



Legal Briefs Filed in The Slants' Supreme Court Case

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Days before the presidential inauguration, one of the most interesting cases regarding the First Amendment and trademark law in recent history will be argued before the US Supreme Court.

Many years ago, Simon Tam of Portland, Oregon, and his friends started a dance-pop band. They called themselves **The Slants**. A friend suggested they trademark the name for legal purposes. Tam, the band's bassist, has been attempting to do just that for more than five years. The problem is, the US Patent and Trademark Office (USPTO) says the name can't be trademarked because it violates Section 2(a) of The Lanham Act, an archaic and possibly outdated – potentially unconstitutional—law that prohibits the granting of trademarks for language that can be considered “disparaging” against a portion of the population.

It's also worth noting, before diving down the rabbit hole of legal briefs filed in the case, that Tam and the other members of The Slants, are all Asian Americans, and nearly all the attorneys arguing on both sides of the case are Caucasian. And when his case had been argued in court, more often than not, he's not been permitted to speak on his own behalf.

The question before the Supreme Court, on Jan. 18, is “Whether the disparagement provision in [Section 2(a) of the Lanham Act] is facially invalid under the Free Speech Clause of the First Amendment.”

The **brief** filed by the USPTO in the case, clocking in at 92 pages, identifies Tam as the lead singer of the band on page 4. He's not. Moving on, the government agency explains that the trademark application was denied “on the ground that it is disparaging to persons of Asian ancestry.”

The denial of the trademark, which a federal appeals court said **a year ago** was incorrect, is “facially constitutional... It does not in any way restrict respondent's freedom of speech. Nothing in the First Amendment requires Congress to encourage the use of racial slurs in interstate commerce,” USPTO states in its brief. Pointing to several previous cases in which the Supreme Court has ruled, USPTO notes that the “common thread running through these decisions is that the government has significant discretion to decide which activities to fund and what criteria to use for inclusion in government programs. Because the government is not restricting free speech, but merely declining to provide government assistance, the strict scrutiny normally applicable to content- and view-point-based distinctions is inappropriate... Refusal of registration does not affect the respondent's ability to use The Slants as a trademark or to engage in any other speech,

but simply renders unavailable benefits and protections that federal registration provides,” because granting a trademark that contains disparaging language in the eyes of the USPTO would lead to the office having to grant the same rights and protections to “the most repellant racial slurs and white-supremacist slogans and demeaning illustrations of the prophet Mohammed and other religious figures.”

The collection of briefs filed in support of **Tam and The Slants** is a diverse and interesting group, including The Cato Institute, the **International Trademark Association**, the Rutherford Institute, the **Electronic Frontier Foundation**, the **First Amendment Lawyers Association** and the **Pacific Legal Foundation**. The band also has the support of the Washington Redskins of the NFL—the team has been fighting a similar battle to preserve the use of its moniker for years, although the Native American community has not shown similar enthusiastic support of the team in the same way the Asian American community has embraced The Slants and their efforts.

Among the highlights of the briefs filed in support of Tam and The Slants:

The **Cato Institute**, a Libertarian think-tank, calls their submission “Brief of the Cato Institute and a Basket of Deplorable People and Organizations as *Amici Curiae* Supporting Respondent.” This, of course, is a nod to the insult hurled by Hillary Clinton against some of Donald Trump’s supporters. Early on, the Cato Institute says it is “not normal that the government has chosen sides in this debate, punishing The Slants for their choice of name by denying them federal trademark registration.” In addition to detailing a long list of political parties (the “Abort The Republicans” and “Democrats Shouldn’t Breed” parties), books, theatrical productions and other titles that could or possibly should be considered disparaging, the main thrust of the organization’s argument is that a government that swears to uphold the Constitution and its First Amendment has no right deciding what is and isn’t disparaging speech.

“As this case shows, supposedly ‘disparaging’ speech is often part of an effort to reclaim a word from its pejorative meaning. Efforts like this have already had a profound influence on the development of many groups’ identities. Jesuits, Methodists, Mormons and Quakers owe their popular names to terms that were originally given to them in disparaging context, and that have since been reclaimed,” The Cato Institute writes. “Without disparaging epithets, our vocabulary would be deprived of such terms as ‘cavalier,’ ‘yankee,’ ‘impressionist’ (Renior, not Rich Little), and ‘suffragette.’ How did a donkey become the Democratic Party symbol? A political opponent labeled Andrew Jackson as a ‘jackass,’ so Jackson put the animal on campaign posters.”

The Slants are following in the proud tradition of other bands who have selected their names for the disparaging language contained therein, including NWA, Queen, The Slits, The Hillbilly Hellcats, Queen Pansy Division and others, the organization says. And let’s not forget “the Sex Pistols, Dead Kennedys, Butthole Surfers, Rapeman, Snatch and the Poontangs, Pussy Galore, Dying Fetus and many, many more.”

Taking a turn for the more serious and buttoned-down, the International Trademark Association **says** the USPTO’s position is wrong because the ban on disparaging language is “unconstitutionally vague under the Fifth Amendment and this vagueness has led to inconsistent and arbitrary applications of rule by USPTO examiners.”

The **Rutherford Institute** notes that the Lanham Act's 'disparagement' question "has been turned into a weapon against disfavored views, to protect groups from perceived offense. The government does not deny that it is deciding whether to confer the benefit of trademark registration based on whether it believes a trademark would cause offense. Instead, the government claims that its subjective and inconsistent treatment of words and phrases does not affect speech at all.

"This is nonsense. Trademarks are protected speech," the group says. "A trademarked name, word, phrase, logo or design can do far more than inform customers or denote origin.... Tam's proposed trademark was denied by the PTO. Why? Not because the mark was inaccurate or misleading or violated someone's intellectual property interests. The government denied Tam the beneficial trademark status routinely afforded others solely because some government employees considered 'the Slants' to be 'offensive' or 'disparaging' to a subset of Asians."

By ruling against Tam, the US government "has chosen to defend the Lanham Act by embracing its new role as the arbiter of taste, making the high-minded claim that the government should not be required to associate with crude or demeaning messages—commercial or otherwise. The United States' position undermines the core role of the First Amendment as a check on government power, which this court has applied vigorously."

The reverberations from this case, however the Supreme Court rules, could be felt for years and across industries. We'll keep you posted.