

# WHAT'S IN A NAME?: *MATAL V. TAM* & THE RIGHT TO OWN DISPARAGING WORDS

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## INTRODUCTION

In June 2017, the Supreme Court decided *Matal v. Tam*,<sup>1</sup> a rare case in which intellectual property and First Amendment law collided.<sup>2</sup> The principal question was whether the Lanham Act's ("the Act") Disparagement Clause was constitutional.<sup>3</sup> While the Court had declined to answer this question with previous plaintiffs, such as the Washington Redskins ("the Redskins"), the Court granted certiorari to Simon Tam ("Tam") and his Asian-American bandmates to decide whether the U.S. Patent and Trademark Office ("PTO") had wrongly denied trademark registration for their band name: The Slants.<sup>4</sup>

Tam and his bandmates (collectively "The Slants") are more sympathetic plaintiffs than the Washington Redskins: they are Asian-Americans reclaiming an outdated term derogatory to Asian-Americans.<sup>5</sup> The Redskins, on the other hand, operate under a long-reviled racist term for Native Americans, and at best, a slim minority of their members is Native American.<sup>6</sup> The Slants won their Supreme Court case, but the Court left unresolved the next question, which is what this decision means for less-than-sympathetic parties like the Redskins.<sup>7</sup>

This paper will explore what rights individuals and organizations have in owning derogatory terminology. Part II provides the background of trademark registration criteria and benefits, a summary of the process to appeal rejected trademarks, an introduction to the Act and Disparagement Clause, and a brief overview of First Amendment law. Part III provides a history of Redskins litigation, highlighting previous disputes over the Disparagement Clause. Part IV introduces *Matal v. Tam* and provides its procedural history. Part V explores whether the Court could or should have

provided a carve-out for those members of the potentially "disparaged" group reclaiming otherwise disparaging words. Ultimately, I conclude *Tam* was rightly decided, and both The Slants' and the Redskins' trademarks must stand according to First Amendment freedom of speech principles. ■

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<sup>1</sup> 137 S. Ct. 1744 (2017).

<sup>2</sup> See generally *id.*

<sup>3</sup> See generally *id.*

<sup>4</sup> See generally *id.*

<sup>5</sup> See generally *id.*

<sup>6</sup> Ian Shapira, *A Brief History of the Word 'Redskin' and How it Became a Source of Controversy*, WASH. POST (May 19, 2016), [https://www.washingtonpost.com/local/a-brief-history-of-the-word-redskin-and-how-it-became-a-source-of-controversy/2016/05/19/062cd618-187f-11e6-9e16-2e5a123aac62\\_story.html?utm\\_term=.ef0c18f81d1f](https://www.washingtonpost.com/local/a-brief-history-of-the-word-redskin-and-how-it-became-a-source-of-controversy/2016/05/19/062cd618-187f-11e6-9e16-2e5a123aac62_story.html?utm_term=.ef0c18f81d1f).

<sup>7</sup> See Michael McCann, *Why the Redskins Scored a Victory in the Supreme Court's Ruling in Favor of The Slants*, SPORTS ILLUSTRATED (June 19, 2017), <https://www.si.com/nfl/2017/06/19/washington-redskins-name-slants-trademark-supreme-court>.