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IN THE SUPREME COURT OF THE UNITED STATES

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MICHELLE K. LEE, DIRECTOR, :

UNITED STATES PATENT :

AND TRADEMARK OFFICE, :

Petitioner : No. 15-1293

v. :

SIMON SHIAO TAM, :

Respondent. :

- - - - - x

Washington, D.C.
Wednesday, January 18, 2017

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:07 a.m.

APPEARANCES:

MALCOLM L. STEWART, ESQ., Deputy Solicitor General,
Department of Justice, Washington, D.C.; on
behalf of the Petitioner.

JOHN C. CONNELL, ESQ., Haddonfield, N.J.; on behalf
of the Respondent.

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P R O C E E D I N G S

(10:07 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case No. 15-1293, Lee v. Tam.

Mr. Stewart.

ORAL ARGUMENT OF MALCOLM L. STEWART

ON BEHALF OF THE PETITIONER

MR. STEWART: Thank you, Mr. Chief Justice, and may it please the Court:

The statutory provision at issue in this case, 15 U.S.C. 1052(a), prohibits the registration of any mark that may disparage persons, institutions, beliefs, or national symbols. Based on that provision, the PTO denied Respondent's application to register The Slants as a service mark for his band. The PTO's ruling did not limit Respondent's ability to use the mark in commerce, or otherwise to engage in expression or debate on any subject he wishes.

Because Section 52(a)'s disparagement provision places a reasonable limit on access to a government program rather than a restriction on speech, it does not violate the First Amendment.

JUSTICE KENNEDY: Is copyright -- copyright a government program?

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 --

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