

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,*

*and*

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**

---

**RESPONSE TO PETITION FOR A WRIT OF  
CERTIORARI BEFORE JUDGMENT**

---

JESSE A. WITTEN  
*Counsel of Record*  
TORE T. DEBELLA  
PATRICK H. THOMPSON  
DRINKER BIDDLE & REATH LLP  
1500 K Street NW  
Washington, DC 20005  
(202) 842-8800  
Jesse.Witten@dbr.com  
*Counsel for Respondents*

---

---

## QUESTIONS PRESENTED

Section 2(a) of the Lanham Act establishes that a trademark is not eligible for federal registration if it “[c]onsists of or comprises . . . matter which may disparage ... persons, living or dead, ... or bring them into contempt, or disrepute.” 15 U.S.C. § 1052(a).

1. Does the First Amendment require the government to register racist and ethnic slurs as part of its trademark registration program?
2. Is the Section 2(a) provision against registering marks with matter that “may disparage” unconstitutionally vague?
3. Does the cancellation of registrations for trademarks owned by Pro-Football, Inc. (“PFI”), following litigated proceedings before the Trademark Trial and Appeal Board (“TTAB”) and a District Court, violate due process?

**RULE 29.6 STATEMENT**

Respondents Amanda Blackhorse, Marcus Briggs-Cloud, Phillip Gover, Jillian Pappan and Courtney Tsotigh are individuals.

**TABLE OF CONTENTS**

	<b>Page</b>
QUESTIONS PRESENTED .....	i
RULE 29.6 STATEMENT.....	ii
TABLE OF CONTENTS .....	iii
TABLE OF AUTHORITIES .....	v
INTRODUCTION .....	1
STATEMENT OF THE CASE.....	2
A.    Proceedings Below .....	2
B.    Prior Litigation .....	4
C.    Factual Background .....	5
REASONS FOR DENYING THE WRIT .....	19
I.    IF THE COURT GRANTS THE PETITION, IT SHOULD DO SO ONLY AS TO THE FIRST AMENDMENT QUESTION.....	19
A.    The Void-For-Vagueness Question Is Case-Specific and PFI Erroneously Implies That Tam Has Abandoned This Issue .....	20
B.    PFI’s Due Process Argument Is Waived, Case-Specific, Has Nothing To Do With <i>Tam</i> , and Lacks Merit .....	22

C.	PFI's Statutory Interpretation Argument Was Not Properly Raised in the Petition, Has Been Waived, Lacks Merit, and Has Never Been Considered by Any Court .....	29
	CONCLUSION.....	32

## TABLE OF AUTHORITIES

CASES	Page(s)
<i>Am. Canoe Ass’n v. Murphy Farms, Inc.</i> , 326 F.3d 505 (4th Cir. 2003).....	24
<i>Astrue v. Ratliff</i> , 560 U.S. 586 (2010).....	31
<i>Blackhorse v. Pro-Football, Inc.</i> , 2014 WL 2757516 (T.T.A.B. 2014) .....	2, 27
<i>Central Bank of Denver v. First Interstate Bank</i> , 511 U.S. 164 (1994).....	31
<i>Harjo v. Pro-Football, Inc.</i> , 1999 WL 375907 (T.T.A.B. 1999) .....	5
<i>Harjo v. Pro-Football, Inc.</i> , 415 F.3d 44 (D.C. Cir. 2005).....	5
<i>Harjo v. Pro Football, Inc.</i> , 565 F.3d 880 (D.C. Cir. 2009).....	5
<i>In re Heeb Media LLC</i> , 2008 WL 5065114 (T.T.A.B. 2008) .....	27
<i>Hoffman Estates v. Flipside, Hoffman Estates, Inc.</i> , 455 U.S. 489 (1982).....	20
<i>Holder v. Humanitarian Law Project</i> , 561 U.S. 1 (2010).....	20

<i>In re Int’l Flavors &amp; Fragrances Inc.</i> , 183 F.3d 1361 (Fed. Cir. 1999) .....	23, 24
<i>J.C. Eno (U.S) Ltd. v. Coe</i> , 106 F.2d 858 (D.C. Cir. 1939) .....	25
<i>Jones v. Angelone</i> , 94 F.3d 900 (4th Cir. 1996) .....	25
<i>Nat’l Endowment for the Arts v. Finley</i> , 524 U.S. 569 (1998) .....	20
<i>Ohio State Conference of NAACP v. Husted</i> , 768 F.3d 524 (6th Cir. 2014) .....	30
<i>P.A.B. Produits et Appareils de Beaute v. Satinine Societa in Nome Collettivo di S.A.e.M. Usellini</i> , 570 F.2d 328 (C.C.P.A. 1978) .....	25
<i>Perry v. Blum</i> , 629 F.3d 1 (1st Cir. 2010) .....	25
<i>Pro-Football, Inc. v. Blackhorse</i> , 112 F. Supp. 3d 439 (E.D. Va. 2015) .....	3, 4, 5, 20
<i>In re Riverbank Canning Co.</i> , 95 F.2d 327 (C.C.P.A. 1938) .....	28
<i>In re Tam</i> , 785 F.3d 567 (Fed. Cir. 2015) ( <i>en banc</i> ) .....	22
<i>United States v. Harris</i> , 551 Fed. Appx. 699 (4th Cir. 2014) .....	25

<i>United States v. Jones</i> , 689 F.3d 696 (7th Cir. 2012).....	20
<i>United States v. Kalbflesh</i> , 621 Fed. Appx. 157 (4th Cir. 2015) .....	25
<i>United States v. Lovasco</i> , 431 U.S. 783 (1977).....	25
<b>STATUTES, RULES &amp; REGULATIONS</b>	
15 U.S.C. § 1052(a).....	<i>passim</i>
15 U.S.C. § 1052(c) .....	31
15 U.S.C. § 1064(3).....	2, 26, 28
15 U.S.C. § 1071(a).....	1, 3
15 U.S.C. § 1071(b).....	2, 3
28 U.S.C. § 1295(a)(4)(B) .....	1
Sup. Ct. R. 11 .....	1, 19, 29, 31
Sup. Ct. R. 14(a).....	29
<b>OTHER AUTHORITIES</b>	
Kimberly A. Pace, <i>The Washington Redskins Case and The Doctrine of Disparagement: How Politically Correct Must a Trademark Be?</i> , 22 Pepp. L. Rev. 7 (1994).....	26



## INTRODUCTION

In a separate case, the United States has petitioned for a writ of certiorari from a Federal Circuit decision holding that the disparagement provision of Section 2(a) of the Lanham Act violates the First Amendment. *See* Pet. For Certiorari, *Lee v. Tam*, No. 15-1293 (filed Apr. 20, 2016). The Court should grant the petition in *Tam*. The First Amendment question in *Tam* is important and the Federal Circuit's ruling will effectively resolve the issue because any applicant for trademark registration has the option of appealing an adverse decision of the TTAB to the Federal Circuit. *See id.* at 8-9, 21-24; 15 U.S.C. § 1071(a); 28 U.S.C. § 1295(a)(4)(B).

PFI's petition presents not only the First Amendment question, but also three additional issues – vagueness, due process, and a statutory interpretation argument – that are not in common with *Tam* or have been waived, and are not worthy of this Court's immediate review before judgment. *See* Sup. Ct. R. 11. If the Court grants PFI's petition, it should do so only for the First Amendment question. The Court should deny PFI's petition as to questions other than the First Amendment question.

## STATEMENT OF THE CASE

### A. Proceedings Below

PFI owns the Washington NFL football team. In 1967, 1974, 1978, and 1990, examining attorneys at the United States Patent and Trademark Office (“PTO”) erroneously registered six of PFI’s trademarks that contain the term “redskin” despite the Section 2(a) provision against registering marks that contain matter that “may disparage” Native Americans or bring them into “contempt or disrepute.”

On August 11, 2006, Respondents Amanda Blackhorse, Marcus Briggs-Cloud, Phillip Gover, Jillian Pappan, and Courtney Tsotigh petitioned the TTAB to cancel the six registrations as having been issued “contrary to the provisions of” Section 2(a). 15 U.S.C. § 1064(3).

After reviewing the extensive evidentiary record presented by the parties, the TTAB ruled in favor of Respondents. The TTAB held that the PTO had issued the registrations in error because PFI’s marks contain matter (*i.e.*, the term “redskins”) that “may disparage” Native Americans or bring them into contempt or disrepute. Accordingly, the TTAB ordered cancellation of the registrations. *Blackhorse v. Pro-Football, Inc.*, 2014 WL 2757516 (T.T.A.B. 2014).

PFI filed suit in the Eastern District of Virginia pursuant to 15 U.S.C. § 1071(b), seeking to

overturn the TTAB decision. JA 22-56.<sup>1</sup> PFI sought declaratory judgment that the registered marks do not contain matter that may disparage Native Americans or that may bring Native Americans into contempt or disrepute; that Section 2(a) violates the First Amendment; that Section 2(a) is void for vagueness; that Section 2(a) violates the Due Process and Takings Clauses; and that Respondents' petition in the TTAB was barred by laches. *Id.* The United States intervened on the side of the Respondents. JA 102-04.<sup>2</sup>

In the District Court, the parties were permitted to supplement the evidentiary record and, pursuant to Fourth Circuit precedent, the District Court reviewed all the evidence *de novo*. *Pro-Football, Inc. v. Blackhorse*, 112 F. Supp. 3d 439, 452 (E.D. Va. 2015); 15 U.S.C. § 1071(b)(3).

Respondents introduced considerable evidence to supplement the already ample TTAB record, including: (1) additional dictionary evidence that “redskin” is an ethnic slur; (2) additional scholarly articles describing “redskin” as an ethnic slur; (3) additional newspaper articles regarding opposition to PFI’s team name; (4) the expert report of linguist Geoffrey Nunberg demonstrating that “redskin” is used with negative modifiers at a much greater frequency than “Indian,” indicating that “redskin” is

---

<sup>1</sup> Citations to “JA \_\_\_\_” are citations to the Joint Appendix filed in the Fourth Circuit.

<sup>2</sup> PFI could have appealed the TTAB’s decision to the Federal Circuit under 15 U.S.C. § 1071(a), but opted instead to file a new civil action in United States District Court pursuant to 15 U.S.C. § 1071(b).

a slur and that “Indian” is a neutral term; (5) the expert report of historian James Riding In concerning the historic opposition of Native Americans to the team name “Redskins”; (6) evidence that in 1972, the University of Utah dropped “Redskins” as the name of its sports teams to avoid offending Native Americans; (7) declarations from prominent Native Americans describing their personal experiences with the slur “redskin”; and (8) the declaration and testimony of former National Congress of American Indians President Leon Cook concerning a 1972 meeting in which he and other Native American leaders formally asked PFI’s then-President Edward Bennett Williams to change the team name.

PFI and Respondents filed cross-motions for summary judgment. On July 8, 2015, the District Court denied PFI’s motions and granted summary judgment to Respondents on all counts. *Pro-Football, Inc. v. Blackhorse*, 112 F. Supp. 3d 439 (E.D. Va. 2015).

PFI filed a Notice of Appeal on August 4, 2015. PFI’s appeal with the Fourth Circuit is fully briefed.

## **B. Prior Litigation**

*Blackhorse* is the second case challenging the PTO’s decision to issue registrations for PFI’s trademarks. In 1992 (only two years after the most recent registration was issued), Suzan Shown Harjo and five other prominent Native Americans petitioned the TTAB to cancel registrations for PFI’s trademarks that contain “redskins.” JA 2179.

In 1999, in *Harjo*, the TTAB found that the marks may disparage Native Americans, and ordered the cancellation of PFI's trademark registrations. *Harjo v. Pro-Football, Inc.*, 1999 WL 375907 (T.T.A.B. 1999). PFI then brought action in the United States District Court for the District of Columbia to overturn the TTAB ruling. The District Court granted summary judgment for PFI, ruling that the TTAB erred in not dismissing the *Harjo* petition due to laches and also held that the TTAB's decision in *Harjo* was not supported by substantial evidence. After two trips to the D.C. Circuit, in 2009 the District Court decision was affirmed, but only on the basis of laches. *Harjo v. Pro-Football, Inc.*, 415 F.3d 44 (D.C. Cir. 2005); *Harjo v. Pro Football, Inc. v. Harjo*, 565 F.3d 880 (D.C. Cir. 2009).

As noted above, the *Blackhorse* TTAB petition was filed in 2006, while the *Harjo* federal court proceedings were pending. In addition, as noted above, Respondents in *Blackhorse* substantially supplemented the *Harjo* evidentiary record. *Blackhorse*, 112 F. Supp. 3d at 487.

### **C. Factual Background**

The *Blackhorse* District Court held that there was no disputed issue of material fact on the question of whether PFI's trademarks contain matter that *may* disparage Native Americans at the time the various registrations in question were issued. Evidence in the *Blackhorse* record establishing that PFI's trademarks contain matter that "may disparage" Native Americans includes:

- Dictionary definitions;

- Scholarly articles and other written sources;
- A significant admission by PFI's expert lexicographer;
- Expert testimony comparing the usage of "redskin" and "Indian";
- Evidence that Native Americans understand "redskin" as a slur and have experienced the slur; and
- Opposition, over decades, by leading Native American organizations and individuals to PFI's team name.

### 1. Dictionary Definitions

Dating back to 1898 and through the time period in which PFI's registrations were issued, dictionary usage labels demonstrate that "redskin" is a term that "may disparage":

- *Webster's Collegiate Dictionary* (1898): "often contemptuous."
- *The Random House Dictionary of the English Language* (1966): "Often Offensive."
- *Thorndike-Barnhart Intermediate Dictionary* (1974): "a term often considered offensive."
- *Oxford American Dictionary* (1980): "contemptuous."

- *The American Heritage Dictionary of the English Language* (1982): “Offensive Slang.”
- *Webster’s Ninth New Collegiate Dictionary* (1983): “usu[ally] taken to be offensive.”
- *Merriam-Webster Collegiate Dictionary* (1983): “usu[ally] taken to be offensive.”
- *Collier’s Dictionary* (1986): “considered offensive.”

JA 382, 387-98, 400-11, 413-23, 425-33, 454-57, 472. The parties’ expert witnesses agreed that dictionary entries tend to lag behind usage, and particularly so in their treatment of ethnic labels. JA 522-29, 598-99, 628-29.

## 2. Scholarly Articles and Other Written Sources

Scholarly articles, news articles, and other written sources also establish, or demonstrate through usage, that “redskin” may disparage Native Americans as of the dates of the registrations. For example:

- The 1911 *Encyclopedia Britannica* cautioned that, as a reference to Native Americans, the term “redskin” was “not in such good repute.” JA 650.
- A famous 1939 article by literary critic Philip Rahv entitled *Paleface and Redskin* divided American writers into two groups: “palefaces” and “redskins.”

According to Rahv, “paleface” writers are erudite and intellectual, in contrast to “redskin” writers who are “low-brow,” “primarily emotional, spontaneous and lacking in personal culture,” with a “habitual hostility to ideas.” Rahv bemoaned that “[a]t present, the redskins are in command of the situation, and literary life in America has seldom been so deficient in intellectual power.” JA 737-38.

- A 1962 article in *The American Journal of Sociology* published by the University of Chicago press identified “redskin” as an example of a “racial or ethnic group derogatory nickname for another.” JA 637. The article gave examples: “whites call Negroes ‘niggers,’” “the Spanish-speaking are called ‘spics,’” “Gentiles call Jews ‘Yids,’” and “[w]hites call Indians ‘redskins.’” *Id.* (emphasis added).
- A well-respected 1990 book on ethnic slurs described “redskin” as a “slur-name” and a “racial epithet.” JA 644, 646.<sup>3</sup> The title of the work even included “redskin” as an example of a slur. JA 642. PFI’s expert admitted that the book “certainly is a respected source” and its author is “an authoritative sociologist who is

---

<sup>3</sup> Irving Lewis, *Unkind Words: Ethnic Labeling from Redskin to WASP* 3, 18 (1990).



respected within the general field of ethnic labeling.” JA 625.

- A 1972 article in *The Washington Star* reported on the controversy over the team’s name and contrasted the neutral term “Indian” with the slur “redskin”: “Of course, the names and symbols differ. They range from the name Indian all the way to Redmen and Redskins, and the symbols go from strong and gallant caricatures to silly war-whooping idiots.” JA 741.
- News articles throughout the time of the registrations published in *The Washington Post*, *The Washington Daily News*, *The Baltimore Evening Sun*, *The Chicago Tribune*, *The Wall Street Journal*, *Sports Illustrated*, and *The Atlanta Constitution*, among other publications, reflected or reported on the understanding that “redskin” is a slur. JA 743-802.

*See also* Alden Vaughan, *From White Man to Redskin: Changing Anglo-American Perceptions of the American Indian*, 87 *Am. Hist. Rev.* 917, 942, 949 (1982) (“redskins” is an “epithet”); Haig Bosmajian, *Defining the ‘American Indian’: A Case Study in the Language of Suppression*, in *Exploring Language*, G. Goshgarian, Ed. (1983) at 295 (“Our language includes various phrases and words which relegate the Indian to an inferior status,” including “Redskins”); Robert Keller, “Hostile Language: Bias in Historical Writing About American Indian

Resistance,” *Journal of American Culture* (1986) at 15 (providing “redskin” as an example of “deprecatory language”); Jay Coakley, *Sport in Society: Issues and Controversies* (1990) at 206 (“The use of the name Redskins cannot be justified under any conditions. To many native Americans, redskin is as derogatory as ‘nigger’ is for black Americans.”). JA 652, 677, 684, 692, 703; 724.

### **3. PFI’s Expert Lexicographer Admitted That in 1967, 1975 and 1985, “Redskin” “Certainly Might Be Offensive.”**

PFI retained a lexicographer, David K. Barnhart, to testify as an expert witness in both *Harjo* and *Blackhorse*. Counsel for PFI asked Mr. Barnhart about the opinions he had formed of the “word redskin in 1967 as applied to American Indian persons.”

Mr. Barnhart admitted that as of 1967, the term “redskin” “*certainly might be offensive.*” JA 495-96 (emphasis added). He testified that his opinion was the same for 1975 and 1985. JA 497.

### **4. Evidence of Usage Reveals That “Redskin” Has Negative Connotations.**

Expert linguist Geoffrey Nunberg, of the University of California-Berkeley, studied the relative frequencies with which “redskin” and “Indian” were modified by negative or positive terms. Using a database of 6,200 newspapers, Dr. Nunberg queried the archive from 1920 to 1979 to determine

how frequently various positive and negative terms were used to modify either “redskin” or “Indian.”

He compared the relative frequency with which “redskin” and “Indian” were used with the terms “friendly,” “loyal,” “faithful,” “courageous,” “brave,” “contemporary,” “princess,” “noble,” “hostile,” “marauding,” “savage,” “treacherous,” “bloodthirsty,” “screaming,” “yelling,” “shrieking,” “whooping,” “murderous,” “thieving,” “crafty,” “wily,” “\_\_\_ bit the dust,” “pesky” and “infernal.”

Dr. Nunberg found that positive and neutral modifiers were used with much greater relative frequency with “Indian” than with “redskin.” Likewise, Dr. Nunberg found that negative modifiers were used with much greater relative frequency with “redskin” than with “Indian.” For example, he found that for every “friendly redskin,” there were 289 references to “friendly Indian,” but for every “pesky/infernal/crafty/wily redskin,” there were only 2.3 references to “pesky/infernal/crafty/wily Indian.” JA 552, 820. By reviewing for relative frequency, Dr. Nunberg accounted for the fact that “Indian” is a more commonly used word than “redskin.”

Dr. Nunberg’s work demonstrated that “redskin” is a term that carries negative connotations when compared to the neutral term “Indian.”

### **5. Native Americans Understand That “Redskin” Is a Slur and Have Experienced the Slur**

The record also contains evidence that Native Americans understand that “redskin” is a slur and have personally experienced the slur.

A 1963 scholarly study of the use of slang among Native American students at Haskell Institute in Lawrence, Kansas, confirms that Native Americans viewed “redskin” as a slur.<sup>4</sup> See Alan Dundes & C. Fayne Porter, “American Indian Student Slang,” *American Speech* 270 (Dec. 1963). JA 883. After describing slang terms that Haskell students used for Indians from certain tribes or states, the authors observed: “*Almost all the students resent being called redskins.*” JA 884 (emphasis added).<sup>5</sup>

In addition, four prominent older Native Americans testified about their personal experiences encountering “redskin” as a slur: (1) Raymond Apodaca (former VP of the National Congress of American Indians (“NCAI”) and Governor of his

---

<sup>4</sup> At the time, Haskell Institute was a post-secondary coeducational vocational training school for American Indians, operated by the United States government. In 1962, more than 1,000 American Indian students attended Haskell Institute from at least 80 different tribes covering 30 states. JA 849-50, 860-62, 883.

<sup>5</sup> Alan Dundes was an eminent Professor of Folklore at University of California-Berkeley and C. Fayne Porter was an Instructor at Haskell Institute. JA 521, 883. According to PFI’s expert, *American Speech* is a well-regarded publication. JA 521, 619-620

pueblo); (2) Leon Cook (former NCAI President and former Council Member and Tribal Administrator of his tribe); (3) Kevin Gover (prominent attorney, former Director of the Bureau of Indian Affairs, and Executive Director since 2007 of the Smithsonian National Museum of the American Indian); and (4) Suzan Shown Harjo (former NCAI Executive Director and recipient of the Presidential Medal of Freedom). JA 307-336.

Growing up in rural Oklahoma, Ms. Harjo and her friends were called “redskins” as an insult on dozens of occasions, at the same time that “No Indians or Dogs Allowed” signs were posted in stores near where she lived. JA 330. Mr. Apodaca was told at a bus stop in Lubbock, Texas, that he must eat his lunch outside and not at the lunch counter because he was a “redskin.” JA 311. Mr. Gover was called a “dirty redskin” on the elementary schools playground and a “redskin” on the football field by members of opposing teams in order to bully him. JA 324.

## **6. Native American Organizations and Individuals Have Long Objected to PFI’s Team Name**

Throughout the time period during which PFI obtained its trademark registrations, Native Americans organizations and individuals have objected to PFI’s team name and have pressed for a change in the name.

Much of the effort was led by NCAI. From the 1960s to the present, NCAI has been the largest and

most prominent national American Indian organization. NCAI was founded in 1944 to represent the interests and needs of American Indian governments and communities. JA 309, 311, 316, 332, 862-63. In the late 1960s and the years thereafter, NCAI had approximately 150 tribes as members; these tribes comprised approximately 50% of all American Indians. JA 309, 316, 896-97, 900. (There were 277 federally recognized tribes as of 1979, the first year the Department of Interior published a list. JA 907-09). In 1972, NCAI's member tribes comprised between 300,000 and 350,000 Native Americans. JA 796, 798.

Leon Cook was elected President of NCAI in 1971. After his election, he sought to find common ground with other national Native American groups, like the American Indian Movement, National Indian Youth Council, and Americans for Indian Opportunity. As Cook explained, NCAI and these other organizations had "disparate priorities and goals with regard to Native American issues," but leaders of these organizations "all agreed that opposing the Washington football team's name, and seeking a change in that name, would be the first issue on which we could unite in a common effort." JA 317.

In January 1972, Harold Gross, a former NCAI staff attorney, sent a moving letter to Edward Bennett Williams, who was then President of PFI. JA 318, 919-20. The letter described the name as a "derogatory racial epithet" that promoted a "misleading and denigrating image of the Native American." JA 930-32. As Leon Cook and Harold

Gross both testified, in March 1972, they and leaders of the other organizations met with Williams to present their grievances. JA 318-19, 921-25. They demanded that PFI change the team name and explained that the team name was a derogatory racial epithet. JA 318-19, 922-25, 930-32.

The day after the meeting, Williams wrote to NFL Commissioner Pete Rozelle that he had met a “delegation of American Indian leaders who are vigorously objecting to the continued use of the name Redskins.” Williams enclosed the letter from Harold Gross, and admitted that the Native American leaders “set[] out their position quite cogently.” JA 356-57, 936.

Ultimately, PFI did not change the team name, but Williams agreed to change the cheerleaders’ stereotypical Indian-style wigs and uniforms. Williams also decided to revise the lyrics to the team’s fight song to make them less mocking of Native Americans. JA 319, 358-360, 800, 1062.<sup>6</sup>

The local and national press reported on the efforts by the NCAI and other organizations to change the team name, including the meeting between the Native American leaders and Williams. Articles appeared in *The Washington Post*, *Washington Daily News*, *Washington Evening Star*, *The Baltimore Sun*, and *The Wall Street Journal*. JA

---

<sup>6</sup> At the time, the fight song lyrics were: “Hail to the Redskins/Hail Vic-to-ry!/Braves on the warpath/Fight for old Dixie/Scalp ‘em swamp ‘em/We will take ‘em big score/Read ‘em/Weep ‘em/Touch-down we want heap more.” JA 358-59, 1061-62 (emphasis added).

741-48, 796-802, 942-57. Similarly, a November 1972 Washington game program contained a lengthy article that discussed controversy over the “Redskins” team name. JA 370-74.

Although the name change effort did not succeed with PFI, there was a significant decision to drop “Redskins” by another team in 1972. The University of Utah decided to stop using “Redskins” as the name of its sports teams to avoid offending Native Americans. JA 873, 960, 962-64, 981-82.<sup>7</sup>

Since the Williams meeting, the NCAI has persisted in its efforts opposing PFI’s team name. At the 1973 NCAI annual convention in Tulsa, Reuben Snake, the Winnebago Tribal Chairman, addressed the convention and introduced a resolution calling for an end to racism in sports and especially an end to the Washington team’s name. The convention voted unanimously in support. JA 319, 334.

NCAI leaders who have been outspoken in their opposition to the Washington NFL team name include: Vine Deloria (NCAI Executive Director, 1964-67, and *Harjo* petitioner); Leon Cook (NCAI President, 1971-73); Joseph De La Cruz (NCAI President, 1984-85); Reuben A. Snake, Jr. (NCAI

---

<sup>7</sup> According to Professor James Riding In, since the University of Utah dropped “Redskins,” other schools have done so as well, in many cases as a result of opposition by American Indians or Indian groups. Eleven high school districts dropped “Redskins” in the 1990s, and another 18 have done so since 2000. At the college level, Southern Nazarene University changed its name from “Redskins” in 1988 and Miami University dropped “Redskins” in favor of “Red Hawks” in 1993. JA 877.



President, 1985-87); John Gonzales (NCAI President, 1987-89); Suzan Shown Harjo (NCAI Executive Director, 1984-89); Raymond Apodaca (NCAI Regional Vice President, and *Harjo* petitioner); and gaiashkibos (NCAI President, 1992). JA 309, 311, 316, 319, 896. Joann Chase, Executive Director of NCAI in 1996, testified that the issue of the “Washington Redskins” team name is an issue of “national significance, and which would be of concern to at least every Indian person I have ever had contact with ....” JA 1032.

Suzan Shown Harjo, in her elected role as Executive Director of NCAI from 1984 through 1989, served with a series of NCAI Presidents. Throughout her tenure as Executive Director, Harjo “reflected and carried out the position of the NCAI to oppose the name of the Washington NFL team and to call for its elimination.” JA 332-33. Ms. Harjo sent “notes to the team’s then co-owner, Edward Bennett Williams (1984-1985), in an effort to renew NCAI’s request to change the team’s name, and to the team’s then primary owner Jack Kent Cooke (1984-1989), in an attempt to set up a meeting to discuss reasons for Native American opposition to the offensive team name to encourage him to change it.” JA 334. Mr. Cooke never responded. JA 334. While Harjo was Executive Director, the NCAI had over 300 tribal members. JA 333.

After Ms. Harjo’s efforts to renew dialogue with PFI were unsuccessful, the NCAI turned towards more active public protest. When the Washington football team played in the 1988 playoffs and Super Bowl, the NCAI supported

protest efforts, including a “Change The Name” banner towed by a small plane above the NFC Conference Championship game in January 1988 and protests at the Super Bowl a few weeks later. The NCAI participated alongside other Native American organizations and individuals in these protests. JA 719-20, 766-76, 1037.

In 1993, the NCAI adopted two formal resolutions opposing PFI’s team name. JA 1050, 1058. One of the declarations expressed support for the *Harjo* TTAB petition, and declared further:

[T]he term REDSKINS is not and has never been one of honor or respect, but instead it has always been and continues to be a pejorative, derogatory, denigrating, offensive, scandalous, contemptuous, disreputable, disparaging and racist designation for Native American[s].

JA 1050.

In sum, as the *Lakota Times* (a newspaper with primarily Native American readership) noted in 1992, “[t]he National Congress of American Indians has been battling against the racist use of Indians as mascots for decades.” JA 869.

**REASONS FOR DENYING THE WRIT****I. IF THE COURT GRANTS THE PETITION, IT SHOULD DO SO ONLY AS TO THE FIRST AMENDMENT QUESTION.**

As discussed above, this Court should grant the United States' petition for certiorari in *Lee v. Tam*, No. 15-1283, to consider whether the disparagement provision of Section 2(a) violates the First Amendment.

PFI's petition raises the same First Amendment issue, but also raises three additional arguments – vagueness, due process, and a statutory interpretation argument – that are not in common with *Tam* or have been waived, and that are not worthy of this Court's immediate review. PFI's three other arguments are either highly fact-specific or waived – or both.

Further, these additional arguments do not satisfy the rigorous standard for granting a petition for certiorari before judgment. They are not “of such imperative public importance as to justify deviation from normal appellate practice” and do not “require immediate determination in this Court.” Sup. Ct. R. 11.

As a result, if the Court grants PFI's petition, it should do so only for the First Amendment question. The Court should deny PFI's petition as to questions other than the First Amendment question.

**A. The Void-For-Vagueness Question Is Case-Specific and PFI Erroneously Implies That Tam Has Abandoned This Issue.**

1. Whether a statute is void for vagueness is a case-specific inquiry that depends on the specific facts presented. “We consider whether a statute is vague as applied to the particular facts at issue, for ‘[a] plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others.’” *Holder v. Humanitarian Law Project*, 561 U.S. 1, 18-19 (2010) (quoting *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 (1982));<sup>8</sup> see also *United States v. Jones*, 689 F.3d 696, 702 (7th Cir. 2012) (explaining that “vagueness challenges are normally evaluated in light of the particular facts of the case, not in general”).

Thus, whether the disparagement provision in Section 2(a) is unduly vague when applied to “redskins” is a different question from whether it is unduly vague when applied to “slants.” Assessing whether “may disparage” is void for vagueness when applied to a particular trademark requires an

---

<sup>8</sup> Of course, Section 2(a) does not “proscribe” any conduct. It is impossible to “violate” Section 2(a) as it imposes no criminal or civil penalties. For this reason, a relaxed standard would be applied to evaluate whether Section 2(a) violates due process due to vagueness. See *Blackhorse*, 112 F. Supp. 3d at 465; see also *Nat’l Endowment for the Arts v. Finley*, 524 U.S. 569, 589 (1998) (explaining that a relaxed vagueness standard applies to review a statute setting criteria for NEA subsidy decisions); *Hoffman Estates*, 455 U.S. at 498 (stating that economic regulation is “subject to a less strict vagueness test”).

inquiry into evidence unique to the term in question. The relevant evidence may be linguistic evidence, evidence of usage, evidence to public perception of the term, and so on. *See supra* at 5-18.

PFI's void-for-vagueness argument will require the Court to consider all the facts relevant to the term "redskin," facts that have nothing to do with whether Section 2(a) is void for vagueness when applied to "slants." Similarly, facts relevant to "slants" will have nothing to do with whether Section 2(a) is void for vagueness when applied to "redskins."

Consequently, and contrary to PFI's suggestion, granting certiorari over the void for vagueness question raised in *Blackhorse* would not aid in deciding that question in *Tam*, any more so than an *amicus* brief by PFI would do. There is no sound reason for PFI's void-for-vagueness argument to leapfrog over the Fourth Circuit and for this Court to grant certiorari before judgment over this issue.

2. PFI's petition may give the misimpression that *Tam* failed to make a void-for-vagueness argument and that PFI's petition should be granted for that reason:

Granting certiorari before judgment in this case offers the Court the best opportunity to consider the vagueness challenge. The parties in *Tam* did not brief vagueness to the en banc Federal Circuit; the en banc court did not actually decide it; and [the] government's petition in *Tam* does not present the question. *By contrast*, the Team independently challenged § 2(a)'s

disparagement clause as vague, and the court below decided the issue.

Petition at 20 (emphasis added). In fact, there is no such “contrast.” Tam made the vagueness argument before the Federal Circuit panel, which considered and rejected the argument. *See* Brief of Appellant, *In re Tam*, No. 2014-1203 (Fed. Cir. filed Apr. 21, 2014) at 47-50; *In re Tam*, 785 F.3d 567, 572 (Fed. Cir. 2015).

In *Tam*, when the Federal Circuit granted an en banc rehearing, it ordered that “[b]riefing should be strictly limited to” the First Amendment issue. *See* Order, *In re Tam*, No. 2014-1203 (Fed. Cir. Apr. 27, 2015) at 2. Thus, the reason that Tam did not re-argue vagueness at the en banc stage was because the Federal Circuit ordered him not to do so.

Indeed, Tam has not abandoned the vagueness argument. He has asked that the Court grant certiorari, and consider his void-for-vagueness argument. Resp. Br., *Lee v. Tam*, No 15-1293 (Filed Jun. 20, 2016) at 30-33.

Accordingly, there is no merit to PFI’s suggestion that the Court must grant its petition before judgment so that the vagueness argument will be presented.

**B. PFI’s Due Process Argument Is Waived, Case-Specific, Has Nothing To Do With *Tam*, and Lacks Merit.**

1. PFI argues that the government’s delay between issuance and cancellation of its registrations violated due process because PFI

supposedly has a constitutionally protected property interest in its *registrations*. Petition at 22. This argument was waived by PFI below, *emphatically*. In the District Court, PFI deliberately and precisely emphasized that it was *not* arguing that it had a property interest in the registrations, but *instead* was arguing that the supposed property deprivation concerned its property interest in the trademarks themselves.

In the District Court, the United States and Respondents opposed PFI's due process argument by relying upon *In re Int'l Flavors & Fragrances Inc.*, 183 F.3d 1361, 1366 (Fed. Cir. 1999), which held that there is no property interest in a trademark registration under the Due Process Clause.<sup>9</sup> Seeking to distinguish this holding, PFI insisted that it was *not* arguing that that it had a property interest in the *registrations*, but was *instead* arguing that it had been deprived of a property interest in the *trademarks*. PFI explained its argument in a reply brief filed with the District Court:

PFI argued [in its opening brief] that its **trademarks** are constitutional property under the Takings and Due Process Clauses, and that cancellation of the marks' registrations constitutes a taking of the **underlying marks**.... [Respondents] and the U.S. concede that the trademarks are constitutional

---

<sup>9</sup> Def.'s Br. Summ J. on Counts 3 through 6, *Pro-Football, Inc. v. Blackhorse*, No. 1:14-cv-1043 (E.D.Va. 2015), ECF No. 106 at 27-28; U.S. Br. Summ. J., *Pro-Football, Inc. v. Blackhorse*, No. 1:14-cv-1043 (E.D.Va. 2015), ECF No. 110 at 30.

property but argue that **registrations** are not.... Accordingly, most of [Respondents] and the U.S.'s arguments are irrelevant.

JA 2158-59 (emphasis original). PFI insisted further that “the relevant inquiry” is whether trademarks – and not the registrations – are “constitutional property.” JA 2159.

PFI made a deliberate, strategic decision to declare that it was *not* arguing that the registrations were the property interest of which it was deprived without due process. PFI has therefore waived its right now to argue the reverse – that the registrations are actually the property interest after all. *See Am. Canoe Ass’n v. Murphy Farms, Inc.*, 326 F.3d 505, 515 (4th Cir. 2003).

Waiver aside, PFI is incorrect that a federal trademark registration is a property interest under the Due Process Clause. *See Int’l Flavors & Fragrances Inc.*, 183 F.3d at 1366. PFI currently attempts to distinguish *Int’l Flavors and Fragrances* because the decision deals with obtaining a federal registration and not cancelling registrations that have already issued. But the Federal Circuit’s analysis shows that distinction is irrelevant. *Id.* at 1368. Nor is there any logic to PFI’s distinction. Either a registration is a property interest or it is not, and the Federal Circuit has held it is not. *Id.*

PFI relies on two dated cases for the proposition that its registrations constitute constitutionally protected property, but in neither case was that question addressed by the court. Rather, both cases involve questions of procedural



due process that happen to involve trademark registrations. *J.C. Eno (U.S) Ltd. v. Coe*, 106 F.2d 858, 859-60 (D.C. Cir. 1939) (addressing the question of joinder of necessary parties to cancellation actions under a precursor statute to the Lanham Act); *P.A.B. Produits et Appareils de Beaute v. Satinine Societa in Nome Collettivo di S.A.e.M. Usellini*, 570 F.2d 328, 333 (C.C.P.A. 1978) (addressing the question of a party's duty to supplement its responses to an adverse party's interrogatories).

2. PFI also waived a second aspect of its due process argument. In the District Court, PFI never explained how it was prejudiced by the passage of time since the issuance of the registrations. A showing of prejudice is necessary to make out a due process claim. See *United States v. Lovasco*, 431 U.S. 783, 790 (1977) ("proof of prejudice is generally a necessary but not sufficient element of a due process claim"); *Perry v. Blum*, 629 F.3d 1, 17 (1st Cir. 2010) ("a party who claims to be aggrieved by a violation of due process must show prejudice").

For example, in *Jones v. Angelone*, 94 F.3d 900, 907 (4th Cir. 1996), the Fourth Circuit held that a defendant claiming a due process violation from pre-indictment delay had the "heavy burden" of showing that prejudice was both "actual" and "substantial," and not merely speculative. The defendant must show that he was meaningfully impaired in his ability to defend against the charges to such an extent that the disposition of the proceeding was likely affected. *Id.* at 908. See also *United States v. Harris*, 551 Fed. Appx. 699, 703 (4th Cir. 2014) (following *Angelone*); *United States v.*

*Kalbflesh*, 621 Fed. Appx. 157, 158-59 (4th Cir. 2015) (following *Angelone*). PFI, however, made only the conclusory and vague assertion that "... the delay has resulted in, *inter alia*, lost records, the death of witnesses, and faded memories." JA 123.

In the District Court, PFI made no showing of evidence that was lost, or of evidence it could have developed, that could have made a difference. Having failed to do so in the District Court, it is too late for PFI to try for the first time at the appellate stage, let alone at the Supreme Court.

PFI's pro forma assertion of prejudice applies equally to Respondents who, as PFI conceded before the TTAB, had a statutory right to seek cancellation under 15 U.S.C. § 1064(3). The youngest of the Respondents, Courtney Tsotigh, filed her cancellation petition when she was only 18 years old, *i.e.*, without undue delay on her part. But PFI never explains how the passage of time caused it to suffer more prejudice than Ms. Tsotigh or the other Respondents in terms of developing evidence.

Waiver aside, given the low "may disparage" standard of Section 2(a), PFI cannot show prejudice from delay sufficient to establish a due process violation. No additional evidence could have negated the evidence in the record that PFI's trademarks contain matter that "may disparage." See Kimberly A. Pace, *The Washington Redskins Case and The Doctrine of Disparagement: How Politically Correct Must a Trademark Be?*, 22 Pepp. L. Rev. 7, 33 & n.

174 (1994) (emphasizing the significance of “may” in “may disparage”).<sup>10</sup>

Section 2(a) does not require a weighing of the evidence, but only a consideration of whether there is evidence that shows that the trademark contains matter that “may disparage.” Once it is determined that there is evidence that the mark “may disparage,” contrary evidence will not affect that conclusion. As the TTAB explained:

[PFI] has introduced evidence that some in the Native American community do not find the term ‘Redskin’ disparaging when it is used in connection with professional football. While this may reveal differing opinions within the community, it does not negate the opinions of those who find it disparaging.... *[O]nce a substantial composite has been found, the mere existence of differing opinions cannot change the conclusion.*

*Blackhorse*, 2014 WL 2757516, at \*29 (emphasis added); *see also In re Heeb Media LLC*, 2008 WL 5065114, at \*8 (T.T.A.B. 2008) (explaining that “Applicant’s evidence, in support of its contention that its use of the term HEEB is not disparaging, does not erase the perception of others....” and “[a]lthough some in the [Jewish] community may not find ‘HEEB’ disparaging, ... the evidence shows that

---

<sup>10</sup> The author is the Honorable Kimberly Moore of the Federal Circuit.

there is a substantial composite of those in the named group who do.”).

Furthermore, the Lanham Act put PFI on clear notice that a petition to cancel its registration as containing matter that may disparage could be filed “at any time.” 15 U.S.C. § 1064(3).

PFI knew or should have known that trademarks containing “redskin” could be vulnerable to a challenge under Section 2(a), especially after the 1972 meeting between Native American leaders and Edward Bennett Williams, and media coverage from at least 1972 onward over the controversy surrounding the team name. Further, dictionaries and myriad other published sources should have led PFI to understand that its trademarks were vulnerable to cancellation for containing matter that “may disparage.” Indeed, a game program from 1972 contained an article that discussed controversy over the team’s name. It is common sense that “one who uses debatable marks does so at the peril that his mark may not be entitled to registration.” *In re Riverbank Canning Co.*, 95 F.2d 327, 329 (C.C.P.A. 1938).

Furthermore, PFI grossly exaggerates the delay. The final registration was issued in 1990. Litigation surrounding its registrations started only two years later with the *Harjo* TTAB petition and has continued since then in one form or fashion.

3. PFI’s due process argument is entirely case-specific. It has nothing to do with *Tam*. In fact, PFI has not argued that its due process argument will affect anyone but PFI. Nor has PFI

demonstrated a legal issue justifying a grant of certiorari, let alone before the Fourth Circuit rules.

PFI's due process issue does not meet the standard of Supreme Court Rule 11 for the grant of a writ of certiorari before judgment.

**C. PFI's Statutory Interpretation Argument Was Not Properly Raised in the Petition, Has Been Waived, Lacks Merit, and Has Never Been Considered by Any Court.**

On page 24 of its petition, PFI reveals its intention of making a statutory interpretation argument concerning Section 2(a). PFI intends to argue that "persons" as used in Section 2(a) refers "only to identifiable individuals or juristic persons," and not to groups of people such as Native Americans. Petition at 24.

PFI did not include this question among its Questions Presented. Petition at i. As a result, the Court should deny PFI's petition as to this question. *See* Sup. Ct. R. 14(a) ("Only the questions set out in the petition, or fairly included therein, will be considered by the Court").<sup>11</sup>

Even if the Court were to overlook PFI's Rule 14(a) violation, the Court should deny certiorari as to the statutory interpretation argument because it

---

<sup>11</sup> Tam also raised this argument in his response to the Government's petition for a writ of certiorari in *Lee v. Tam*. Resp. Br., *Lee v. Tam*, No. 15-1293 (Jun. 20, 2016) at 13-21. Tam never made this argument before. Just like PFI, Tam has waived the argument.

was waived. In addition, no court has ever before considered the argument, and it lacks merit.

1. PFI concedes that it “did not make this argument in the district court.” Petition at 25. PFI has therefore waived the argument. PFI points out that it has “extensively” made this argument in its brief in the Fourth Circuit (and intends to “vigorously press the point” in this Court). *Id.* But making an argument for the first time in the Fourth Circuit does not cure a waiver that occurred at the District Court level.

This Court should not grant certiorari before judgment on the statutory interpretation issue before the Fourth Circuit has had a chance to rule on waiver.

PFI cites the principle of constitutional avoidance under which a statute is sometimes interpreted so as to avoid rendering it unconstitutional. Petition at 24. The constitutional avoidance principle is not an exception to waiver, however. *See Ohio State Conference of NAACP v. Husted*, 768 F.3d 524, 552 (6th Cir. 2014) (explaining that the argument for constitutional avoidance was raised for the first time on appeal and therefore forfeited), *vacated on other grounds*, No. 14-3877, 2014 WL 10384647 (6th Cir. Oct. 1, 2014).

2. PFI’s statutory argument also lacks merit. Section 2(a) refers to “persons.” Respondents and all Native Americans are indisputably “persons.” PFI’s marks contain matter that may disparage Respondents and other Native American “persons.”

By contrast, Section 2(c) provides that the PTO is not to register a mark that “identif[ies] a *particular* living individual except by his written consent.” 15 U.S.C. § 1052(c) (emphasis added). Thus, Congress knew how to draft trademark law provisions to refer to identifiable persons, but did not do so in Section 2(a). *See, e.g., Astrue v. Ratliff*, 560 U.S. 586, 595 (2010) (“Congress knows how to make fees payable directly to attorneys where it desires to do so.”); *Central Bank of Denver v. First Interstate Bank*, 511 U.S. 164, 177 (1994) (“Congress knew how to impose aiding and abetting liability when it chose to do so.”). That Congress found it necessary to include “particular” in Section 2(c) demonstrates that “particular” (or “identifiable” or a similar term) should not be read into Section 2(a) where it does not appear.

3. No court has ever considered PFI’s statutory interpretation argument. This issue should be vetted and reviewed by lower courts before the Supreme Court considers it. PFI’s argument is not of sufficient importance to warrant certiorari before judgment. *See Sup. Ct. R. 11.*

**CONCLUSION**

If the Court grants PFI's petition for a writ of certiorari before judgment, it should do so only for the First Amendment question. The Court should deny the petition as to all other questions presented.

Respectfully Submitted,

JESSE A. WITTEN  
*Counsel of Record*  
TORE T. DEBELLA  
PATRICK H. THOMPSON  
DRINKER BIDDLE & REATH LLP  
1500 K St. NW  
Washington, DC 20005  
(202) 842-8800  
Jesse.Witten@dbr.com

*Counsel for Respondents*  
*Amanda Blackhorse, Marcus*  
*Briggs-Cloud, Phillip Gover,*  
*Jillian Pappan and Courtney*  
*Tsotigh*

June 27, 2016