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Can disparaging trademarks be denied? The Supreme Court is skeptical.

By Robert Barnes January 18

A majority of the Supreme Court seemed highly skeptical Wednesday that the federal government can refuse to register all trademarks that may be disparaging, casting this as the government improperly taking sides in free speech disputes.

Justice Elena Kagan said that a government program that allowed only positive speech and denied negative speech would be a “fairly classic case of viewpoint discrimination,” in which the government cannot engage.

The court was considering the case of an Asian American band called the Slants, whose founder was denied trademark registration for the group’s name.

The trademark office in 2011 said registering the trademark would violate a part of the 1946 Lanham Trademark Act that prohibits registration of a trademark that “may disparage . . . persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute.”

The office said the name was likely to disparage a significant number of Asian Americans. But founder Simon Tam said the point of the band’s name

is just the opposite: an attempt to reclaim a slur and use it “as a badge of pride.”

Tam lost in the first legal rounds. But then a majority of the U.S. Court of Appeals for the Federal Circuit said the law violates the First Amendment’s guarantee of free speech. The government may not “penalize private speech merely because it disapproves of the message it conveys,” a majority of the court found.

The outcome of the Supreme Court case is likely to affect the legal case of the Washington Redskins, whose trademark registration was revoked in 2014 under the same disparagement clause.

Although the comments suggested the Slants might win, the justices also seemed concerned about going too far and forcing the government to register all trademarks, with no discretion.

The hour-long oral argument was a lively affair, with justices showing how difficult it was to reconcile the law with the First Amendment and then playing devil’s advocate about their own assertions.

With Assistant Solicitor General Malcolm L. Stewart in the well, Justice Anthony M. Kennedy wondered why a negative message could not be registered as a trademark when negative or even offensive speech is eligible for copyright protection.

Justice Ruth Bader Ginsburg ventured that a band called “Slants Are Superior” would receive trademark registration because it was not disparaging, while “the Slants” would be denied. She wondered why Tam’s intent did not matter.

“You can’t say ‘slants’ because the [Patent and Trademark Office] thinks that’s a bad word,” Ginsburg said. “Does it not count at all that everyone knows that the Slants is using this term not at all to disparage, but simply to

describe?”

Chief Justice John G. Roberts Jr. described the government’s argument as “circular.”

Justice Stephen G. Breyer wondered how rejecting negative trademarks advanced the goals of the government program, which is to aid consumers in identifying specific commercial interests.

At one point, Stewart compared the program to a public university dedicating a room as a place students could express their views, but without using racial epithets or speaking ill of other students.

“So the government is the omnipresent schoolteacher?” retorted Justice Anthony M. Kennedy.

The justices did not seem satisfied with Stewart’s argument that the band can be called whatever Tam wanted and that its music could receive a copyright, but that the First Amendment does not force the government to register trademarks that are offensive.

Even “the vilest racial epithets, insulting caricatures of venerated religious figures” would have to be approved by the government trademark office under the arguments the band advanced, Stewart said.

In the second half of the argument, the justices turned around even their own assertions to test the Slant’s attorney John C. Connell. But they appeared to be left cold by Connell’s absolutist arguments.

He argued that the government had almost no leeway when presented with almost any proposed trademark name.

Justice Sonia Sotomayor said he went too far.

“No one is stopping your client from calling themselves the Slants,” said Sotomayor, adding, “You are asking the government to endorse your name.”

Kagan, who had toughly questioned Stewart, said Connell did not seem to differentiate between a government program such as trademark registration and prohibited government restraints on private speech.

“Some aspects seem like government speech as well,” she said, referring to the trademark process, because the trademark is printed in the federal register and sent to other countries.

The justices were also concerned that Connell seemed not to believe the trademark office could deny registrations that denigrated an individual or a competitor’s product.

Sotomayor wondered about a hypothetical trademark: “Trump is a thief.”

“Even if they go to court and prove that that’s a libel or a slander, that trademark would still exist and would be capable of use because otherwise canceling it would be an abridgment of the First Amendment?” Sotomayor asked.

“I believe that’s correct,” Connell answered.

“That makes no sense,” Sotomayor said.

The comments seemed to indicate that the court was not ready to discard the entire trademark examination process.

The Redskins filed an amicus brief supporting the Slants.

The team’s trademark registration was canceled in 2014 after decades of use. The team asked a district judge in Virginia to overturn the cancellation and was refused. The case is now in the U.S. Court of Appeals for the 4th Circuit

in Richmond, pending the Supreme Court's decision in the Slants case.

Registration of a trademark provides a nationwide defense against others who would try to use it.

Robert Barnes has been a Washington Post reporter and editor since 1987. He has covered the Supreme Court since November 2006.

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