

No. 15-1311

IN THE
Supreme Court of the United States

PRO-FOOTBALL, INC.,
Petitioner,

v.

AMANDA BLACKHORSE; MARCUS BRIGGS-CLOUD;
PHILLIP GOVER; JILLIAN PAPPAN; COURTNEY TSOTIGH,
Respondents,

UNITED STATES OF AMERICA,
Intervenor-Respondent.

**On Petition for a Writ of Certiorari
Before Judgment to the United States
Court of Appeals for the Fourth Circuit**

REPLY BRIEF

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REPLY

The government argues that this Court should consider § 2(a)'s constitutionality only in the context of initial refusals to register, not cancellations. In other words, "Pay no attention to that man behind the curtain." *THE WIZARD OF OZ* (Warner Bros. Pictures 1939). But it makes no sense to review the facial constitutionality of a statute while ignoring one of the two contexts in which the statute applies. It makes even less sense to ignore the context where the government's case is weakest. With cancellations, the burdens on speech are at their apex and the government's interests are at their nadir. And the cancellation question affects the owners of all 2 million current registrations. If the government had the courage of its convictions on the merits, it should have no objection to the Court peering behind the curtain and examining the cancellation context. Indeed, the individual respondents here do not oppose hearing the Team's First Amendment challenge together with *Tam*. Blackhorse 1. Nor does the respondent in *Tam*. Br. for Respondent 11 (No. 15-1293). The petition for certiorari before judgment should be granted.

A. Certiorari Before Judgment Is Warranted To Consider Whether § 2(a) Violates the First Amendment in the Cancellation Context

1. If this Court accepts review in *Tam* to determine whether § 2(a) violates the First Amendment in the context of initial refusals to register, the Court should also consider the statute's constitutionality in the context of cancellations. Although the government states that this case and *Tam* "raise the same First Amendment issue," U.S. 15, a holding that the statute is valid for purposes of initial refusals to register

would not necessarily resolve the validity of the statute as applied to cancellations. Pet. 15-16. The government does not argue otherwise. The government responds that any “distinct constitutional concerns” surrounding cancellations should be addressed first by the Fourth Circuit. U.S. 16. But that makes zero sense if this Court will already be rolling up its sleeves to review § 2(a) in *Tam*. Seriatim resolution would waste the resources of this Court and the myriad *amici*.

Although facial First Amendment challenges may not “depend on the particular factual circumstances of a given case,” U.S. 15, how § 2(a) operates in the cancellation context makes all the difference in the world. For instance, the government asserts that its interest in dissociating itself from disparaging marks “is as strong in the cancellation context as in the initial registration context.” U.S. 16. That statement is baseless. The government cancels registrations only if a mark was disparaging when registered, without regard to its meaning today. Whatever interest the government may have in disassociating itself from marks that groups *today* find insulting, that interest is incoherent if groups no longer object to the marks.

Today, “[n]ine in 10 Native Americans say they are not offended by the Washington Redskins name.” J. Cox et al., *New poll finds 9 in 10 Native Americans aren’t offended by Redskins name*, Wash. Post, May 19, 2016. “[A] 2004 poll by the Annenberg Public Policy Center found the same result.” *Id.* The government thus cancelled the Team’s registrations for supposedly disparaging Native Americans in 1967-1990, even though the name has not offended the overwhelming

majority of Native Americans from at least 2004-present.¹

Conversely, cancellations impose exponentially greater burdens on speech than initial refusals to register. Pet. 14-15. While initial applicants (like Tam) have never relied on the benefits of registration, the Team has invested tens of millions of dollars building its brand around the Redskins name since the PTO first registered it in 1967. It is therefore difficult to comprehend the government's assertion that § 2(a)'s cancellation scheme "avoid[s] disrupting settled expectations." U.S. 15. The PTO registered the Redskins marks six times over 23 years without any objection. The massive disruption to settled expectations that flows from cancellation is not presented in the context of initial refusals. For example, it would certainly burden Joe Doe if the government refused his requested name change to Joe Redskins. But the burdens would magnify a-thousand-fold were the government to cancel the birth certificate of a 23-year-old named Joe Redskins.

2. To be sure, the Team can file as an *amicus* in *Tam*. But an *amicus* brief does not put the cancellation context squarely before this Court with full briefing and argument. Moreover, parties may respond to arguments in *amicus* briefs only in passing. And were the Team an *amicus*, the government could argue that Tam conceded that trademarks are commercial speech. Pet. 25-27. The government notably does not offer to forgo that argument. Granting this case

¹ The individual respondents' discussion of whether the Redskins marks were disparaging (Blackhorse 5-18) is irrelevant to the questions presented and rife with misstatements and omissions that the Team detailed in the Fourth Circuit.

ensures that the argument that trademarks deserve greater protection is on the table.

To be clear: the Team seeks certiorari now only if the Court grants review in *Tam*. Pet. 3. The government thus irrelevantly notes that the Team could seek certiorari later if the Court *denies* review in *Tam*. The government asserts that the Team “does not believe that time is of the essence,” U.S. 11-12, but the Team petitioned five days after the government petitioned in *Tam*. Before then, the Team had no reason to seek certiorari before judgment.

Neither respondent disputes that this Court has granted certiorari before judgment “to review a case as a companion to another case.” U.S. 16. The government observes that it sought review in *Booker* and *Fanfan* together because the questions presented in both cases affected “tens of thousands” of criminal sentences. *Id.* at 16-17. The cancellation context here affects the owners of all 2 million registrations.

The government notes that *Grutter* and *Gratz* involved “overlapping parties,” in that the government defendant, the University of Michigan, was a party in both cases. U.S. 17. But the United States is a party here and in *Tam*. And this case offers “a broader spectrum of features and more substantial record’ to decide the issues.” *Id.* (quoting Pet. 14-16, *Gratz v. Bollinger*, 539 U.S. 244 (2003) (No. 02-516)). Also as in *Gratz*, “resolution of the constitutional question depend[s] on the particular facts” of the government action—here, the cancellation of the Team’s longstanding registrations. *Id.*

For similar reasons, the government’s reliance on this Court’s limited resources and the doctrine of constitutional avoidance is bizarre. U.S. 12-14. The

government cannot reasonably rely on constitutional avoidance with respect to a constitutional question the government itself has asked the Court to decide immediately. *See* U.S. *Tam* Pet. i (No. 15-1293). The Team requests certiorari only if the Court will already be addressing § 2(a)'s constitutionality in *Tam*.

3. Before deciding the First Amendment question, the Court should consider the argument that § 2(a) prohibits disparaging only identifiable individuals or juristic persons—not groups as a whole, including Native or Asian Americans or any other group. Neither respondent disputes that the Team's narrowing construction obviates the constitutional question in this case and *Tam*.

The individual respondents oppose this Court's review of the statutory question, noting that the Team raised the argument for the first time in the court of appeals. Blackhorse 30. But the government contends that the Court should consider the argument, if at all, in *Tam*, where the respondent first raised the issue even later than the Team, in response to the government's petition. U.S. 13-14 n.4.

Constitutional avoidance requires the Court to decide this issue regardless of waiver. *Rosenberg v. Fleuti*, 374 U.S. 449, 451 (1963); *Neese v. S. Ry. Co.*, 350 U.S. 77, 78 (1955); *see* Team CA4 Reply 21 (citing additional cases). In *Ohio State Conference of N.A.A.C.P. v. Husted*, 768 F.3d 524 (6th Cir. 2014) (cited at Blackhorse 30), the Sixth Circuit *considered* the waived argument. The government does not dispute that "principles of constitutional avoidance supersede usual rules of waiver and forfeiture." U.S. 14 n.4. And the government's petition in *Tam* observes that "[t]he first step in a First Amendment analysis is to construe the challenged statute." U.S. *Tam* Pet. 10 (internal

quotation marks omitted). It would also make little sense for this Court to resolve § 2(a)'s constitutionality, knowing that lower courts could later determine that this entire enterprise was unnecessary because the statute does not cover groups.

The individual respondents are wrong that the Team needed to list its statutory construction argument as a separate question presented. Blackhorse 29. The First Amendment question encompasses the issue. “[G]ranted certiorari to determine whether a statute is constitutional fairly includes the question of what the statute says.” *Rumsfeld v. Forum for Acad. and Inst’l Rights, Inc. (FAIR)*, 547 U.S. 47, 56 (2006).

As to the merits, neither respondent explains how a group qualifies as a “juristic person” or a “natural person” under 15 U.S.C. § 1127; how their interpretation of § 2(a) gives any meaning to § 1127’s “sue or be sued” provision; or why Congress wanted to protect any and all groups regardless of the absurdity of such a construction. Pet. 24-25. The government invokes *Chevron* deference, U.S. 14 n.5, but the “canon of constitutional avoidance trumps *Chevron* deference.” *Nat’l Mining Ass’n v. Kempthorne*, 512 F.3d 702, 711 (D.C. Cir. 2008) (citing *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 574-77 (1988)).

Respondents err in relying on § 2(c)’s reference to “a particular living individual.” Blackhorse 31; U.S. 14-15 n.5. The word “particular” in § 2(c) is superfluous under any reading of § 2(a), because every “living individual” is “particular.” And the canon against superfluity does not render respondents’ reading of § 2(a) “clear and unambiguous,” as required to bypass the constitutional avoidance doctrine. *I.N.S. v. St. Cyr*, 533 U.S. 289, 305 (2001).

B. Certiorari Before Judgment Is Warranted To Consider Whether § 2(a) Is Vague and Whether Cancellation Triggers Procedural Due Process

If this Court grants review in *Tam*, it should consider whether § 2(a) is unconstitutionally vague, and whether cancellation violates procedural due process if delay has caused prejudice. Both questions are important and are intertwined with the First Amendment question.

1. Neither respondent disputes that vagueness and the First Amendment are intertwined. Considering the vagueness question would assist the Court in resolving the First Amendment question, even if the Court ultimately invalidates § 2(a) under the First Amendment alone. *E.g.*, *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 870 (1997) (“Regardless of whether the CDA is so vague that it violates the Fifth Amendment, the many ambiguities concerning the scope of its coverage render it problematic for purposes of the First Amendment.”). The decision the government cites for the (erroneous) proposition that a relaxed vagueness standard applies, *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998), is a First Amendment decision that only highlights why the Court should consider the questions together. U.S. 19.

Section 2(a) fails to provide fair notice, fosters arbitrary and discriminatory enforcement, and permits any of this nation’s 300 million citizens to effect a heckler’s veto over protected speech. Pet. 16-20. The government states that “the PTO does not allow its examiners to rely on their own subjective views,” U.S. 19, but the PTO describes its disparagement assessment as “highly subjective,” Pet. 17 (quoting the TTAB). And the government’s reliance on *In re Geller*,

751 F.3d 1355 (Fed. Cir. 2014), for the notion that § 2(a) has a “settled legal meaning” is ironic indeed. *Geller* held that STOP THE ISLAMISATION OF AMERICA disparages Muslims. *Id.* at 1357-58. Yet in April, the PTO determined that STOP ISLAMIZATION OF AMERICA was entitled to registration notwithstanding § 2(a).²

The government argues that “context” explains the inconsistencies permeating the enforcement of § 2(a). U.S. 19-20. But the government fails to identify any contextual difference that reconciles the inconsistencies. Is STOP ISLAMIZATION OF AMERICA less disparaging than STOP THE ISLAMISATION OF AMERICA because it omits the “THE” and switches the “S” to a “Z”? Is HEEB less disparaging on a magazine cover than a t-shirt? What context surrounding WILD INJUN made it less disparaging than URBAN INJUN? What explains the other inconsistencies the Team and the Federal Circuit listed? If the government has a coherent explanation, it won’t say.

The government remarks that “[r]egistration errors occasionally occur.” U.S. 20. But the government does not say *which* inconsistent registrations or refusals were errors. Section 2(a) is vague not because examiners occasionally make mistakes but because the government is unable to tell anyone what constitutes a mistake.

The individual respondents suggest that the vagueness question is “case-specific.” Blackhorse 20. But the Team raises a facial vagueness challenge, Pet. 16-21; Pet. App. 37a-38a, and this Court regularly holds

² The Team noted this inconsistency in its *amicus* brief in *Tam*, filed June 20. On July 7, the PTO withdrew its approval of the registration, citing § 2(a). Suspension Notice, U.S. Trademark Application No. 86857969.

that statutes or aspects of statutes are facially vague. *E.g.*, *Johnson v. United States*, 135 S. Ct. 2551 (2015); *City of Chicago v. Morales*, 527 U.S. 41 (1999); *Maynard v. Cartwright*, 486 U.S. 356 (1988). That challenge does not depend on the meaning of “redskins,” just as the facial vagueness question raised by the *Tam* respondent does not depend on the meaning of “slants.” And while the Team has a separate, as-applied vagueness challenge under *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307 (2012), based on the PTO’s six prior registrations of the Redskins marks, Pet. 20, that history is also highly relevant to the facial challenge common to this case and *Tam*. In evaluating facial vagueness, the Court considers past “experience” in interpreting a law. *Johnson*, 135 S. Ct. at 2560.

Contrary to the individual respondents’ suggestion, Blackhorse 21, the Team’s petition states that “[t]he respondent in *Tam* briefed the vagueness question at the panel stage in the Federal Circuit.” Pet. 20. Our point, however, is that *Tam*’s vagueness argument “omitted key points.” *Id.* No respondent disagrees with that statement.

The *Tam* respondent asks the Court to add a question on vagueness. Br. for Respondent i (No. 15-1293). We agree. But *Tam* is no better a vehicle than this case, and in many ways it is worse, for reasons explained in the petition that no respondent disputes. Pet. 20-21. The government’s argument that the “consequences of imprecision [in § 2(a)] are not constitutionally severe,” U.S. 19 (citation omitted), only underscores the need to consider this case. If the government makes this dubious argument, it should be forced to confront the party facing the most severe consequences—the Team. Unlike *Tam*, the Team’s

registrations have been cancelled after tens of millions of dollars of investment over nearly 50 years.

2. Contrary to respondents' suggestion, the Team's third question presented involves a legal issue of immense "general importance." U.S. 20-21; *see* Blackhorse 28-29. The district court below held that procedural due process does not apply to the cancellation of trademark registrations. Pet. 22; Pet. App. 43a. Two federal circuits have disagreed,³ and the government does not defend the district court's holding. Rather, the government offers a slight variation with the same end result. Procedural due process applies, the government admits, but delay can *never* violate due process because registrants get a pre-deprivation hearing and know that the PTO can cancel registrations at any time. U.S. 21-22.

This issue bears significantly on the First Amendment question. If procedural due process permits cancellation at any time regardless of what evidence has been lost, that greatly magnifies § 2(a)'s First Amendment chilling effect. Pet. 23-24. The presence or absence of prompt administrative and judicial review is crucial to the First Amendment analysis of licensing statutes. *City of Littleton, Colo. v. Z.J. Gifts D-4, L.L.C.*, 541 U.S. 774, 778-81 (2004) (citing cases). This was the Team's principal argument supporting certiorari before judgment on the delay question, yet neither respondent addresses it.

Under the government's theory, the PTO may cancel 50- or even 500-year-old registrations even if every shred of evidence has been lost and every witness is dead. U.S. 22. And the government further contends

³ Though neither case involved delay, U.S. 21, that distinction is irrelevant to whether cancellation triggers due process.

that Congress can eliminate the protections of procedural due process by enacting a statute giving trademark registrants “notice” that those protections are eliminated. *Id.* The government’s dangerously expansive view of its cancellation power only highlights that this issue should be front and center when this Court decides the First Amendment question.

The Team did not waive the argument that the PTO delayed too long to cancel. *Cf.* Blackhorse 22-23. The Team sought summary judgment on the ground that “cancelling the registrations pursuant to the statutory procedure after nearly eighty years of use and fifty years of registration ... substantially prejudices PFI and ... denies PFI due process.” COA Joint App. 2162; *see id.* at 116-17, 122-24. The district court decided the issue, holding that the registrations are not a protected property interest. Pet. App. 43a. The Team’s challenge to that holding is preserved. The government does not argue waiver.

The individual respondents acknowledge that the Team identified prejudice from the delay, but argue that the Team should have said more. Blackhorse 26. The district court did not so hold, and the prejudice is readily apparent. Pet. 21-22. If the Team had taken a survey at the relevant times, for example, the surveys might have shown that 90% of Native Americans did not find the name disparaging. *Supra* at 5. And if respondents are correct that “[n]o additional evidence” could possibly have been relevant because the standard for disparagement is so “low” (Blackhorse 26), that only highlights § 2(a)’s constitutional infirmity. In any event, if the Court grants the third question presented, it could address the legal principle reflected in the district court’s holding, and remand for consideration of whether the delay here violated due process.

CONCLUSION

If this Court grants review in *Tam*, the petition for certiorari before judgment should be granted.

Respectfully submitted,

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