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Will Asian American band's First Amendment argument resonate with Supreme Court?

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The government doesn't know what to make of the Slants, the all Asian American, Chinatown dance-rock band at the center of this term's most vexing Supreme Court free-speech case.

One branch of the federal government has for years fought the band's effort to register a trademark for its cheeky name. In a case going before the justices this week, the Patent and Trademark Office argues that a decades-old law forbids official recognition of trademarks that "may disparage" members of a particular ethnic group — in the Slants' case, fellow Asians.

But other parts of the government love the Slants. The Defense Department sent the group to Bosnia and Kosovo to entertain troops; MPs were called when the party went on too long.

The White House is into them, too: The Slants were included in a compilation of Asian American artists that is part of an anti-bullying initiative — "deeply ironic," says band founder Simon Tam, because the song chosen is "an open letter to the trademark office."

Which must be a first for a Supreme Court plaintiff.

At Track Town Records in this college town, where the Slants were putting finishing touches on their new EP, "The Band Who Must Not Be Named," Tam reflected on the mixed reaction.

"One branch of government is celebrating us for our work in the Asian American community, and the other area of government is calling us racist," he said. "But I'm kind of used to it at this point."

Contradictions abound in the case, *Lee v. Tam*. For one, a victory for the Slants would be a godsend for the Washington Redskins, whose legal battle to hold on to its revoked trademark has been put on hold pending the outcome. The band members abhor the Washington nickname and wince when the team's fate is linked to their own.

"I don't want to be associated with Dan Snyder," Tam said, referring to the team's owner.

Another oddity, at least to the band: The trademark office has registered several versions of the word "slant," but turned down Tam's application specifically because of the band's Asian American connection.

Some Asian American groups support Tam's attempt to reappropriate a slur and make it a point of pride, as other artists of color have done. Tam's cause has united the American Civil Liberties Union and the conservative religious law organization Alliance Defending Freedom.

But groups of minority lawyers oppose them, and a coalition of liberal, minority members of Congress say that the First Amendment shouldn't force the federal government to give a stamp of approval to hateful speech.

Today the Slants, the worry goes, tomorrow the n-word.

It's a free country, and the Slants can call themselves whatever they want, Acting Solicitor General Ian Heath Gershengorn wrote in his brief to the court. But the government is under no obligation to provide the band with the legal protection and benefits that comes with trademark registration, such as nationwide, exclusive use of the trademark.

"Nothing in the First Amendment requires Congress to encourage the use of racial slurs in interstate commerce," Gershengorn wrote.

The government is appealing a decision by the U.S. Court of Appeals for the Federal Circuit that found that the prohibition on the registration of marks that "may disparage . . . persons, living or dead, institutions, beliefs or national symbols" violated the First Amendment.

The government may not "penalize private speech merely because it disapproves of the message it conveys," the court found.

Tam, 35, a onetime religion and philosophy major turned bass-playing MBA, says record labels and agents require bands to register the trademarks; it's not a privilege so much as a necessity.

Tam has always approached the band as a business, and he wants to reach the place where band members can quit their jobs and make music full-time. (Tam himself is the marketing director for an Oregon environmental nonprofit group, an adjunct instructor at two colleges, and a traveling writer and speaker who sits on six boards of directors.)

As the other members coaxed lead singer Ken Shima through his umpteenth phrasing of a line in their new song "Fight Back," Tam was constantly on his laptop in the dark and chilly studio. He was booking gigs for the band, and posting appeals on social media for money so the band can travel to Washington for the Supreme Court hearing.

"Our case is not the floodgate for hate speech in this country," Tam said as he took a break.

"Every single racial slur you can think of for Asian Americans is a trademark right now. And almost any kind of slur you could think of for any group is a registered trademark right now. The law's not working."

'Our slant on life'

Indeed, the Redskins' amicus brief in the case contains 18 pages of offensive-to-somebody registrations from the Patent and Trademark Office, beginning with *Afro-Saxon* clothing and working its way down to *Yardapes* landscaping.

Even if it makes the Slants uncomfortable, the Redskins have a lot riding on the case. The team is locked in its own battle with the trademark office, which cited the disparagement clause in revoking the team's decades-old trademark registration in 2014. The team's own battle with the office has been put on hold until the Supreme Court acts on the Slants' case.

In the team's amicus brief, Washington lawyer Lisa S. Blatt argues that "the PTO has registered countless marks that meet the government's exceptionally broad definition of disparagement, i.e., potentially demeaning to even a small segment of a race, gender or religious group.

"Just for musical bands, the PTO has registered *White Trash Cowboys; Whores from Hell; N.W.A.; Cholos on Acid; Reformed Whores; The Pop Whores; Hookers & Blow; The Roast Beef Curtains; Flea Market Hookers; The Pricks and Barenaked Ladies.*"

Tam said he got the idea for his band's name even before it formed in 2006. The child of Chinese and Taiwanese parents, Tam was raised in diverse Southern California but moved to Portland, Ore., to join another band.

"They call Portland 'America's whitest city,' " Tam said during the 110-mile drive south from Portland to Eugene. "It's changing now, but at the time if I saw a table of Chinese people, I'd go up to them and say hello."

Always the "token Asian" in bands, Tam decided he would start his own, and he put up posters in Asian shopping centers and dim sum restaurants until he found a lineup. The band has changed over the years, but now consists of Tam, Shima (Japanese American) Yuya Matsuda (Japanese American) and Joe X. Jiang, who was born in China.

"I wanted to flip some stereotypes over," Tam said, and he asked friends what all Asians had in common.

"The first thing they said: All Asians have slanted eyes," he said. "I thought, 'That's interesting.' Number one, because it's not even true. But then I thought, I could call it the Slants. It would be this play on words — because we could talk about our slant on life, what it's like to be people of color, to be Asian American."

Neither Tam nor any of his bandmates said they had ever been called a "slant" growing up, and they did not even think of it as a slur.

"We played a lot of Asian American festivals and a lot of Asian press covered us," Tam said. "None of them even asked why were called the Slants."

When his lawyer called to say that the trademark registration application had been turned down, Tam thought it was a joke. The initial evidence that the band's name might be disparaging to Asian Americans was a [citation to urbandictionary.com](http://urbandictionary.com) and "a picture of Miley Cyrus pulling her eyes back in a slant-eyed gesture," he said.

As the appeals process progressed, the trademark office's objections became more sophisticated, and other evidence was introduced.

Some think the band members are simply too young, or from the wrong parts of the country, to have heard "slant" used as a slur.

Robert S. Chang is executive director of the Fred T. Korematsu Center, named for the man whose famous Supreme Court case unsuccessfully challenged the government's wartime orders that led to the incarceration of Japanese Americans in camps during World War II. Chang remembers hearing the slur as a child in Ohio, and he told the court in a brief that the similarity between the band and the Washington football team is deeper than the band acknowledges.

“While the Redskins may be a professed homage to the noble savage for some, it is a painful reminder for Native Americans of their place in American society,” the brief states. “The Slants is no better. While empowering to a young social justice rock band, that same mark may be debilitating for those who remember life in American internment camps during World War II.”

Plenty of other Asian Americans disagree, but lawyers told Tam that he had little chance of convincing the trademark office that the band's name was not disparaging; the officials had never reversed such a decision.

They suggested another approach: “Why don't we throw in a First Amendment argument?”

Weighing disparagement

The full Federal Circuit, which is charged with hearing patent and trademark cases, bought the First Amendment argument.

The Slants' name *is* disparaging, the majority agreed. But it is also private speech that the government may not hinder by denying trademark registration, the judges held.

“Mr. Simon Shiao Tam named his band The Slants to make a statement about racial and cultural issues in this country,” wrote Judge Kimberly Ann Moore. “With his band name, Mr. Tam conveys more about our society than many volumes of undisputedly protected speech.”

Tam's attorneys tell the Supreme Court that the government cannot recognize only positive messages and reject negative ones, because that endorses one viewpoint over the other.

The disparagement clause “forbids the registration of Democrats are Terrible but allows the registration of Democrats are Wonderful,” lawyer John C. Connell writes. “It forbids the registration of Stop the Islamisation of America, but allows the registration of Encourage the Islamisation of America.”

But Gershengorn, the acting solicitor general, counters that the Supreme Court has agreed the government can take viewpoint into consideration when offering a subsidy or public benefit. It is constitutional for the government to forbid the use of federal funds for abortion, for instance.

And in 2015, the court ruled that messages displayed on specialized license plates are a form of government speech and that Texas was free to reject a proposed design that featured the Confederate flag.

Justice Clarence Thomas joined the court's liberals to find that “Texas's license plate designs convey government agreement with the message displayed” — a ruling the government leans heavily upon in urging the court to find the disparagement clause constitutional.

Tam's attorneys say the court does not have to take the bold step of declaring that the law violates the First Amendment. For one, it could conclude that the trademark office and the lower court were simply wrong, and that in context, Tam's use of the Slants is not disparaging. Or that it must be shown to be disparaging actual people, rather than groups.

The justices could find the law so vague that it cannot be uniformly implemented. The briefs are filled with seemingly contradictory rulings. Tam's attorneys say that the office refused registration to the trademark *Have You Heard Satan Is a Republican* because it disparaged Republicans, but it allowed *The Devil Is a Democrat* as a trademark.

Tam's supporters say the government should simply register valid trademarks, not judge them.

"This court should make the jobs of the employees at the U.S. Patent and Trademark Office much easier," said a brief filed by the libertarian Cato Institute, which added that "no public official can be trusted to neutrally identify speech that 'disparages.'"