

1                   IN THE SUPREME COURT OF THE UNITED STATES

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3   MICHELLE K. LEE, DIRECTOR,                   :

4   UNITED STATES PATENT                       :

5   AND TRADEMARK OFFICE,                     :

6                           Petitioner                       :   No. 15-1293

7                   v.                               :

8   SIMON SHIAO TAM,                           :

9                           Respondent.                     :

10  - - - - - x

11   Washington, D.C.

12   Wednesday, January 18, 2017

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14                   The above-entitled matter came on for oral  
15 argument before the Supreme Court of the United States  
16 at 10:07 a.m.

17 APPEARANCES:

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19       Department of Justice, Washington, D.C.; on  
20       behalf of the Petitioner.

21 JOHN C. CONNELL, ESQ., Haddonfield, N.J.; on behalf  
22       of the Respondent.

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1 P R O C E E D I N G S

2 (10:07 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument  
4 first this morning in Case No. 15-1293, Lee v. Tam.

5 Mr. Stewart.

6 ORAL ARGUMENT OF MALCOLM L. STEWART

7 ON BEHALF OF THE PETITIONER

8 MR. STEWART: Thank you, Mr. Chief Justice,  
9 and may it please the Court:

10 The statutory provision at issue in this  
11 case, 15 U.S.C. 1052(a), prohibits the registration of  
12 any mark that may disparage persons, institutions,  
13 beliefs, or national symbols. Based on that provision,  
14 the PTO denied Respondent's application to register The  
15 Slants as a service mark for his band. The PTO's ruling  
16 did not limit Respondent's ability to use the mark in  
17 commerce, or otherwise to engage in expression or debate  
18 on any subject he wishes.

19 Because Section 52(a)'s disparagement  
20 provision places a reasonable limit on access to a  
21 government program rather than a restriction on speech,  
22 it does not violate the First Amendment.

23 JUSTICE KENNEDY: Is copyright -- copyright  
24 a government program?

25 MR. STEWART: I think we would say copyright

1 and copyright registration is a government program, but  
2 it's historically been much more tied to First Amendment  
3 values to the incentivization of free expression.

4 JUSTICE KENNEDY: But part of that, seems to  
5 me, to ignore the fact that we have a culture in which  
6 we have tee shirts and logos and rock bands and so forth  
7 that are expressing a -- a point of view. They are  
8 using the -- the market to express views.

9 MR. STEWART: I mean, certainly --

10 JUSTICE KENNEDY: But I was -- disparagement  
11 clearly wouldn't work with copyright, and -- but that's  
12 a powerful, important government program.

13 MR. STEWART: Let me say two or three things  
14 about that.

15 First, there's no question that through  
16 their music, The Slants are expressing views on social  
17 and political issues. They have a First Amendment right  
18 to do that. They're able to copyright their songs and  
19 get intellectual property protection that way.

20 If Congress attempted to prohibit them,  
21 either from having copyright protection or copyright  
22 registration on their music, that would pose a much more  
23 substantial First Amendment issue. But --

24 JUSTICE ALITO: Substantial First Amendment  
25 issue. I was somewhat surprised that in your briefs you

1     couldn't bring yourself to say that the government could  
2     not deny copyright protection to objectionable material.

3                     Are you going to say that?

4                     MR. STEWART: I -- I hate to give away any  
5     hypothetical statute without hearing the justification,  
6     but I'll come as close as I possibly can to say, yes, we  
7     would give that away. It would be unconstitutional to  
8     deny copyright protection on that ground.

9                     But I -- I would also say, even in the  
10    copyright context, we would distinguish between limits  
11    on copyright protection and restrictions on speech. For  
12    instance, it's historically been the case, and it  
13    remains the position of the copyright office, that a  
14    person can't copyright new words or short phrases. Even  
15    if a person comes up with something that is original,  
16    that is pithy, that makes a point, if it's too short,  
17    you can't get copyright protection.

18                    We would certainly defend the  
19    constitutionality of that traditional limit on the scope  
20    of copyrightable material, and if there were a First  
21    Amendment challenge brought, we would argue that there's  
22    a fundamental distinction between saying you can't  
23    copyright a four-word phrase and saying you can't say  
24    the four-word phrase, or you can't write it in print.  
25    But there's --

1 JUSTICE GINSBURG: There's a significant  
2 difference between the copyright regime, you can't sue  
3 for copyright infringement unless you register. Isn't  
4 that so?

5 MR. STEWART: You have to have filed an  
6 application to register in order to -- to pursue an  
7 infringement suit. And so the -- the statute -- I  
8 believe it's 17 U.S.C. 411(a) indicates that if you  
9 filed an application to register your copyright, even if  
10 that application has been denied, you can still bring  
11 your copyright suit, and the register is entitled to be  
12 heard on questions of copyrightability.

13 JUSTICE GINSBURG: There's no restriction  
14 on -- on the trademark.

15 MR. STEWART: That's correct. You can file  
16 a suit under Section 1125(a) of Title 15 under -- under  
17 the trademark laws either for infringement or of an  
18 unregistered trademark or for unfair competition more  
19 generally. But -- but --

20 CHIEF JUSTICE ROBERTS: Counsel, I'm -- I'm  
21 concerned that your government program argument is -- is  
22 circular. The claim is you're not registering on my  
23 mark because it's disparaging, and your answer is, well,  
24 we run a program that doesn't include disparaging  
25 trademarks, so that's why you're excluded. It -- it

1 doesn't seem to me to advance the argument very much.

2 MR. STEWART: Well, I think the  
3 disparagement provision is only one of a number of  
4 restrictions on copy -- I'm sorry, on trademark  
5 registrability that really couldn't be placed on speech  
6 itself. For example, words -- marks that are merely  
7 descriptive, that are generic, marks as to which the --  
8 the applicant is not the true owner because somebody  
9 else was previously using the mark in commerce, those  
10 can't be registered either.

11 JUSTICE BREYER: Well, each of those -- and  
12 I know there are several -- are related to the ultimate  
13 purpose of a trademark, which is to identify the source  
14 of the product. So every trademark makes that  
15 statement.

16 Now, what is -- what purpose or objective of  
17 trademark protection does this particular disparagement  
18 provision help along or further? And I'm thinking of  
19 the provision that says you can say something nice about  
20 a minority group, but you can't say something bad about  
21 them. With all the other -- I know the others -- I  
22 don't know all, but I know many of them, and I can  
23 relate that. You relate this.

24 MR. STEWART: I think Congress evidently  
25 concluded that disparaging trademarks would hinder

1 commercial development in the following way: A  
2 trademark in and of itself is simply a source  
3 identifier.

4 JUSTICE BREYER: Right.

5 MR. STEWART: Its function is to tell the  
6 public from whom did the goods or services emanate. It  
7 is not expressive in its own right.

8 Now, it is certainly true that many  
9 commercial actors will attempt to devise trademarks that  
10 not only can identify them as the source, but that also  
11 are intended to convey positive messages about their  
12 products. For example, if you see the -- the name Jiffy  
13 Lube or a B&B that's called Piney Vista. The -- the  
14 mark is -- is sort of a dual-purpose communication. It  
15 both identifies the source and it serves as a kind of  
16 miniature advertisement.

17 There's always the danger, as some of the  
18 amicus briefs on our side point out, that when a person  
19 uses as his mark words that have other meanings in  
20 common discourse, that it will distract the consumer  
21 from the intended purpose of the trademark qua  
22 trademark, which is to identify source, and basically  
23 Congress says, as long as you are promoting your own  
24 product, saying nice things about people, we'll put up  
25 with that level of distraction.



1 JUSTICE GINSBURG: But suppose the -- the  
2 application here had been for Slants Are Superior. So  
3 that's a complimentary term. Would that then be -- take  
4 it outside the disparagement bar?

5 MR. STEWART: I -- I think that under the  
6 PTO's historical practice, probably not. I believe --  
7 and I think the same thing would be true of other racial  
8 epithets, terms that have long been used as slurs for a  
9 particular minority group --

10 CHIEF JUSTICE ROBERTS: Why isn't that  
11 disparaging of everyone else? Slants Are Superior,  
12 well, superior to whom?

13 MR. STEWART: I -- I think the basis for the  
14 PTO's practice, and they obviously don't have that --  
15 this -- that case, is that the term "Slants," in and of  
16 itself, when used in relation to Asian-Americans --

17 JUSTICE BREYER: I have it. Right. I want  
18 to get the answer to my question because that is the one  
19 question I have for you.

20 The only question I have for you is what  
21 purpose related to trademarks objective does this serve?  
22 And I want to be sure I have your answer. Your answer  
23 so far was, it prevents the -- or it helps to prevent  
24 the user of the product from being distracted from the  
25 basic message, which is, I made this product.

1                   I take it that's your answer. And if that's  
2   your answer, I will -- my follow-up question to that  
3   would be, I can think probably, and with my law clerks,  
4   perhaps 50,000 examples of instances where the space the  
5   trademark provides is used for very distracting  
6   messages, probably as much or more so than the one at  
7   issue, or disparagement. And what business does  
8   Congress have picking out this one, but letting all the  
9   other distractions exist?

10                  MR. STEWART: Well, I think what -- I think  
11   what you've described as my first-line answer, and I  
12   think the precise justification for different kinds  
13   of -- for prohibiting registration of different kinds of  
14   disparaging trademarks would depend to some extent on  
15   who is being disparaged. That is, in the --

16                  JUSTICE BREYER: It's not disparaging; your  
17   answer was distracting. And -- and -- and one of the  
18   great things of 99 percent of all trademarks is they  
19   don't just identify; boy, do they distract. It's a form  
20   of advertising. So if the answer is distracting, not --  
21   you didn't provide an answer to disparagement. You're  
22   answer is why disparagement was they don't want  
23   distraction from the message.

24                  MR. STEWART: They don't want -- they don't  
25   want distraction and they don't want particular type --

1 types of distraction. That is, when we're dealing --

2 JUSTICE BREYER: But that's where I have the  
3 question. What relation is there to a particular type  
4 of distraction, disparagement, and any purpose of a  
5 trademark?

6 MR. STEWART: The -- the type -- the type of  
7 distraction that may be caused by a disparaging  
8 trademark will depend significantly on the precise type  
9 of disparagement at issue. That is, in the case of  
10 racial epithets, these words are known to cause harm, to  
11 cause controversy. They -- in some sense they may no --  
12 they may be no more distracting than a positive message,  
13 but Congress can determine this is the wrong kind of  
14 distraction.

15 JUSTICE KAGAN: Mr. Stewart, please.

16 MR. STEWART: Another type would be a  
17 competing soft drink manufacturer who wants to register  
18 the trademark Coke Stinks, who wants to identify his own  
19 product with a sentiment that is antithetical to one of  
20 his competitors. Congress can determine we would prefer  
21 not to encourage that form of commerce. We can prefer  
22 to -- that -- that commercial actors will promote their  
23 own products rather than disparage others. Obviously,  
24 under the First Amendment, we couldn't prevent that kind  
25 of criticism, but we can decline to encourage it.

1 I'm sorry.

2 JUSTICE KAGAN: Assume government speech  
3 itself is not involved. I always thought that  
4 government programs were subject to one extremely  
5 important constraint, which is that they can't make  
6 distinctions based on viewpoint.

7 So why isn't this doing exactly that?

8 MR. STEWART: Because it -- it precludes  
9 disparagement of all and it casts a wide net. It --

10 JUSTICE KAGAN: Yes. Well, that's  
11 absolutely true. It -- it precludes disparagement of  
12 Democrats and Republicans alike, and so forth and so on,  
13 but it makes a very important distinction, which is that  
14 you can say good things about some person or group, but  
15 you can't say bad things about some person or group.

16 So, for example, let's say that I wanted a  
17 mark that expressed the idea that all politicians are  
18 corrupt, or just that Democrats are corrupt. Either  
19 way, it doesn't matter. I couldn't get that mark, even  
20 though I could get a mark saying that all politicians  
21 are virtuous, or that all Democrats are virtuous.  
22 Either way, it doesn't matter. You see the point.

23 The point is that I can say good things  
24 about something, but I can't say bad things about  
25 something. And I would have thought that that was a

1 fairly classic case of viewpoint discrimination.

2 MR. STEWART: Well, as we pointed out in our  
3 brief, laws like libel laws have -- have not  
4 historically been treated as discriminating based on  
5 viewpoint, even though they --

6 JUSTICE KAGAN: Well, that's libelism, one  
7 of our historically different, but very distinct  
8 categories. And you don't make the claim that this  
9 falls into a category of low value speech in the way  
10 that libel laws and the way that defamation does or  
11 fighting words or something like that. And you're not  
12 looking to create a new category.

13 So in that case, it seems that the  
14 viewpoint-based ban applies, and -- and this -- as I  
15 said, I would be interested to hear your answer of why  
16 the example that I stated is not viewpoint-based. It  
17 says you can say something bad about -- you can say  
18 something good about somebody, but not something bad  
19 about somebody or something.

20 MR. STEWART: Well, certainly if you singled  
21 out a particular category of people like political  
22 officials and say -- said you can't say anything bad  
23 about any of them, but you can say all the good things  
24 you want, I think that would be viewpoint-based, because  
25 it would be protected a discrete group of people.

1                   Let me just give a -- a couple of other  
2     answers.

3                   JUSTICE KAGAN: But why isn't that this?

4                   JUSTICE KENNEDY: But -- but if you didn't  
5     limit it, if you -- if you said you can't say anything  
6     bad about anybody any time, that's okay?

7                   MR. STEWART: Again, it's -- again, we're  
8     not saying you can't say anything bad. We're saying we  
9     don't register your trademark if it is disparaging.  
10    Certainly --

11                  JUSTICE KAGAN: No, no, no. That's -- it --  
12    as I said, even in a government program, even assuming  
13    that this is not just a classic speech restriction,  
14    you're still subject to the constraint that you can't  
15    discriminate on -- on the basis of viewpoint.

16                  MR. STEWART: Well, in -- in Boos v. Barry,  
17    it's -- it's not a majority opinion, but the Court there  
18    was confronted with a law that made it illegal to -- I  
19    believe it was post signs or engage in expressive  
20    activity within 500 feet of a foreign embassy that was  
21    intended to bring the foreign government into contempt  
22    or disrepute. And the -- the law was struck down as  
23    sweeping too broadly, but at least the -- the plurality  
24    would have held that it was not viewpoint-based because  
25    it applied to all foreign embassies. It didn't turn on

1 the nature of the criticism.

2 Another example I would give, and it's a  
3 hypothetical example, but at least I have a strong  
4 instinct as to how the -- the case should be decided.  
5 Suppose at a public university the -- the school set  
6 aside a particular room where students could post  
7 messages on topics that were of interest or concern to  
8 them as a way of promoting debate in a  
9 nonconfrontational way, and the school said, just two  
10 ground rules: No racial epithets and no personal  
11 attacks on any other members of the school community.

12 It -- it would seem extraordinary to say  
13 that's a viewpoint-based distinction that can't stand  
14 because you're allowed to say complimentary things about  
15 your fellow students --

16 JUSTICE KENNEDY: So -- so the government is  
17 the omnipresent schoolteacher? I mean, is that what  
18 you're saying?

19 MR. STEWART: No.

20 JUSTICE KENNEDY: The government's a  
21 schoolteacher?

22 MR. STEWART: No. Again, that analysis  
23 would apply only if the public school was setting aside  
24 a room in its own facility. Clearly, if the government  
25 attempted more broadly to restrict disparaging speech by

1 students or others rather than simply to limit the terms  
2 under which a forum for communication could be made  
3 available, that would involve entirely different  
4 questions. That's why the plurality in *Boos v. Barry*  
5 would have found the law unconstitutional even though  
6 they found it not to be viewpoint-based.

7 CHIEF JUSTICE ROBERTS: But one distinction  
8 is the scope of the government program. If you're  
9 talking about a particular discussion venue at a -- at a  
10 public university, that's one thing. If you're talking  
11 about the entire trademark program, it seems to me to be  
12 something else.

13 MR. STEWART: Well, the -- the trademark  
14 registration program and trademarks generally have not  
15 historically served as vehicles for expression. That  
16 is, the Lanham Act defines trademark and service mark  
17 purely by reference to their source identification  
18 function.

19 And I think it's -- to -- to get back to  
20 copyright for just a second, I think it's at least  
21 noteworthy that everyone would recognize that Mr. Tam is  
22 not entitled to a copyright on *The Slants*. The  
23 copyright office doesn't register short phrases. Two  
24 words is certainly short, especially when one of them --

25 JUSTICE GINSBURG: It's not because -- it's



1 not because of the content or the viewpoint expressed,  
2 it's just it's a short phrase, and any short phrase  
3 would be no good. This is -- this is -- you can't say  
4 Slants because the PTO thinks that's a bad word. Does  
5 it not count at all that everyone knows that The Slants  
6 is using this term not at all to disparage, but simply  
7 to describe?

8 MR. STEWART: I think --

9 JUSTICE GINSBURG: It takes the sting out of  
10 the word.

11 MR. STEWART: Well, the trademark examining  
12 attorney went through this in a lot of detail. And the  
13 trademark examiner acknowledged that Mr. Tam's sincere  
14 intent appeared to be to reclaim the word, to use it as  
15 a symbol of Asian-American pride rather than to use it  
16 as a slur. He -- he also found a lot of evidence in  
17 form of Internet commentary to the effect that many  
18 Asian-Americans, even those who recognized that this was  
19 Mr. Tam's intent, still found the use of the word as a  
20 band name offensive.

21 But the point I was trying to make about  
22 copyright is, is not that copyright protection would be  
23 denied on the ground of disparagement. You're right, it  
24 would be denied because it's a short phrase and not even  
25 an original phrase. But copyright is kind of the branch

1 of intellectual property law that is specifically  
2 intended to foster free expression on matters of  
3 cultural and political, among other, significance.

4 JUSTICE ALITO: Do you deny that trademarks  
5 are used for expressive purposes?

6 MR. STEWART: I don't deny that trademarks  
7 are used for expressive purposes. As I was saying  
8 earlier, I think many commercial actors will pick a mark  
9 that will not only serve as a source identifier, but  
10 that will cast their products in an attractive light  
11 and/or that will communicate a message on some other  
12 topic. My -- my only point is in deciding whether  
13 particular trademarks should be registered, Congress is  
14 entitled to focus exclusively on the source  
15 identification aspect.

16 JUSTICE ALITO: I -- I wonder if you are not  
17 stretching this, the -- the concept of a government  
18 program, past the breaking point. The government  
19 provides lots of services to the general public. And I  
20 don't think you would say that those fall within the  
21 government program line of cases that you're talking  
22 about, like providing police protection to the general  
23 public or providing fire protection to the general  
24 public. Those cost money and those are government  
25 programs. Can the government say, well, we're going to

1 provide protection for some groups, but not for other  
2 groups?

3 MR. STEWART: No. I think those would raise  
4 serious -- I mean, depending on the nature of the -- the  
5 distinction -- equal protection problems, potential --

6 JUSTICE KAGAN: There are potential -- there  
7 are potential First Amendment problems, too, if the  
8 nature of the distinction was based on the person's  
9 speech; isn't that right?

10 MR. STEWART: Certainly. I mean, clearly,  
11 if it was based on viewpoint and clearly I would say --

12 JUSTICE KAGAN: So absolutely clearly if it  
13 was based on viewpoint. And -- and so I guess I don't  
14 want to interrupt your answer to Justice Alito, if --  
15 but I want to get back to -- because I don't really  
16 understand the answer that you gave me before. You said  
17 a government regulation that distinguished between  
18 saying politicians are good and virtuous and politicians  
19 are corrupt would clearly be viewpoint-based; is that  
20 right?

21 MR. STEWART: Right.

22 JUSTICE KAGAN: So -- and similarly, if you  
23 said that the flag is a wonderful emblem, this -- this  
24 applies to national symbols --

25 MR. STEWART: Uh-huh.

1 JUSTICE KAGAN: -- but you could say that  
2 the flag is a wonderful emblem, but you can't say that  
3 the flag is a terrible emblem.

4 MR. STEWART: I --

5 JUSTICE KAGAN: That would be  
6 viewpoint-based.

7 MR. STEWART: Well --

8 JUSTICE KAGAN: I mean, that's what this --  
9 this regulation does.

10 MR. STEWART: If you're talk --

11 JUSTICE KAGAN: It says you can say one of  
12 those things, but you can't say the other and get  
13 trademark.

14 MR. STEWART: But it -- it sweeps with a  
15 broad brush -- brush. And I think the reason that  
16 viewpoint-based discrimination has historically been the  
17 most disfavored type of regulation from a First  
18 Amendment perspective is that it creates the danger that  
19 the government is attempting to suppress disfavored  
20 messages. I mean, there was a -- there's a TTAB, a  
21 Trademark Trial and Appeal Board decision from 1969 that  
22 declined to register a proposed trademark that was  
23 essentially the Soviet hammer and sickle with a slash  
24 through it. And registration was denied on the ground  
25 that it disparaged the national symbol of the Soviet

1 Union. Now, obviously, hostility towards the Soviet  
2 Union was not inconsistent with United States policy in  
3 1969. No one would have perceived the denial of  
4 trademark registration as an attempt to suppress a  
5 disfavored viewpoint. And the point of the -- the point  
6 of my defense of the statute is it casts -- it sweeps  
7 with such a broad brush --

8 JUSTICE KAGAN: But that's like saying it  
9 does so much viewpoint-based discrimination that it  
10 becomes all right.

11 MR. STEWART: But it -- it does so -- I  
12 mean, it -- it imposes this restriction only within the  
13 confines of a government program. And --

14 JUSTICE KAGAN: Yes, yes. And -- and I'm  
15 willing to give you that. But even government programs,  
16 again, assuming it's not government speech itself, even  
17 government programs are subject to this constraint,  
18 which is that you can't distinguish based on the  
19 viewpoint of a speaker.

20 MR. STEWART: Well, part -- part of this  
21 government program is government speech. And let -- let  
22 me just describe the two types of basic services that  
23 the PTO performs in the course of administering the --  
24 the program.

25 First, when an application is filed, the

1 examining attorney and potentially the -- the Trademark  
2 Trial and Appeal Board will go through it to see whether  
3 the applicant satisfies the statutory prerequisites to  
4 registration. And some of those, like 1052(a), are not  
5 essential to having a valid trademark. But many of the  
6 prerequisites to registration overlap with the  
7 prerequisites to having a valid trademark. And so when  
8 the examining attorney decides, is this merely  
9 descriptive, is it generic, does it serve as a mark that  
10 consumers will associate with the -- the product in  
11 commerce, is this person the true owner of the mark, the  
12 examining attorney is deciding the same sorts of  
13 questions that could arise in an infringement suit if  
14 the applicant ever filed one. And therefore --

15 JUSTICE GINSBURG: What about scandalous?  
16 That's another one. Scandalous or immoral. Those are  
17 just like disparaged. They block you from registering  
18 the mark; right?

19 MR. STEWART: They do block you from  
20 registering the mark, not -- not from filing an  
21 infringement suit or alleging unfair competition.

22 JUSTICE GINSBURG: Because that's the same  
23 thing.

24 MR. STEWART: That's -- that's the -- that's  
25 the same thing as disparagement. I -- I was just saying

1 many of the other statutory prerequisites do overlap  
2 with the prerequisites to having a valid trademark.

3 And so if the examining attorney approves  
4 the application, he is giving the -- the applicant at  
5 least some comfort that he can continue to use the mark  
6 in commerce with a degree of confidence that if somebody  
7 else infringes the mark, he will be able to satisfy  
8 the -- the prerequisites.

9 CHIEF JUSTICE ROBERTS: Running the Federal  
10 courts is a government program. Can you say that the  
11 courts -- when it comes to trademarks, the courts are  
12 not open for actions to enforce infringement of a  
13 disparaging trademark?

14 MR. STEWART: If Congress had taken to its  
15 furthest possible step the desire to disassociate the  
16 Federal government from the enforcement of -- or from  
17 these marks --

18 CHIEF JUSTICE ROBERTS: So that was how the  
19 hypothetical was framed --

20 MR. STEWART: Right.

21 CHIEF JUSTICE ROBERTS: -- the furthest  
22 possible step. But it's the same -- do you apply the  
23 same analysis you do simply with the -- as in this case?  
24 How far can they go in defining the government program?

25 MR. STEWART: I think we would typically

1 think of the -- the PTO as exercise of discretionary  
2 authority and as -- the exercise of discretionary  
3 authority by an executive branch agency as -- as  
4 different from the neutral enforcement of the law by --  
5 by the courts. Obviously --

6 JUSTICE KENNEDY: If it's a government  
7 program, can you do anything you want with speech?  
8 Or what -- what are -- what are the restrictions that we  
9 can -- is it intermediate? You don't argue that this  
10 statute meets strict scrutiny.

11 MR. STEWART: I think -- I think --

12 JUSTICE KENNEDY: I take it you don't.

13 MR. STEWART: No. I think the basic test  
14 would be is it reasonably relate -- related to the  
15 objectives of the government program, and in cases of  
16 viewpoint discrimination, in cases where the -- the  
17 program raises the concern that the government is  
18 attempting to promote disfavored messages and suppress  
19 disfavored messages, the -- the program would be  
20 presumptively unconstitutional.

21 The second form of service that the PTO  
22 provides in the course of administering the program is  
23 that if it decides the trademark should be registered,  
24 it publishes the trademark on the Federal Register. And  
25 publication has a -- is significant in a variety of



1 ways. First, outside the -- the context of legal suits,  
2 publication of the trademark on the Federal Register  
3 reduces the likelihood that any infringement will occur,  
4 because it provides notice to potential competitors in  
5 commerce that the PTO has approved this mark. It will  
6 give them an incentive to choose marks that are not  
7 confusingly similar.

8 JUSTICE GINSBURG: And just as importantly,  
9 because your time is running, the questions have  
10 concentrated on viewpoint discrimination, but there's  
11 also a large concern with vagueness here, and the list  
12 that we have of things that were trademarked and things  
13 that weren't. Take, for example, one had the word  
14 "Heb," and that was okay in one application and it was  
15 not okay in another.

16 MR. STEWART: First, if -- if the Court  
17 accepts our basic theory that this should be judged by  
18 the standards that typically apply to government  
19 benefits under a government program, although the  
20 statute doesn't draw an entirely bright line, it's  
21 sufficiently clear. The Court has approved, for  
22 instance, the criteria for awarding any A grants that  
23 were at issue in Finley to the effect that the -- the  
24 grant givers should take account of the diverse views  
25 and -- and beliefs of the American public.

1           The trademark -- the PTO receives 300,000  
2 trademark applications every year, so it's not  
3 surprising that there is some potential inconsistency.

4           And the other thing I would -- the other two  
5 things I would say are, first --

6           JUSTICE SOTOMAYOR: Isn't it another way to  
7 say it's not clear enough for them to get it right?

8           MR. STEWART: It -- it's not a bright-line  
9 rule. I would say two things -- two further things  
10 before I sit down.

11           The first is that I think a lot of the  
12 examples that the PTO has had trouble with and where it  
13 may -- there may be an appearance in, perhaps, the fact  
14 of inconsistent decisions, are instances where people  
15 are deliberately using terms that have historically been  
16 insulting, but with the intent to be edgy, provocative,  
17 to reclaim the slur. This is entirely legitimate, but  
18 when people self-consciously use words in a way other  
19 than they have traditionally been used, it's not  
20 surprising that -- that sometimes they're -- they're  
21 misunderstood.

22           The second thing I'd say is the examples  
23 that the other side gives are -- raise the concern that  
24 the PTO might have approved some trademarks that it  
25 shouldn't have approved, but they really haven't

1 identified any examples of marks that were rejected as  
2 disparaging, even though no reasonable person could view  
3 them as such.

4 If I may, I'd like to reserve the balance of  
5 my time.

6 CHIEF JUSTICE ROBERTS: Thank you, Counsel.  
7 Mr. Connell.

8 ORAL ARGUMENT OF JOHN C. CONNELL  
9 ON BEHALF OF THE RESPONDENT

10 MR. CONNELL: Thank you, Mr. Chief Justice,  
11 and may it please the Court:

12 If our client, Mr. Simon Tam, had sought to  
13 register the mark of his band as The Proud Asians, we  
14 would not be here today. But he did not do that.  
15 Instead he sought to register The Slants.

16 JUSTICE KENNEDY: Suppose we had this  
17 hypothetical case. The facts are largely parallel to  
18 these, other than the band are non-Asians, they use  
19 makeup to exaggerate slanted eyes, and they make fun of  
20 Asians. Could the government, under a properly-drawn  
21 statute, decline to register that as a trademark in your  
22 view?

23 MR. CONNELL: They could not.

24 JUSTICE KENNEDY: The First Amendment  
25 protects absolutely outrageous speech insofar as

1 trademarks are concerned.

2 MR. CONNELL: That is correct.

3 JUSTICE KENNEDY: I think you have to take  
4 that position.

5 MR. CONNELL: Well, we take that position  
6 because --

7 (Laughter.)

8 MR. CONNELL: -- because marks constitute  
9 both commercial speech and noncommercial speech, and the  
10 disparagement clause specifically targets the  
11 noncommercial speech and denies registration to marks  
12 that only express negative views.

13 JUSTICE SOTOMAYOR: But I have --

14 JUSTICE KENNEDY: But in your view, the  
15 Congress could not draw a statute, even different to  
16 this, to make the distinction that the hypotheticals  
17 points out, and the Congress, in your view, could draw  
18 no statute denying trademark protection in the  
19 hypothetical case.

20 MR. CONNELL: I cannot think of a  
21 circumstance under which that could occur.

22 JUSTICE SOTOMAYOR: Then I have a question  
23 for you. This is a bit different than most cases. No  
24 one is stopping your client from calling itself The  
25 Slants. No one is stopping them from advertising

1 themselves that way, or signing contracts that way, or  
2 engaging in any activity, except that stopping someone  
3 else from using the same trademark. But even that they  
4 could do. Because you don't need a registered trademark  
5 to sue under the Lanham Act's entitlement for the  
6 confusion of the public in the use of any kind of  
7 registered or unregistered mark. If another band called  
8 themselves Slants, they would be subject to deceptive  
9 advertisements because they wouldn't be this Slants.

10                   So there is a big difference. You are  
11 asking the government to endorse your name to the extent  
12 of protecting it in a way that it chooses not to. So  
13 it -- there is a reason why the argument's appealing.  
14 And why shouldn't we consider it in those ways when your  
15 speech is not being burdened in any traditional way?

16                   MR. CONNELL: The registration program, the  
17 regulatory system of trademark registration, is widely  
18 available to a broad number of mark holders who seek the  
19 legal protections of registration.

20                   In this case, the government has used the  
21 disparagement clause to selectively deny those legal  
22 benefits to a mark holder expressing negative views that  
23 the government favors, as opposed to mark holders who  
24 received those benefits because they express neutral or  
25 positive views that the government does favor.

1 JUSTICE SOTOMAYOR: It doesn't answer my  
2 question. You can still use your name.

3 MR. CONNELL: But --

4 JUSTICE SOTOMAYOR: Why is it a burden?

5 MR. CONNELL: It -- it is a -- it is a  
6 burden because our client is denied the benefits of  
7 legal protections that are necessary for him to compete  
8 in the marketplace with another band. And the only  
9 reason for the denial of those benefits is the burden on  
10 his noncommercial speech contained in the mark.

11 JUSTICE SOTOMAYOR: He can still sue.

12 MR. CONNELL: He can still --

13 JUSTICE SOTOMAYOR: He can still compete.

14 MR. CONNELL: He can still compete, but he  
15 can't --

16 JUSTICE SOTOMAYOR: He's just not getting as  
17 much as he would like, but he's not stopped from doing  
18 what he's doing.

19 MR. CONNELL: He could still -- his only  
20 resort at that point would be to seek the protection  
21 of -- of -- or to assert his right to exclusive use of  
22 the mark under Section 43, or State trademark law, or  
23 common law, none of which have the extensive and  
24 substantial benefits that this Court has recognized  
25 under trademark registration.

1 CHIEF JUSTICE ROBERTS: It seems to me -- I  
2 mean, does your argument depend upon the breadth of the  
3 government program? Let's say you had a government  
4 program putting on a -- a festival or a lecture series.  
5 We only want pro-Shakespeare presentations. It's about  
6 celebrating Shakespeare. And if you disparage  
7 Shakespeare, you can't participate.

8 Is there anything wrong with that?

9 MR. CONNELL: I -- I don't believe there is  
10 in that -- in that limited forum, that that -- that  
11 would make a difference. But this is not that case.  
12 This is a widely available program that's made -- that  
13 all comers can -- can utilize.

14 CHIEF JUSTICE ROBERTS: Well, but no, it's  
15 not. If you have a disparaging trademark, you can't  
16 utilize it.

17 MR. CONNELL: Except again, that targets the  
18 noncommercial aspect of speech, which has nothing to do  
19 with the commercial objectives of the Lanham Act.

20 CHIEF JUSTICE ROBERTS: Well, I guess I  
21 don't understand yet your distinction why the  
22 only-celebrating-Shakespeare program is -- is okay, but  
23 the trademark one is not. You can't disparage  
24 Shakespeare. You can't have disparaging marks about  
25 anybody in the trademark context. Is it just the

1 comprehensive nature of the government program?

2 MR. CONNELL: In -- in this case it is.

3 JUSTICE KAGAN: But why does that --

4 JUSTICE BREYER: Why does that --

5 JUSTICE KAGAN: -- matter?

6 JUSTICE BREYER: Yeah.

7 JUSTICE KAGAN: I mean, maybe the government  
8 just decides we want to celebrate everything. We want  
9 to be relentlessly positive.

10 (Laughter.)

11 MR. CONNELL: And Justice Kagan, that goes  
12 back to your point before, that that would -- would  
13 discriminate against any negative viewpoints and only  
14 arm one side of the debate.

15 JUSTICE BREYER: It isn't quite like that.  
16 After all, as Justice Sotomayor pointed out, this is  
17 more like a single bulletin board on the train station.  
18 The train station which has a thousand bulletin boards.  
19 People can say whatever they want. But this bulletin  
20 board, one out of a thousand, is reserved today for  
21 people who want to say nice things about Shakespeare.

22 This is not a general expression program.  
23 This is a program that has one objective. The objective  
24 is to identify the source of the product. It stops  
25 nobody from saying anything. All it says is when you're



1     trying to fulfill our objective, which is identify the  
2     source of your product, if you want, put a little circle  
3     with an R in it and write down beneath in tiny letters,  
4     Mr. and Mrs. Smith. Anything you want. But in that  
5     circle, not the thing that says the insulting thing  
6     about somebody else. See? Very much like one  
7     Shakespeare celebration board out of a million. Let me  
8     say 10 million to make the point stronger. Do you see?  
9     That's -- that -- that's where you can't express  
10    yourself, so -- and then I said to them, well, why do  
11    you do that? And they said because, you know, the  
12    purpose of a -- of a trademark is to identify a source.  
13    It's not to get people into extraneous arguments. And  
14    what this will do is it will get people into extraneous  
15    arguments, losing or diluting the force of a program  
16    that seeks to use a trademark to identify a source.

17                 Now, that's what I got out of my answer to  
18    the last question on the other side, and I would like to  
19    know what you think.

20                 MR. CONNELL: Actually, I think the -- the  
21    government's position is --

22                 JUSTICE BREYER: I don't care what their  
23    position is. I want to know what you think in respect  
24    to the question I'm asking.

25                 MR. CONNELL: Well, I -- I think what the

1 government is trying to do here is simply encourage  
2 commercial actors to conduct business in such a way as  
3 to not insult customers.

4 JUSTICE BREYER: Well, not -- not conduct  
5 business. They can insult customers. Boy, you could  
6 have 50,000 insults on every physical item that you put  
7 out. All you cannot do is when it comes to a little  
8 mark or a form of words, it is designed to say one  
9 thing -- I'm repeating myself -- I am the source of the  
10 product. And you can do that in little letters, big  
11 letters, tiny letters, no letter, whatever. But there  
12 you have to stick to business, and if you're going to go  
13 beyond business, don't use insults.

14 Do you believe that they can stop trademarks  
15 from saying -- this is the trademark you can't use --  
16 Joe Jones is a jerk?

17 MR. CONNELL: They could not stop that.

18 JUSTICE BREYER: They could not stop that.  
19 They can't -- can they say Smith's beer is poison?

20 MR. CONNELL: They could not.

21 JUSTICE BREYER: Oh, my goodness. I mean,  
22 there are laws all over the place that stop you from  
23 saying that a competitor is -- has bad products. It's  
24 called product disparagement. There are laws all over  
25 the place that stop you from saying Joe Jones is a jerk

1 or something more specific. They're called libel laws  
2 or slander laws. But you're saying the government  
3 couldn't do that?

4 MR. CONNELL: The government cannot burden  
5 the noncommercial aspect of the mark, and that's what  
6 they would be doing in that case.

7 JUSTICE GINSBURG: Now, that's saying you  
8 cannot trademark a slogan that has one of George  
9 Carlin's seven day -- dirty words in it.

10 (Laughter.)

11 JUSTICE GINSBURG: If you were to use one of  
12 those seven words, we won't register your trademark.

13 MR. CONNELL: I think that is a burden on  
14 speech. In fact, I think if the phrase that was used in  
15 Cohen v. California was -- was trademarked, there's no  
16 question that there would be a -- a burden on the  
17 noncommercial aspect of that mark.

18 JUSTICE GINSBURG: Yes, but --

19 JUSTICE KAGAN: Can I --

20 JUSTICE GINSBURG: -- due to this Court's  
21 specific decision, which said it was okay to ban those  
22 words from the airwaves --

23 MR. CONNELL: Well, I --

24 JUSTICE GINSBURG: But then -- now, this --  
25 this is not, yeah, you can have trademark protection,

1 but we're not going to let you get the extra benefits of  
2 registration. It's you can't use those words on the  
3 air, and this Court upheld it.

4 MR. CONNELL: Yeah. Pacifica actually  
5 simply was limited to time, place, and manner  
6 restrictions. The Court expressly said that they were  
7 not banning the use of those words. And in addition,  
8 Pacifica did say that notwithstanding the content  
9 restrictions imposed on -- on -- on those words, the  
10 fact of the matter was that if the -- the restrictions  
11 were motivated by a negative view of the ideological or  
12 political message being conveyed, that would be  
13 unconstitutional.

14 JUSTICE BREYER: But time, place, or manner,  
15 there is time, place, or manner. In fact, you can use  
16 these words anywhere at any time in your performance.  
17 Just don't use them as the registered source of the  
18 message, I am the owner of the -- of the -- of the band.  
19 Time, place, and manner. You have the entire universe  
20 where you can say what you want, including this.

21 So why is this somehow not a restriction on  
22 time, place, and manner if the others were?

23 MR. CONNELL: Because, again, I come back to  
24 the fact that this is a burden on the noncommercial  
25 aspect of the mark.

1 JUSTICE SOTOMAYOR: Excuse me.

2 JUSTICE BREYER: How do you --

3 JUSTICE SOTOMAYOR: Let's go back to, if we  
4 can, the earlier part of Justice Breyer's question.

5 1052 has two components. You can't  
6 disparage or falsely suggest a connection with a person  
7 institution. Are you challenging or saying that the  
8 second part of 1052 falsely suggests the connection is  
9 unconstitutional as well?

10 MR. CONNELL: That's not the question before  
11 this Court.

12 JUSTICE SOTOMAYOR: I know. But your  
13 argument earlier was that if someone slanders or libels  
14 an individual by saying -- Trump before he was a public  
15 figure -- Trump is a thief and that becomes their  
16 trademark, that even if they go to court and prove that  
17 that's a libel or a slander, that trademark would still  
18 exist and would be capable of use because otherwise  
19 canceling it would be an abridgement of the First  
20 Amendment?

21 MR. CONNELL: I believe that's correct.

22 JUSTICE SOTOMAYOR: That makes no sense.

23 JUSTICE ALITO: Mr. Connell, don't you think  
24 that Congress could deny a trademark registration for  
25 something that fit within the narrow, historically

1 recognized category of libel and slander which have  
2 never been regarded as having First Amendment  
3 protection?

4 MR. CONNELL: I -- I think the outer limit  
5 of the protection here are the categories of  
6 historically prescribed speech. That would include  
7 threats, it would include fraud, things such as that.  
8 That's not the case, obviously, with the mark that we're  
9 using here.

10 JUSTICE KAGAN: Well, one of the things,  
11 Mr. Connell, that troubles me about this case is that  
12 it's not quite as simple as just saying, well, here's a  
13 government program and the government is discriminating  
14 on the basis of viewpoint, because there are aspects of  
15 this program that seem like government speech itself,  
16 maybe not quite that, but something approaching it,  
17 which is the program says that anything that's  
18 registered, the government publishes in its own  
19 publication. The government sends to foreign countries,  
20 again, in its own publication. So the whole program is  
21 geared in such a way that individual marks that are  
22 registered end up being -- I doubt anybody would ascribe  
23 them to the government, but the government republishes  
24 them, communicates them and so forth. And doesn't that  
25 aspect of the program give the government greater leeway

1 here than it would in a typical program in which no  
2 government speech itself is involved?

3 MR. CONNELL: It does not. The register  
4 simply serves as a recordation of the marks that the  
5 government has approved according to the statutory  
6 criteria. This is in no way different than copy  
7 registration, patent registration, marriage license  
8 registration, car registrations, any other kind of  
9 typical government registrations that are simply  
10 ministerial. The government is not speaking. It's not  
11 its message. The control over the creation and design  
12 of the mark is retained at all times by the owner.  
13 There is no history here of the government using marks  
14 to speak through private mark holders, and there's no  
15 association with -- between the government and -- and  
16 the mark itself.

17 JUSTICE GINSBURG: But doesn't the  
18 government have some interest in disassociating itself  
19 from racial ethnic slur -- slurs? Things like, what  
20 about the license -- Texas license, vanity license  
21 plate, and they said we won't do one with the  
22 Confederate flag.

23 MR. CONNELL: That was specifically a  
24 government speech case. That's not our case here. This  
25 is not a government ID, issued on government property,

1 controlled by the government as to design and content  
2 and so on. It's -- in fact, it's exactly the opposite.

3 CHIEF JUSTICE ROBERTS: You've said --  
4 you've said several times that the problem is that the  
5 government is burdening noncommercial -- the  
6 noncommercial aspects of the trademark, but it seems to  
7 me that that's an awfully blurry line. A lot of these  
8 trademarks promote the commercial aspect, in fact, by  
9 disparaging other groups. So they figure that it's a  
10 way to promote sales. How do you tell the difference  
11 between the commercial aspect of the trademark and the  
12 noncommercial aspect?

13 MR. CONNELL: The commercial aspect is that  
14 part of the mark that simply identifies the source of  
15 the good or service in question. In the case of The  
16 Slants, there's another component, that being the  
17 noncommercial, which communicates the political and  
18 social message of Asian pride.

19 This is akin to Justice Breyer before  
20 talking about the in -- inherit advertisement that can  
21 take place. Bands don't exist without names, and -- and  
22 people associate the music with the band name and the  
23 band name with the music that they perform.

24 So that -- that is where the noncommercial  
25 aspect of -- of the speech comes in. And to the extent



1     that the government is burdening it by denying  
2     registration because they believe that it -- it conveys  
3     a negative view, that's unconstitutional.

4                 JUSTICE KENNEDY:  You want us to say that  
5     trademark law is just like a public park -- the public  
6     park, a public forum, the classic example of where you  
7     can say anything you want.  We treat this -- we treat  
8     trademarks just like we treat speech in a public park.  
9     Thank you very much.  Good-bye.  That's it.  That's your  
10    argument.

11                MR. CONNELL:  It -- it is my argument.  I  
12    think the limitation on that, as I said before, are the  
13    categories of historically prescribable speech.

14                JUSTICE KAGAN:  Well, Mr. Connell, this  
15    can't be right, because think of all the other things,  
16    the other -- I mean, I'll call them content distinctions  
17    because they are -- that trademark law just makes.  I  
18    mean, Section 2 prohibits the registration of any mark  
19    that's falsely suggestive of a connection with persons  
20    likely to cause confusion, descriptive, misdescriptive,  
21    functional, a geographic indication for wine or spirits,  
22    government insignia, a living person's name, portrait,  
23    or signature.  You couldn't make any of those  
24    distinctions in a -- in a -- in a public park, and yet,  
25    of course, you can make them in trademark law, can't

1     you?

2                   MR. CONNELL: All of those other  
3     distinctions are viewpoint-neutral and advance the  
4     commercial objectives of the Lanham Act in terms of  
5     reducing consumer confusion.

6                   JUSTICE KAGAN: Well, these might be  
7     viewpoint-neutral, but they're certainly not  
8     content-neutral, and yet we would -- I mean, I think  
9     that a challenge to many of these would fall flat.

10                  MR. CONNELL: On what basis?

11                  JUSTICE KAGAN: Because -- like, how is  
12     trademark law supposed to function unless it can make  
13     these kinds of distinctions?

14                  MR. CONNELL: I'm suggesting that those --  
15     those sections would survive.

16                  JUSTICE KAGAN: Well --

17                  MR. CONNELL: Section B --

18                  JUSTICE KAGAN: -- okay. If those would  
19     survive, then this is not a public park, because those  
20     would not survive in a public park.

21                  MR. CONNELL: Agreed.

22                  JUSTICE KAGAN: There's something different  
23     here, in other words, that this is coming up in the  
24     context of a government program --

25                  MR. CONNELL: Well --

1 JUSTICE KAGAN: -- which provides certain  
2 benefits that the government doesn't have to provide at  
3 all.

4 MR. CONNELL: The -- the point here is  
5 that the -- the government program, at least the goals  
6 of the Lanham Act, are to reduce consumer confusion, and  
7 that is a legitimate interest that the government has.  
8 And these -- these factors under 1052 advance that --  
9 that purpose.

10 JUSTICE ALITO: I want to come back to  
11 the -- the Chief Justice's question. I really have  
12 difficulty separating the expressive from the commercial  
13 aspect of a trademark. Let me give you an example.

14 I think that Nike's phrase "Just Do It" is a  
15 registered trademark. Now, is that commercial or is  
16 that expressive?

17 MR. CONNELL: It is both. The -- the two  
18 are intertwined. The -- just like with The Slants. You  
19 have the source identifier that is inextricably  
20 intertwined with the message that the mark is -- is  
21 conveying about the source -- or about the goods and  
22 services identified.

23 JUSTICE ALITO: Well, if they're  
24 inexplicably intertwined, then I -- I don't understand  
25 how we can separate them and apply to the expressive

1 part a more rigorous test than we would apply to the  
2 commercial part.

3 MR. CONNELL: I'm not sure I understand your  
4 question.

5 JUSTICE ALITO: All right. Do you think  
6 that viewpoint discrimination is always prohibited in  
7 commercial speech? For example, could the government  
8 say -- and maybe it already has said -- that a  
9 manufacturer of cigarettes could not place on a package  
10 of cigarettes "Great for your health. Don't believe the  
11 surgeon general"?

12 MR. CONNELL: Viewpoint discrimination is  
13 prohibited in commercial speech, no question, under the  
14 Sorrell case.

15 JUSTICE BREYER: Well, it's back to really  
16 the Chief Justice's question. I -- I wouldn't ask it,  
17 but I think -- except that I think you do have something  
18 of an answer that you haven't fully expressed.

19 Look. We're creating, through government, a  
20 form of a property right, a certain form. That's a  
21 trademark. It's as if through government we created a  
22 certain kind of physical property right that certain  
23 people could dedicate a small part of their houses or  
24 land to Peaceful Grove. And in Peaceful Grove, you  
25 write messages, but peaceful messages. And above all,

1     you don't write messages that will provoke others to  
2     violence or bad feelings.   Okay?

3                   Anything wrong with that?   I can't think of  
4     anything wrong with that.   There are thousands of places  
5     where they can express hostile feelings.   It's just in  
6     this tiny place, one-quarter of an acre, that you  
7     yourself have chosen to take advantage of that you can't  
8     because it will destroy the purpose.   It will destroy  
9     the purpose of Peaceful Grove.   That's why I asked my  
10    question.

11                   To what extent does interfering with  
12    viewpoints here serve a trademark-related purpose?   As  
13    we can see how in Peaceful Grove or in Shakespeare, the  
14    messages that we were talking about did harm the  
15    government purpose.   And here, they're saying similarly,  
16    disparaging messages get in the way of the objective of  
17    this program, which is to identify the source.   Now,  
18    that, I think, is what I heard.   That's what I'd like  
19    you to think about and respond to.

20                   MR. CONNELL:   Disparaging messages in  
21    trademark do not interfere with the source.   They simply  
22    control the -- the other component of -- of the message.  
23    The -- The Slants is -- is the band.   It's clearly  
24    identified.   So the -- the identification of the source  
25    of the service, the music in question, is -- is served

1 by the mark. What the government objects to is the  
2 other message. It's the other message.

3 JUSTICE BREYER: Well, I understand that.  
4 But now your answer -- okay, I've got your answer. And  
5 now your other answers were worrying me, because what's  
6 worrying me is I accept what you just said -- suppose I  
7 did; am I suddenly saying no Peaceful Grove, no  
8 Shakespeare celebration, no normal restrictions on  
9 normal restrictions, no function -- you know, it's  
10 functional, can't have functional things in a trademark,  
11 da, da, da, all the ones we read. If I buy into your  
12 answer just -- that you just gave, have I suddenly  
13 opened the door to striking down all those things?

14 MR. CONNELL: No. I don't think so,  
15 because --

16 JUSTICE BREYER: Well, why not?

17 MR. CONNELL: Because the purpose, as -- as  
18 you said, Your Honor, of Peaceful Grove was to have a  
19 place of seclusion, of solitude, of -- of calm. That's  
20 completely different than the trademark regime, which is  
21 open to all comers and which simply is trying to advance  
22 the goal of source identification. And if the mark  
23 holder wishes to include a component in the mark to  
24 somehow advertise the good, the service to convey a  
25 different message, that doesn't get in the way of the

1 source identification at --

2 CHIEF JUSTICE ROBERTS: Well, but it seems  
3 to me that you're defining the government program  
4 differently than the government would. I think they're  
5 suggesting that there's more to their program than just  
6 source identification.

7 MR. CONNELL: That is not clear at all in  
8 the Lanham Act. In fact, the only purpose of the Lanham  
9 Act, as identified by this Court in Park 'N Fly -- and  
10 this was a citation to, I believe, the -- the Senate  
11 Report, was the reduction of consumer confusion and the  
12 protection of the goodwill of the mark holder. There  
13 was no suggestion that this was a --

14 CHIEF JUSTICE ROBERTS: Well, we heard --

15 MR. CONNELL: -- a politeness statute.

16 CHIEF JUSTICE ROBERTS: Well, we heard from  
17 Mr. Stewart that they thought the disparagement aspect  
18 would distract from the commercial identification. I --  
19 I think that's what he said.

20 MR. CONNELL: Yes.

21 CHIEF JUSTICE ROBERTS: And you're saying  
22 that's -- that's not really their purpose or --

23 MR. CONNELL: Well, I'll say they -- that's  
24 nowhere in the legislative history and that's nowhere in  
25 the legislation itself. I mean, that seems to be pulled

1 out of thin air by the government, who, again, in their  
2 brief talks about reducing the -- the level of insult or  
3 the occasion of insult to customers. That's -- that's  
4 not part of the Lanham Act. That's not part of the  
5 commercial purpose of the Lanham Act.

6 JUSTICE GINSBURG: Would you say the same  
7 thing about a scandalous mark? Would that be equally  
8 impermissible?

9 MR. CONNELL: I think that conclusion is  
10 inevitable.

11 If there are no further questions.

12 CHIEF JUSTICE ROBERTS: Thank you, counsel.

13 MR. CONNELL: Thank you.

14 CHIEF JUSTICE ROBERTS: Mr. Stewart, two  
15 minutes.

16 REBUTTAL ARGUMENT OF MALCOLM L. STEWART

17 ON BEHALF OF THE PETITIONER

18 MR. STEWART: Thank you, Mr. Chief Justice.

19 Let me make three quick points.

20 Mr. Connell has said that the government --  
21 that the government registration program regulates only  
22 the expressive and not the commercial aspect of the  
23 mark, and I think that's getting it exactly backwards.  
24 The -- Mr. Tam wants to do two things with the mark The  
25 Slants. He wants to use the mark himself in relation to



1 his band, and he wants to be able to sue other people  
2 who use it in a way that would cause him commercial  
3 harm. And denial of a registration affects only the  
4 second thing. It places no restrictions on his ability  
5 to use the mark. It may limit the remedies that are  
6 available for infringement, but -- but that's entirely  
7 regulating the commercial aspects of the conduct.

8           The second thing is Mr. Connell's position  
9 clearly is that the test for constitutionality of a  
10 registration condition is, could the government ban this  
11 speech altogether? And putting that in place would  
12 eviscerate the trademark registration program. Most  
13 obviously, as -- as Justice Kagan has pointed out, there  
14 are a lot of other content-based registration criteria.

15           And in addition, I'd point out one of the  
16 prerequisites to registration is that you be using the  
17 mark in commerce. If this were truly a suppression of  
18 speech, we'd ask by what authority could the government  
19 make the right to speech contingent on providing goods  
20 and services in commerce.

21           Finally, Justice Kagan, you mentioned  
22 commercial speech. And there is an important government  
23 communicative aspect to this program. The preparation  
24 of the principal register is not just an ancillary  
25 consequence of this program. It's the whole point to

1 provide a list of trademarks so other people know what  
2 has been approved, what's off limits.

3 And the consequence of Mr. Connell's  
4 position is that the government would have to place on a  
5 principal register, communicate to foreign countries the  
6 vilest racial epithets, insulting caricatures of  
7 venerated religious figures. The test for whether the  
8 government has to do that can't be coextensive with the  
9 test for whether private people can engage in that form  
10 of expression.

11 JUSTICE ALITO: Mr. Stewart, you really  
12 think that speech can be restricted by the government on  
13 the ground that foreign countries may object to it?

14 Could -- could the government do that with  
15 copyright? I mean, an awful lot of things are  
16 copyrighted in this country that are deeply offensive to  
17 some foreign countries, and yet, the FBI enforces the  
18 copyright laws.

19 MR. STEWART: I would agree that with the  
20 copyright is different. It's historically played a far  
21 more fundamental role in free expression than trademark  
22 law has played, but the government, at the very least,  
23 has a significant interest in not incorporating into its  
24 own communications words and symbols that the public and  
25 foreign countries will find offensive.

1 CHIEF JUSTICE ROBERTS: Thank you, counsel.

2 Case is submitted.

3 (Whereupon, at 11:03 a.m., the case in the  
4 above-entitled matter was submitted.)

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<p><b>A</b></p> <p><b>a.m</b> 1:16 3:2 51:3</p> <p><b>ability</b> 3:16 49:4</p> <p><b>able</b> 4:18 23:7 49:1</p> <p><b>above-entitled</b> 1:14 51:4</p> <p><b>abridgement</b> 37:19</p> <p><b>absolutely</b> 12:11 19:12 27:25</p> <p><b>accept</b> 46:6</p> <p><b>accepts</b> 25:17</p> <p><b>access</b> 3:20</p> <p><b>account</b> 25:24</p> <p><b>acknowledged</b> 17:13</p> <p><b>acre</b> 45:6</p> <p><b>Act</b> 16:16 31:19 42:4 43:6 47:8 47:9 48:4,5</p> <p><b>Act's</b> 29:5</p> <p><b>actions</b> 23:12</p> <p><b>activity</b> 14:20 29:2</p> <p><b>actors</b> 8:9 11:22 18:8 34:2</p> <p><b>addition</b> 36:7 49:15</p> <p><b>administering</b> 21:23 24:22</p> <p><b>advance</b> 7:1 42:3 43:8 46:21</p> <p><b>advantage</b> 45:7</p> <p><b>advertise</b> 46:24</p> <p><b>advertisement</b> 8:16 40:20</p> <p><b>advertisements</b> 29:9</p> <p><b>advertising</b> 10:20 28:25</p> <p><b>agency</b> 24:3</p> <p><b>agree</b> 50:19</p> <p><b>Agreed</b> 42:21</p>	<p><b>air</b> 36:3 48:1</p> <p><b>airwaves</b> 35:22</p> <p><b>akin</b> 40:19</p> <p><b>alike</b> 12:12</p> <p><b>Alito</b> 4:24 18:4 18:16 19:14 37:23 43:10,23 44:5 50:11</p> <p><b>alleging</b> 22:21</p> <p><b>allowed</b> 15:14</p> <p><b>altogether</b> 49:11</p> <p><b>Amendment</b> 3:22 4:2,17,23 4:24 5:21 11:24 19:7 20:18 27:24 37:20 38:2</p> <p><b>American</b> 25:25</p> <p><b>amicus</b> 8:18</p> <p><b>analysis</b> 15:22 23:23</p> <p><b>ancillary</b> 49:24</p> <p><b>and/or</b> 18:11</p> <p><b>answer</b> 6:23 9:18,22,22 10:1,2,11,17 10:20,21,22 13:15 19:14,16 30:1 33:17 44:18 46:4,4 46:12</p> <p><b>answers</b> 14:2 46:5</p> <p><b>antithetical</b> 11:19</p> <p><b>anybody</b> 14:6 31:25 38:22</p> <p><b>Appeal</b> 20:21 22:2</p> <p><b>appealing</b> 29:13</p> <p><b>appearance</b> 26:13</p> <p><b>APPEARAN...</b> 1:17</p> <p><b>appeared</b> 17:14</p> <p><b>applicant</b> 7:8 22:3,14 23:4</p>	<p><b>application</b> 3:14 6:6,9,10 9:2 21:25 23:4 25:14</p> <p><b>applications</b> 26:2</p> <p><b>applied</b> 14:25</p> <p><b>applies</b> 13:14 19:24</p> <p><b>apply</b> 15:23 23:22 25:18 43:25 44:1</p> <p><b>approaching</b> 38:16</p> <p><b>approved</b> 25:5 25:21 26:24,25 39:5 50:2</p> <p><b>approves</b> 23:3</p> <p><b>argue</b> 5:21 24:9</p> <p><b>argument</b> 1:15 2:2,5,8 3:3,6 6:21 7:1 27:8 31:2 37:13 41:10,11 48:16</p> <p><b>argument's</b> 29:13</p> <p><b>arguments</b> 33:13,15</p> <p><b>arm</b> 32:14</p> <p><b>ascribe</b> 38:22</p> <p><b>Asian</b> 40:18</p> <p><b>Asian-American...</b> 17:15</p> <p><b>Asian-American...</b> 9:16 17:18</p> <p><b>Asians</b> 27:13,20</p> <p><b>aside</b> 15:6,23</p> <p><b>asked</b> 45:9</p> <p><b>asking</b> 29:11 33:24</p> <p><b>aspect</b> 18:15 31:18 35:5,17 36:25 38:25 40:8,11,12,13 40:25 43:13 47:17 48:22 49:23</p>	<p><b>aspects</b> 38:14 40:6 49:7</p> <p><b>assert</b> 30:21</p> <p><b>associate</b> 22:10 40:22</p> <p><b>association</b> 39:15</p> <p><b>Assume</b> 12:2</p> <p><b>assuming</b> 14:12 21:16</p> <p><b>attacks</b> 15:11</p> <p><b>attempt</b> 8:9 21:4</p> <p><b>attempted</b> 4:20 15:25</p> <p><b>attempting</b> 20:19 24:18</p> <p><b>attorney</b> 17:12 22:1,8,12 23:3</p> <p><b>attractive</b> 18:10</p> <p><b>authority</b> 24:2,3 49:18</p> <p><b>available</b> 16:3 29:18 31:12 49:6</p> <p><b>awarding</b> 25:22</p> <p><b>awful</b> 50:15</p> <p><b>awfully</b> 40:7</p> <p><b>B</b></p> <p><b>B</b> 42:17</p> <p><b>B&amp;B</b> 8:13</p> <p><b>back</b> 16:19 19:15 32:12 36:23 37:3 43:10 44:15</p> <p><b>backwards</b> 48:23</p> <p><b>bad</b> 7:20 12:15 12:24 13:17,18 13:22 14:6,8 17:4 34:23 45:2</p> <p><b>balance</b> 27:4</p> <p><b>ban</b> 13:14 35:21 49:10</p> <p><b>band</b> 3:15 17:20 27:13,18 29:7</p>	<p>30:8 36:18 40:22,23 45:23 49:1</p> <p><b>bands</b> 4:6 40:21</p> <p><b>banning</b> 36:7</p> <p><b>bar</b> 9:4</p> <p><b>Barry</b> 14:16 16:4</p> <p><b>based</b> 3:13 12:6 13:4 19:8,11 19:13 21:18</p> <p><b>basic</b> 9:25 21:22 24:13 25:17</p> <p><b>basically</b> 8:22</p> <p><b>basis</b> 9:13 14:15 38:14 42:10</p> <p><b>beer</b> 34:19</p> <p><b>behalf</b> 1:20,21 2:4,7,10 3:7 27:9 48:17</p> <p><b>beliefs</b> 3:13 25:25</p> <p><b>believe</b> 6:8 9:6 14:19 31:9 34:14 37:21 41:2 44:10 47:10</p> <p><b>beneath</b> 33:3</p> <p><b>benefits</b> 25:19 29:22,24 30:6 30:9,24 36:1 43:2</p> <p><b>beyond</b> 34:13</p> <p><b>big</b> 29:10 34:10</p> <p><b>bit</b> 28:23</p> <p><b>block</b> 22:17,19</p> <p><b>blurry</b> 40:7</p> <p><b>board</b> 20:21 22:2 32:17,20 33:7</p> <p><b>boards</b> 32:18</p> <p><b>Boos</b> 14:16 16:4</p> <p><b>boy</b> 10:19 34:5</p> <p><b>branch</b> 17:25 24:3</p> <p><b>breadth</b> 31:2</p> <p><b>breaking</b> 18:18</p>
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