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. :

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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:

18 MALCOLM L. STEWART, ESQ., Deputy Solicitor General,

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 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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