NO. 15-1293

IN THE
Supreme Court of the United States

MICHELLE K. LEE, DIRECTOR, UNITED STATES PATENT AND TRADEMARK OFFICE,
Petitioner,

v.

SIMON SHIAO TAM,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF OF AMICUS CURIAE ALLIANCE DEFENDING FREEDOM IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

The disparagement clause in section 2(a) of the Lanham Act, 15 U.S.C. § 1052(a), prohibits the registration of a trademark that "may disparage … persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute." The question presented is whether the disparagement clause is contrary to the First Amendment.

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INTEREST OF AMICUS CURIAE[1]

Alliance Defending Freedom is a not-for-profit public interest legal organization providing strategic planning, training, funding, and direct litigation services to protect civil liberties and family values. Since its founding in 1994, Alliance Defending Freedom has played a role, either directly or indirectly, in dozens of cases before the Supreme Court, numerous cases before the courts of appeals, and in hundreds of cases before federal and state courts across the country, as well as in tribunals around the world.

Alliance Defending Freedom and its over 3,000 allied attorneys regularly litigate free speech cases. We rely on the Free Speech Clause to protect individuals and organizations whose speech is restricted by laws and errant government officials. *See, e.g.*, *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015). Alliance Defending Freedom has strong interest in ensuring that laws and regulations discriminating based on content and viewpoint undergo the strictest of scrutiny.

SUMMARY OF ARGUMENT

The disparagement clause of the Lanham Act, 15 U.S.C. § 1052(a), is another in a line governmental

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[1] The parties to this case have consented to the filing of this brief and letters indicating their consent are on file with the Clerk. *Amicus* states that no counsel for a party authored this brief in whole or in part, and no person other than the *amicus* and its counsel made any monetary contribution intended to fund the preparation or submission of this brief.

efforts to penalize negative or offensive speech. This Court has long rejected such censorship because provocative speech that stirs people to anger is foundational to freedom. *Terminiello v. City of Chicago*, 377 U.S. 1, 5 (1949). It is precisely the type of speech the First Amendment was designed to protect because officials generally do not censor positive, complimentary speech that is not likely to offend.

Penalizing speech that "may disparage" by denying it the important benefits of trademark registration endangers all speech—especially when done in a vague and overbroad fashion as is the case here. This Court should affirm the Federal Circuit's holding that such censorship by government officials is unconstitutional.

ARGUMENT

I. First Amendment Protection for Disparaging Speech is Vital to Freedom.

Petitioners' Policy prohibits registering any trademark a government official thinks may be disparaging. For instance, if a mark is complimentary to religious persons the government allows it, but any views that government officials deem disparaging of religious persons are prohibited. This regulation is facially unconstitutional. *See Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995) ("Discrimination against speech because of its message is presumed to be unconstitutional.").

This proscription of viewpoint discrimination applies even if the speech is traditionally less protected like fighting words, defamation, and obscenity. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992) (explaining that even in the context of proscribable speech like fighting words "[t]he government may not regulate use based on hostility—or favoritism—towards the underlying message expressed").

Unlike fighting words, disparaging speech enjoys full First Amendment protection. In 1949, this Court decided *Terminiello* during an era when fear of Communism ran rampant, and the evils of Fascism were still fresh in everyone's mind. Father Terminiello was a Catholic priest who belonged to a group called the Christian Veterans of America, which was vehemently anti-communist, but definitely had fascist leanings (though Father Terminiello denied that he was fascist). *Id.* at 22 (Jackson, J., dissenting) (Justice Jackson outlines the facts and Terminiello's speech in detail).

The case arose from a fine levied against Father Terminiello for a speech he delivered to members of his group in Chicago. The speech was anti-Communist and anti-Semitic. A crowd of over one thousand people gathered outside the building and became unruly. Terminiello was fined $100 because "his speech stirred people to anger, invited public dispute, or brought about a condition of unrest." *Id.* at 5. Despite the fact that his views were disparaging of Jews and Communists, the conviction and fine were reversed because [t]he vitality of civil and political institutions in our society depends on free discussion.

As Chief Justice Hughes wrote in *De Jonge v. Oregon*, 299 U.S. 353, 365, 57 S.Ct. 255, 260, 81 L.Ed. 278 [1937], it is only through free debate and free exchange of ideas that government remains responsive to the will of the people and peaceful change is effected. The right to speak freely and to promote diversity of ideas and programs is therefore one of the chief distinctions that sets us apart from totalitarian regimes.

> Accordingly a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea.

Id. (internal citation omitted). Respondents' band name, The Slants, falls precisely in this category of speech.

Twenty years after *Terminiello* and in the context of an anti-war protest in a public school (where freedom of speech is necessarily somewhat restricted), this Court observed:

> Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of

> another person may start an argument or cause a disturbance. But our Constitution says we must take this risk, *Terminiello v. Chicago*, 337 U.S. 1 (1949); and our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.
>
> [T]o justify prohibition of a particular opinion, . . . [the state] must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.

Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508-09 (1969). Refusal to register Mr. Tam's trademark because it may cause discomfort is unconstitutional.

II. Use of Vague Terms Like "Disparaging" to Penalize Speech Allows for Unbridled Discretion.

The disparagement clause cannot be viewpoint neutral, as a facial matter, unless it contains "protection … for viewpoint neutrality [as] part of the [approval] process." S*ee Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 235 (2000).

But Petitioner has virtually unlimited discretion to determine whether a mark "may disparage." In

such circumstances, "the possibility is too great that this power will be exercised in order to suppress disfavored speech." *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 757 (1988) (ordinance permitting mayor to decline a permit to place newsracks on public property if it was "not in the public interest" unconstitutionally conferred unfettered discretion).

For example, in *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969), an ordinance impermissibly conferred unfettered discretion by allowing refusal of a parade permit if the city commission determined in "its judgment the public welfare, peace, safety, health, decency, good order, morals or convenience require that it be refused." *Id.* at 149-51. This Court held that regulations governing speech must contain "narrow, objective, and definite standards" to avoid censorship. *Id.* at 151.

Excluding any mark that "may disparage" is completely subjective and anything but narrow, objective, and definite. Instead it is a hopelessly vague restriction on speech—a context where "a heightened vagueness standard appli[es]." *Brown v. Entm't Merch. Ass'n*, 564 U.S. 786, 793 (2011).

III. Burdening Disparaging Speech by Denying Trademark Registration is Impermissibly Overbroad.

"It has long been recognized that the First Amendment needs breathing space and that statutes attempting to restrict or burden the exercise of First Amendment rights must be narrowly drawn and

represent a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society." *Broadrick v. Oklahoma*, 413 U.S. 601, 611-12 (1973) (citations omitted). To protect these vital freedoms, litigants may challenge an overly broad statute on its face because "the statute's very existence may cause others not before the court to refrain from constitutionally protected speech . . . ." *Id.* at 612. A law regulating speech is overbroad on its face if it sweeps within its ambit a substantial amount of protected speech along with that which it may legitimately regulate. *Id.* at 615.

Section I of this brief demonstrates that disparaging speech is not only protected, but the very type of speech the First Amendment was designed to guard. Denying any speech that may be disparaging the substantial benefits that accompany trademark registration broadly penalizes protected speech.

Numerous lower courts have stricken similar restrictions even in the school context where speech is often less protected. For instance, the Third Circuit held that a high school speech policy which prohibited negative, demeaning, and derogatory speech was unconstitutional. *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 214-217 (3rd Cir. 2001). *See also Sypniewski v. Warren Hills Reg'l Bd. of Educ.*, 307 F.3d 243, 262 (3d Cir. 2002) (striking down policy prohibiting speech that creates "ill will" because it was likely that there will be a "good deal of speech" falling within this category that "does not substantially interfere with the rights of other students or with the operation of the school");

Dambrot v. Central Mich. Univ., 55 F.3d 1177, 1183-84 (6th Cir. 1995) (striking down policy prohibiting "demeaning" speech or "negative connotations" about a person's racial or ethnic affiliation); *Killion v. Franklin Reg'l Sch. Dist.*, 136 F. Supp. 2d 446, 459 (W.D. Pa. 2001) (striking down policy that prohibits "verbally or otherwise abus[ing] a staff member" because "it is not limited to speech that causes substantial disruption or interference with the work of the school, as required by Tinker"); *UWM Post, Inc. v. Bd. of Regents of the Univ. of Wis. System,* 774 F. Supp. 1163, 1178 (E.D. Wis. 1991) (striking down as overbroad a policy prohibiting discriminatory speech, directed at an individual, which demeans that person's race, sex, religion, color, creed, disability, sexual orientation, national origin, ancestry, or age, and creates an intimidating, hostile, or demeaning educational environment); *Doe v. Univ. of Mich.*, 721 F. Supp. 852, 866 (E.D. Mich. 1989) (striking down as overbroad a policy prohibiting "any behavior, verbal or physical, that stigmatizes or victimizes an individual" on the basis of specified characteristics).

CONCLUSION

The Court should be affirm.

Respectfully submitted,

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December 16, 2016