

# PUBLICATION

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## Rock Band Assists Washington Redskins to an Offseason Victory

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**Yesterday, the Supreme Court of the United States handed down a landmark trademark decision that will pave the way for those with so-called "offensive" or disparaging trademarks to secure federal trademark registration for those marks. To date, the poster child for "disparaging" trademarks has been the Washington Redskins football team, whose name and logo have been the subject of increasingly vocal challenges by Native Americans and others as an offensive stereotype against Native Americans. (Ironically, even the members of the band The Slants, whose lawsuit eventually paved the way for the Redskins to maintain trademark registrations for the team name, were allegedly against the team's use of the arguably offensive name.)**

The case decided yesterday by the Supreme Court originated in 2011 when The Slants, an Asian American rock band, tried to obtain federal trademark registration for their band name. The U.S. Patent and Trademark Office (USPTO) rejected The Slants' application, citing evidence that the term "slant" is disparaging to Asian Americans. As an arm of the Federal Government, the USPTO is not subject to many of the First Amendment's restrictions on the regulation of government speech – this is known as the government-speech doctrine. With respect to federal trademark registration, the Lanham Act, enacted in 1946, includes a restriction known as the "disparagement clause," which prohibits federal registration for a trademark "which may disparage ... persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute." Thus the USPTO has, although somewhat inconsistently, refused federal registration for trademarks that it deems to meet this subjective criteria.

Simon Tam, lead singer of The Slants, appealed the USPTO's decision and the fight eventually made its way to the Supreme Court, where yesterday the Court found the so-called disparagement clause to be unconstitutional as a violation of the Free Speech Clause of the First Amendment. In so doing, the Court rejected the USPTO's argument that federal trademark registrations fell under the government-speech doctrine. Even though federal trademark registrations are issued by the USPTO, the Court reasoned, "[t]he Federal Government does not dream up these marks, and it does not edit marks submitted for registration." In other words, "[i]f the federal registration of a trademark makes the mark government speech, the federal government is babbling prodigiously and incoherently ... saying many unseemly things ... [and] unashamedly endorsing a vast array of commercial products and services."

The other primary argument advanced by the USPTO in favor of the constitutionality of the disparagement clause was that trademarks are a form of government subsidy. This argument was also rejected by the Court, which contrasted federal trademark registration, for which the applicant pays a fee to the government, to previously-disputed forms of government subsidy, involving instances where the government paid cash or cash equivalents to individuals.

In rendering its decision, the Court held as unconstitutional a provision that has been a fundamental aspect of trademark law for more than 70 years. It's a victory for free speech advocates, and although it has the potential to open the floodgates for federal registration of marks that some or most may deem offensive, it does not impact the right to actually use those marks in commerce, which right has existed for decades and will continue for the foreseeable future.

