See *infra* Table 1.

the change in media markets overall. These data show that each of the songs in question experienced a reduction in consumption post-complaint that differs from the expected consumption in light of market wide trends.

Dependent Variable	log(Number of Streams)		
	Rihanna	Panic!	Rolling Stones
Treated Song	-9.843*** (0.0102)	-8.163*** (0.0113)	-9.029*** (0.0167)
Post-use × Treated Song	-0.1841*** (0.0049)	-0.0636*** (0.0037)	-0.0231*** (0.0036)
<i>Fixed Effects</i>			
Media Market	Yes	Yes	Yes
Week	Yes	Yes	Yes
<i>Fit Statistics</i>			
Observations	26,586	26,586	26,586
R ²	0.99878	0.99909	0.99868
Within R ²	0.99868	0.99900	0.99857

Table 1: Difference-in-Differences Estimation of Effect of Trump Campaign Use, by Artist (Daily Data)⁸⁵

On its own, a drop in streaming tells us little about who stopped listening to these songs or why. To investigate that question, we examined the relative popularity of the songs across DMAs. We expected to find that changes in the popularity of the three songs would differ across DMAs on the basis of those markets' political leanings. In particular, we hypothesized that Trump supporters would be less inclined to listen to artists after they objected to use by his campaign. This might result in larger drops in a song's popularity in DMAs where the 2020 popular vote favored Trump, whereas, in markets with more Democratic partisans (who we predicted would be more likely to embrace artists that opposed Trump), songs might experience a relative upswing.

To explore this second hypothesis, we calculated a voting score for each DMA based on the proportion of votes cast for Donald Trump in the 2020

85. Clustered standard-errors are in parentheses. Significance Codes are as follows: ***: 0.01; **: 0.05; *: 0.1.

Presidential Election.⁸⁶ For example, in the counties composing the New York, NY, media market, Trump received 36 percent (3,450,548 of 9,575,134) of the total votes cast.⁸⁷ Thus, the voting score for the New York, NY, DMA was 0.36. The most Trump-leaning DMA was Abilene-Sweetwater, TX (0.79), and the most Biden-leaning DMA was San Francisco-Oakland-San Jose (0.22).⁸⁸ Surprisingly, we did not find a statistically significant relationship between Trump vote share and the treatment effect. In other words, there was no evidence that streaming dropped off more—or less, for that matter—in pro-Trump markets compared to pro-Biden markets.

B. ANALYSIS

These data indicate that consumption changed for the worse for all three songs after the artists complained about the Trump campaign's use at its rallies. However, it is unclear whether this drop in popularity is the result of the Trump campaign's use, the artists' vocal renunciation of the candidate, or some independent factor. It seems more likely that any nationwide effect would reflect widespread media coverage of the artists' complaints, rather than the local rallies at which the songs were played.⁸⁹ If media coverage of the objections were the driving force behind these songs' declining popularity, however, we'd expect to see a more pronounced effect in DMAs with greater concentrations of Trump supporters. Since we did not, we cannot rule out the possibility that the drop in streams was caused by some unrelated phenomenon.

The age of the songs and their respective artists offers one alternative explanation. The effect was strongest for "Don't Stop," more moderate for "High Hopes," and weakest for "You Can't." More than 50 years since its release, demand for the Rolling Stones' song might be relatively invariant. Rihanna and Panic! are decades younger. Compared to the Rolling Stones, they are neophytes, but both have commercially successful careers. Both artists experienced breakthrough success in the mid-2000s and were a decade or more

86. Each DMA comprises a certain number of counties of varying geographical and population sizes. In some cases, a county will be assigned proportionally to two DMAs. In such a case, we divided the votes proportionally. For example, the population of Solano County, California, is split between the Sacramento-Stockton-Modesto DMA (.64) and the San Francisco-Oakland-San Jose DMA (.36). We split the Trump vote in Solano proportionally. See *Nielsen DMA – Designated Market Area Regions 2018-2019*, NIELSEN, https://thevab.com/storage/app/media/Toolkit/DMA_Map_2019.pdf [hereinafter *Nielsen DMA*] (last visited Feb. 15, 2024).

87. The DMA includes Fairfield County, CT; Bergen, Essex, Hudson, Hunterdon, Middlesex, Monmouth, Morris, Ocean, Passaic, Somerset, Sussex, Union, and Warren Counties, NJ; Bronx, Dutchess, Kings, Nassau, New York, Orange, Putnam, Queens, Richmond, Rockland, Suffolk, Sullivan, Ulster, and Westchester Counties, NY; and Pike County, PA. See *Nielsen DMA*, *supra* note 86.

88. Since third-party vote share was negligible in 2020 in nearly all DMAs, Trump's vote share is a reliable mirror image of Biden's. Ruth Igielnik, Scott Keeter & Hannah Hartig, *Behind Biden's 2020 Victory*, PEW RESEARCH CENTER (June 30, 2021), <https://www.pewresearch.org/politics/2021/06/30/behind-bidens-2020-victory>.

89. *Panic! At the Disco's Brendon Urie Tells President Trump . . . 'F*** You' and Stop Playing My Music!!!*, TMZ (June 24, 2020, 7:52 AM), <https://www.tMZ.com/2020/06/24/panic-at-the-disco-trump-campaign-stop-playing-music-rallies>.

into their careers when Trump used their songs.⁹⁰ If older artists maintain steady popularity while younger artists are subject to greater fluctuation in popularity, that might explain our results regardless of Trump's use or the artists' objections. Or it may help explain why the Rolling Stones were relatively immune to the harmful effects of Trump's use as compared to younger, less well-established artists like Rihanna and Panic!.⁹¹

Our experimental data, described in Part IV, lends some credence to this theory. Effects of political use were strongest when the artist had neither previous commercial success nor an established reputation. This theory is also consistent with the documented trend in music streaming in favor of older songs. As Ted Gioia wrote:

The 200 most popular new tracks now regularly account for less than five percent of total streams. That rate was twice as high just three years ago. The mix of songs actually purchased by consumers is even more tilted toward older music. The current list of most-downloaded tracks on iTunes is filled with the names of bands from the previous century, such as Creedence Clearwater Revival and The Police.⁹²

Music industry firms have spent billions of dollars in recent years acquiring the catalogs of decades-old artists. Indeed, they spent over \$1 billion just on the publishing and sound recording rights to the catalogs of Bob Dylan and Bruce Springsteen.⁹³ In this environment, it may not be surprising to see the Rolling Stones streaming figures hold steady while relatively young artists experience a decline.

We were surprised to find little evidence that vote share in a given DMA correlates to the popularity of these songs. We predicted that streaming would

90. Rihanna's third studio album, *Good Girl Gone Bad*, was released in 2007 and reached the number two spot on the U.S. album charts. The lead single, "Umbrella," sold over twelve million copies. *Chart History: Rihanna*, BILLBOARD, <https://www.billboard.com/artist/rihanna/chart-history/tp> (last visited Feb. 15, 2024). Panic!'s first album, *A Fever You Can't Sweat Out*, was released in 2005 and has sold over three million copies. *In Retrospect: Panic! At the Disco's 'A Fever You Can't Sweat Out'*, BLUNT MAG. (May 18, 2021), <https://www.bluntmag.com.au/music/in-retrospect-panic-at-the-discos-a-fever-you-cant-sweat-out>.

91. Given the group's age and the respective demographics of the Republican and Democratic parties, we might also expect reactions to Trump more evenly distributed among Rolling Stones listeners than either Rihanna or Panic!. A related theory, which admittedly goes beyond the data presented here, posits that White male artists suffered comparatively moderate streaming reductions compared to Rihanna, a Black woman due to backlash against female and non-white celebrities engaging in activism. See e.g., Spring Duvall, *Becoming Celebrity Girl Activists: The Cultural Politics and Celebrification of Emma Gonzalez, Marley Dias, and Greta Thunberg*, 47 J. COMMUN INQUIRY 399, 402 (2022) (contending that young girl activists are "the target of uniquely vitriolic backlash that perpetuates misogyny and racism"); Donara Barojan, *Measuring the Effectiveness of Celebrity Activism: Celebrity Advocate v Celebrity Endorser*, 11 DEF. STRATEGIC COMMUN 81, 106 (2022) (reporting in a study of ten celebrity advocacy and endorsement cases that female and non-white celebrity endorsers and advocates had more reach of male and white counterparts but media coverage focused more on the female and non-white celebrity's identity than on the issue).

92. Ted Gioia, *Is Old Music Killing New Music?*, THE ATLANTIC (Jan. 31, 2022, 5:20 PM), <https://www.theatlantic.com/ideas/archive/2022/01/old-music-killing-new-music/621339>.

93. Chloe Melas, *Why Bob Dylan, Bruce Springsteen, Stevie Nicks and More Artists Have Sold Their Music Catalogs*, CNN (Jan. 25, 2022, 9:46 PM), <https://www.cnn.com/2022/01/25/entertainment/music-artists-selling-catalog>.

drop in Trump-leaning DMAs, while holding steady or increasing in Biden-leaning DMAs after each artist objected to Trump's use of their song. Although we did not identify that trend, we should note some limitations to our approach. In even the most polarized markets, at least 20 percent of voters supported the losing major-party candidate. Our data may reflect countervailing trends among Trump supporters and detractors, with the two groups effectively canceling each other out. Moreover, we lack the demographic data to say with any certainty how the population of music streamers in these markets compares to the population of voters. Thus, Trump's popularity or lack thereof among voters in a DMA may not accurately reflect his favorability among music listeners in the same market. Finally, comparing the streams of a given song to the market will hide a certain amount of noise. At any given point, consumption of some subset of songs will invariably increase or decrease in a counter-market trend.

Although industry streaming data shows that demand for these three songs was reduced in the wake of the Trump campaign's use and the artists' objections, our analysis is inconclusive with respect to the underlying cause of this drop. In the next Part, we turn to an experimental approach that sheds additional light on the extent to which campaign use and artists' objections influence consumer perceptions of those artists and their willingness to stream and purchase music.

IV. DOES CAMPAIGN USE HARM REPUTATION?

Artists may worry that their reputations will suffer as a result of unauthorized campaign uses. This harm could arise in at least two ways.⁹⁴ First, consumers could falsely believe that the artist supports or endorses a candidate.⁹⁵ Such false beliefs could harm perceptions of the artist separate and apart from any immediate impact on the popularity of their songs.⁹⁶ Second, even in the absence of any false endorsement, campaign use of an artist's music could create a more nebulous negative association akin to tarnishment.⁹⁷ If an artist is closely associated with a candidate—consider Trump and the Village People—their reputation may suffer even if consumers do not believe the artist endorsed the candidate.

94. One theory we don't explore empirically is the possibility that campaign uses could implicate the right of publicity. We discuss the implications of a right of publicity claim in *infra* Part V.D.

95. Arlen W. Langvardt, *Musicians, Politicians, and the Forgotten Tort*, 27 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 429, 434, 462–63 (2017).

96. See *Browne v. McCain*, 611 F. Supp. 2d 1062, 1070 (C.D. Cal. 2009) (holding that Browne met his burden of establishing, in response to an anti-SLAPP motion, that a political ad with his song “appropriated his identity to [the politician’s] advantage” and “gave the false impression that [Browne] was associated with or endorsed” the McCain campaign).

97. The Lanham Act defines tarnishment as an “association arising from the similarity between a mark or trade name and a famous mark that harms the reputation of the famous mark.” 15 U.S.C. § 1125(c)(2)(C).

One explanation for artists' tendency to disavow objectionable campaign uses is that they want to prevent or mitigate these reputational harms.⁹⁸ Of course, artists may also see an opportunity for self-promotion and signaling to fans that they have the "correct" politics, even if that means no politics at all. One line of research argues that brands perceived as sharing political views with consumers might experience an uptick in sales as politically minded consumers embrace the brand.⁹⁹ Others opine that consumers are rarely if ever confused by this sort of use, and that consumers are not likely to punish the artist or stop consuming the song even if they are confused.¹⁰⁰

As discussed below, our experiment is designed, in part, to measure the extent to which campaign use of popular music or an artist's objection influences consumer perceptions about the artist's endorsement of candidates. We are not aware of any prior research that empirically tests false endorsement effects in this context, although trademark litigants may present survey evidence in an effort to establish or refute false endorsement.¹⁰¹ Research does suggest that music and celebrity endorsements have a powerful effect on consumer

98. Cf. Clay Calvert, *Harm to Reputation: An Interdisciplinary Approach to the Impact of Denial of Defamatory Allegations*, 26 PAC. L.J. 933, 957 (1995) (reporting the results of an experiment where respondents exposed to a defamatory statement paired with a repeated denial experienced a significantly smaller negative change in opinion about the target of the defamation than respondents exposed to the defamatory statement with no denial).

99. Kyle Endres, Costas Panagopoulos & Donald P. Green, *Elite Messaging and Partisan Consumerism: An Evaluation of President Trump's Tweets and Polarization of Corporate Brand Images*, 74 POL. RES. Q. 834, 836 (2021). See generally Kyle Endres & Costas Panagopoulos, *Boycotts, Buycotts, and Political Consumerism in America*, RSCH. & POL., Nov. 1, 2017, at 1 (discussing American political-consumer behavior); Costas Panagopoulos, Donald P. Green, Jonathan Krasno, Michael Schwam-Baird & Kyle Endres, *Partisan Consumerism: Experimental Tests of Consumer Reactions to Corporate Political Activity*, 82 J. POL. 996 (2020) (arguing that consumer preferences are influenced by party attachments); Victoria Leigh Hannon, *Boycotting Chick-Fil-A: A Tale of Religion, Politics, & Consumption* (May 2, 2013) (Master's thesis, University of Colorado) (on file with CU Scholar University Libraries) (emphasizing the importance of consumer activism).

100. Greg Kanaan, *When Politicians Use Music Without Permission It's Not a Copyright Issue, It's a Trademark Issue (But It Doesn't Matter Anyway)*, THE LEGAL ARTIST (Sept. 15, 2015), <https://www.thelegalartist.com/blog/when-politicians-use-music-without-permission-its-not-a-copyright-issue-its-a-trademark-issue-but-it-doesnt-matter-anyway>.

101. See, e.g., *Fifty-Six Hope Rd. Music, Ltd. v. A.V.E.L.A., Inc.*, 688 F. Supp. 2d 1148, 1167 (D. Nev. 2010) (acknowledging the Ninth Circuit's holding that surveys are appropriate to demonstrate consumer confusion); *Kournikova v. Gen. Media Commc'ns, Inc.*, 278 F. Supp. 2d 1111, 1124–26 (C.D. Cal. 2003) (noting that despite plaintiff's introduction of survey evidence to show confusion, this survey was flawed); *KIS, S.A. v. Foto Fantasy, Inc.*, 204 F. Supp. 2d 968, 971–73 (N.D. Tex. 2001) (finding that while there are flaws in the course of conducting a survey, it was not dispositive of the survey's admissibility as evidence). See also William McGeeveran, *Disclosure, Endorsement, and Identity in Social Marketing*, 2009 U. ILL. L. REV. 1105, 1146 (2009) ("Litigants in false endorsement cases often proffer survey evidence demonstrating that consumers did (or did not) understand the use of the trademark in question to convey affiliation or sponsorship."); Malla Pollack, *Suing Your Cut-Rate Competitor: Repackaged Goods, Refurbished Goods, and Rerouted Goods*, 114 AM. JUR. TRIALS 461, § 49 (2009) ("A survey of consumer perception is the evidentiary lynchpin of the false endorsement trademark claim; therefore, it is also not suitable for the preliminary injunction motion.").

purchasing behavior.¹⁰² Other work indicates that celebrity endorsements and music used at rallies can both shape election outcomes.¹⁰³

Our experiment also measures potential tarnishment suffered by artists. Considerably more empirical research has explored that question.¹⁰⁴ Buccafusco and Heald, for example, reported that subjects exposed to low-quality readings of audiobooks attach a lower monetary value to the underlying work than to works with high-quality audiobooks.¹⁰⁵ Buccafusco, Heald, and Bu also investigated whether exposure to advertisements for pornographic derivatives of popular films would reduce the value of the original film.¹⁰⁶ They found no

102. See, e.g., Jagdish Agrawal & Wagner A. Kamakura, *The Economic Worth of Celebrity Endorsers: An Event Study Analysis*, 59 J. MKTG. 56, 60 (1995); Michael D. Basil, *Identification as a Mediator of Celebrity Effects*, 40 J. BROAD. & ELEC. MEDIA 478, 478, 490–91 (1996).

103. See, e.g., Erica Weintraub Austin, Rebecca Van de Vord, Bruce E. Pinkleton & Evan Epstein, *Celebrity Endorsements and Their Potential to Motivate Young Voters*, 11 MASS. COMM'N & SOC'Y 420, 424, 433 (2008) (using celebrity endorsers may increase political engagement of younger potential voters); Ted Brader, *Striking a Responsive Chord: How Political Ads Motivate and Persuade Voters by Appealing to Emotions*, 49 AM. J. POL. SCI. 388, 389 (2005) (suggesting that the results show music can influence responses to campaign ads); Craig Garthwaite & Timothy J. Moore, *Can Celebrity Endorsements Affect Political Outcomes? Evidence from the 2008 U.S. Democratic Presidential Primary*, 29 J.L. ECON. & ORG. 355, 358, 375, 381 (2012) (estimating that Oprah Winfrey's endorsement of Barack Obama netted him over one million votes in the 2008 Democratic primary and increased donations to his campaign, as well as voter turnout); David J. Jackson & Thomas I. A. Darrow, *The Influence of Celebrity Endorsements on Young Adults' Political Opinions*, 10 HARV. INT'L J. PRESS/POL. 80, 80, 94 (suggesting that celebrity endorsements make unpopular opinions more palatable); Ekant Veer, Ilda Becirovic & Brett A.S. Martin, *If Kate Voted Conservative, Would You? The Role of Celebrity Endorsements in Political Party Advertising*, 44 EUR. J. MKTG. 436, 445 (2010) (showing that celebrity endorsements increase the likelihood that low political salience respondents will vote for the endorsed political party but decrease the likelihood for high salience respondents).

104. Christo Boshoff reports that subjects whose responses were measured using electroencephalography and electromyography reacted more positively to brand stimulus when first exposed to tarnishing stimulus, although the tarnishing stimuli were mild, humorous and parodic, rather than unsavory. Christo Boshoff, *The Lady Doth Protest Too Much: A Neurophysiological Perspective on Brand Tarnishment*, 25 J. PROD. & BRAND MGMT. 196, 201 (2016). Hannelie Kruger and Boshoff tested tarnishment of four famous South African brands, finding that tarnishment had a strong detrimental influence on cognition and attitude strength of the famous brands considered together, and differing levels of actual or potential harmful effects depending on the respondent's involvement with the brand and the nature of the tarnishing advertisement. Hannelie Kruger & Christo Boshoff, *The Influence of Trademark Dilution on Brand Attitude: An Empirical Investigation*, 24 MGMT. DYNAMICS 50, 63 (2015). Suneal Bedi and David Reibstein focused on brand association and brand attitude measures for tarnishment. Suneal Bedi & David Reibstein, *Measuring Trademark Dilution by Tarnishment*, 95 IND. L.J. 683, 686, 704 (2020). Two single-exposure studies found no statistically significant tarnishing effect, but a multi-exposure study showed statistically significant tarnishment effects in a sex-related context. *Id.* at 703, 706, 729. In addition to tarnishment, dilution by blurring has also been the subject of several studies. The results are mixed, but generally call into question whether famous trademarks suffer a loss of distinctiveness from potentially blurring use. See, e.g., Barton Beebe, Roy Germano, Christopher Jon Sprigman & Joel H. Steckel, *Testing for Trademark Dilution in the Court and the Lab*, 86 U. CHI. L. REV. 611, 661 (2019); Maureen Morrin & Jacob Jacoby, *Trademark Dilution: Empirical Measures for an Elusive Concept*, 19 J. PUB. POL'Y & MKTG. 265, 268–70 (2000); Chris Pullig, Carolyn J. Simmons & Richard G. Netemeyer, *Brand Dilution: When Do New Brands Hurt Existing Brands?*, 70 J. MKTG. 52, 52–53 (2006); Rebecca Tushnet, *Gone in Sixty Milliseconds: Trademark Law and Cognitive Science*, 86 TEX. L. REV. 507, 510, 519–22, 543 (2008).

105. Christopher Buccafusco & Paul J. Heald, *Do Bad Things Happen When Works Enter the Public Domain?: Empirical Tests of Copyright Term Extension*, 28 BERKELEY TECH. L.J. 1, 27 (2013).

106. Christopher Buccafusco, Paul J. Heald & Wen Bu, *Testing Tarnishment in Trademark and Copyright Law: The Effect of Pornographic Versions of Protected Marks and Works*, 94 WASH. U.L. REV. 341, 372 (2016).

statistically significant tarnishing effect overall, but did identify a significant effect among self-described “very socially conservative” respondents.¹⁰⁷ More recently, Bedi and Schuster found that sampling a copyrighted work in a critical failure leads to negative perceptions of the sampled work, pointing to a negative spillover effect that can harm perceptions of the underlying work.¹⁰⁸ Finally, Linford, Sevier, and Willis reported two experiments.¹⁰⁹ In the first, associating well-known marketplace brands with sex- and drug-related messaging produced a burnishment effect, rather than tarnishment—the perceived desirability of mark-bearing goods was increased or burnished in the test condition.¹¹⁰ Participants preferred target brands more when they were associated with ostensibly tarnishing use than when they were not, although the effect was more consistent for political progressives compared to conservatives.¹¹¹ In the second, subjects with high-religiosity rated the taste of Chick-fil-A sandwiches lower when exposed to sacrilegious use of Chick-fil-A’s trademark.¹¹²

A. METHODOLOGY

To measure any false endorsement or tarnishment effect, we developed an experiment that tested consumers’ reactions to fictitious campaign uses. We gathered a panel of 1,255 respondents, representative of the adult U.S. population in terms of race, age, and gender. They were roughly evenly divided among self-identified Democrats, Republicans, and independent voters.¹¹³ All respondents were initially asked a set of screening questions to ensure that they had purchased, streamed, or listened to music on the radio in the prior six months.¹¹⁴

We then showed respondents a series of three short, fictitious news articles featuring uses of songs performed by three artists. We chose one artist associated with liberal political views, Olivia Rodrigo. Her 2021 album *Sour* reached number one on the Billboard charts and was the second most popular album of

107. *Id.* at 387.

108. Suneal Bedi & Mike Schuster, *Measuring Fair Use’s Market Effect*, 2022 WIS. L. REV. 1467, 1503, 1512 (2022). *But see* Mike Schuster, David Mitchell & Kenneth Brown, *Sampling Increases Music Sales: An Empirical Copyright Study*, 56 AM. BUS. L.J. 177, 178 (2019) (reporting that sales of sampled songs increased after being repurposed in songs that made the Billboard top 100 charts in 2006–15).

109. Jake Linford, Justin Sevier & Allyson Willis, *Trademark Tarnishmyths*, 55 ARIZ. ST. L.J. 609, 647 (2023).

110. *Id.* at 647–63.

111. *Id.* at 659–60.

112. *Id.* at 664–73.

113. Partisan identification fluctuates over time. *See Party Affiliation*, GALLUP, <https://news.gallup.com/poll/15370/party-affiliation.aspx> (last visited Feb. 15, 2024). For this reason, we chose not to tie our sample to any particular recent polling of party affiliation, instead opting to represent the three categories equally. That choice is roughly in line with recent polling on the question. *See, e.g., In Changing U.S. Electorate, Race and Education Remain Stark Dividing Lines: Gender Gap in Party Identification Remains Widest in a Quarter Century*, PEW RSCH. CTR. 5 (June 2, 2020), https://www.pewresearch.org/politics/wp-content/uploads/sites/4/2020/06/PP_2020.06.02_Party-ID_FINAL.pdf.

114. These data were gathered from April 1 to April 7, 2022.

2021, with roughly 2.9 million equivalent album units.¹¹⁵ Rodrigo spoke in favor of COVID-19 vaccinations at a Biden White House press briefing in 2021.¹¹⁶ On the conservative side, we chose Morgan Wallen. His album *Dangerous* took the top spot in 2021, selling an equivalent of approximately 3.2 million copies.¹¹⁷ Wallen criticized supporters celebrating Biden's victory during the pandemic as hypocritical, and his concerts have featured chants of "Let's go, Brandon" and "Fuck Joe Biden."¹¹⁸ Finally, we created a fictitious artist, Lonesome Ghosts.¹¹⁹ Since the band does not exist, respondents have no reason to associate it or its members with any particular political ideology.¹²⁰

Respondents were randomly assigned to a control or test group. For the control group, we showed each respondent three news stories from a fictitious local newspaper—The Fairview Observer. Those stories described non-political uses of each of the artists' songs: a post-football game celebration, a routine by a local dance troupe, and a high school fashion show. An example of one of those stories can be seen below; the others are included in the Appendix.

115. Keith Caulfield, *Dua Lipa's 'Levitating' Is Most-Streamed Song of 2021 in U.S., Morgan Wallen's 'Dangerous: The Double Album' Is MRC Data's Top Album*, BILLBOARD (Jan. 6, 2022), <https://www.billboard.com/music/chart-beat/dua-lipa-morgan-wallen-us-2021-mrc-data-1235016079>.

116. Marissa Martinez, *Olivia Rodrigo Joins Biden Vaccine Push to Make Young People 'Happy and Healthy'*, POLITICO (July 14, 2021, 2:18 PM), <https://www.politico.com/news/2021/07/14/olivia-rodrigo-biden-499631>.

117. Caulfield, *supra* note 115.

118. *Morgan Wallen: Biden Celebrations Hypocritical . . . Why Can't I Do Live Shows?*, TMZ (Nov. 9, 2020, 6:58 AM), <https://www.tz.com/2020/11/09/morgan-wallen-lashes-out-joe-biden-presidential-election-celebration-hypocrites>; Tyler McCarthy, *Morgan Wallen's Crowd Chants 'Let's Go, Brandon' at Packed Madison Square Garden Show*, FOX NEWS (Feb. 10, 2022, 11:13 AM), <https://www.foxnews.com/entertainment/morgan-wallen-lets-go-brandon-packed-madison-square-garden>. Wallen also faced criticism from the press after a video was released showing him using a racial slur. In the wake of that incident, his popularity soared. Elisha Fieldstadt, *Morgan Wallen, Caught Using N-Word, Says He Hasn't 'Thought About' Racism in Country Music*, NBC NEWS (July 23, 2021, 8:01 AM), <https://www.nbcnews.com/pop-culture/music/morgan-wallen-caught-using-n-word-says-he-hasn-t-n1274833>.

119. This name was borrowed from a 1937 Disney cartoon. Jim Korkis, *The Story of Disney's "Lonesome Ghosts" (1937)*, CARTOON RSCH. (Oct. 16, 2020), <https://www.cartoonresearch.com/index.php/the-story-of-disneys-lonesome-ghosts-1937>.

120. We note that an Australian group posted three songs to its Soundcloud page under the moniker Lonesome Ghosts in 2016. The band currently has one follower. We do not believe the existence of this group influenced our results. See Lonesome Ghosts, *Lonesome Ghosts*, SOUNDCLOUD, <https://www.soundcloud.com/lonesome-ghosts> (last visited Feb. 15, 2024).

Fairview Squeaks By Jonesville



Krista S. Kano
Fairview Observer

View Comments



Last Friday night, the reigning Division 3A state champs Fairview Cardinals took the field against crosstown rivals Jonesville. In front of a capacity crowd at Davison Field, the Cardinals gained the advantage early with two quick touchdown passes in the first quarter. But the Lions clawed their way back, nearly tying the game before the Cardinals blocked an extra point late in the fourth quarter to eke out a 21-20 win.

After the kick was blocked, the PA system blared Lonesome Ghosts' "Thru the Mirror," a song that's become something of an anthem for the team this year. Next week, the Cardinals take on the Bexley Tigers.

*Figure 1: Football game prompt*¹²¹

Our test groups were shown two non-political stories identical to those shown to the control group—the football game and fashion show. But rather than the dance troupe story, the test groups were shown a story featuring political use of a song. Those uses were made at campaign rallies by either President Joe

121. Image source: Kirsten Stickney, Photograph of Mount Carmel and St. Rita High School Football Players, in Michael O'Brien, *Michael O'Brien's Super 25 High School Football Rankings for Week 2*, CHI. SUN-TIMES (Aug. 29, 2021, 2:19 PM), <https://chicago.suntimes.com/2021/8/29/22647267/high-school-football-rankings-super-25-week2-chicago>.

Biden or former President Donald Trump. We chose these particular politicians for several reasons. At the time of our experiment, they were the clear leaders of the Democratic and Republican parties. As the two most recent presidents and the major party candidates in the prior presidential election, they have unparalleled name recognition.¹²² And since both candidates are white men of a similar age, we hoped to reduce the degree to which racial, gender, or age biases influenced our results.

In our first test group, we showed respondents a story reporting on a local political rally, held by either Biden or Trump. An example featuring a Trump rally is reproduced below. Respondents who viewed this “campaign use” treatment were presented with a single political story, featuring either Biden or Trump performing a song by one of our three artists—Rodrigo, Wallen, or Lonesome Ghosts. To our knowledge, songs by Wallen or Rodrigo have not been played at Trump or Biden campaign events.

122. Angela Wang, *Trump’s Rivals for the 2020 Republican Nomination are at a Huge Disadvantage When It Comes to Name Recognition*, BUS. INSIDER (Sept. 21, 2019, 6:55 AM), <https://www.businessinsider.com/most-americans-have-never-heard-of-trumps-2020-republican-rivals-2019-9>; Grace Panetta & Walt Hickey, *Joe Biden’s Dominating the Early Polls, but His Biggest Strength Will Be Put to the Test at the First Democratic Debates This Month*, BUS. INSIDER (June 3, 2019, 12:24 PM), <https://www.businessinsider.com/joe-bidens-perceived-electability-will-be-tested-at-democratic-debates-2019-6>.

Thousands Attend Trump Rally



Eric Maro

Fairview Observer

View Comments



Last Monday, thousands of local supporters packed the Civic Arena for a campaign event held by former President Donald Trump. Mayor Steve Thompson offered a rousing introduction and praised the President's leadership.

As he has at his last several public appearances, Trump took to the stage as Lonesome Ghosts' song "Thru the Mirror" echoed throughout the arena. Trump's 20-minute speech touched on issues ranging from infrastructure spending to the ongoing pandemic. He thanked those in attendance for their unwavering support, prompting thunderous applause from the crowd.

*Figure 2: Trump use prompt*¹²³

123. Image source: Gaelen Morse, Video of Trump Criticizes Biden . . . , in Nathan Layne, *At Ohio Rally, Trump Knocks Biden on Border, Hints at 2024 Plans*, REUTERS (June 27, 2021, 1:55 AM), <https://www.reuters.com/world/us/trump-revenge-tour-kicks-off-with-saturday-rally-ohio-2021-06-26>.

A second test group featured a story that mentioned the local rally but focused primarily on the artist in question objecting to either Biden or Trump's use of their song and asking the politician to discontinue such use. These stories were modeled on press coverage of actual demands by various artists in recent years.¹²⁴ We believe they accurately reflect the sort of exposure to these events that respondents might encounter in the political or entertainment press.¹²⁵ An example featuring Biden is included below. Again, respondents who viewed these "objection" treatments were presented with only one political story and two non-political stories.

Morgan Wallen to Biden: Don't Play My Song



[View Comments](#)



Today, top-selling recording artist Morgan Wallen made it clear that he objects to his songs being played at President Joe Biden's campaign events. A spokesperson for Wallen issued a statement that read in part: "Morgan Wallen has not granted President Biden permission to play his music at campaign events. He asks the campaign to please refrain from playing "More Than My Hometown" or any of his songs going forward."

This statement comes just days after thousands of local supporters packed the Civic Arena for a Biden campaign event. Mayor Steve Thompson offered a rousing introduction and praised the President's leadership.

As he has at his last several public appearances, Biden took to the stage as Wallen's song "More Than My Hometown" echoed throughout the arena. Biden's 20-minute speech touched on issues ranging from infrastructure spending to the ongoing pandemic. He thanked those in attendance for their unwavering support, prompting thunderous applause from the crowd.

Figure 3: Biden objection prompt¹²⁶

Respondents were randomly assigned to one of the control or test groups. After reading the three stories, they were asked a series of questions designed to measure any resulting false endorsement or tarnishment.

B. SUPPORT AND ENDORSEMENT

A number of artists have expressed concern that unauthorized use of their songs might falsely communicate support for or endorsement of a candidate. An open letter signed by dozens of songwriters and performers decried unauthorized campaign uses, arguing that they may constitute false endorsement, among other legal theories.¹²⁷ In his lawsuit against the McCain campaign,¹²⁸ Jackson Browne argued that under the Lanham Act, McCain's use of his song was "likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association" of Browne with the McCain campaign.¹²⁹ Browne's claim survived a motion to dismiss before the case settled.¹³⁰ Similarly, when Sam Moore asked President Obama to stop using Sam & Dave's "Hold On, I'm Comin,'" he wrote, "I have not agreed to endorse you for the highest office in our land. I reserve my right to determine who I will support when and if I choose to do so."¹³¹ Likewise, when Tom Scholz of the band Boston demanded Mike Huckabee's campaign stop playing their hit, "More Than a Feeling," he noted that "Boston has never endorsed a political candidate, and with all due respect, would not start by endorsing a candidate who is the polar opposite of most everything Boston stands for."¹³²

We sought to measure any risk of false perceptions of support or endorsement arising from a candidate's use of an artist's song. Our data strongly suggest that an artist's perceived support for or endorsement of a candidate is material to consumer behavior and could have a considerable impact on an

124. See *supra* notes 66–72 and accompanying text.

125. Our campaign use stories are less representative of real-world reporting since news coverage of campaign rallies typically does not mention the event's playlist.

126. Image source: Keith Srakocic, Photograph of Former Vice President Joe Biden Speaking During a Campaign Stop, in Michelle Williams, *Joe Biden, Bernie Sanders, Pete Buttigieg See Early Support from New Hampshire Voters*, MASS LIVE (Apr. 30, 2019, 7:40 AM), <https://www.masslive.com/politics/2019/04/joe-biden-bernie-sanders-pete-buttigieg-see-early-support-from-new-hampshire-voters.html>.

127. *Letter to Campaign Committees*, ARTIST RTS. ALL. (July 28, 2020), https://artistightsalliance.org/letter_7_28_20.

128. *Browne v. McCain*, 612 F. Supp. 2d 1125, 1131 (C.D. Cal. 2009).

129. *Id.* at 1129; 15 U.S.C. § 1125(a)(1)(A).

130. Eriq Gardner, *John McCain Settles Jackson Browne Lawsuit, Apologizes for Use of Song*, HOLLYWOOD REP. (July 21, 2009, 3:45 AM), <https://www.hollywoodreporter.com/business/business-news/john-mccain-settles-jackson-browne-63221>.

131. Tierney Sneed, *Five Artists Who Told Campaigns: Quit Using Our Music!*, U.S. NEWS & WORLD REP. (Aug. 16, 2012), <https://www.usnews.com/news/slideshows/five-artists-who-told-campaigns-quit-using-our-music?slide=4>.

132. Andy Greene, "More Than a Feeling" Writer Says Mike Huckabee Has Caused Him "Damage", ROLLING STONE (Feb. 14, 2008), <https://www.rollingstone.com/politics/politics-news/more-than-a-feeling-writer-says-mike-huckabee-has-caused-him-damage-102776>.

artist's popularity.¹³³ But respondents in our test conditions did not reliably connect the use of a song—or the objection to such use—with the recording artist's support for or endorsement of Biden or Trump.

1. Materiality

We asked respondents whether an artist's support or endorsement of a candidate would make them more or less likely to listen to that artist's music. Our results for both Biden and Trump were roughly consistent. If an artist supported or endorsed Biden, 30 percent of respondents said they were less likely to listen to their music.¹³⁴ Likewise if an artist supported or endorsed Trump, 31 percent were less likely to listen to the artist's music.¹³⁵ But these results were tempered by a subset of respondents who were more likely to listen if the artist endorsed the politician. If an artist supported or endorsed Biden, 16 percent of respondents said they were more likely to listen to their music.¹³⁶ Similarly, if an artist supported or endorsed Trump, 22 percent of respondents said they were more likely to listen to their music.¹³⁷ These results suggest that artists' political support or endorsement of candidates, at least at the presidential level, are material to popular music consumers, and that political endorsement may yield a net loss in listeners.

Respondents' reactions were split predictably and significantly along party lines.¹³⁸ Democrats were more likely to listen to an artist who supported or endorsed Biden and less likely if they supported or endorsed Trump. And the opposite was true for Republicans. They favored artists who supported or endorsed Trump and disfavored those who supported or endorsed Biden.

133. It is worth noting that false association or endorsement claims under the Lanham Act do not require evidence of materiality, although false advertising claims do. See Mark A. Lemley & Mark McKenna, *Irrelevant Confusion*, 62 STAN. L. REV. 413, 446–47 (2010).

134. Of respondents, 19% were “definitely less likely,” and 11% were “somewhat less likely.” See *infra* Figure 4.

135. Of respondents, 23% were “definitely less likely,” and 8% were “somewhat less likely.” See *infra* Figure 4.

136. Of respondents, 6% were “definitely more likely,” and 10% were “somewhat more likely.” See *infra* Figure 4.

137. Of respondents, 10% were “definitely more likely,” and 12% were “somewhat more likely.” See *infra* Figure 4.

138. We also observed significant variations on these questions along race and age lines. However, we observed no significant difference on our materiality questions between the control and test groups. In other words, exposure to campaign uses and objections related to our three artists did not yield statistically significant differences in respondents' reaction to an unnamed artist supporting Biden or Trump.

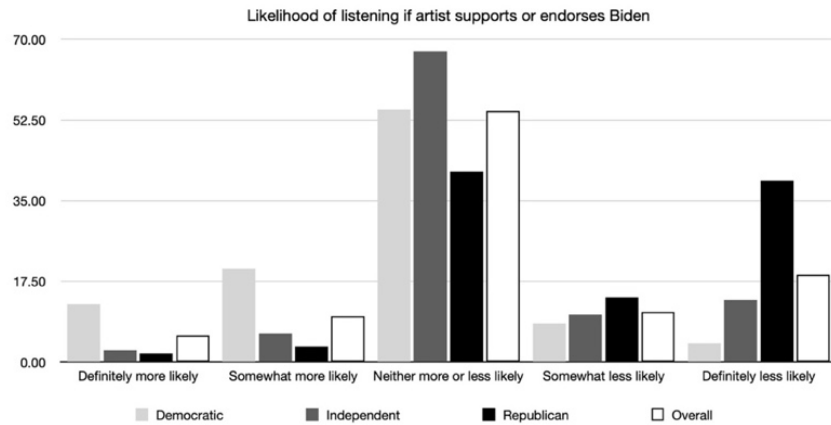


Figure 4: Likelihood of listening if artist supports or endorses Biden

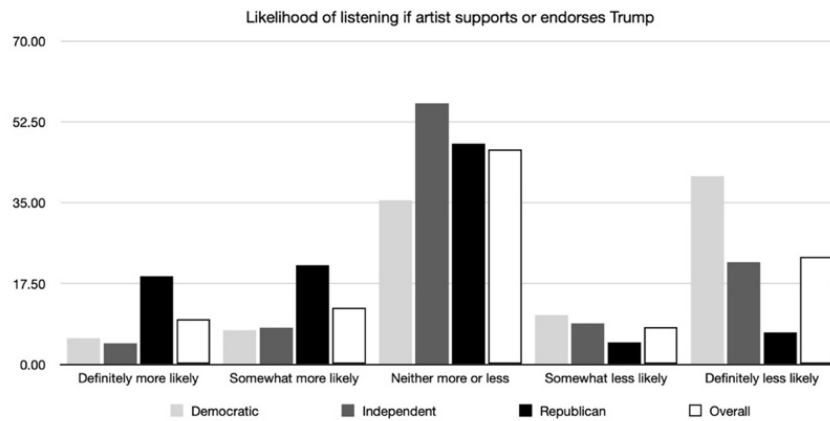


Figure 5: Likelihood of listening if artist supports or endorses Trump

Having established materiality, we now turn to the question of whether respondents actually perceived any implied support or endorsement on the basis of a song’s use by a campaign or the artist’s objection.

2. Measuring Support and Endorsement

We asked respondents two sets of questions designed to measure whether they believed an artist—Wallen, Rodrigo, or Lonesome Ghosts—supported or endorsed Biden or Trump on the basis of campaign use or artist objections. First, we asked whether they believed the artist “supports any particular political

candidate, regardless of whether [they] have officially endorsed a candidate.”¹³⁹ If they answered yes, we asked them to identify that candidate in an open-ended question. We then asked them to explain why they believed the artist supported that candidate in another open-ended question. Beyond worries about inferred support of candidates, artists may be concerned that use of their songs will be interpreted as an official endorsement. To measure that risk, we followed up with an otherwise identical battery of questions directed to whether the artist “officially endorses any particular political candidate.”

Analyzing the responses to these questions turns in part on our criteria for establishing the existence of a false perception of an artist’s support or endorsement. We count a respondent as confused if they (1) answer “yes” to the initial support (or endorsement) question and (2) identify either Biden or Trump as the candidate they believe the artist supports (or endorses). By comparing the percentage of respondents who meet those criteria under the control and test condition, we can measure the degree to which campaign use and artist objections created false impressions. As we will discuss in more detail below, it is reasonable to apply another criterion: the respondent must (3) identify the campaign use or the artist objection as the reason for their belief that the artist supports or endorses the candidate. Applying the first two criteria yields perceptions of support and endorsement near the threshold courts deem probative of consumer confusion, at least under some test conditions. Taking respondents’ stated basis for their beliefs into account generally leads to a smaller effect for campaign uses, but a more pronounced effect when artists object to such use.

a. *General perceptions of support and endorsement*

When asked whether they believed an artist supported a particular—but unnamed—candidate, we observed significant differences between our control and test groups for all three artists. For our control groups, the overwhelming majority of respondents reported that they did not know whether the artist supported a particular candidate—72 percent for Lonesome Ghosts, 73 percent

139. In a standard point-of-sale likelihood of confusion case where consumers are evaluating consumer goods, the *Eveready* survey format is the gold standard. See *Union Carbide Corp. v. Ever-Ready, Inc.*, 531 F.2d 366, 385–86 (7th Cir. 1976); Jerre B. Swann, *Likelihood of Confusion*, in *TRADEMARKS AND DECEPTIVE ADVERTISING SURVEYS: LAW, SCIENCE, & DESIGN* 53, 56–57, 62 (Shari Seidman Diamond & Jerre B. Swann eds., 2012). Respondents are shown a stimulus of defendant’s potentially infringing label or packaging, and then asked open-ended questions, starting with an open-ended source confusion question: “Who do you think puts out ___?”. *Union Carbide*, 531 F.2d at 385 n.11. The format thus invites the respondent to identify potential competitors in their own words. *Eveready* surveys then often drill down with closed-ended follow-up questions. See, e.g., *Novartis Consumer Health, Inc. v. Johnson & Johnson-Merck Consumer Pharm. Co.*, 290 F.3d 578, 591 n.8 (3d Cir. 2002). But scholars and survey experts also note that open-ended questions can undercount confusion. See, e.g., Jacob Jacoby, *Are Closed-Ended Questions Leading Questions*, in *TRADEMARKS AND DECEPTIVE ADVERTISING SURVEYS: LAW, SCIENCE, & DESIGN*, *supra* note 139, at 271; cf. Shari Seidman Diamond & Andrew Koppelman, *Measured Endorsement*, 60 MD. L. REV. 713, 749 (2001) (describing how open-ended questions may fail to fully capture a respondent’s reactions).

for Morgan Wallen, and 76 percent for Olivia Rodrigo. Our endorsement question elicited identical “I don’t know” (“IDK”) results for each artist. In most of our test groups, we saw a significant increase in respondents’ confidence about artists’ support and endorsement, with notable increases in both “yes” and “no” answers.

For Lonesome Ghosts, these shifts were significant in three of the four test groups with respect to perceived support. As shown in Figure 6 below, when Biden used their song, IDK answers dropped by nearly 20 percent, with corresponding 10 percent increases in both “yes” and “no” responses. But when Trump played the song at his rally, we saw very little change.¹⁴⁰ For the groups who read about Lonesome Ghosts objecting to the use of their song, we found significant shifts for both candidates. When the band objected to Biden’s use, IDK responses fell more than thirty points to 40 percent, and the “yes” answers increased from 10 percent in the control group to 24 percent. Objecting to Trump showed an even larger shift, with IDK answers falling to 46 percent and “yes” answers reaching 25 percent. Results for our endorsement questions were nearly indistinguishable.¹⁴¹

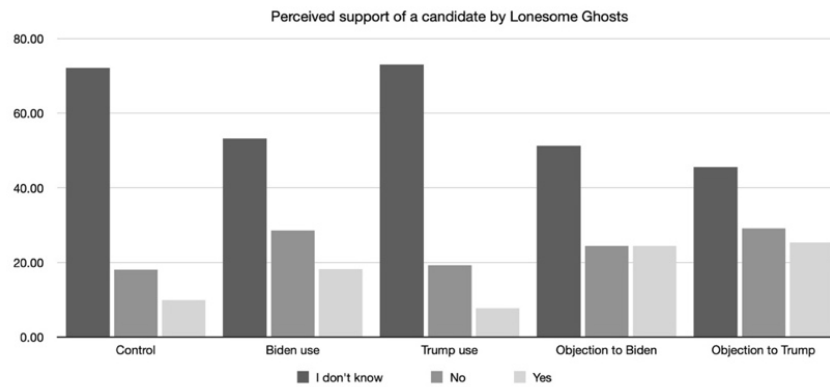


Figure 6: Perceived Support by Lonesome Ghosts

140. One possible explanation is that respondents expect Trump to use songs without permission and are thus less likely to imply support or endorsement by the artist. See *infra* Figures 6, 11 & 12.

141. See *infra* Figure 6. Again, we found significant shifts in three of four scenarios. When Biden used their song, IDKs dropped to 53%, while “yes” and “no” answers each increased by about 10%. But when Trump used their song, we observed little change. Both objection conditions, however, resulted in significant shifts. When the band objected to Biden, IDKs dropped to 40%, and “yes” answers increased by 14%. In responses to their objection to Trump, we saw an even more pronounced pattern as IDKs dropped to 46%, and “yes” and “no” responses rose 15 and 11 points respectively.

For Morgan Wallen, we observed no statistically significant shifts in perceived support when Biden or Trump used his song. However, when Wallen objected to Biden’s use of his song, IDKs fell from 73 percent for the control group to 44 percent, with a corresponding increase of “yes” answers from 18 percent to 34 percent.¹⁴² Again, our results for perceived endorsement closely followed this same pattern.¹⁴³

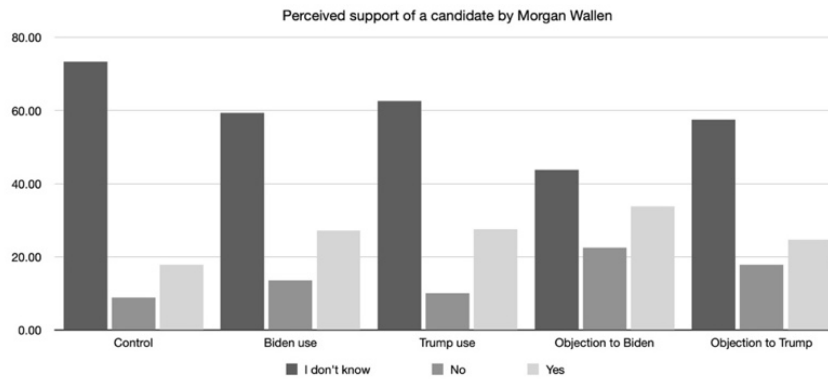


Figure 7: Perceived Support by Morgan Wallen

For Olivia Rodrigo, we saw statistically significant shifts in perceived support in three of the four test groups. When Biden played her song, IDKs dropped from 76 percent to 57 percent, and “yes” answers nearly doubled from 15 percent to 29 percent. Trump’s use of her song did not lead to a significant change, with a less than 1 percent change in “yes” and a 10 percent swing from “I don’t know” to “no.” However, we did observe significant shifts in response to Rodrigo’s objections to both Biden and Trump. The Biden objection condition saw IDKs responses fall to 60 percent and “no” answers increase from 8 percent to 20 percent. Objecting to Trump corresponded to an even more pronounced shift. IDKs responses fell to 50 percent, and “yes” answers climbed from 15 percent to 34 percent. As with Lonesome Ghosts and Wallen, responses to the perceived support and endorsement questions were nearly identical for Rodrigo.¹⁴⁴

142. See *infra* Figure 7. Objecting to Trump’s use resulted in a consistent but less pronounced pattern that was just outside of our significance threshold. For this scenario, $p=0.075$.

143. We observed significant results when Wallen objected to Biden’s use of his song. IDKs dropped to 44%, and “no” answers more than doubled to 31%. See *infra* Figure 7.

144. See *infra* Figure 8. We observed significant shifts in perceived endorsement under every condition aside from Trump’s use. When Biden played Rodrigo’s song, IDKs dropped to 52%, and “yes” answers increased from 7% to 21%. When she objected to Biden and Trump, we observed similar drops in IDKs and increases in both “yes” and “no” responses. See *infra* Figure 8.

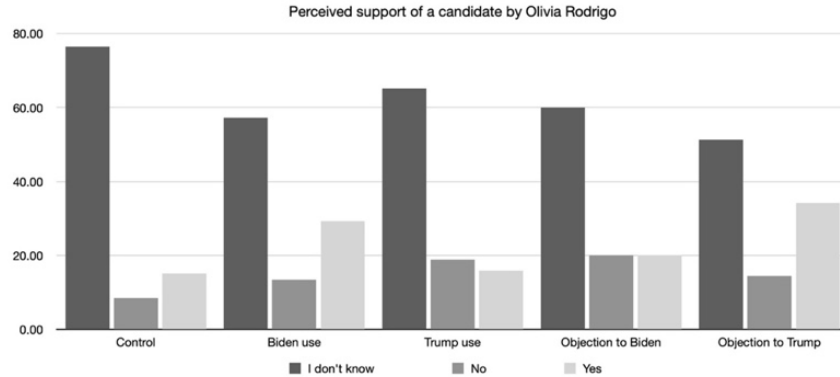


Figure 8: Perceived Support by Olivia Rodrigo

b. *Perceived support or endorsement for Biden and Trump*

Taken alone, respondents' beliefs as to whether an artist supports or endorses some unnamed candidate cannot tell the full story. A "yes" response does not reveal whether the respondent believes the artist supports or endorses Biden, Trump, or some other candidate.¹⁴⁵ As the results below reveal, when respondents were asked to identify candidates by name, we find fewer false beliefs attributable to campaign uses or artist objections.¹⁴⁶ Nonetheless, we do observe some notable shifts. Consistent with our intuition and common sense, a candidate's use of an artist's song generally increased the proportion of respondents who identify that candidate as the recipient of the artist's support or endorsement. And objections to a candidate's use tend to give their opponent a boost in perceived support or endorsement by the artist. Indeed, artist objections typically had a greater impact on perceived support or endorsement than campaign uses.

In the control condition, very few respondents identified either Biden or Trump as the candidate Lonesome Ghosts supported or endorsed.¹⁴⁷ Since respondents had no reason to associate the fictional band with either candidate, this is not surprising. Under our various test conditions, we saw some notable shifts in perceived support, as illustrated in Figure 9. The largest occurred when

145. Across all three artists, just under 22% of respondents answered "yes" to the support question and only 14% to the endorsement question.

146. We coded responses as identifying a candidate when the respondent either named the candidate or the candidate's party ("Trump", "the republican"). We did not code the response as identifying Biden or Trump when the respondents occasionally named other Democratic or Republican politicians ("Bernie," "Barack Obama," "Marco Rubio") or otherwise failed to indicate perceived support of Biden or Trump. This fairly forgiving approach to coding likely overestimates perceived support and endorsement of the candidates. For example, 34% of the respondents we coded as believing an artist supported Trump identified the Republican candidate, rather than Trump by name.

147. Figure 9 reports the difference in perceived endorsement between the control and test conditions but does not report the control numbers. Responses in the control condition ranged from less than 1% to less than 3%.

the band objected to Trump’s use, which corresponded to a 10.9 percent boost in the group’s perceived support for Biden compared to the control group. Biden’s use of the song was also accompanied by an 8.6 percent uptick in his perceived support. And when the band objected to Biden’s use of the song, we noted a 7.6 percent increase in perceived support for Trump.¹⁴⁸

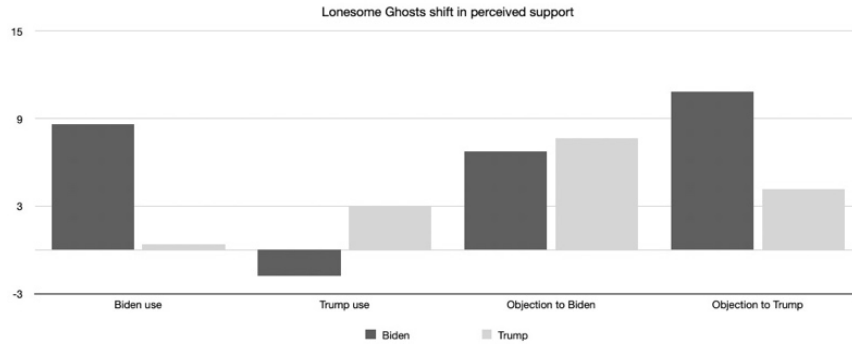


Figure 9: Shift in perceived support of Biden and Trump by Lonesome Ghosts

As we see in Figure 10, the only notable change in perceived endorsement was a 7.7 percent increase for Biden in the Biden use condition. The other shifts were negligible.

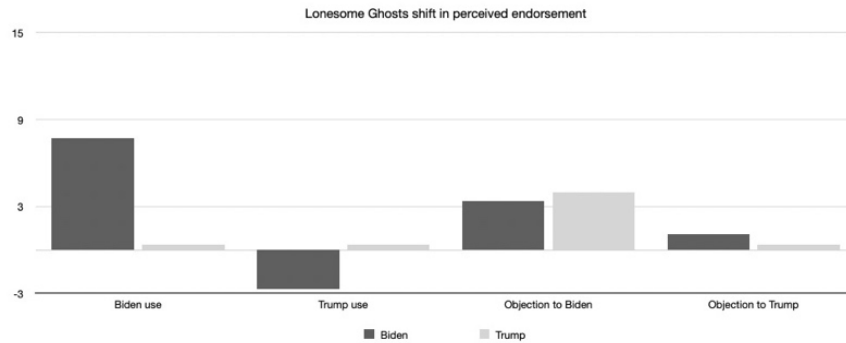


Figure 10: Shift in perceived endorsement of Biden and Trump by Lonesome Ghosts

Turning to Morgan Wallen, a substantial percentage of respondents (just under 10 percent) in our control group believed he supported Trump. And roughly 6 percent believed Wallen endorsed the former President. Under our test conditions, we again saw notable shifts. As with Lonesome Ghosts, Biden’s use of Wallen’s song led to a 7.2 percent increase in perceived Biden support, while

148. See *infra* Figure 9. Objecting to Biden’s use also led to a counterintuitive 6.7% increase in perceived Biden support.

Trump's use had little impact, as illustrated in Figure 11. The effects were even larger when Wallen opposed the candidates' uses. His objection to Biden yielded a 7.6 percent increase in perceived support for Trump. And objecting to Trump corresponded with an 8.4 percent swing towards support of Biden.¹⁴⁹

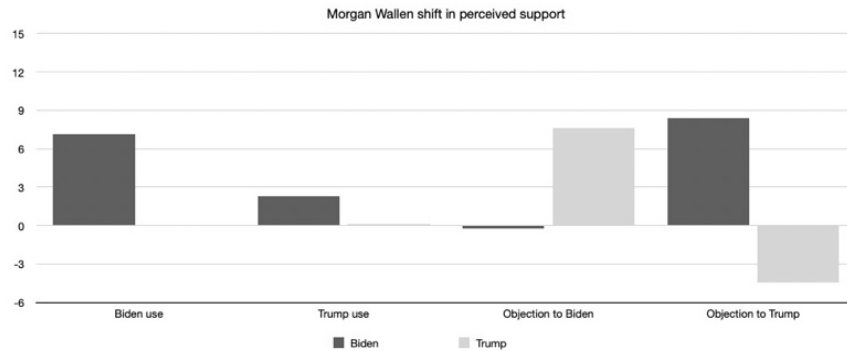


Figure 11: Shift in perceived support of Biden and Trump by Morgan Wallen

As Figure 12 shows, we saw a similar pattern for endorsements, with 8 percent and 5.3 percent shifts when Wallen objected to Trump and Biden, respectively.

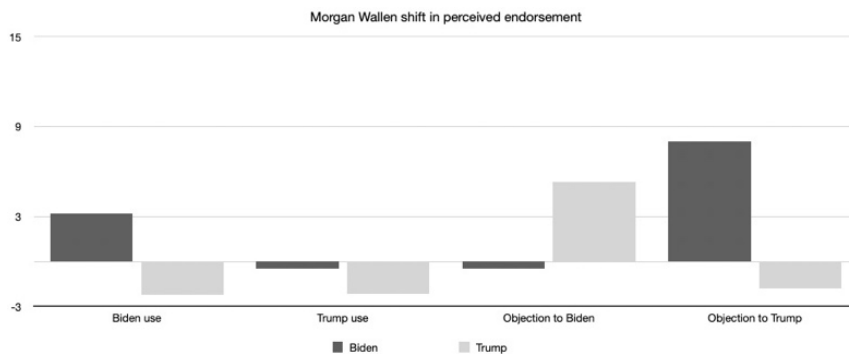


Figure 12: Shift in perceived endorsement of Biden and Trump by Morgan Wallen

Olivia Rodrigo had the highest level of perceived support and endorsement in the control group. More than 12 percent of respondents believed she supported Biden, and 6.6 percent believed she endorsed him. As seen in Figure 13, Biden's use of her song led to a six percent bump in perceived support. When Trump

149. See *infra* Figure 11. Objecting to Trump also corresponded to a 4.4% drop in Wallen's perceived support of Trump. See *infra* Figure 11.

used her song, perceived support of his candidacy increased by 6.8 percent, while perceived support of Biden dropped by nearly as much. Objecting to Trump’s use led to a 6.2 percent increase in Rodrigo’s perceived support of Biden.¹⁵⁰

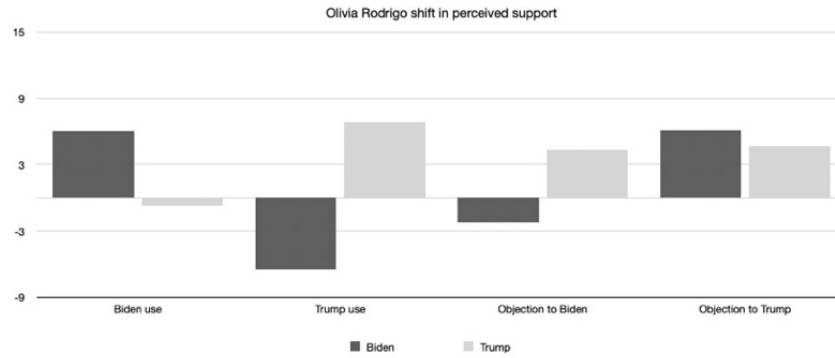


Figure 13: Shift in perceived support of Biden and Trump by Olivia Rodrigo

Rodrigo’s perceived endorsement shifted notably when her song was used by either candidate, as seen in Figure 14. Biden’s use led to an 8.3 percent increase, and Trump’s use led to a corresponding 7.2 percent increase. Objecting to Biden’s use yielded a 7.5 percent increase in respondents who believed Rodrigo endorsed Trump.

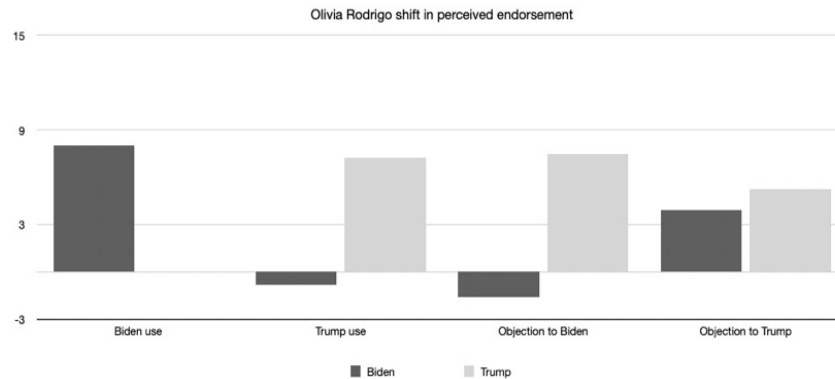


Figure 14: Shift in perceived endorsement of Biden and Trump by Olivia Rodrigo

150. See *infra* Figure 13. But in the Trump objection condition, Trump’s perceived support also went up by 4.7%. One possible explanation for that shift is the tendency for consumers to misunderstand disclaimers. See, e.g., Jake Linford, *A Linguistic Justification for Protecting “Generic” Trademarks*, 17 YALE J.L. & TECH. 110, 167–68 (2015).

Generalizing from these results, some patterns emerge. First, and not surprisingly, respondents are more likely to believe that an artist supports Biden or Trump than they are to believe the artist has officially endorsed that candidate. Second, artist objections prompted sizable shifts in perceived support and endorsement more often than campaign uses. Biden's use of a song appears to influence perceived support and endorsement more than use by the Trump campaign, with the exception of Olivia Rodrigo. We can only speculate as to why that may be. Perhaps because Rodrigo is the most left-leaning of our three artists, Trump's use sent a strong signal, especially in the absence of the perhaps anticipated objection.

Numerically, the largest shifts we observed for perceived support and endorsement of Biden or Trump sit near the cutoff courts typically impose for probative evidence of actual confusion. To support a likelihood of confusion, a survey need not show a majority of consumers are confused. A substantial or "appreciable" minority is sufficient.¹⁵¹ So, for example, a survey finding more than 25 percent of consumers are confused offers strong support for a finding of likely confusion.¹⁵² But when surveys show rates of confusion near or below 10 percent, courts are divided.¹⁵³ Some would treat the most pronounced of our

151. See *McGregor-Doniger Inc. v. Drizzle Inc.*, 599 F.2d 1126, 1130 (2d Cir. 1979) ("[A]n appreciable number of ordinarily prudent purchasers are likely to be misled, or indeed simply confused, as to the source of the goods . . ."); *Int'l Ass'n of Machinists & Aerospace Workers v. Winship Green Nursing Ctr.*, 103 F.3d 196, 201 (1st Cir. 1996) ("[T]he law has long demanded a showing that the allegedly infringing conduct carries with it a likelihood of confounding an appreciable number of reasonably prudent purchasers exercising ordinary care.").

152. *Thane Int'l, Inc. v. Trek Bicycle Corp.*, 305 F.3d 894, 902–03 (9th Cir. 2002).

153. See, e.g., *Humble Oil & Refin. Co. v. Am. Oil Co.*, 405 F.2d 803, 815 (8th Cir. 1969) (holding that confusion among 11% of a national market of millions of consumers constitutes a number of confused consumers sufficient to keep an injunction in force); *Grotian v. Steinway & Sons*, 365 F. Supp. 707, 716 (S.D.N.Y. 1973) (holding that 7.7% confusion provided strong evidence of likely confusion); *Novartis Consumer Health, Inc. v. Johnson & Johnson-Merck Consumer Pharm. Co.*, 290 F.3d 578, 594 n.13 (3d Cir. 2002) (citing *Coca-Cola Co. v. Tropicana Prods., Inc.*, 690 F.2d 312, 317 (2d Cir. 1982)) (recognizing that 7.5% confusion could sustain a finding of substantial consumer confusion); *Quality Inns Int'l, Inc. v. McDonald's Corp.*, 695 F. Supp. 198, 220 (D. Md. 1988) (stating that small percentages may prove confusion if they translate into large numbers of people); *Chanel, Inc. v. Mauriello*, Opp. Nos. 91168097, 91172654, at 30–31 (T.T.A.B. 2010) ("[E]ven if we were to subscribe to defendant's calculations which reduces the survey result to 9% being confused, this percentage has been recognized by courts as supporting a finding of likelihood of confusion."). *But see, e.g., Sara Lee Corp. v. Kayser-Roth Corp.*, 81 F.3d 455, 467 n.15 (4th Cir. 1996) ("[S]urvey evidence clearly favors the defendant when it demonstrates a level of confusion much below ten percent."); *Henri's Food Prods. Co. v. Kraft, Inc.*, 717 F.2d 352, 358 (7th Cir. 1983) (holding that 7.6% confusion weighs against infringement); *Wuv's Int'l, Inc. v. Love's Enters., Inc.*, 208 U.S.P.Q. (BL) 736, 756 (D. Colo. 1980) (holding that 9% is insufficient); *Mini Melts, Inc. v. Reckitt Benckiser LLC*, 118 U.S.P.Q.2d (BL) 1464, 1477 (T.T.A.B. 2016) (concluding that percentages between 7% and 8.5% support the conclusion that there is no likelihood of confusion); *Newport Pac. Corp. v. Moe's Sw. Grill, LLC*, No. 05-995-KL, 2006 WL 2811905, at *14, *16–17 (D. Or. Sept. 28, 2006) (dismissing infringement claim on summary judgment where survey showed 14% confusion rate); *Cairns v. Franklin Mint Co.*, 24 F. Supp. 2d 1013, 1040 (C.D. Cal. 1998) (showing 6.9% rate of confusion favored defendant). See generally Gerald L. Ford, *Survey Percentages in Lanham Act Matters*, in TRADEMARK AND DECEPTIVE ADVERTISING SURVEYS: LAW, SCIENCE, & DESIGN, *supra* note 139, at 314 ("[W]hile it is true that

results for perceived support or endorsement as indicative of a likelihood of confusion among an appreciable minority of consumers. Others would reach the opposite conclusion. In any case, we can conclude with reasonable confidence that, using these criteria, our results do not firmly establish that either campaign uses or artist objections produce strong evidence of actual confusion as to support or endorsement.

c. *Rationales for perceived support and endorsement*

Finally, we turn to respondents' subjective reasons for perceiving support of a candidate. Even among those who believed an artist supported Biden or Trump, respondents may have a range of reasons for drawing that conclusion.¹⁵⁴ In the control groups, as expected, none of the respondents mentioned use of an artist's music at campaign events or objections to such use. Instead, they offered a variety of rationales for artists' perceived support of the candidates. For those who believed the artist supported Biden, they pointed to assumptions like "most music artists are liberal." Others noted specific facts about the artist such as Olivia Rodrigo's White House visit or her status as a member of a minority group. When it came to perceived support of Trump, respondents noted that Morgan Wallen is "a country artist who's said some questionable stuff." Another noted that "the [expletive deleted] media call him racist." Rationales for responses to the endorsement question were similar: "Most musicians are Democrat," "Because Donald is the man," "Cause she [Rodrigo] got to meet [Biden] and Fauci."

In the test groups, by contrast, respondents sometimes cited either the use of the song ("He plays their music at rallies," "Allowed her song at his rally"), the artist's response ("They objected to their music being played at a Biden rally," "Their unwillingness to allow Trump to use their music"), or the news story itself ("Because of the article that I just read") in explaining their perceived support or endorsement.

some courts have not accorded probative weight to survey results between 10% and 20%, numerous courts have found likelihood of confusion surveys with percentage results between 10% and 20% probative of a likelihood of confusion."); Swann, *supra* note 139, at 62 n.67 (opining that because of the structure of an *Eveready* study, net confusion of less than 10% "may suffice to support a conclusion as to likelihood of confusion" while the inherent noise in a *Squirt* study where respondents are presented with competing stimuli, net confusion of greater than 10% may be required).

154. This additional level of scrutiny is sometimes, though not always, employed in litigation. In *Smith v. Wal-Mart Stores, Inc.*, for example, the trademark owner's expert—the noted authority Dr. Jacob Jacoby—constructed a survey that counted respondents as confused only if, after stating their belief that the t-shirts in question "came from Wal-Mart" or a connected company, they also "indicate[d] that his or her reason for that understanding was either because of the prefix 'Wal,' the name (or equivalent), the smiley face, or the star after the prefix 'Wal.'" 537 F. Supp. 2d 1302, 1320 (N.D. Ga. 2008).

This tendency was more pronounced for respondents in the objection conditions.¹⁵⁵ Those who believed that an artist supported Biden or Trump after reading about an objection were considerably more likely to state a rationale tied to our test conditions. When artists objected to Trump’s use, perceived support of Biden increased by more than 10 percent.¹⁵⁶ Objections to Biden’s use led to a nearly 8 percent increase in perceived support of Trump across all three artists.¹⁵⁷ We observed a smaller effect for perceived endorsements under the objection conditions, as Figure 15 illustrates.

Respondents under the campaign use conditions, who read about the song being played by a campaign, rarely mentioned that use as the basis for their belief. Biden’s use of a song led only 2.5 percent of respondents to conclude the artist supported his candidacy, and only 2.1 percent inferred the artist endorsed him. When it came to Trump, fewer than 0.5 percent of respondents mentioned his campaign’s use of a song as a basis for the artist’s support, and just as few inferred an endorsement on that basis.

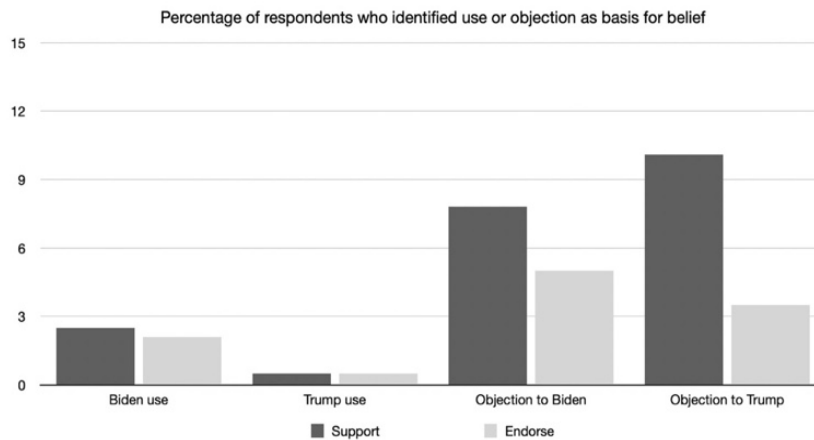


Figure 15: Percentage of respondents who identified campaign use or artist objections as the basis for perceived support or endorsement across all three artists

155. Given the small number of respondents who believed an artist supported or endorsed Biden or Trump, we cannot make any claims about the statistical significance of these results. But in the trademark context, “small and non-random samples that are not projectible to the general population or susceptible to evaluations of statistical significance” are not uncommon. *Id.* at 1333 (quoting 6 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 32:165 (4th ed. 2006)).

156. *See infra* Figure 15. This corresponds to 23 of the 228 respondents in the Biden objection conditions.

157. *See infra* Figure 15. This corresponds to 19 of the 242 respondents in the Trump objection conditions. Objecting to Biden’s use resulted in 5% of respondents concluding that the artist supported Trump. Objections to Trump’s use of music led 3.5% of respondents to believe the artist supported Biden.

Our results were not uniform across the three artists. We observed the largest effects with Rodrigo and Wallen. When Rodrigo objected to Trump's use, her perceived support of Biden increased by 11.8 percent. Wallen's objection to Trump yielded an 11 percent increase in his perceived support of Biden. When he objected to Biden, we saw an even larger 12.5 percent uptick in Wallen's perceived support of Trump. Lonesome Ghosts' perceived support of Biden increased by 7.6 percent when they objected to Trump's use. Likewise, their perceived support of Trump increased by 6.1 percent when they objected to Biden's use. In contrast, when artists objected to Biden we found near-uniform 5 percent increases in respondents who perceived an endorsement of Trump. The shift in perceived endorsements of Biden after the artists objected to Trump's use of their songs fell within a narrow band of 2.5 to 5.5 percent, with Wallen's objection producing the largest shift.

Our campaign use conditions led to relatively minor shifts in support and endorsement, regardless of the artist. Across those conditions for both candidates and all three artists, the largest rate of confusion we found was 3.9 percent. And in nearly half of the conditions, there was no effect whatsoever. Those figures are sufficiently low to constitute evidence of an absence of consumer confusion.

In the end, we uncovered marginal evidence of confusion when we looked only at (1) respondents' belief that an artist supported (or endorsed) a candidate and (2) the identity of that candidate. Factoring in the third criterion—respondents' stated rationale—reduced the rate of confusion attributable to a candidate's use of a song, but offered somewhat stronger evidence to believe that artist objections may shift consumer perceptions about which candidates they support.

C. TARNISHMENT

Artists also express concerns that campaign uses tarnish their music and reputations. When the Foo Fighters objected to John McCain's use of their song, "My Hero," the band argued the use "pervert[ed] the original sentiment of the lyric [and] just tarnishe[d] the song."¹⁵⁸ We sought to measure the potentially tarnishing effect from using a song in a political context.

1. Favorability Scores

We asked respondents to rank each of the three artists on a zero to ten favorability scale, with ten being the highest. For the control groups, Rodrigo

158. Jonathan Cohen, *Foo Fighters Blast McCain Use Of 'My Hero'*, BILLBOARD (Oct. 8, 2008), <https://www.billboard.com/music/music-news/foo-fighters-blast-mccain-use-of-my-hero-1043836>; see also ARTIST RTS. ALL., *supra* note 127 (citing tarnishment as a legal theory).

had the highest score among our three artists, with a 4.8.¹⁵⁹ Morgan Wallen was rated 4.2. Not surprisingly, Lonesome Ghosts—a band whose music no respondents had heard—earned the lowest control score, 3.7.

We observed some notable shifts in favorability scores under some of our test conditions, although the data did not establish statistical significance. For example, respondents who read that Trump played a Lonesome Ghosts song at his rally gave the band an average score of 3.1, a drop of 0.6. That drop was largely due to a sizable decrease in the band's rating among Democratic voters, falling from 3.6 for the control group to 2.4 in the Trump use condition. Similarly, when respondents read about Olivia Rodrigo's song being played at a Trump event, her score fell from 4.8 to 4.1. In that case, both Democrats and Republicans rated her lower. In other instances, average scores increased. When presented with a story about Biden playing a Morgan Wallen song, Wallen's average score increased from 4.2 to 5, reflecting higher scores across all three party identifications. However, even the most pronounced of these shifts in favorability scores were not statistically significant.¹⁶⁰

In contrast, scores varied significantly across party affiliations for both Olivia Rodrigo and Morgan Wallen. Rodrigo scored a 5.4 average among Democrats, 4.2 among Republicans, and 4.5 among independents. The nearly 1.2-point differential between Democrats and Republicans was larger than any shift observed between the control and test prompts. Wallen's score also varied both significantly and predictably by party. He scored 3.9 among Democrats, 4.7 among Republicans, and 4.1 among independents. Unsurprisingly, scores for Lonesome Ghosts did not show any significant variation by party.

2. *Likelihood of Streaming, Purchases, and Concert Tickets*

Next, we asked respondents how likely they were to stream an artist's music, purchase their records, and buy their concert tickets. Answers were reported on a 5-point Likert scale.

In most scenarios, we observed no significant variation across the control and test groups. In other words, news stories reporting on either a candidate's use of a song or an artist's objection to such use had no significant effect on the likelihood that consumers will stream or purchase music or buy tickets for live shows.

There were, however, a few notable exceptions. We found a significant shift in the likelihood of streaming Lonesome Ghosts' music in the Trump use

159. We also asked respondents about two other artists. Beyonce scored a 6.1 overall, and Kanye West averaged 4.1. Given Beyonce's long and consistent success, we were not surprised to see her outscore the rest of the field. West, a more polarizing figure, has alienated some listeners in recent years.

160. For these scores, we determined significance using analysis of variance across the control and test groups. Lonesome Ghosts came the closest to significance, with $p=0.13$. In addition, we used t-tests to compare the control group to those instances where we observed sizable shifts in mean scores. Again, none of these shifts were significant. Wallen's 0.77 point bump when his song was used by the Biden campaign was nearest to significance, with $p=0.08$.

condition.¹⁶¹ Compared to the control group, those who reported they were “somewhat likely” to stream dropped from 22 percent to 8 percent. And those who reported they were “extremely unlikely” jumped from 31 percent to 49 percent. We observed a similar shift for likely purchases of the band’s music when it was used by Trump, with “somewhat likely” responses falling from 14 percent for the control group to 5 percent and “extremely unlikely” climbing from 35 percent to 53 percent.

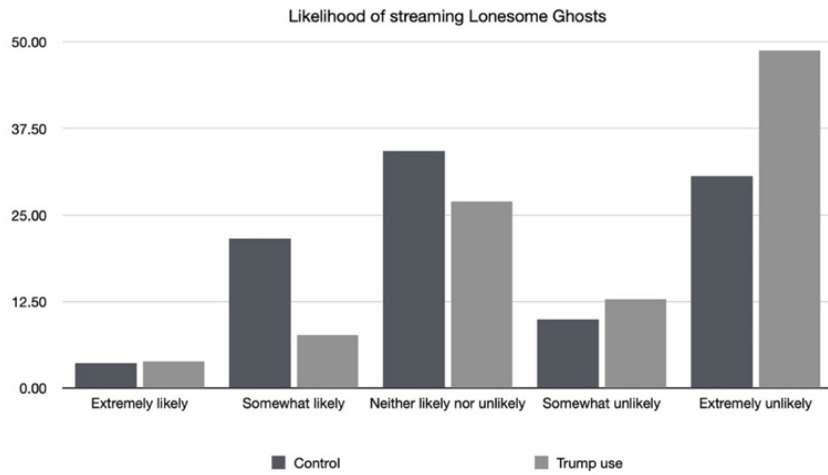


Figure 16: Likelihood of Streaming Lonesome Ghosts

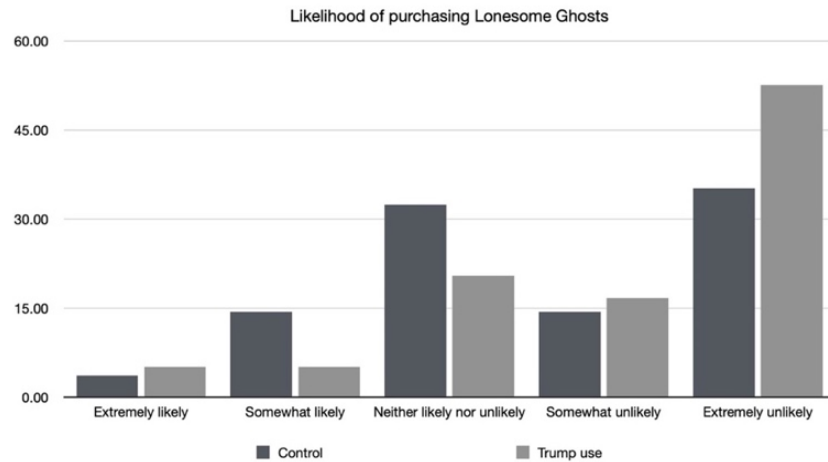


Figure 17: Likelihood of Purchasing Lonesome Ghosts

161. See *supra* Figure 16. For these questions, we used the chi-squared test.

For Olivia Rodrigo, we observed a statistically significant shift in the likelihood of ticket purchases when she objected to Trump's use of her song. Compared to the control group, "somewhat likely" responses increased from 5 percent to 21 percent, while "neither likely nor unlikely" responses dropped from 27 percent to 18 percent. Qualitatively, this is a less dramatic effect than those we saw for Lonesome Ghosts, but notable nonetheless. Given the relatively high price of concert tickets and other costs associated with live events, we are not surprised to see respondents who report willingness to stream or download Rodrigo's music draw the line when it comes to attending her concerts.¹⁶²

Vis-à-vis Morgan Wallen, we observed no significant shifts among the control and test groups for these three questions.¹⁶³

As an alternate measure of preferences, we asked respondents to choose which of the three artists they would be most likely to add to a playlist for a friend. In our control groups, Olivia Rodrigo was the most popular of the artists. Respondents chose her nearly half the time. The remaining respondents were split nearly evenly between Morgan Wallen and Lonesome Ghosts.

Comparing those results to our various test conditions, we observed only one scenario with a significant change. When Lonesome Ghosts objected to Trump's use of their song, the number of respondents who chose them over Rodrigo and Wallen increased from 25 percent to 34 percent. That increase was largely a product of a 20-point increase among independents, who chose Lonesome Ghosts 52 percent of the time in Trump objection condition. In that same scenario, Wallen's score also increased from 28 to 37 percent. His boost came largely from Republicans, 59 percent of whom chose Wallen, compared to 39 percent in the control group. We believe the most likely explanation for this pattern is that—believing Lonesome Ghosts opposed Trump's use— independents shifted from Rodrigo to Lonesome Ghosts, while Republicans rallied around an artist perceived to be more Trump-friendly.¹⁶⁴

162. The average concert ticket in the United States was more than \$90 in 2019. Lucas Shaw, *Concerts Are More Expensive Than Ever, and Fans Keep Paying Up*, BLOOMBERG (Sept. 10, 2019, 2:00 AM), <https://www.bloomberg.com/news/articles/2019-09-10/concerts-are-more-expensive-than-ever-and-fans-keep-paying-up>. In 2021, tickets for Rodrigo's performance in San Francisco ranged from \$755 to \$9,000 each on the resale site StubHub. Joshua Bote, *Someone's Re-selling Tickets for Olivia Rodrigo's San Francisco Concert for as High as \$9,000*, SFGATE (Dec. 10, 2021), <https://www.sfgate.com/music/article/Olivia-Rodrigo-SF-tickets-resold-for-9000-dollars-16691749.php>.

163. The condition closest to significance was Biden's use of Wallen's song ($p=0.078$). There, we saw an increase in "extremely likely" responses from 5% to 14%, and a sharp decline in "extremely unlikely" responses from 44% to 26%.

164. Independent respondents' preference for Rodrigo dropped from 42% to 15% in this scenario.

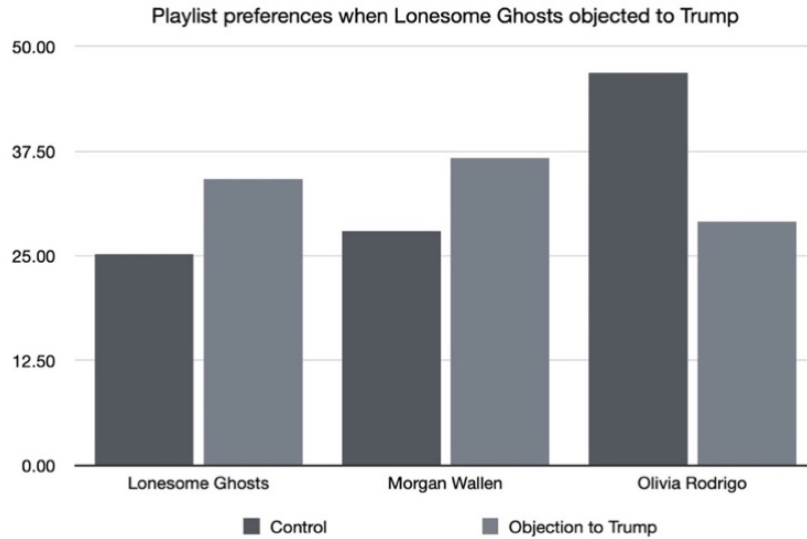


Figure 18: Playlist Lonesome Ghost, Trump Objection

More generally, we found—perhaps not surprisingly—a significant relationship between respondents’ party identification and their preference for artists. Olivia Rodrigo was considerably more popular with Democrats (56%) than Republicans (33%), with independents favoring her 45 percent of the time. Wallen performed poorly among Democrats (17%), much stronger among Republicans (34%), and slightly worse among independents (31%). Preferences for Lonesome Ghosts, as we would expect, were much more evenly split across party lines—27 percent among Democrats, 24 percent among Republicans, and 32 percent among independents.

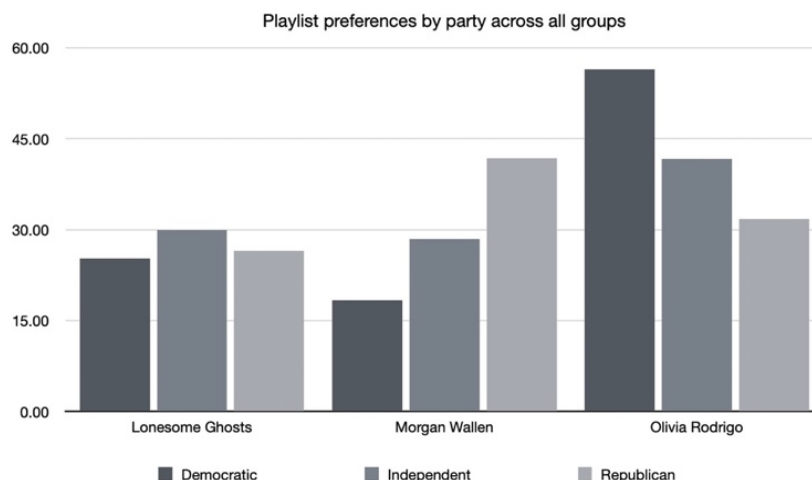


Figure 19: Playlist Preference by Party Across Groups

Overall, while most of our test scenarios did not yield significant changes, we found some evidence of tarnishment under certain circumstances. It appears that use of a song by an unpopular candidate may reduce streaming and purchasing of that artist's music, but that effect appears to be limited to artists without established reputations or clearly perceived political leanings. Relatedly, our data suggest that such an artist may benefit from objecting to the use of their songs by an unpopular candidate. Interestingly, while objecting to Trump increased the likelihood Lonesome Ghosts would be added to a playlist, we found no corresponding effect when the band objected to Biden's use.¹⁶⁵ Finally, we saw no significant shifts in artists' scores on the ten-point favorability metric. In the end, we believe that the evidence of tarnishment is neither trivial nor overwhelming.

There are some reasons we might see different results for the three tested artists. Lonesome Ghosts is an imaginary band and something of an empty vessel. Thus, consumer perceptions of the band are more heavily influenced by its association with Trump. When Trump played their song, respondents who disapprove of Trump also disapproved of the band. Similarly, when the band objected to Trump, respondents who oppose him were more likely to include the band on a playlist. This pattern may shed some light on the reactions of artists who publicly disavowed Trump. If an artist has a relatively weak reputation, an

165. During our data collection in April of 2022, both Biden and Trump had approval ratings of about 42%. *Do Americans Have a Favorable or Unfavorable Opinion of Donald Trump?*, FIVETHIRTYEIGHT (Sept. 28, 2023, 9:43 AM), <https://projects.fivethirtyeight.com/polls/favorability/donald-trump/>; *How Popular Is Joe Biden*, FIVETHIRTYEIGHT (Sept. 28, 2023, 9:36 AM), <https://projects.fivethirtyeight.com/biden-approval-rating/>.

association with Trump might be enough to turn consumers away, while rebuking him might boost their popularity.

In Wallen's case, some degree of association with Trump may be baked into consumer expectations, whereas Rodrigo was generally assumed to be a left-leaning artist. At the time of our data collection, Rodrigo was a newer artist with a less established reputation and fanbase when compared to Wallen.¹⁶⁶ While we don't have evidence directly supporting this explanation, it is plausible that an artist with a more established reputation is less susceptible to a negative associational effect than an artist with a less established reputation or no reputation at all, like Lonesome Ghosts. It is also plausible that Rodrigo, a female artist with a Filipino father, is more vulnerable to reputational shocks than Wallen, who is white and male.¹⁶⁷ Thus, while Rodrigo suffered a drop in likely ticket purchases when she objected to Trump, Wallen experienced no significant drops in any scenario.

V. IMPLICATIONS & OPEN QUESTIONS

Taken as a whole, our data tell a complex story with no clear winners and losers. We found significant downward trends in streaming for three songs in the aftermath of the Trump campaign's use and the artists' objections. The available market data cannot tell us whether those declines were due to Trump's use, the artists' rebukes, or some other set of factors. But the difference-in-differences analysis suggests that the change is independent of market wide trends in music consumption. When it comes to false support and endorsement, we uncovered strong evidence of materiality when consumers conclude an artist sponsors a candidate, but little evidence that political use of a song leads consumers to such a conclusion. And our various measures of tarnishment suggest that less established artists may suffer reputational harm when their songs are used by a candidate as divisive as Trump.

These findings are instructive in their own right. They offer useful insights into the extent to which artists' objections are rooted in well-founded concerns of market or reputational harm. And they provide a fuller picture of the complex tradeoffs and uncertainties facing artists whose songs are adopted by candidates without their express permission. From a doctrinal perspective, these findings also better equip us to assess the likelihood of success of the various legal claims

166. Wallen's first album, released in 2018, reached #3 on the Billboard pop charts, and his 2021 album hit the top spot for three weeks. *Chart History: Morgan Wallen*, BILLBOARD, <https://www.billboard.com/artist/morgan-wallen/chart-history/tsl> (last visited Feb. 15, 2024). Rodrigo's first commercial release was the single "Driver's License" in 2020, although she had roles in Disney Channel television programs before the start of her singing career. Joe Coscarelli, *Olivia Rodrigo's 'Drivers License' Hit No. 1 in a Week. Here's How.*, N.Y. TIMES (July 12, 2021), <https://www.nytimes.com/2021/01/19/arts/music/olivia-rodrigo-drivers-license.html>.

167. Cf. Madeline E. Heilman & Tyler G. Okimoto, *Why Are Women Penalized for Success at Male Tasks?: The Implied Communitiy Deficit*, 92 J. APPLIED PSYCH. 81, 81 (2007) (reporting three experimental studies that "support the idea that penalties for women's success in male domains result from the perceived violation of gender-stereotypic prescriptions").

artists might raise in reaction to campaign uses. Evidence of consumer perception and harm is crucial to many of those claims, but it is not the only stumbling block artists would need to overcome.

Music, because of its communicative and associational power, has long been an important tool in the persuasive efforts of political campaigns. And there are strong arguments in favor of robust First Amendment protections for candidates and their campaigns. If using a popular song helps campaigns compete in our increasingly crowded markets for voters' attention, perhaps we ought to celebrate that small win for democracy even if the artist objects.

This Part considers how copyright, false endorsement, and tarnishment claims are likely to play out in light of both our empirical findings and the First Amendment concerns surrounding campaign speech. Finally, it considers the viability of claims rooted in the right of publicity and artists' moral rights.

A. CAMPAIGN USE AS FAIR USE

Assuming campaign use is not covered by a blanket public performance license and the relevant copyright holder objects, one question likely to arise in future litigation is whether such use should be considered fair, and thus non-infringing.¹⁶⁸ No court has yet meaningfully analyzed a copyright claim based on a campaign's unauthorized public performance of a song at a rally or other event. But we would expect fair use to play an important role in mediating these sorts of disputes. Political speech, including speech by and about candidates, is among the core concerns of the First Amendment.¹⁶⁹ And the Supreme Court has described fair use as one of copyright law's "built-in First Amendment accommodations" that reduces the risk of conflict between copyright restrictions and free speech.¹⁷⁰

As Cathay Smith has described in detail, campaigns have been accused of infringing a range of copyrighted works over the years.¹⁷¹ From former Congressman Steve King's use of the Success Kid meme to Mitt Romney's copying of NBC News footage, campaigns have faced accusations related to, inter alia, photographs, video footage, website text, and even ad campaign formats.¹⁷² As Smith argues, courts tend to be more accepting of fair use arguments in the campaign context when the allegedly infringed work was originally created for political purposes or depicts a candidate.¹⁷³ For example,

168. 17 U.S.C. § 107.

169. *Mills v. Alabama*, 384 U.S. 214, 218 (1966) (noting the "practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs [which] of course includes discussions of candidates").

170. *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003).

171. Cathay Y. N. Smith, *Political Fair Use*, 61 WM. & MARY L. REV. 2003, 2012–39 (2021).

172. *Id.* at 2015, 2034.

173. As Smith argues, courts emphasize the second fair use factor, the nature of the work, more heavily in political cases. *Id.* at 2040–41.

when campaigns have used photographs of opposing candidates in critical ads, courts have typically deemed those uses fair.¹⁷⁴

The general trend in fair use cases is to focus on whether the purpose and character of the appropriating use is transformative.¹⁷⁵ But in copyright disputes arising from political campaigns, courts have been less receptive to fair use when campaigns repurpose non-political expression to make a political point. For instance, when a candidate rewrote the lyrics of two songs by Don Henley to criticize President Obama, the court rejected the candidate's fair use argument.¹⁷⁶ Likewise, the court was not persuaded when the McCain campaign used Jackson Browne's hit "Running on Empty" in an ad criticizing Obama's energy policy.¹⁷⁷ Had the ad been critical of Browne, as well as Obama, the court may well have viewed it differently. Ralph Nader, for example, prevailed on fair use when Mastercard sued him for copying its "Priceless" commercial format in a campaign ad decrying corporate contributions to major party candidates.¹⁷⁸

As Smith notes, litigation over political ads is rare. And threatened lawsuits over songs performed at rallies or other campaign events almost always dissipate in a clatter of saber rattling.¹⁷⁹ Nonetheless, we might expect the general trends in political fair use cases to play out similarly in a future case over use at a campaign rally. If so, fair use claims will be weakest when a campaign plays a song that has no discernible political message. Consider, for example, Trump's long running use of the Village People's "YMCA,"¹⁸⁰ a song that co-author Victor Willis states is about "hanging out in urban neighborhoods in my youth."¹⁸¹ The song has been appropriated as a gay anthem, but Willis disclaims any such authorial intent.¹⁸²

But even where the song resonates with the campaign's political message in some indirect way—Bill Clinton's use of Fleetwood Mac's "Don't Stop," for instance—the fair use argument will be relatively weak. To the extent a song is overtly political, fair use appears to be more likely. If Lee Greenwood suddenly

174. See, e.g., *Galvin v. Ill. Republican Party*, 130 F. Supp. 3d 1187, 1197 (N.D. Ill. 2015); *Dhillon v. Does 1–10*, No. C 13-01465 SI, 2014 WL 722592, at *3–5 (N.D. Cal. Feb. 25, 2014).

175. See, e.g., Clark D. Asay, Arielle Sloan & Dean Sobczak, *Is Transformative Use Eating the World?*, 61 B.C. L. REV. 905, 906, 919–20 (2020).

176. *Henley v. DeVore*, 733 F. Supp. 2d 1144, 1148, 1159–63, 1169 (C.D. Cal. 2010).

177. *Browne v. McCain*, 612 F. Supp. 2d 1125, 1128, 1130–31 (C.D. Cal. 2009).

178. *MasterCard Int'l Inc. v. Nader 2000 Primary Comm., Inc.*, No. 00 CIV. 6068 (GBD), 2004 WL 434404, at *1, * 13–16 (S.D.N.Y. Mar. 8, 2004).

179. Smith, *supra* note 171, at 2027 (“[U]nauthorized use of music at campaign rallies is generally one-off, sometimes licensed under a performance-rights organization's blanket license, and disputes frequently settle with musicians publicly denouncing the uses or campaigns promising not to use the songs again.”).

180. See *supra* note 42 and accompanying text.

181. Alex Hopper, *Behind the Meaning of the Classic Hit “Y.M.C.A.” by the Village People*, AM. SONGWRITER (Oct 29, 2022, 10:26 AM), <https://americansongwriter.com/behind-the-meaning-of-the-classic-y-m-c-a-by-village-people>.

182. Willis claims he has “no qualms” that “the gay community adopted [Y.M.C.A.] as their anthem,” *id.*, but has threatened to sue media outlets “that falsely suggest[] Y.M.C.A. is somehow about illicit gay sex,” Victor Willis, FACEBOOK (Sept. 20, 2020), <https://www.facebook.com/officialvictorwillis/posts/3290323071055027>.

objected to Trump's use of "God Bless the USA," a court may be more likely to deem that use fair, because the song evokes sentiments about religiosity and patriotism that have been key elements of the Republican party platform.¹⁸³ But the strongest cases for political fair use involve an overtly political work being used in a manner contrary to its original political intent. Thus, a future Democratic nominee may have an even stronger case that taking the stage to Greenwood's conservative anthem is a fair use.

The strongest case for fair use of a song by a campaign may be the least common—when the opposing candidate is a songwriter or performer. Artists occasionally run for office. Some, like Sonny Bono, the only member of Congress to have scored a number-one pop single on the US Billboard Hot 100 Chart,¹⁸⁴ or Midnight Oil's Peter Garrett, who served in the Australian Parliament for nine years,¹⁸⁵ have long and successful political careers. Most do not. When an artist attempts to make the transition from music to politics, as Kanye West arguably did in 2020, they shouldn't be surprised if their songs are used against them by their rivals.¹⁸⁶ We expect courts would determine such uses fair, especially to the extent the songs in question include politically relevant content.

One underexplored question in the existing political fair use case law is how to evaluate potential market harm. Under the fourth fair use factor, courts consider "the effect of the use upon the potential market for or value of the copyrighted work."¹⁸⁷ When the original works in question are political in nature, "courts frequently find that there is no further market" for them on the assumption that creators of political works "are not likely to license their works to opponents to use to criticize their candidate or political party."¹⁸⁸ But when those works are non-political, the question of market harm is more complicated since courts will need to grapple with the impact of political uses on works that have broader market appeal.

The results of our analysis underscore that complexity. Even when we observed steep declines in the consumption of a song immediately after its use by the Trump campaign, we were unable to disentangle the relative contributions

183. See, e.g., Stella Rouse & Shibley Telhami, *Most Republicans Support Declaring the United States a Christian Nation*, POLITICO (Sept. 21, 2022, 4:30 AM), <https://www.politico.com/news/magazine/2022/09/21/most-republicans-support-declaring-the-united-states-a-christian-nation-00057736>.

184. Keith Caulfield, *Rewinding the Charts: Fifty Years Ago, Sonny & Cher 'Got' to No. 1*, BILLBOARD (Aug. 14, 2015), <https://www.billboard.com/pro/rewinding-the-charts-fifty-years-ago-sonny-cher-got-to-no-1>.

185. Jed Gottlieb, *Midnight Oil Still Burning for a Cause*, BOS. HERALD (June 12, 2022, 12:35 AM), <https://www.bostonherald.com/2022/06/12/bhr-l-oil-0612> (describing Garrett's political activities).

186. When a politician has a musical past, the same is likely true. During Beto O'Rourke's 2018 Senate campaign against Ted Cruz, Texas Republicans tweeted old photos of O'Rourke's band, Foss, with him clad in a floral dress. Madlin Mekelburg, *Texas GOP Uses Beto O'Rourke Skating, Band, Arrest Photos in Twitter Attack*, EL PASO TIMES (Aug. 30, 2018, 2:29 PM), <https://www.elpasotimes.com/story/news/politics/elections/2018/08/29/texas-gop-republican-party-twitter-beto-o-rourke-mugshot-arrest-ted-cruz-us-senate/1135606002>.

187. 17 U.S.C. § 107(4).

188. Smith, *supra* note 171, at 2058.

of the campaign's use, the artist's objection, and unrelated exogenous factors. Plaintiffs in some cases have argued that associating their works with a particular campaign, or politics in general, can harm their reputations and thus lower the value of their works.¹⁸⁹ As discussed below, our experimental evidence supports that conclusion only in relatively narrow circumstances. Regardless of the empirical reality, courts have not been particularly receptive to claims of reputational harm in political fair use cases.¹⁹⁰ In the end, we believe the fair use case for the run-of-the-mill campaign use of a popular song is relatively weak, but establishing market harm, a key element in a fair use inquiry, may prove challenging.¹⁹¹

B. FALSE ENDORSEMENT

To prevail on a Lanham Act false endorsement claim, a plaintiff must prove (1) imitation of a distinctive attribute of a celebrity's identity, (2) in connection with goods or services (3) in interstate commerce and (4) likely confusion among a substantial portion of the relevant class of purchasers, regarding the celebrity's endorsement of the goods or services.¹⁹² Assuming that a false endorsement claim targeting noncommercial, political speech could survive constitutional scrutiny,¹⁹³ use that confuses an artist's purchasing public about a political endorsement could be actionable under the Lanham Act.¹⁹⁴

1. *False Endorsement and Political Use*

Before addressing the implications of our empirical findings for the likelihood of confusion, a threshold hurdle facing false endorsement claims merits some attention. While political uses of a trademark or an attribute of identity might not qualify as use "in connection with goods or services,"¹⁹⁵

189. *Id.* at 2059; see also Laura A. Heymann, *The Law of Reputation and the Interest of the Audience*, 52 B.C. L. REV. 1341, 1402–03 (2011).

190. See *Peterman v. Republican Nat'l Comm.*, 369 F. Supp. 3d 1053, 1065 (D. Mont. 2019) ("[Copyright law] does not exist to protect artists' general reputations. No artist can guarantee exclusivity; every copyrighted work is subject to fair use.").

191. The most straightforward market harm argument would focus on lost licensing revenue when campaigns fail to acquire a blanket license. But when artists opt out of blanket licenses, campaigns lack any effective way to pay for the right to play a song. Under those conditions, courts may be more likely to find the use fair. See generally Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessors*, 82 COLUM. L. REV. 1600 (1982) (noting concerns with the fair use doctrine, including the inability for defendants to properly purchase the right to use the work through the market).

192. See 15 U.S.C. § 1125(a)(1)(A); see also *Downing v. Abercrombie & Fitch*, 265 F.3d 994, 1007–08 (9th Cir. 2001).

193. See Linford, Sevier & Willis, *supra* note 109, at 641–47 (analyzing the possibility that a tarnishment cause of action would be held an unconstitutional restriction on speech).

194. Thomas F. Cotter & Irina Y. Dmitrieva, *Integrating the Right of Publicity with First Amendment and Copyright Preemption Analysis*, 33 COLUM. J.L. & ARTS 165, 205, 220–22 (2010).

195. Cf. Taylor L. Condit, *The Need for Songwriters' Control: A Proposal to Prevent Unwanted Uses of Musical Compositions at Political Rallies*, 47 SW. L. REV. 207, 219–20, 222 (2018) (discussing songwriters'

courts have held that § 43(a) can reach political speech.¹⁹⁶ For example, in *United We Stand America, Inc. v. United We Stand, America New York, Inc.*, the court affirmed a grant of summary judgment against the appropriation of plaintiff's service mark, "United We Stand America," even though defendant argued its use was political speech protected by the First Amendment.¹⁹⁷ As the court noted, without protection against confusion in political contexts:

[a]ny group trading in political ideas would be free to distribute publicity statements, endorsements, and position papers in the name of the "Republican Party," the "Democratic Party," or any other. The resulting confusion would be catastrophic; voters would have no way of understanding the significance of an endorsement or position taken by parties of recognized major names. The suggestion that the performance of such functions is not within the scope of "services in commerce" seem to us to be not only wrong but extraordinarily impractical for the functioning of our political system.¹⁹⁸

McGeeveran notes that generally, fabricating a direct personal testimonial "would almost surely mislead consumers, harming both audience and alleged endorser" as well as "intrude on the personal interests of the person whose identity was misused."¹⁹⁹ Post and Rothman similarly note that "[d]efendants can wrongfully appropriate performances by using them in contexts not designed to produce a profit, for example, as in fundraising for a nonprofit

challenges in bringing right of publicity claims). Notably, the legislative history of amendments to Section 43(a) suggest that "commercial" uses should not include political advertising and promotion. 134 CONG. REC. 31852 (daily ed. Oct. 19, 1988) (statement of Rep. Kastenmeier) (emphasis added) ("[The Lanham Act] uses the word 'commercial' to describe advertising or promotion for business purposes, whether conducted by for-profit or non-profit organizations or individuals. Political advertising and promotion is political speech, and therefore not encompassed by the term 'commercial.' This is true whether what is being promoted is an individual candidacy for public office, or a particular political issue or point of view."); see also John Zevitas, Comment, *If It Doesn't Fit, Keep on Trying?: The Courts' Attempt to Find a Place for Pure Political Speech in the Lanham Act*, 60 CATH. U. L. REV. 243, 245–6 (2010) (arguing that the Lanham Act should not reach pure political speech).

196. See, e.g., *United We Stand Am., Inc. v. United We Stand, Am. N.Y., Inc.*, 128 F.3d 86, 92–93 (2d Cir. 1997); *MGM-Pathe Commc'ns Co. v. Pink Panther Patrol*, 774 F. Supp. 869, 877 (S.D.N.Y. 1991) (granting in part an injunction against use of MGM's Pink Panther mark on shirts used by a gay rights organization's street patrol and rejecting the organization's First Amendment defenses). See also Langvardt, *supra* note 95, at 466–74 (discussing cases in which courts have found that 43(a) may reach political speech); Michelle Lin, *Keep on Rockin' in the Free World: Trademark Remedies for Musicians*, 93 J. PAT. & TRADEMARK OFF. SOC'Y 98, 108–17 (2011) (analyzing cases addressing political speech in the context of remedies). But see *Farah v. Esquire Mag.*, 736 F.3d 528, 541 (D.C. Cir. 2013) (affirming a Rule 12(b)(6) dismissal of, *inter alia*, Lanham Act § 43(a) claims of falsity based on an article in *Esquire Magazine's* Politics Blog criticizing a book that claimed that President Obama was not a U.S. citizen because the "blog post was political speech aimed at critiquing [plaintiffs'] position on the [President's] birth certificate question").

197. 128 F.3d at 88, 93.

198. *Id.* at 90; see also Quentin J. Ullrich, Note, *Is This Video Real? The Principal Mischief of Deepfakes and How the Lanham Act Can Address It*, 55 COLUM. J.L. & SOC. PROBS. 1, 45 (2021) ("[C]ourts have at times articulated a broad interpretation of the 'in connection with [goods or services]' requirement for the purposes of protecting the public from confusion during the political process.")

199. William McGeeveran, *Selfmarks*, 56 HOUS. L. REV. 333, 359 (2018) (citing *Pavesich v. New England Life Ins.*, 50 S.E. 68, 69, 79 (Ga. 1905)); see also McGeeveran, *supra* note 101, at 1127–30 (discussing potentially misleading endorsements).

organization or during a political-campaign rally.”²⁰⁰ Indeed, they conclude “[i]t serves no one’s interest if a political candidate can with impunity mislead the public into thinking that he has been endorsed by a particular celebrity.”²⁰¹

2. *Establishing a False Endorsement Claim*

Assuming a campaign playing a popular song meets the commercial use requirement, the key question is whether consumers are likely to believe that the artist endorsed the campaign or candidate.²⁰² Commentators have disagreed about the likelihood of such confusion.²⁰³ Following the lead of the Ninth Circuit, most courts deciding false endorsement cases have concluded that the “likelihood of customer confusion is the determinative issue.”²⁰⁴ Outlier circuits mix confusion and right of publicity issues in their false endorsement analysis,²⁰⁵ treat false endorsement as a type of false advertising claim,²⁰⁶ or do not

200. Robert C. Post & Jennifer E. Rothman, *The First Amendment and the Right(s) of Publicity*, 130 YALE L.J. 86, 102 (2020).

201. *Id.* at 151 (citing *Browne v. McCain*, 611 F. Supp. 2d 1062, 1070–72 (C.D. Cal. 2009)); *see also* Lauren M. Bilasz, *Copyrights, Campaigns, and the Collective Administration of Performance Rights: A Call to End Blanket Licensing of Political Events*, 32 CARDOZO L. REV. 305, 327–28 (2010) (distinguishing the political use of music from other uses); Sarah Schacter, Note, *The Barracuda Lacuna: Music, Political Campaigns, and the First Amendment*, 99 GEO. L.J. 571, 574, 598–99, 603 (2010) (arguing for a limited right to approve or remove a song from political use).

202. Condit, *supra* note 195, at 221–22. Condit further posits that the performing artist might have a stronger claim than a songwriter who does not sing the song. *Id.* at 219. Note that consumers could conclude the artist approves of the use of the song while not endorsing the candidate or campaign.

203. *See, e.g.*, Bilasz, *supra* note 201, at 327; Lin, *supra* note 196, at 111 (finding confusion as to endorsement plausible); Kimberlianne Podlas, *I Do Not Endorse This Message! Does a Political Campaign’s Unauthorized Use of a Song Infringe on the Rights of the Musical Performer?*, 24 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1, 3 (2015) (expressing doubt that playing a song at a rally would confuse or mislead consumers); Laura E. Schrauth, *Law is a Battlefield: Why Musicians and Politicians Both Lose with Blanket Licensing*, 9 N. ILL. U. L. REV. 46, 69 (2018) (finding false endorsement plausible only if the song itself is overtly political).

204. *Cairns v. Franklin Mint Co.*, 292 F.3d 1139, 1149 (9th Cir. 2002). *See, e.g.*, *Electra v. 59 Murray Enters., Inc.*, 987 F.3d 233, 258 (2d Cir. 2021) (citing *Bondar v. LASplash Cosms.*, No. 12-cv-1417, 2012 WL 6150859, at *7 (S.D.N.Y. Dec. 11, 2012) (“[T]he misappropriation of a completely anonymous face could not form the basis for a false endorsement claim, because consumers would not infer that an unknown model was ‘endorsing’ a product, as opposed to lending her image to a company for a fee.”)); *Martin v. Living Essentials, LLC*, 653 F. App’x 482, 484–85 (7th Cir. 2016) (unpublished) (noting the key inquiries in celebrity-related false endorsement cases are “whether consumers are likely to be confused and believe that the aggrieved party endorses or approves of a product” and whether the plaintiff possesses a “degree of public notoriety” (citing *White v. Samsung Elec. Am., Inc.*, 971 F.2d 1395, 1396, 1399–1401 (9th Cir. 1992)); *Ji v. Bose Corp.*, 626 F.3d 116, 120 (1st Cir. 2010) (“[Plaintiff] did not show, nor could the court credibly infer, that her identity (or ‘mark,’ in trademark parlance) was familiar to [defendant’s] target audience.”), *aff’g*, 538 F. Supp. 2d 349, 351 (D. Mass. 2008); *Facenda v. N.F.L. Films, Inc.*, 542 F.3d 1007, 1020 (3d Cir. 2008) (adopting the Ninth Circuit’s *Downing* factors and modifying the fourth factor by adding the words “and the length of time the defendant employed the allegedly infringing work before any evidence of actual confusion arose”).

205. *ETW Corp. v. Jireh Publ’g., Inc.*, 332 F.3d 915, 924–26 (6th Cir. 2003).

206. *Dryer v. Nat’l Football League*, 814 F.3d 938, 944 (8th Cir. 2016) (holding that the plaintiffs failed to present evidence the films included “misleading or false statement” or that the films were “literally false as a factual matter”). *Contra Facenda*, 542 F.3d at 1021–22 (recognizing and rejecting a similar erroneous conflation of false endorsement and false advertising elements).

distinguish false endorsement from other types of trademark confusion.²⁰⁷ Other courts have not yet directly addressed the issue.²⁰⁸

Under the majority approach, courts tailor the standard likelihood of confusion factors to fit a false endorsement inquiry.²⁰⁹ Three factors would be largely determinative in the sorts of disputes we have outlined: the plaintiff's relative celebrity, whether that celebrity might drive interest in defendant's campaign, and whether the defendant has successfully evoked the plaintiff's likeness by using the song. In *Downing v. Abercrombie & Fitch*, the court held the first and second factors favored plaintiff surfers, "legends in the surf community" whose images were included in a surf-themed advertisement.²¹⁰ Similarly, in *Lemon v. Harlem Globetrotters Int'l, Inc.*, the district court found the first factor favored a plaintiff who provided evidence of his fame among consumers of defendant's product, but did not favor other basketball players who provided no evidence of their fame among defendant's consumers.²¹¹ Artists like Rodrigo and Wallen likely have the notoriety sufficient to support a false endorsement claim, while a cipher like Lonesome Ghosts or other unknown artists would not.

In *Waits v. Frito-Lay*, the court considered whether Frito-Lay's use of a jingle crafted to imitate the voice and one of the more popular songs of Tom Waits in a Dorito's ad constituted false endorsement. The court affirmed a jury verdict in favor of Waits, noting that the jury was instructed to determine whether "ordinary consumers . . . would be confused as to whether Tom Waits sang on the commercial . . . and whether he sponsors or endorses SalsaRio Doritos."²¹² Factors considered included "the distinctiveness of Waits' voice and style, the evidence of actual confusion as to whether Waits actually sang on the commercial, and the defendants' intent to imitate Waits' voice."²¹³ In a case

207. *Univ. of Ala. Bd. of Trs. v. New Life Art, Inc.*, 683 F.3d 1266, 1278 (11th Cir. 2012) ("[W]e have never treated false endorsement and trademark infringement claims as distinct under the Lanham Act.").

208. *Klayman v. Jud. Watch, Inc.*, 6 F.4th 1301, 1314 (D.C. Cir. 2021).

209. *See Downing v. Abercrombie & Fitch*, 265 F.3d 994, 1007–08 (9th Cir. 2001) (outlining the following factors: 1) the level of recognition that the plaintiff has among the segment of the society for whom the defendant's product is intended (the strength of the plaintiff's identity as mark); 2) the relatedness of the fame or success of the plaintiff to the defendant's product (similarity of plaintiff's endorsement opportunities and defendant's offerings); 3) the similarity of the likeness used by the defendant to the actual plaintiff (similarity of defendant's use to plaintiff's identity); 4) evidence of actual confusion (including survey evidence); 5) marketing channels used; 6) likely degree of purchaser care; 7) defendant's intent in selecting the plaintiff; and 8) likelihood of expansion of the product lines); *cf. Newton v. Thomason*, 22 F.3d 1455, 1462 (9th Cir. 1994) (applying the *Sleekcraft* factors to celebrity endorsement cases).

210. *Downing*, 265 F.3d at 1008. Other Ninth Circuit cases have also recognized false endorsement claims. *See, e.g., Wendt v. Host Int'l, Inc.*, 125 F.3d 806, 806–07, 812–14 (9th Cir. 1997); *Abdul-Jabbar v. Gen. Motors Corp.*, 85 F.3d 407, 409–10, 413 (9th Cir. 1996); *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1395, 1400–01 (9th Cir. 1992).

211. *Lemon v. Harlem Globetrotters Int'l, Inc.*, 437 F. Supp. 2d 1089, 1096 (D. Ariz. 2006). The second factor favored even the non-famous players, because they played for defendant's organization. *Id.* at 1097.

212. *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1111 (9th Cir. 1992), *abrogated on other grounds by Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014).

213. *Waits*, 978 F.2d at 1111.

where the candidate adopts the artist's own recording, establishing similarity should be more straightforward. But the artist would still need to demonstrate that the candidate appropriated or imitated "a distinctive attribute of the celebrity's identity."²¹⁴

Our experimental evidence suggests that perceived political endorsements have a pronounced effect on consumers' likelihood of listening to an artists' music. And many artists endorse candidates they prefer. Thus, an artist could plausibly persuade a court they are sufficiently engaged with politics to prevail on the second factor. However, our evidence also suggests that consumers are unlikely to readily associate the use of a song at a political event with sponsorship or endorsement. The vast majority of our survey respondents did not conclude that an artist supports or endorses a candidate on the basis of the artist's song playing at a campaign event. But this similarity factor is critically important. In a broader analysis of likelihood of confusion cases decided at the turn of the 21st century, no plaintiff who failed to establish similarity of defendant's use and plaintiff's mark prevailed in its case.²¹⁵

Based on our study, consumers are considerably more likely to infer endorsement or support—of the opposing candidate—when an artist objects to a campaign's use of their song. By demanding a candidate stop playing their song, artists are highlighting their political engagement and likely amplifying existing preconceptions about their political leanings. To the extent these objections lead to a likelihood of confusion among a substantial subset of consumers as to an artist's endorsement, we see no viable claim. It's the artist's own behavior that created any misperceptions.

Of course, our experimental data cannot predict how consumers will react to every use of a particular artist's music by a particular candidate. There may be circumstances in which false endorsement is more likely given the unique reputations and policy positions of specific pairings of artists and candidates. If reliable evidence of confusion exists, courts will need to confront the competing speech interests of artists and candidates. Political speech is an important communicative vehicle at the heart of the democratic process. But confusion might reasonably be more important to prevent in political contexts than

214. *Fifty-Six Hope Rd. Music, Ltd. v. A.V.E.L.A., Inc.*, 778 F.3d 1059, 1068 (9th Cir. 2015); see also Elizabeth Long, *Trumped by False Endorsement: Musicians Might Still Have Intellectual Property Rights to Prohibit Politicians from Using Their Songs Despite Copyright Licenses*, 44 N. KY. L. REV. 171, 177–84 (2017) (discussing how false endorsement claims may be asserted). Compare *Oliveira v. Frito-Lay, Inc.*, 251 F.3d 56, 62 (2d Cir. 2001) (holding that a licensed use of a copyrighted song sung did not falsely imply the singer's endorsement because an artist's "signature performance" cannot establish a trademark signifying that artist), with *Beastie Boys v. Monster Energy Co.*, 66 F. Supp. 3d 424, 432, 448, 451–54 (S.D.N.Y. 2014) (concluding that *Oliveira* did not bar a finding of false endorsement where defendant used extensive excerpts from five songs, a textual reference to the band, and a different reference to one of the band's three members).

215. Barton Beebe, *An Empirical Study of the Multifactor Tests for Trademark Infringement*, 94 CALIF. L. REV. 1581, 1604 (2006).

commercial ones.²¹⁶ As the court noted in *Browne v. McCain*, “[The Lanham] Act’s purpose of reducing consumer confusion supports application of the Act to political speech, where the consequences of widespread confusion as to the source of such speech could be dire.”²¹⁷ As Rothman observes, “if someone votes for a President thinking that she was endorsed by Colin Powell or that she was a war veteran, when she is not, the stakes are much higher” than are the stakes for commercial confusion.²¹⁸

3. *Defenses to False Endorsement Claims*

Assuming an artist could establish a likelihood of confusion, a range of doctrinal tools for mediating the tension between commercial speech and expressive uses may limit recovery. The most important is the Second Circuit’s artistic relevance standard, first articulated in *Rogers v. Grimaldi*.²¹⁹ There, the court limited a false endorsement claim over the title of a movie, holding that the Lanham Act ought “apply to artistic works only where the public interest in avoiding consumer confusion outweighs the public interest in free expression.”²²⁰ So long as the use of the mark in the title was relevant to the defendant’s artistic message and not explicitly misleading, it would not be subject to a false endorsement cause of action.²²¹ The Ninth Circuit has applied *Rogers* expansively in Lanham Act cases, not only to the titles of expressive works, but to their content as well.²²²

In considering the applicability of the *Rogers* test to campaign uses of popular music, the first question is whether a campaign rally qualifies as an expressive work. Some events, like carefully scripted and choreographed

216. Jennifer E. Rothman, *Commercial Speech, Commercial Use, and the Intellectual Property Quagmire*, 101 VA. L. REV. 1929, 1991 (2015).

217. *Browne v. McCain*, 611 F. Supp. 2d 1073, 1079 (C.D. Cal. 2009) (citing *United We Stand Am., Inc. v. United We Stand, Am. N.Y., Inc.*, 128 F.3d 86, 91–93 (2d Cir. 1997)).

218. Rothman, *supra* note 216; see also Andrew Gilden, *Endorsing After Death*, 63 WM. & MARY L. REV. 1531, 1535, 1538 (2022) (discussing the outsized power of the executors of the Ronald Reagan and Rev. Martin Luther King, Jr. estates to leverage a posthumous endorsement in political discourse); Anthony J. Nownes, *Celebrity Endorsements and Voter Emotions: Evidence from Two Experiments*, 45 AM. POL. RES. 648, 662 (2017), <https://doi.org/10.1177/1532673X17704938> (reporting an experiment conducted during the 2016 presidential campaign finding that celebrity endorsements profoundly decreased the negative emotions of anger and anxiety vis-à-vis Secretary Clinton); Junze Sun, Arthur Schram & Randolph Sloof, *Elections Under Biased Candidate Endorsements — An Experimental Study*, 125 GAMES & ECON. BEHAV. 141, 141 (2021) (examining how “biased candidate endorsements” can impact elections).

219. *Rogers v. Grimaldi*, 875 F.2d 994, 999 (2d Cir. 1989).

220. *Id.*

221. *Id.*

222. *Brown v. Elec. Arts, Inc.*, 724 F.3d 1235, 1245 (9th Cir. 2013) (applying *Rogers* to a 43(a) false endorsement claim over the use of a retired athlete’s likeness in a video game); *E.S.S. Ent. 2000, Inc. v. Rock Star Videos, Inc.*, 547 F.3d 1095, 1099 (9th Cir. 2008) (applying *Rogers* to the incorporation of an existing strip club into a video game’s depiction of Southern California). *But see* *Jack Daniel’s Props., Inc. v. VIP Prods. LLC*, 143 S. Ct. 1578, 1583 (2023) (declining to extend *Rogers* as broadly as the Ninth Circuit and holding that the sale of purportedly parodic dog toys “falls within the heartland of trademark law, and does not receive special First Amendment protection”).

national party conventions, fit comfortably within our conception of expressive works. But even more mundane campaign stops bear some of the hallmarks of expressive works. They are designed to communicate a particular set of ideas or messages. They are orchestrated to deliver those messages effectively to an audience, and they involve a variety of audiovisual components to facilitate that communicative goal. That is not to say every campaign stop is an expressive work. But we believe many events would satisfy this initial threshold under *Rogers*.

On its own, the fact that the use occurs at a political rally does not mean *Rogers* protects the campaign's activity. The question is whether the use of a particular song is artistically relevant to the campaign rally. Unlike the use of "Ginger and Fred" as the title of a movie about a duo of dancing film stars, a candidate's use of a given song as walk-out or rope-line music is not necessarily relevant to the underlying message the campaign is communicating. It is that artistic relevance that led the court in *Rogers* to conclude "the slight risk that such use . . . might implicitly suggest endorsement or sponsorship to some people is outweighed by the danger of restricting artistic expression."²²³ The use of a popular song to pump up a crowd would typically seem "arbitrarily chosen [] to exploit the [entertainment] value" of the song rather than having "genuine relevance" to an artistic or political message.²²⁴ That said, we can imagine circumstances where the use of a song, because of its overt political message or a particular resonance with a campaign's themes, could satisfy the *Rogers* test.

Courts might instead engage in something like a parody analysis, querying whether the candidate's use targeted the artist, or merely drummed up attention.²²⁵ This analysis would largely mirror the copyright fair use analysis discussed above.²²⁶ In other cases, courts subsume the expression question in the likelihood of confusion analysis.²²⁷ In some cases, expressive use is insulated from liability for confusion because its expression leads courts to conclude the use is non-commercial,²²⁸ although the Supreme Court has recently held the antidilution statute does not apply to parodies where the defendant uses the mark as a designation of source.²²⁹ And under a somewhat disfavored alternative

223. *Rogers*, 875 F.2d at 1000.

224. *Id.* at 1001.

225. *Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394, 1405 (9th Cir. 1997).

226. *See supra* Part V.A.

227. *Louis Vuitton Malletier S.A. v. Haute Diggity Dog, LLC*, 507 F.3d 252, 259 (4th Cir. 2007).

228. *VIP Prods. LLC v. Jack Daniel's Prods., Inc.*, 953 F.3d 1170, 1176 (9th Cir. 2020), *vacated*, 143 S. Ct. 1578 (2023) (holding that a potentially diluting use that "parodies" and "convey[s] a humorous message" is noncommercial and excluded from liability "even if used to sell a product").

229. *Jack Daniel's Prods., Inc. v. VIP Prods. LLC*, 143 S. Ct. 1578, 1592 (2023) ("[T]he fair-use exclusion . . . does not apply when the use is 'as a designation of source for the person's own goods or services' . . . [and] the Ninth Circuit's approach is that it reverses that statutorily directed result . . ." (quoting 15 U.S.C. § 1125(c)(3)(A)(ii))).

avenues test, a candidate would generally lose if there was another song they could use instead of the artist's rendition.²³⁰

4. *The Uncertain Actionability of "False Support"*

Given that consumers are more likely to believe an artist supports a candidate even if they have not endorsed them, we should consider the possibility of claims based on "false support." For a variety of reasons, we are skeptical that these claims are viable, at least in the context of campaign use of popular music.

Our evidence of false perceptions of support, while generally stronger than our evidence of false endorsement, was far from overwhelming. In terms of campaign use, we saw the highest rate of confusion when Biden played Lonesome Ghosts' song. Under our two-criteria test, that use yielded an 8.6 percent confusion rate. When we asked respondents to explain their rationale, it fell to just 3.9 percent. These results, of course, assume that respondents' beliefs about artists' support are mistaken. With regard to our fictitious band, we can say with confidence that Lonesome Ghosts did not support any candidate in 2020. And while we decline to speculate about whether, or for whom, Morgan Wallen voted, the odds that Olivia Rodrigo voted for Joe Biden in 2020 are high.²³¹

Voting, of course, is only one proxy for support.²³² The term "support" is susceptible to a range of interpretations. Claiming that an artist supports Joe Biden might mean any number of the following: the artist agrees with Biden's policy positions, the artist donated money to the Biden campaign, the artist encouraged others to vote for or donate to Biden, the artist voted or intends to vote for Biden, or the artist hopes Biden succeeds even if they don't intend to vote for him. Distinguishing between these various forms of support presents a practical challenge for plaintiffs.

But more importantly, it is unclear how the various relationships between artists and candidates that the term "support" encompasses would map onto the theories of confusion trademark law recognizes. Although its standard for infringement is broad,²³³ the Lanham Act does not mandate we stamp out all forms of confusion, or even all forms of marketplace confusion.²³⁴ But

230. *Am. Dairy Queen Corp. v. New Line Prods., Inc.*, 35 F. Supp. 2d 727, 734 (D. Minn. 1998).

231. See Ashley Iasimone, *Olivia Rodrigo Dedicates Lily Allen's 'F— You' to the Supreme Court at Glastonbury*, BILLBOARD (June 25, 2022), <https://www.billboard.com/music/music-news/olivia-rodrigo-roe-vs-wade-supreme-court-glastonbury-1235106395>.

232. It is also a proxy subject to both type I and type II errors.

233. See 15 U.S.C. § 1114(1)(a) (prohibiting uses of a mark that are "likely to cause confusion, or to cause mistake, or to deceive"); see also *Syntex Lab'ys, Inc. v. Norwich Pharmacal Co.*, 437 F.2d 566, 568 (2d Cir. 1971) (noting the removal in 1962 of the qualifying phrase "purchasers as to the source of origin of such goods or services" from the statute).

234. See, e.g., Mark P. McKenna, *A Consumer Decision-Making Theory of Trademark Law*, 98 VA. L. REV. 67, 94 (2012) ("[T]rademark law cannot, and should not, respond to all forms of confusion or even to all confusion in the marketplace. Courts clearly understand this.").

trademark liability has undoubtedly expanded over the last several decades to embrace more than the core concern of confusion by purchasers with respect to the source of goods or services. Today, courts routinely recognize claims premised on confusion as to trademark owner's "sponsorship or affiliation" of another product or service,²³⁵ over the consistent condemnation of many scholars.²³⁶

We do not argue here that there is no room in trademark law for claims premised on sponsorship or affiliation confusion. Our claim is that any relationship we would deem "support" of a candidate but that falls short of an "endorsement" is too thin a reed upon which to hang a successful trademark claim. Sponsorship and affiliation theories have expanded considerably, arguably to the detriment of trademark law. But a claim premised on the notion that, by playing an artist's song at a campaign event, a candidate has falsely signaled that "Artist A hopes Candidate C wins the election" does not describe a dynamic within the reasonable bounds of trademark liability.²³⁷

235. See, e.g., *Bd. of Supervisors for La. State Univ. Agric. & Mech. Coll. v. Smack Apparel Co.*, 550 F.3d 465, 471 (5th Cir. 2008) (concluding that "the colors, content, and context of the offending t-shirts are likely to cause confusion as to their source, sponsorship, or affiliation"); *Pebble Beach Co. v. Tour 18 I Ltd.*, 155 F.3d 526, 544 (5th Cir. 1998) ("For a party to suggest to the public, through its use of another's mark or a similar mark, that it has received permission to use the mark on its goods or services suggests approval, and even endorsement, of the party's product or service and is a kind of confusion the Lanham Act prohibits."); *Hershey Co. v. Friends of Steve Hershey*, 33 F. Supp. 3d 588, 594 (D. Md. 2014) (noting that the politician's use of signage with his last name imitating Hershey Co.'s product packaging could deceive consumers as to sponsorship or affiliation). *But see* *Griffith v. Fenrick*, 486 F. Supp. 2d 848, 852 (W.D. Wis. 2007) (finding no evidence of the actor's claim that voters were confused about the sponsorship of a politician who adopted the actor's name); *Am. Fam. Life Ins. Co. v. Hagan*, 266 F. Supp. 2d 682, 691 (N.D. Ohio 2002) (finding little "competitive proximity" between the insurance seller who advertised with the AFLAC duck and the defendant's political campaign for governor which used a "TaftQuack" duck with the superimposed head of a political opponent).

236. See, e.g., James Gibson, *Risk Aversion and Rights Accretion in Intellectual Property Law*, 116 YALE L.J. 882, 907 (2007) ("The definitions of sponsorship and approval, however, are notoriously broad and ambiguous, making liability a significant possibility for any use of a mark from which consumers might infer acquiescence by the mark owner."); see also 15 U.S.C. § 1125(a)(1)(A) (referring to confusion as to "sponsorship, or approval" for unregistered marks); Lemley & McKenna, *supra* note 133, at 451 (arguing that courts should draw distinctions between different types of confusion); McKenna, *supra* note 234 (criticizing courts for recognizing "new forms of liability").

237. We think a false advertising claim under Lanham Act § 43(a)(1)(B) is even less likely to succeed. Lanham Act false advertising claims can only be brought by competitors or others within the statute's commercial "zone of interest." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 131–32 (2014); see also *Animal Legal Def. Fund v. HVFG LLC*, 939 F. Supp. 2d 992, 1000 (N.D. Cal. 2013) ("No court has held that Lanham Act competitors may be other than *business* competitors."); *Two Moms & a Toy, LLC v. Int'l Playthings, LLC*, 898 F. Supp. 2d 1213, 1219 (D. Colo. 2012) (dismissing the plaintiff's false advertising claim because the plaintiff was not a competitor of the defendant). And those claims must allege commercial advertising or promotion. A political rally is unlikely to be categorized as advertising or promotion, although a fundraising dinner might be so classified. 5 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 27:71 (5th ed. 2023) ("Legislative history indicates that the 'commercial' requirement was intended to exempt political speech from the false advertising prohibition of § 43(a).") (citing first 134 CONG. REC. 32053–54 (daily ed. Oct. 20, 1988) (statement of Sen. DeConcini); and then citing 134 CONG. REC. 31852 (daily ed. Oct. 19, 1988) (statement of Rep. Kastenmeier)).

Sponsorship and affiliation claims make the most sense when they are directed to uses of a mark that suggest the trademark owner exercises some quality control or supervisory authority over the defendant.²³⁸ When Pepsi, or now Apple, sponsors the Super Bowl Halftime Show, for example, consumers may plausibly infer that the sponsor has some editorial input in the production. But an inference that Olivia Rodrigo or Morgan Wallen play a similar role in shaping the Biden campaign because it plays their songs strains credulity. And unlike cases involving apparel that featured college sports teams' colors or golf courses that copied the layout of famous holes, the use at issue here—candidates playing songs at rallies—occurs in a political rather than commercial context.

In the end, our evidence indicates that when artists rebut political campaign uses by a politician that they neither endorse nor support, they may seek to mitigate measurable, but likely small, harms to their reputations. But a false endorsement claim predicated on unauthorized playback at campaign rallies is likely to run aground on one of several doctrinal shoals.

C. TARNISHMENT

As defined by federal law, dilution by tarnishment occurs when an association arises between the junior user's word, name, symbol, or device and a similar senior famous mark, and the association harms the reputation of the senior mark.²³⁹ Tarnishment "generally arises when the plaintiff's trademark is linked to products of shoddy quality, or is portrayed in an unwholesome or unsavory context likely to evoke unflattering thoughts about the owner's product."²⁴⁰ Liability follows, consistent with the theory that the selling power of the senior trademark may be harmed by the distasteful association,²⁴¹ if that new association changes consumers' process for recalling and evaluating the senior mark.²⁴²

Crucially, only famous marks qualify for protection against dilution.²⁴³ A famous mark is one that is "widely recognized by the general consuming public of the United States as a designation of source of the goods or services of the mark's owner."²⁴⁴ Courts take into account a number of factors in determining

238. Lemley & McKenna, *supra* note 133, at 428, 436.

239. See 15 U.S.C. §§ 1125(c)(2)(C), 1127.

240. Tiffany (NJ) Inc. v. eBay Inc., 600 F.3d 93, 111 (2d Cir. 2010) (quoting Deere & Co. v. MTD Prods., Inc., 41 F.3d 39, 43 (2d Cir. 1994)).

241. See 4 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 24:70 (5th ed. 2023).

242. Bedi & Reibstein, *supra* note 104, at 698. *But see* Beebe et al., *supra* note 104, at 624 (consumer association between senior and junior mark users "does not necessarily result in any material change to consumers' purchasing preferences").

243. 15 U.S.C. § 1125(c) (limiting dilution protection to "famous mark[s]").

244. *Id.*; see also Jake Linford & Kyra M. Nelson, *Trademark Fame and Corpus Linguistics*, 45 COLUM. J.L. & ARTS 171, 181–85 (2022) (describing the fame requirement for a dilution cause of action). *But see* Barton Beebe, *The Semiotic Analysis of Trademark Law*, 51 UCLA L. REV. 621, 698 (2004) (arguing that anti-tarnishment protection should not be limited to famous marks).

whether a mark is famous, including: “the duration, extent, and geographic reach of advertising and publicity of the mark,” “the amount, volume, and geographic extent of sales,” and “the extent of actual recognition of the mark.”²⁴⁵ To make out a claim for tarnishment, an artist would first need to establish that the mark—in this case, a particular song—is associated with the artist as a source of goods or services and also famous.²⁴⁶

This threshold showing would prove challenging for most artists. In our increasingly fractured media environment, the proportion of recording artists who are famous among the general U.S. population is likely lower today than at most points over the last several decades.²⁴⁷ While some legacy acts—the Beatles, the Rolling Stones, and U2—and a handful of contemporary artists—Adele, Beyonce, and Taylor Swift—enjoy universal recognition if not appeal, many of today’s top-selling artists remain unknown among the broader population.²⁴⁸ Moreover, a dilution claim against a campaign may turn on the fame of a particular song, not the artist who performs it.

Our experimental data showed that established, successful artists like Olivia Rodrigo and Morgan Wallen face little risk of tarnishment based on campaign use of their songs.²⁴⁹ New and relatively unknown artists, like our fictitious band Lonesome Ghosts, on the other hand face potentially significant harm in the form of tarnishment when their songs are used by unpopular candidates. But those are precisely the artists least likely to successfully invoke trademark dilution given their lack of fame. They are also the artists least likely to have a song selected for a political event.

Aside from this mismatch, the Lanham Act’s statutory defense for “any noncommercial use of a mark” could further limit recovery under a dilution theory.²⁵⁰ In considering a dilution claim brought by Jack Daniels against the makers of a whiskey bottle-shaped dog toy, the Ninth Circuit held that because the product conveyed a humorous message, it did “more than propose a commercial transaction” and was thus noncommercial.²⁵¹ A candidate’s use of a song at a rally would seem equally “noncommercial” and therefore beyond the scope of dilution liability.

245. 15 U.S.C. § 1125(c).

246. *Id.*

247. Simon Reynolds, ‘Streaming Has Killed the Mainstream’: *The Decade That Broke Popular Culture*, *GUARDIAN* (Dec. 28, 2019, 2:00 AM), <https://www.theguardian.com/culture/2019/dec/28/overload-ambush-and-isolation-the-decade-that-warped-popular-culture-simon-reynolds>.

248. *Id.*

249. In Rodrigo’s case, we saw some evidence of reduced willingness to buy concert tickets. Given the exceedingly high demand for tickets to her shows, we suspect any tarnishment effect would have little practical impact on her concert revenue. *See Bote, supra* note 162.

250. 15 U.S.C. § 1125(e)(3)(C).

251. *VIP Prods. LLC v. Jack Daniel’s Props., Inc.*, 953 F.3d 1170, 1176 (9th Cir. 2020), *vacated*, 599 U.S. 140, 162 (2023) (holding that the noncommercial use exception to tarnishment “cannot include . . . every parody or humorous commentary.”).

D. PUBLICITY RIGHTS AND MORAL RIGHTS

Beyond the claims we have already discussed, there are at least two legal theories that artists may invoke in response to unauthorized campaign use of their songs—the right of publicity and moral rights.²⁵² For the reasons outlined below, our industry and experimental data are less relevant to evaluating these claims, although both raise important questions of law and policy.

1. *The Right of Publicity*

Rights of publicity, an assemblage of various state statutory and common law rules that broadly provide for exclusive rights over the use of one's persona, offer another attractive avenue for artists to target campaign use.²⁵³ Individuals generally have a right of publicity or a right against misappropriation of their likeness without permission by another for the other's benefit that harms the individual.²⁵⁴ Interference with the right of publicity is generally seen to impair the individual's control over economic prospects, but there is an associated harm to autonomy that may properly concern "non-economic, or moral, factors."²⁵⁵ False endorsement and the right of publicity claims play overlapping roles in correcting market and reputational harms. Bunker and Erickson group them together under the umbrella of "persona torts."²⁵⁶ Because state right of publicity laws countenance a range of overlapping economic and personal interests, there is no single set of elements or theory of harm we can apply to determine the viability of claims aimed at campaign use of songs.

In its broadest formulation, the right of publicity "seem[s] to endow persons with an absolute right to control the use of their names or images by others . . . regardless of whether they have suffered any specific cognizable injury."²⁵⁷ Plaintiffs in jurisdictions that follow this approach are not required to prove harm, whether it takes the form of economic losses, reputational damage,

252. In his lawsuit against John McCain, Jackson Browne pursued a right of publicity claim in addition to his false endorsement claims. *Browne v. McCain*, 611 F. Supp. 2d 1073, 1077, 1081 (C.D. Cal. 2009).

253. See Long, *supra* note 214, at 173.

254. See, e.g., *Toffoloni v. LFP Publ'g Grp., LLC*, 572 F.3d 1201, 1205 (11th Cir. 2009) (describing "[an individual's] right to the exclusive [commercial] use of his or her name and likeness").

255. Alice Haemmerli, *Whose Who? The Case for A Kantian Right of Publicity*, 49 DUKE L.J. 383, 429 (1999); see also *Brinkley v. Casablancas*, 438 N.Y.S.2d 1004, 1012 (App. Div. 1981) (holding that sections 50 and 51 of the New York Civil Rights Law subsumed the "so-called right of publicity," whether the harm was "injury . . . to one's feelings or to [a] . . . 'property' interest"); Mark P. McKenna, *The Right of Publicity and Autonomous Self-Definition*, 67 U. PITT. L. REV. 225, 275 n.213 (2005) (concurring with Haemmerli that "attempts to give theoretical substance to a right [of publicity] based solely on economic harm have been unsuccessful").

256. Matthew D. Bunker & Emily Erickson, *Plaintiff Identification in the "Persona Torts": What Defamation Law Can Offer the Right of Publicity and Related Claims*, 23 COMM'N. L. & POL'Y 301, 302 (2018). Different jurisdictions use the terms right of publicity and misappropriation for closely related if not identical causes of action. We will treat those terms as synonymous for the purpose of our analysis. See RESTATEMENT (SECOND) OF TORTS §§ 652A, 652C (AM. L. INST. 1977).

257. Post & Rothman, *supra* note 200, at 119.

false perceptions, or negative associations with a product or service.²⁵⁸ Without agreement on the underlying interests at stake, it is no wonder that right of publicity laws vary considerably between jurisdictions.²⁵⁹

Post and Rothman identify four distinct threads in the right of publicity caselaw, explaining the interests at stake and the harms at issue in each.²⁶⁰ In many instances, plaintiffs seek to vindicate fundamentally economic interests.²⁶¹ Cases rooted in this right of commercial value take one of three forms: Plaintiffs may seek to recover fair market value of their name or likeness under an unjust enrichment theory; they may seek to redress consumer confusion regarding a false endorsement; or they may seek to prevent some dilution or diminishment of the commercial value of their persona.²⁶² Although couched in terms of the right of publicity, at their core these claims are largely directed to economic interests like those at stake in the trademark context.²⁶³

Another line of cases, exemplified by Hugo Zacchini's lawsuit against a local television station for broadcasting his entire human cannonball routine,²⁶⁴ focuses less on the identity or persona of the plaintiff, and instead on a particular act or performance. These act and performance publicity cases raise issues similar to performances of sound recordings at campaign events. As Post and Rothman argue, plaintiffs in these cases are not required to establish any economic value of their performance.²⁶⁵ Nor must they show that the defendant engaged in a commercial use.²⁶⁶ Thus, appropriating a performance for "fundraising for a nonprofit organization or during a political-campaign rally" could still violate the performance right.²⁶⁷ While these act and performance publicity cases raise issues similar to performances of sound recordings at campaign events, they differ in one crucial respect. As discussed below, a right of publicity claim based on the performance of an existing sound recording is likely to be preempted by federal copyright law.²⁶⁸

Two other varieties of right of publicity claims bear on campaign uses. Right of publicity cases that vindicate the right of control, as Post and Rothman term it, recognize a quasi-property interest in one's identity.²⁶⁹ Under this theory, a legal right to preclude others from using one's identity is necessary to

258. *Id.*

259. *Id.* at 90 ("In some states, the right is confined to commercial contexts, and in others it is not. In some states, plaintiffs asserting the right must establish that they have commercially valuable identities, and in others they do not. In some states, the right is oriented toward economic injury, and in others it encompasses injuries that are both economic and personal.") (citations omitted).

260. *Id.* at 93–96.

261. *Id.* at 96, 114–15.

262. *Id.* at 107, 110–11, 114–16.

263. *Id.* at 110–16.

264. *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 562, 569 (1977).

265. Post & Rothman, *supra* note 200, at 102.

266. *Id.*

267. *Id.*

268. *See infra* notes 272–275 and accompanying text.

269. Post & Rothman, *supra* note 200, at 116.

guarantee individual autonomy.²⁷⁰ Alternatively, right of publicity claims may also focus on dignitary interests.²⁷¹ For example, when Tom Waits sued over the use of a sound-alike song and imitative vocal performance in a Doritos commercial, he emphasized his “shock, anger, and embarrassment.”²⁷² According to Waits, who was an outspoken critic of commercial endorsements, he felt “humiliated” at the apparent hypocrisy of the ad.²⁷³ Crucially, these interests in exerting control over one’s persona and maintaining one’s dignity do not turn on market harm, consumer confusion, or even the tarnishing effect of negative associations. As a consequence, our industry and experimental data tell us little about practical viability or normative desirability of these theories.

But it is important to note that a claim that a politician violates an artist’s right of publicity by performing the sound recording and underlying musical composition would likely be preempted by the Copyright Act.²⁷⁴ Section 301 of the Copyright Act provides that all rights equivalent to “the exclusive rights within the general scope of copyright as specified in section 106 . . . are governed exclusively by this title.”²⁷⁵ To survive a preemption defense, courts generally consider whether the plaintiff’s claim includes an “extra element” beyond rights covered by the Copyright Act.²⁷⁶ For example, in *Fleet v. CBS, Inc.*, “a right is equivalent to rights within the exclusive province of copyright when it is infringed by the mere act of reproducing, performing, distributing, or displaying the work at issue.”²⁷⁷ To the extent a right of publicity claim turns on “consumer deception in a commercial context,” that extra element may be present.²⁷⁸ But otherwise, a right of publicity claim premised on playing a copyrighted sound recording faces likely preemption.

270. *Id.*

271. *Id.* at 117–18.

272. *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1103 (9th Cir. 1992).

273. *Id.*

274. *Laws v. Sony Music Ent., Inc.*, 448 F.3d 1134, 1143 (9th Cir. 2006) (citing *Del Madera Props. V. Rhodes & Gardner*, 820 F.2d 973, 977 (9th Cir. 1987)); *see also* *Balt. Orioles, Inc. v. Major League Baseball Players Ass’n*, 805 F.2d 663, 677–78 n.26 (7th Cir. 1986) (noting that a recording creates a “tangible form” which may be preempted); *Romantics v. Activision Publ’g, Inc.*, 574 F. Supp. 2d 758, 767 (E.D. Mich. 2008) (“[T]he right of the . . . ‘sound’ as embodied in the sound recording, is equivalent to the right in a sound recording protected by the Copyright Act As a result, Plaintiff’s claim is preempted.”).

275. 17 U.S.C. § 301(a).

276. *See, e.g.*, *Nat’l Basketball Ass’n v. Motorola, Inc.*, 105 F.3d 841, 850 (2d Cir. 2005).

277. *Fleet v. CBS, Inc.*, 58 Cal. Rptr. 2d 645, 653 (Ct. App. 1996); *see also* *Dryer v. Nat’l Football League*, 814 F.3d 938, 938, 943 (8th Cir. 2016) (finding that films created by NFL players were merely expressive, not commercial); Rebecca Tushnet, *Raising Walls Against Overlapping Rights: Preemption and the Right of Publicity*, 92 NOTRE DAME L. REV. 1539, 1545 (2017) (“[T]here is so much overlap between incentivizing the creation of new works and incentivizing celebrity-generating productive activities that they should be treated the same for preemption purposes.”).

278. Tushnet, *supra* note 277; *see also* *Browne v. McCain*, 612 F. Supp. 2d 1125, 1127, 1131 (C.D. Cal. 2009) (denying a motion to dismiss on both right of publicity and false endorsement claims based on the use of a composition and sound recording in a campaign ad); *Estrada v. Toyota Motor Sales U.S.A., Inc.*, 2009 WL 10671571, at *5–7 (C.D. Cal. 2009) (holding that a false endorsement claim was not preempted, although the

2. Moral Rights Theories

As the last two variations on the right of publicity suggest, personal and dignitary harms can be powerful motivators. Creators may be particularly susceptible to perceived interference with their ability to control their work or shape how they are perceived by the public at large. In the context of campaign use, artists often express concerns over dignitary harms. The Artists Rights Alliance, for example, argues that “being dragged unwillingly into politics...can compromise an artist’s personal values.”²⁷⁹ Watching as a song written to express a particular perspective is used on the most public of stages to communicate a message at odds with the artists’ original intent is no doubt a jarring experience.²⁸⁰

Under regimes that recognize an artist’s moral right to integrity, an artist may be empowered to distance themselves from a political figure they find distasteful.²⁸¹ But in contrast to the European tradition, U.S. courts are generally hostile to claims rooted in moral rights.²⁸² To the extent U.S. copyright laws

false designation of origin claim was preempted under *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23 (2003)); *Butler v. Target Corp.*, 323 F. Supp. 2d 1052, 1057–58 (C.D. Cal. 2004) (stating that false endorsement is an extra element).

279. See *supra* note 127 and accompanying text.

280. See, e.g., *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1103 (9th Cir. 1992).

281. See e.g., Berne Convention for the Protection of Literary and Artistic Works art. 6bis(1), Sept. 9, 1886, as revised July 24, 1971, and as amended Sept. 28, 1979, S. TREATY DOC. NO. 99-27, 1161 U.N.T.S. 3 (1986) (recognizing a moral rights claim against any “derogatory act in relation to” the copyright owner’s work “which would be prejudicial to [the author’s] honor or reputation”); see also Cyril P. Rigamonti, *Deconstructing Moral Rights*, 47 HARV. INT’L L.J. 353, 391–92 (2006) (discussing different approaches to moral rights in different jurisdictions); Jeremy M. Roe, *The Current State of Antidilution Law: The Trademark Dilution Revision Act and the Identical Mark Presumption*, 57 DEPAUL L. REV. 571, 604 (2008) (arguing dilution by tarnishment is “analogous to copyright law’s moral rights doctrine”); *Gilliam v. Am. Broad. Cos., Inc.*, 538 F.2d 14, 24 (2d Cir. 1976) (granting an injunction against ABC’s broadcast of bowdlerized versions of Monty Python episodes under a Lanham Act cause of action for misrepresentation of the origin of the authors’ works); *Curwood v. Affiliated Distribs., Inc.*, 283 F. 219, 222–23 (S.D.N.Y. 1922) (enjoining the use of the author’s name and the title of the author’s story in connection with a motion picture that fundamentally changed the story).

282. See Stefan Michel, *You Can’t Always Get What You Want? A Comparative Analysis of the Legal Means to Oppose the Use of Campaign Music*, 18 J. MARSHALL REV. INTELL. PROP. L. 169, 171–72 (2018) (comparing U.S. and British common law regimes to the German regime, which includes a moral right for musicians even if a politician has purchased a public performance license). *Compare* *Shostakovich v. Twentieth Century-Fox Film Corp.*, 80 N.Y.S.2d 575, 578–79 (Sup. Ct. 1948) (rejecting the moral rights claim of four Russian born-composers whose works were used in an anti-Soviet film), *with* *Soc. Le Chant de Monde v. Soc. Fox Europe et Soc. Fox Americane Twentieth Century*, Cour d’appel [CA] [regional court of appeal] Paris, Jan. 13, 1953, 1 Gaz. Pal. 191 (granting an injunction enjoining Twentieth Century Fox from further use of the plaintiffs-composers’ music in a film under French moral rights law because the context of the music created an implication that the composers were disloyal to their government). See also William Strauss, *The Moral Right of the Author*, 4 AM. J. COMPAR. L. 506, 534–35 n.56 (1955) (describing the outcome in *Soc. Le Chant de Monde*). The most notable exception under U.S. law is the Visual Artists Rights Act (VARA), which recognizes limited moral rights for a subset of works. See 17 U.S.C. § 106A. But VARA is inapplicable to musical works or sound recordings.

address these sorts of harms, they do so only indirectly.²⁸³ Indeed, many commentators have called for greater recognition of these interests.²⁸⁴

Despite courts' resistance to moral rights claims, plaintiffs raise dignitary harms in copyright contexts. For example, in *Campbell v. Acuff-Rose Music, Inc.*, one of the publisher's grounds for denying a license for a rap version of "Oh, Pretty Woman" was the possibility that Roy Orbison's image would be tarnished by association with a rap act known for vulgar lyrics.²⁸⁵ But instead of vindicating those interests, the Supreme Court held that 2 Live Crew's parodic interpretation may be a fair use.²⁸⁶ Likewise, the Ninth Circuit held in *Garcia v. Google* that an actress's legitimate fears for her personal safety following the circulation of the infamous *Innocence of the Muslims* video on YouTube could not be vindicated through copyright law.²⁸⁷ Her concerns about safety and privacy stemmed from actual harm, but those harms were "untethered from—and incompatible with—copyright and copyright's function as the engine of expression."²⁸⁸

Some scholars argue copyright is the wrong vehicle to vindicate dignitary concerns.²⁸⁹ Others are amenable to dignitary copyright claims when properly

283. Patrick Goold refers to a subset of copyright claims as an attempt to remedy reputational injury to the artist, most similar to defamation or false light invasion of privacy. Patrick R. Goold, *Unbundling the "Tort" of Copyright Infringement*, 102 VA. L. REV. 1833, 1843 (2016). Benjamin Zipursky suggests these claims might address harms like the civil law wrongs of invasion of moral right and abuse of right. See Benjamin C. Zipursky, *Tort Theory in Copyright Law: Thinking about Patrick Goold's Unbundling the "Tort" of Copyright Infringement*, JOTWELL (Mar. 15, 2017) (reviewing Patrick R. Goold, *Unbundling the "Tort" of Copyright Infringement*, 102 VA. L. REV. 1833 (2016)), <http://torts.jotwell.com/tort-theory-in-copyright-law-thinking-about-patrick-goolds-unbundling-the-tort-of-copyright-infringement>.

284. Tuneen Chisholm argues in favor of a limited moral right for music vocalists grounded in personhood theory. Tuneen E. Chisholm, *In Lieu of Moral Rights for IP-Wronged Music Vocalists: Personhood Theory, Moral Rights, and the WPPT Revisited*, 92 ST. JOHN'S L. REV. 453, 458–59 (2018). Rajan Desai argues for a moral rights scheme in the U.S. to protect musicians against decontextualization. Rajan Desai, *Music Licensing, Performance Rights Societies, and Moral Rights for Music: A Need in the Current U.S. Music Licensing Scheme and a Way to Provide Moral Rights*, 10 U. BALT. INTELL. PROP. L.J. 1, 3 (2001). But see Sarah C. Anderson, Note, *Decontextualization of Musical Works: Should the Doctrine of Moral Rights Be Extended?*, 16 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 869, 871 (2006) (arguing against the decontextualization right).

285. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 572–73, 583, 592 (1994); see also *MCA, Inc. v. Wilson*, 677 F.2d 180, 181–82 (2d Cir. 1981) (stating that the record label objected to a sexually explicit derivative of copyrighted song); *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751, 753 (9th Cir. 1978) (noting that plaintiff objected to use of Disney characters in unwholesome context). For further discussion of such "copyright dilution" claims, see Jennifer E. Rothman, *Sex Exceptionalism in Intellectual Property*, 23 STAN. L. & POL'Y REV. 119, 145–51 (2012).

286. *Campbell*, 510 U.S. at 594.

287. *Garcia v. Google, Inc.*, 786 F.3d 733, 734 (9th Cir. 2015).

288. *Id.* at 745; see also Jeanne C. Fromer, *Should the Law Care Why Intellectual Property Rights Have Been Asserted?*, 53 HOUS. L. REV. 549, 557–64 (2015) (cataloguing copyright cases that seek to preserve privacy or reputation).

289. Pamela Samuelson & Tara Wheatland, *Statutory Damages in Copyright Law: A Remedy in Need of Reform*, 51 WM. & MARY L. REV. 439, 506 (2009) (arguing courts should not award statutory damages "to compensate the plaintiff for injuries that are not cognizable by U.S. copyright law," including reputational harm); Rebecca Tushnet, *Fair Use's Unfinished Business*, 15 CHI.-KENT J. INTELL. PROP. 399, 405 (2016) ("[A]ny interests of the subject of the work as the person about whom the work communicates are not copyright interests,

limited.²⁹⁰ And some decry copyright law's fixation on market harm, instead urging that courts explicitly engage with non-economic motivations for asserting copyright infringement.²⁹¹ We will not attempt to resolve that debate here. But we doubt that unauthorized use of popular music by political candidates presents a set of facts that will persuade either committed critics or supporters of moral rights to reconsider their positions.

CONCLUSION

This Article attempts to identify and measure three distinct but non-exclusive and non-exhaustive harms that unauthorized campaign uses of popular music might cause. We find good evidence of depressed demand for songs in the wake of campaign use controversies but cannot confidently explain its ultimate cause. We also uncover strong support for the notion that political endorsements matter to consumers, but little reason to believe campaign use drives perceptions of support or endorsement. And we see evidence that association with an unpopular candidate can tarnish the reputations of relatively unknown artists. While we cannot offer a clear, simple narrative to explain these findings, we believe they offer useful insights into consumers beliefs and behaviors that can inform the debate over this recurring controversy at the intersection of copyrights, trademarks and personality rights, and politics.

Based on their reactions to campaign use of their music, artists feel the need to protect what they see as legitimate interests and prevent potential harms that may be keenly felt, even if they are difficult to prove. But current legal regimes are not optimized to allow artists to vindicate those interests. Although artists have succeeded in false endorsement cases triggered by unauthorized song uses or soundalikes in advertising, we believe they ultimately will be unlikely to prove false endorsement on the basis of songs played at campaign rallies or other events. At the same time, copyright law discounts reputational harms and preempts claims grounded in rights of publicity. Moral rights claims are similarly difficult to bring under U.S. law. We leave it to policymakers to decide whether our evidence is strong enough to justify opening some new avenue for artists to control whether and how politicians use their songs.

though they may well be important personhood interests. Their protection must lie in the law of defamation and privacy, rather than in copyright.”); M. Margaret McKeown, *Keynote Address: Censorship in the Guise of Authorship: Harmonizing Copyright and the First Amendment*, 15 CHI.-KENT J. INTELL. PROP. 1, 16 (2016) (“[C]opyright cannot be everything to everybody. . . . No matter how noble and important the values of privacy and protection of reputation, copyright is not the direct vehicle for their vindication.”).

290. Edward Lee, *Suspect Assertions of Copyright*, 15 CHI.-KENT J. INTELL. PROP. 379, 379–82 (2016) (positing that copyright may legitimately protect reputation and privacy when “the *author* of the work is asserting copyright”); Thomas F. Cotter, *Damages for Noneconomic Harm in Intellectual Property Law*, 72 HASTINGS L.J. 1055, 1055 (2021) (arguing that courts should recognize reputational harm as a cognizable injury in copyright or trademark cases, but that damages for emotional harm should be limited to right of publicity and moral rights cases).

291. Andrew Gilden, *Copyright's Market Gibberish*, 94 WASH. L. REV. 1019, 1019 (2019).

APPENDIX A

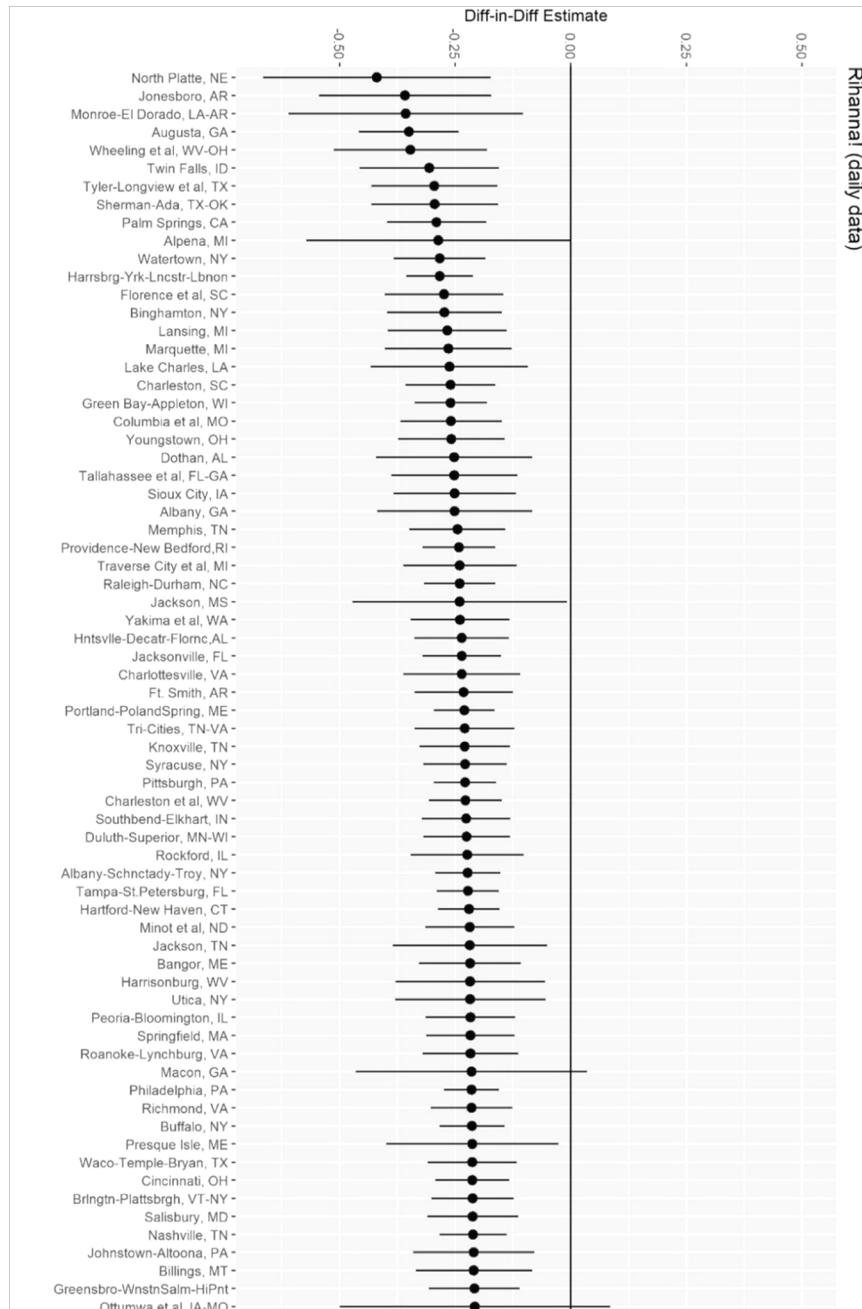


Figure A1: Rihanna DiD by DMA Part 1

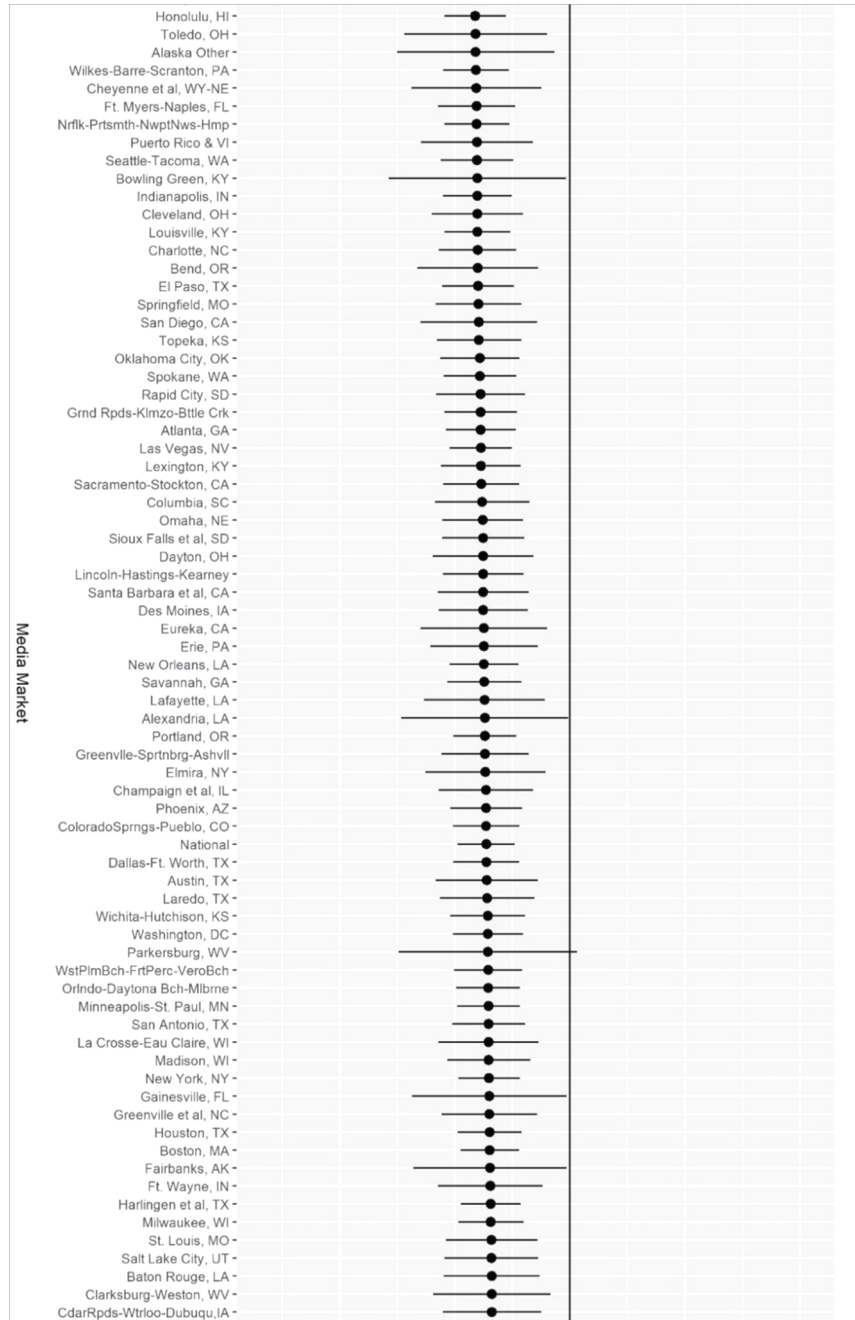


Figure A2: Rihanna DiD by DMA Part 2

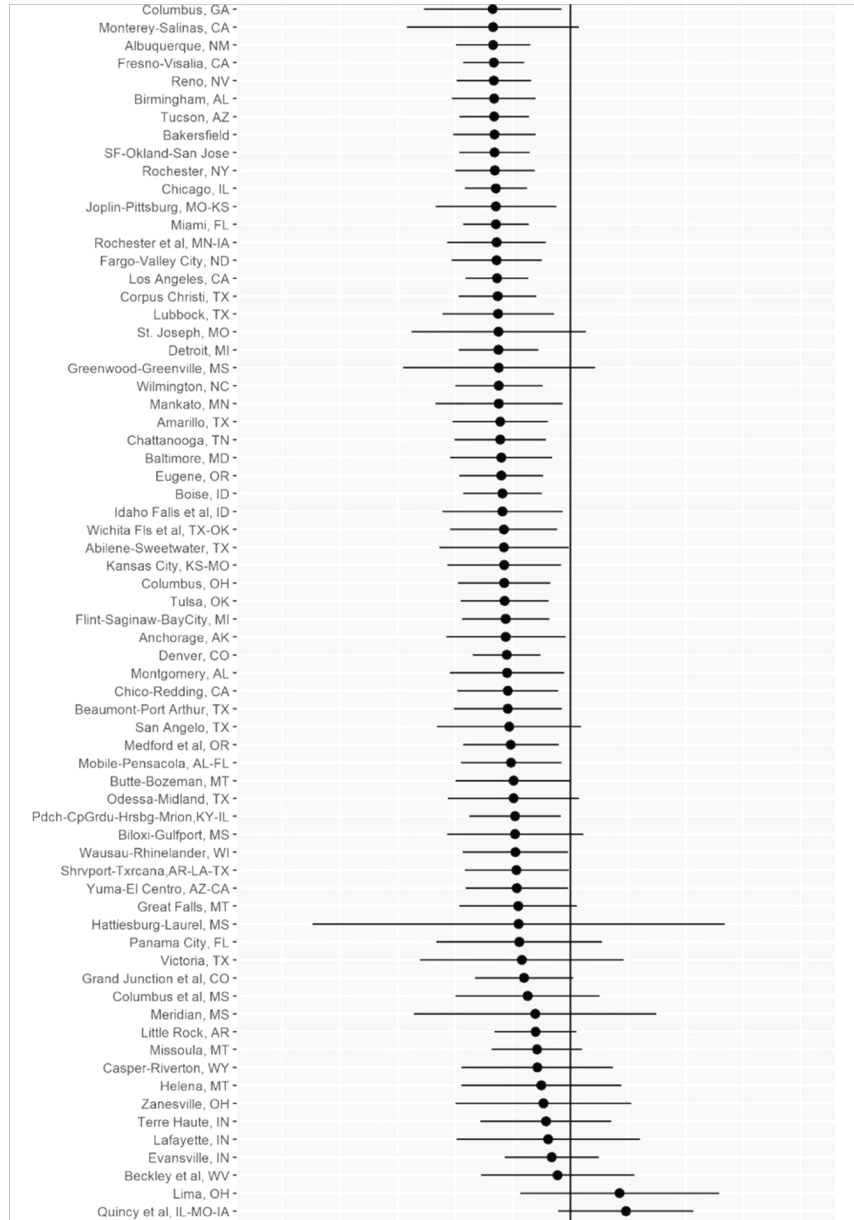


Figure A3: Rihanna DiD by DMA Part 3

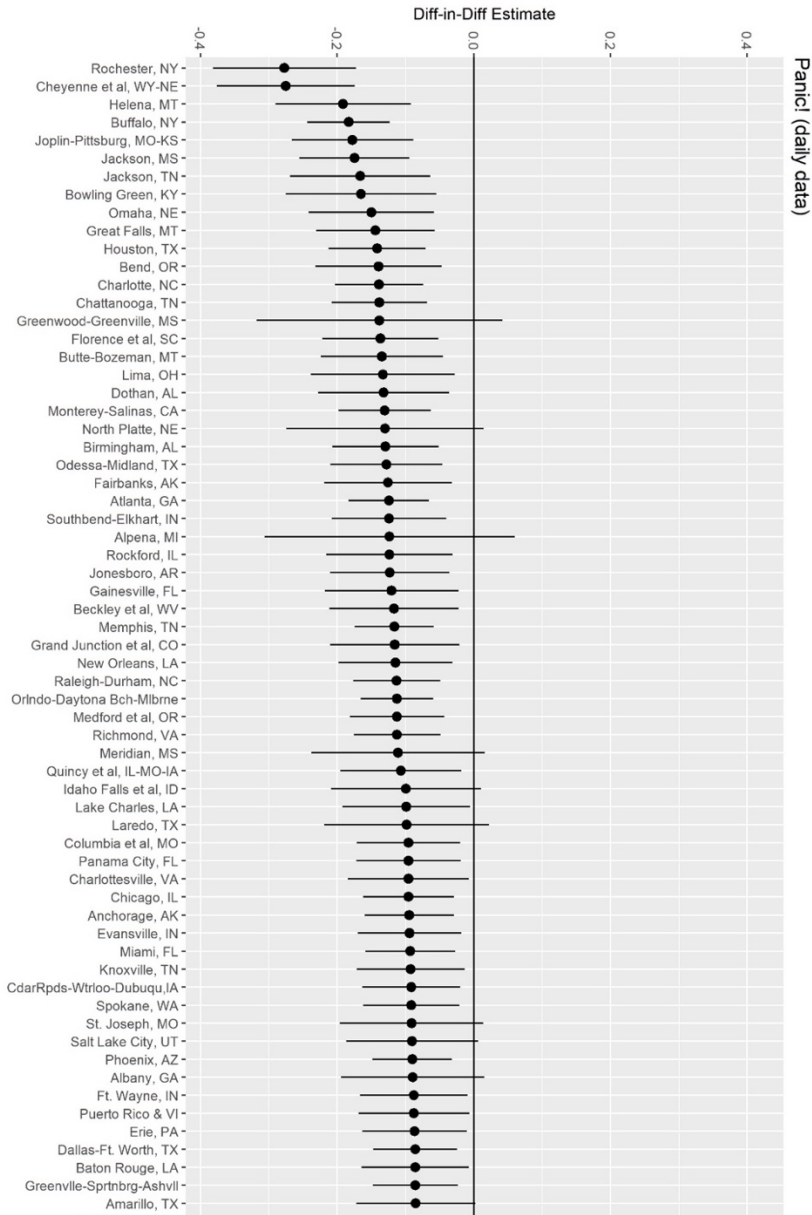


Figure A4: Panic! DiD by DMA Part 1

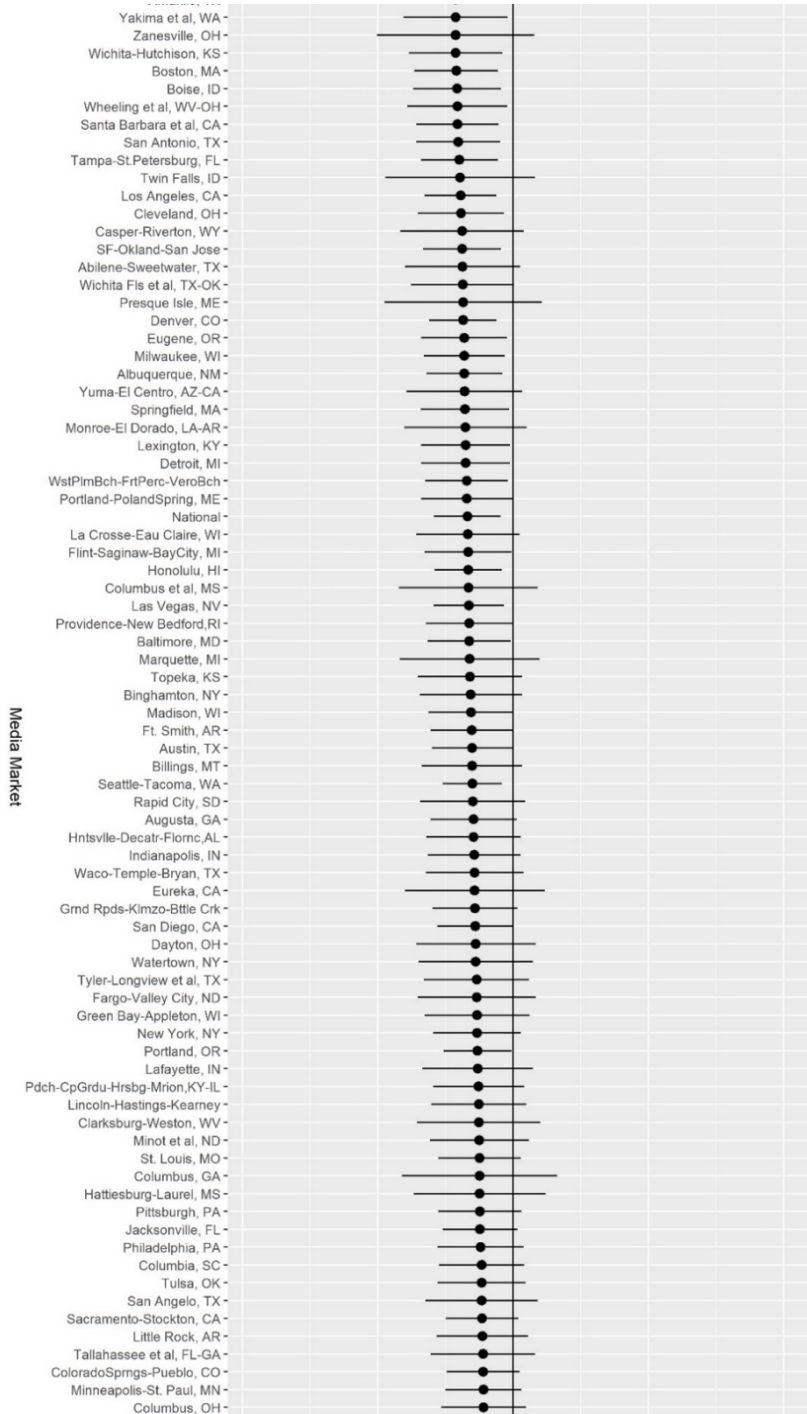


Figure A5: Panic! DiD by DMA Part 2

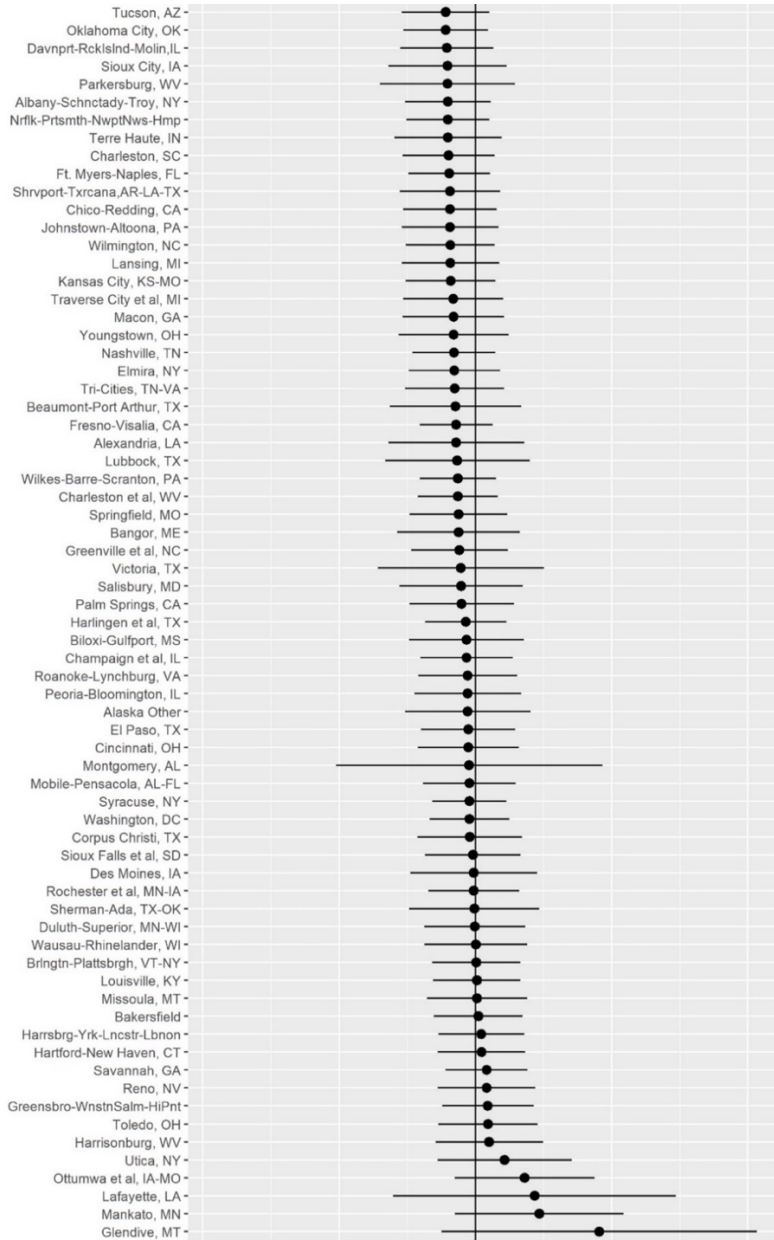


Figure A6: Panic! DiD by DMA Part 3

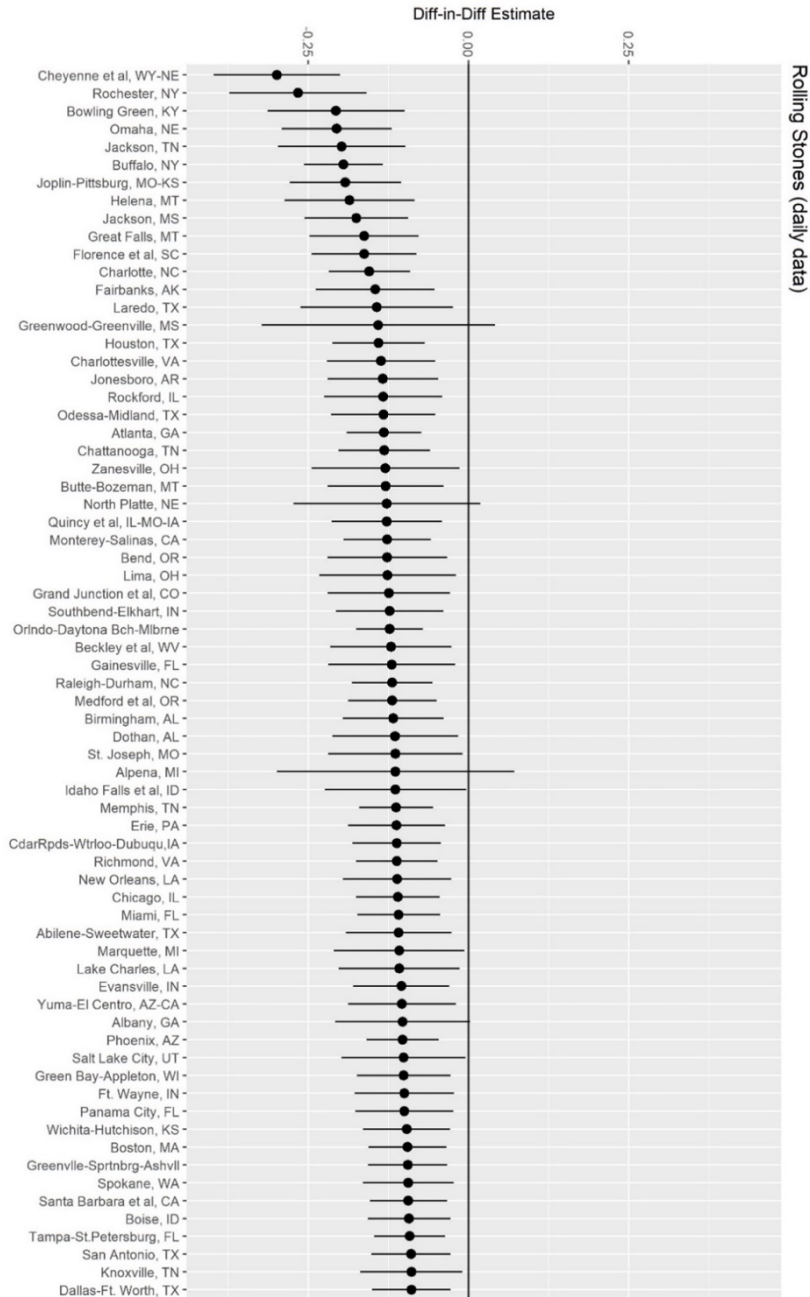


Figure A7: Stones DiD by DMA Part 1

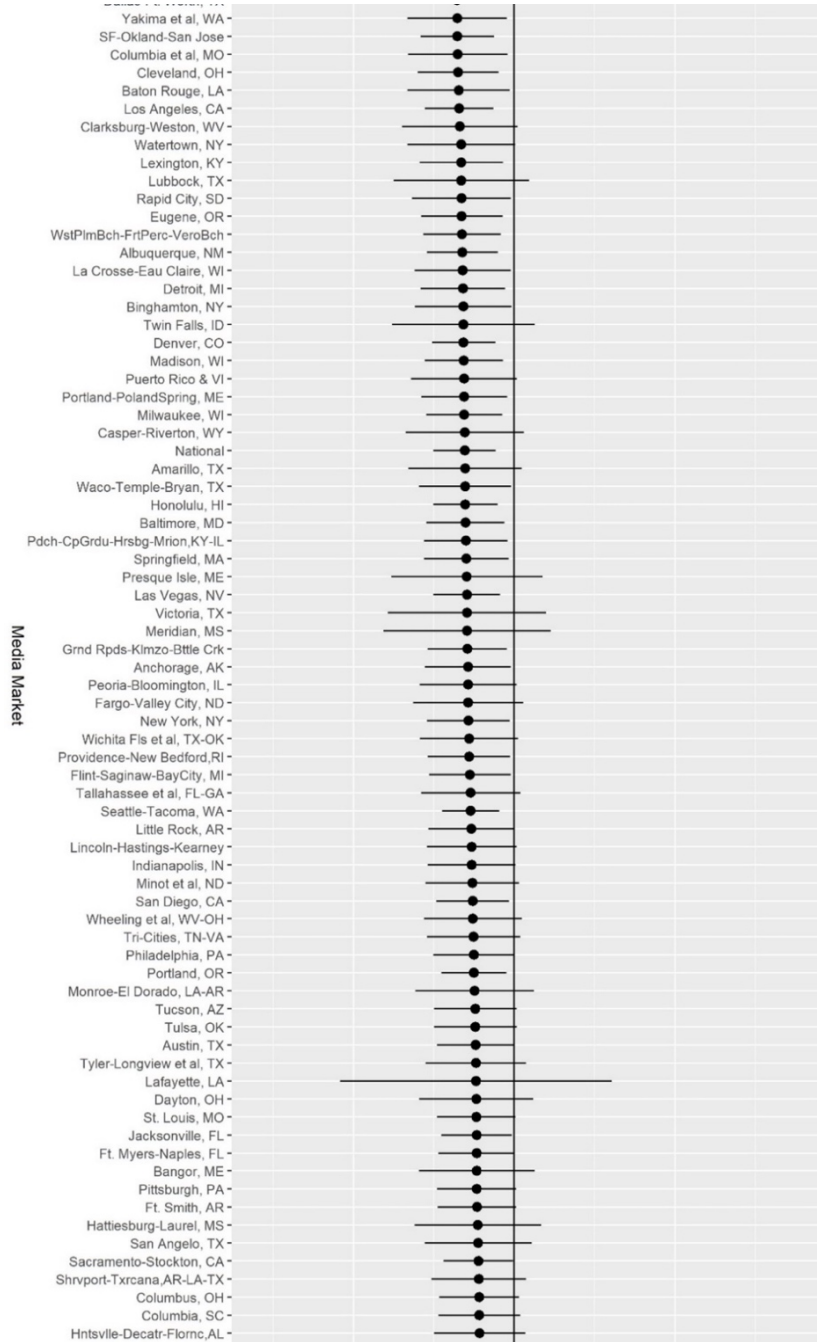


Figure A8: Stones DiD by DMA Part 2

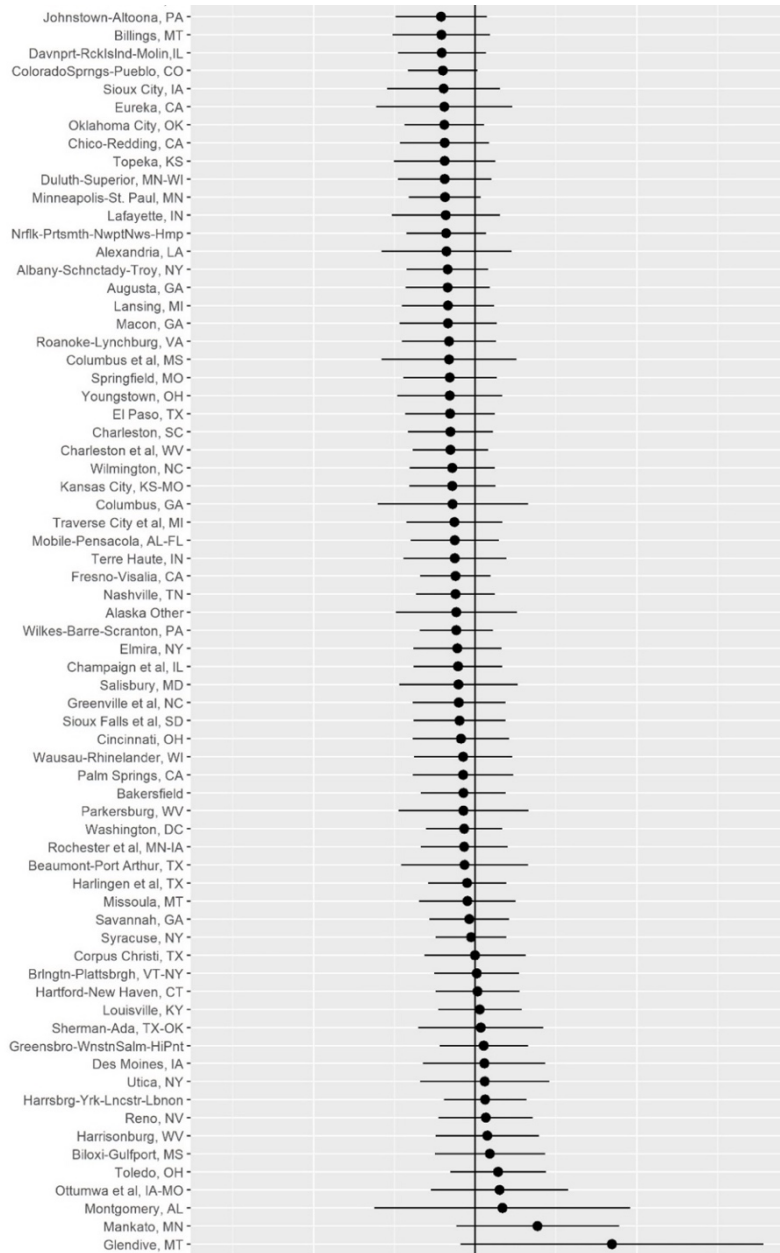


Figure A9: Stones DiD by DMA Part 3

The following figures, A10 and A11, show the two other prompts displayed to our control groups.

Students Show Off Fashion Designs



Phil Keren
Fairview Observer

View Comments



Last Friday night, a crowd of hundreds gathered at the Twin Palms Mall for the finals of the tenth annual Fairview County Fashion Show. As in years past, local high school students designed, fabricated, and modeled their own creations as part of the county's growing Fashion Design & Merchandising program.

The final event kicked off when senior Hadley Channing, clad in a striking pencil dress of her own design, walked the runway as Morgan Wallen's song "More Than My Hometown" echoed through the food court. That song has become the unofficial theme of this year's Fashion Show, featuring at each stage of the competition. In all, nearly two dozen students participated in this year's event.

*Figure A10: Fashion show prompt*²⁹²

292. Image source: Gary Higgins, Photograph of Fashion 1 Students . . . , THE PATRIOT LEDGER (May 12, 2017), <https://www.pinterest.com/pin/112730796905448388>.

Senior Dance Troupe Set to Perform



Eric Maro
Fairview Observer

View Comments



This Saturday, the Fairview Dazzlers will take the stage at the Eastside Community Center for the first of six weekly dance performances. According to founder Louise Caruso, “The Dazzlers formed more than a decade ago to offer local women aged 60 and up an opportunity to sharpen their dance skills and build lasting friendships.”

After weeks of daily rehearsals, the Dazzlers are ready to debut their new routine. The hourlong show is free to the public and features dance standards from decades past, as well as contemporary numbers like Olivia Rodrigo's song “Good 4 U,” which has become a staple of the group’s recent performances.

Figure A11: Dance group prompt²⁹³

293. Image source: DALLAS TAP DAZZLERS, <http://www.dallastapdazzlers.org> (last visited Feb. 15, 2024).