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## FIRST AMENDMENT V. LIMITS ON TRADEMARKS: ON TO THE SUPREME COURT

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In 2015, the Federal Circuit held that “the disparagement provision of [trademark law is] unconstitutional.... We recognize that invalidating this provision may lead to the wider registration of marks that offend vulnerable communities.... But much the same can be (and has been) said of many decisions upholding First Amendment protection of speech that is hurtful or worse.”

The Supreme Court just agreed to review the case. The filings are available for public review at <http://www.scotusblog.com/case-files/cases/lee-v-tam/>.

The mark at issue is one that Simon Tam, “an Asian-American musician, lecturer, and political activist,” uses for his band “The Slants”. According to the prospective registrant’s filings, the band was “intended ... to be a vehicle for expressing his views on discrimination against Asian-Americans.” His position, which prevailed in the Federal Circuit, is that denying his trademark application for “The Slants” on the grounds that it is offensive to Asians, is a violation of his First Amendment rights.

The argument in favor of refusing offensive or disparaging marks revolves around several points, but ultimately boils down to this: “Denial or cancellation of a trademark registration does not trigger civil or criminal penalties, and the PTO’s denial of registration here left respondent free to use “THE SLANTS” as the name of his band and in any promotional materials he wished to disseminate.”

We should know by summer whether content-based discrimination by a government agency is permitted under the First Amendment. You can follow the briefs (and the nearly certain avalanche of “amicus”, or friend of the court, briefs) here.

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