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Trademark This, Said The Slants

The Asian-American rockers have a free speech right to offend.

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If you start a rock band and give it a shocking name, can the government prevent you from trademarking it? That's the question for the Supreme Court Wednesday as the Justices decide if the feds can discriminate against trademark applications based on the viewpoint of the speech.

Simon Tam formed an Asian-American rock band that calls itself "The Slants," appropriating an ethnic slur as a statement against discrimination. That strategy has a long history. But when the Portland-based band applied for a trademark in 2011, the U.S. Patent and Trademark Office denied the application on grounds that the name disparages Asians (*Lee v. Tam*).

Section 2(a) of the 1946 Lanham Act says trademarks can be denied if the name consists of "matter which may disparage . . . persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute." Even if The Slants meant their name as a statement of pride, the trademark office ruled, its potential to offend others is grounds for denying it.

The trademark office's ruling was upheld by a three-judge panel of the Federal Circuit. But the full circuit overturned the ruling as a violation of the First Amendment. "The government cannot refuse to register disparaging marks because it disapproves of the expressive messages conveyed by the marks," the court wrote. The "First Amendment protects even hurtful speech."

That protection is easily understood in other contexts. Imagine if the copyright office refused to extend copyright protection to a book based on a plot or language the government found offensive. Rock bands virtually invented the practice of choosing provocative or offensive names for the purposes of expression or marketing. As the Cato Institute notes in a brief, what are we to do with the Queers, Queen, Pansy Division, or N.W.A., which uses a racial slur against blacks.

The feds claim the trademark denial isn't a free-speech violation because the rockers can still call themselves The Slants. But when trademark status that is commonly conferred is denied based on the message in the name, the denial amounts to viewpoint discrimination with harmful consequences. Mr. Tam can't benefit from the use of that trademark or prevent the term from being used by others.

Lower courts have considered these issues in the battle over the Washington Redskins, which had its trademark denied by the Obama Administration in 2014. The Supreme Court declined to hear the Redskins appeal, but a victory for Mr. Tam would also govern the Redskins.

The government says the First Amendment doesn't oblige it to endorse racist or otherwise offensive speech, but with so many diverse trademarks issued each year, no one thinks a

trademarked name is government speech. Offensive words have a long history in art and music, social protest and politics, and the First Amendment was written to protect them.