Key question of Slants case at SCOTUS: Is trademark registration speech? If so, whose?

Alison Frankel

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These are fraught and unsettled times when it comes to racially and culturally offensive speech in America, so I suppose it's no surprise that an awful lot of groups have strong feelings about Lee v. Tam, the U.S. Supreme Court case that will decide the First Amendment constitutionality of the federal law prohibiting the registration of disparaging trademarks.

At least **17 amicus briefs** have been filed with the justices, including one that surely marks the first appearance of "a basket of deplorable people" as a Supreme Court amicus. (The "deplorables" teamed up with the libertarian Cato Institute in a clever, provocative **brief** whose authors describe themselves therein as "a cracker who grew up near Atlanta," "an Italian-American honky" and "a Canuck frostback.")

Other of the amicus briefs raise a range of interesting questions. Did the Federal U.S. Circuit Court of Appeals **misstate trademark law** in deciding that the U.S. Patent and Trademark Office breached the free speech rights of Asian dance-rock impresario Simon Tam when the PTO refused to register a trademark for Tam's band, The Slants? Does Tam's right to register his trademark **trump the public's right** to use the words he wants to register? And if the federal government can refuse to register a trademark it considers offensive, what's to stop, say, officials at a state university **from refusing to recognize** student groups that depart from school policies?

Mostly, though, the briefs add additional layers of analysis to the core dispute between Simon Tam and the Justice Department. Tam's lawyers at Archer & Greiner and the UCLA Supreme Court Clinic argue that the Lanham Act's non-disparagement clause **squelches the First Amendment rights** of trademark applicants because it discourages them from using marks that might be deemed offensive. The government, in contrast, believes the critical issue isn't the First Amendment at all, but rather **its right to decide who is entitled to government benefits.** Tam can call his band whatever he wants, the government argues, and can enforce his trademark whether or not it is registered at the PTO. The non-disparagement clause, in the Justice Department's argument, simply means the U.S. government can withhold its imprimatur from marks that might damage U.S. interests.

The latter argument was endorsed in amicus briefs by (among others) civil rights groups; members of Congress who represent diverse districts; and dozens of IP law professors. "The Federal Circuit's mistake was to treat a regulatory, benefit granting program as if it were a ban

on speech," **the law professors wrote.** "Although prohibiting the use of disparaging marks would suppress speech, the government does not suppress speech by refusing to include these marks on the federal register … Because registration does not attempt to affect a registrant's speech outside the four corners of the registration, it poses no First Amendment problem."

Native American groups represented by Mayer Brown (which more often appears as Supreme Court amicus counsel for the business lobby) pointed out that Congress has given the government the right to suppress offensive commercial speech in several laws in addition to the Lanham Act, including the Civil Rights Act and the Fair Housing Act. Trademarks are inherently commercial, the brief said, and First Amendment precedent permits the government to regulate commercial speech. (The public interest group Public Citizen **also suggested** that reframing The Slants' case as an issue of intermediate scrutiny for commercial speech would allow the justices to avoid the all-or-nothing First Amendment showdown the government and Tam have portrayed it to be.)

Tam's backers, on the other hand, contend the appropriate standard to evaluate the non-disparagement clause is the heightened scrutiny demanded of content-based restrictions on free speech. It may be true, according to the Tam amici, that The Slants don't need to register their name in order to use it. Nevertheless, trademark registration is "an important benefit conferring valuable rights," wrote Jenner & Block on behalf of the **American Intellectual Property Law Association**. "A rule barring access to that benefit based on the message conveyed by a given trademark requires heightened constitutional scrutiny. The government cannot show that the burden imposed here on respondent's speech passes the requisite scrutiny."

Ten constitutional law professors represented by Cahill Gordon & Reindel argued that the Justice Department's formulation of the case as a matter of government speech turns First Amendment principle "on its head," the profs' brief said. "The doctrine of unconstitutional conditions bars the government from denying government benefits to speakers on the condition that those speakers surrender First Amendment rights they would otherwise enjoy."

The best amicus opposition to the Justice Department's arguments, in my opinion, came in a **brief** from the National Football League team The Redskins, which is embroiled in its own trademark dispute with the government, albeit over trademark cancellation rather than denial of registration. As the brief shows, the team's lawyers at Arnold & Porter andQuinn Emanuel Urquhart & Sullivan have thought as much about trademarks, disparagement and the First Amendment as counsel in The Slants' case. Their argument, in a nutshell, is that the Justice Department concocted its argument that trademark registration is a government benefit just for this litigation. Trademark registration, the team said, has always been regarded as a legal process conferring legal status and protection. It is not a government benefit or a matter of government speech, the team said.

If the Justice Department argument were correct that registration is effectively government speech, the team said, then all manner of obscene and offensive – and registered – marks "would have the full backing of, and bear the official seal of approval from, Uncle Sam," the brief said. "What's more, Uncle Sam would be the one speaking." The Justice Department can't have it both ways, the team said: Either the government is stuck with responsibility for the disparaging names it has already registered, or it admits the First Amendment rights of registrants.

Simon Tam and the NFL team have opposite aims. Tam, who is Asian, is engaged in re-appropriation, reclaiming an ethnic slur as an empowerment tactic. The NFL team wants to perpetuate a term that offends some people it purportedly describes. It's one of the oddities of constitutional litigation that the NFL team is one of Tam's best friends.

The Slants' case is due to be argued at the Supreme Court on Jan. 18.