

PUBLICATION

Free Speech Protects Disparaging Trademarks: Band's Trademark Case May Be Good News for Football's Redskins

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The U.S. Supreme Court held today that the "disparagement clause" of the Lanham Act is unconstitutional, a decision that likely settles the question of whether the Redskins football team's trademarks are registrable amidst criticisms that they are offensive to Native Americans.

The Lanham Act, which is the primary statute on federal trademark law, prohibits registration of a trademark that "[c]onsists of or comprises ... matter which may disparage ... persons living or dead, institutions, beliefs, or national symbols, or bring them into contempt..." As such, a mark that satisfies all of the criteria for federal registration may still be refused, or subsequently cancelled, if it is deemed to be disparaging.

The trademark before the Court today in *Matal v. Tam* is the name of an Asian-American dance-rock band, "The Slants." The U.S. Patent and Trademark Office refused to register the mark, contending that "Slants" is a derogatory term for persons of Asian descent and, thus, was not registrable under the disparagement clause of the Lanham Act.

Simon Tam, the Asian-American leader of The Slants, chose the band name to "reclaim" and "take ownership" of stereotypes about people of Asian ethnicity. The band "draws inspiration for its lyrics from childhood slurs and mocking nursery rhymes," producing albums such as "The Yellow Album" and "Slanted Eyes, Slanted Hearts."

Tam appealed the USPTO's refusal to register the mark to the Trademark Trial and Appeal Board, which affirmed the refusal, and then again to the Federal Circuit, which held in Tam's favor by holding that the disparagement clause is facially unconstitutional under the First Amendment's Free Speech clause. The Supreme Court affirmed the Federal Circuit's ruling, finding that the disparagement clause "offends a bedrock First Amendment principle: Speech may not be banned on the ground that it expresses ideas that offend."

The government argued primarily that trademarks are not private speech, but rather a form of "government" speech, which the Court roundly rejected as "far-fetched." In light of the more than two million active trademark registrations, the Court observed that "if the federal registration of a trademark makes the mark government speech, the Federal Government is babbling prodigiously and incoherently. It is saying many unseemly things ... It is expressing contradictory views," (such as in the registrations, "Abolish Abortion" and "I Stand with Planned Parenthood"), "[i]t is unashamedly endorsing a vast array of commercial products and services," and "it is providing Delphic advice to the consuming public."

In ruling for the band's ability to register its trademark, the Supreme Court set the precedent for a much higher-profile case involving the Washington Redskins football team. That case, which originated in six Petitions to Cancel trademark registrations owned by Pro-Football, Inc. (the entity that owns the Washington Redskins) on the ground that the "REDSKINS" trademarks are disparaging to Native Americans, had been stayed pending the *Tam* ruling. To view Baker Donelson's original article on the case, please click [here](#).

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