No. 15-1293

In The
Supreme Court of the United States

MICHELLE K. LEE, UNDER SECRETARY OF COMMERCE FOR INTELLECTUAL PROPERTY AND 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

AMICUS BRIEF OF THE AMERICAN CENTER FOR LAW AND JUSTICE IN SUPPORT OF RESPONDENT

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INTEREST OF AMICUS[1]

The American Center for Law and Justice (ACLJ) is an organization dedicated to the defense of constitutional liberties secured by law. ACLJ attorneys often appear before this Court as counsel either for a party, *e.g.*, *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009), or for amicus, *e.g.*, *Walker v. Texas Div., Sons of Confederate Veterans*, 135 S. Ct. 2239 (2015), addressing a variety of issues of constitutional law. The ACLJ is dedicated, *inter alia*, to freedom of speech, including the right of religious speakers to equal access to government fora. ACLJ attorneys have been heavily involved in a number of this Court's equal access cases, notably including *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1983). The government's arguments in this case pose a serious threat to current First Amendment doctrine, including the principles of equal access.

SUMMARY OF ARGUMENT

Saying disparaging things about persons, institutions, beliefs, or national symbols may well be uncharitable. The First Amendment, however, does not permit the federal government to be the arbiter of taste in public or private discourse. The government nevertheless attempts to justify such a role under the

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[1] The parties in this case have consented to the filing of this brief. Copies of the blanket consent letters of the parties are on file with this Court. No counsel for any party authored this brief in whole or in part. No person or entity aside from the ACLJ, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

federal trademark statute. The government's arguments, however, represent a distortion of several strands of free speech jurisprudence, namely those governing government speech, government subsidies, commercial speech, and viewpoint discrimination. The government's arguments threaten disarray in free speech case law and in particular bid to undermine established equal access precedents. This Court should reject the government's arguments and affirm the judgment of the en banc Federal Circuit.

ARGUMENT

There are many ways to penalize speech the government does not like. Prohibition is the most obvious, but relegation of certain otherwise protected content or viewpoints to second-class status likewise infringes the First Amendment, at least absent a showing that the government is pursuing a compelling interest by narrowly tailored means. For example, the government could not constitutionally declare that any car bearing "disparaging" bumper stickers or signs may not use HOV or express lanes on federal highways or park in the lots of federal libraries, offices, or museums. The inconvenience to disfavored speakers may be fairly mild, but the hostility to the speech of particular content or viewpoints would be blatant.

What the government argues for in this case is the power to blackball messages the government deems unacceptable. "You can say that," the government acknowledges, "but you thereby forfeit government services such as listing your trademark on a registry." Such official "shunning" should be an obvious First Amendment concern; yet the government here argues, with a straight face, an interest precisely in distancing

itself from disfavored speech, as if it would somehow taint the government to list arguably ugly or mean trademarks in its official register (alongside, it should be noted, countless other trademarks of widely varying degrees of taste).

En route to this position, the government stretches beyond all recognition the government speech, government subsidy, commercial speech, and viewpoint neutrality doctrines. These doctrinal distortions threaten mischief in a host of contexts, notably this Court's important equal access cases. This Court should reject the government's destructive arguments and affirm the judgment below.

I. THE GOVERNMENT SPEECH DOCTRINE DOES NOT ENCOMPASS A REGISTRY OF PRIVATE SPEECH OR IDENTITIES.

Just as the names of the multitudinous entities listed in a phone book are not the speech of the publisher of the directory, so the government's recordation of the trademarks of private businesses does not make the government a speaker of those trademarks. Trademark registration does not entail a contest for the best names, a plea for inclusion in a selective display or collection, or a proposal that the government adopt monikers as its own. The government speech doctrine therefore provides no warrant for the refusal of the government here to register those names it deems tasteless, offensive, or otherwise beneath the government's standards of civility.

A. Scope and Inapplicability of Government Speech Doctrine

"The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech." *Pleasant Grove City v. Summum*, 555 U.S. 460, 467 (2009). Attaching the label "government speech" to expression is thus fatal to any private free speech claims. It is absolutely vital, therefore, that the distinction between private and government speech be drawn correctly.

When the government *selects* things for inclusion on a discretionary menu – which monuments to display in a park, which art to fund or place in a museum, which curriculum to use in government-run schools, which speakers to address a graduation ceremony – that selection process is expressive of the message the government wishes to convey. The government's "selective receptivity," *Pleasant Grove*, 555 U.S. at 471, is government speech,[2] and no

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[2]The items selected, however, remain the speech of their respective authors. Hence, the message which the particular included item itself conveys is not government speech. When selecting something for inclusion, "a government entity does not necessarily endorse the specific meaning that any particular" item, or viewer of that item, might attribute to it. *Pleasant Grove*, 555 U.S. at 476-77. The government thus does not itself necessarily celebrate the Nativity by including in its museum a masterpiece depicting that scene, for example, or embrace the Communist Manifesto by including it in a library, or adopt the speech of the wide spectrum of guest speakers at the commencement ceremonies of a state university, *e.g.*, Kellie Woodhouse, "University of Michigan commencement speeches through the years," *The Ann Arbor News* (May 4, 2013) ("U-M has hosted a wide range of people as commencement speakers, including jurists Thurgood Marshall and Sandra Day O'Connor

proponent of a competing monument, artistic project, or curriculum can assert a First Amendment right to insert a different message. *E.g., Pleasant Grove* (monuments); *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998) (arts funding); *see also Chiras v. Miller*, 432 F.3d 606 (5th Cir. 2005) (textbooks for state-approved curriculum).

Here, the trademarks at issue are obviously private speech. The government is not compiling a list of its favorite, or the most interesting, or the most esthetically pleasing trademarks. Rather, it is simply *registering* names generated entirely by private sources. The trademark registry is thus akin to copyright registration, or the federal database of tax exempt organizations, EO Select Check, Internal Revenue Service,[3] or the federal database of Medicare physicians, Physician Compare, Medicare.gov.[4] Such catalogs of private identities or utterances are meant to be comprehensive lists, not government-edited or government-selected pronouncements.

B. Negative Consequences of Expanding the Government Speech Doctrine to Cover Government Registries

Adoption of the federal government's dramatically expanded understanding of government speech would

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and political figures such as Hilary [sic] Clinton and George H. W. Bush").

[3]https://www.irs.gov/charities-non-profits/exempt-organizations-select-check.

[4]https://www.medicare.gov/physiciancompare/search.html.

both increase government power and correspondingly shrink freedom of speech. This censorial power by its nature would not be limited to disfavoring "disparaging" speech; once the "government speech" label applies, First Amendment protections evaporate entirely, and the government is then permitted to impose *any* standards it wishes,[5] even viewpoint discrimination, *Pleasant Grove*, 555 U.S. at 467-68. Consider: The government could refuse to register trademarks that reflect critically on government policies (*compare* "Government is Beautiful," Serial No.[6] 87045555, *with* "Government by Gunpoint," Serial No. 86455666), or that mention religion ("Mormon Tabernacle Choir," Serial No. 76505493), or that take a position on abortion that the government disfavors (*compare* "Abortion Must End Now," Serial No. 77720117, *with* "Religious Coalition for Abortion Rights," Serial No. 73610092).

Nor would the mischief be limited to trademark registration. There are other contexts where government bodies proffer lists – of permitted users of parks, of internal employee groups and their meetings, of student organizations, etc. If the mere fact that the government assembles and publishes such a list means that the government has the power, under the government speech doctrine, to distance itself from disfavored names or messages, then a public school

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[5]Of course, the government speech would still be subject to *other*, independent constitutional provision, such as the Titles of Nobility Clause or the Establishment Clause. *Pleasant Grove*, 555 U.S. at 468.

[6]All serial numbers herein are taken from results obtained at the trademark search site, tmsearch.uspto.gov.

could refuse to register or list religious users of after-school property, flying in the face of *Lamb's Chapel* and other equal access rights cases.[7] A government employer could likewise refuse to register for space or list on internal notices any employee group it disfavored, whether religious, political, civic, etc. And a state university could refuse to recognize student groups whose names suggest departure from the university's preferred policies.[8] *See also infra* § II(B).

C. Inadequacy of the "Government Program" Argument

The government seeks a different rule, proposing that speech is "government speech" if it takes place

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[7]The government tries to quell this concern by contending that "this case . . . does not raise any public-forum issues." Pet. Br. at 40. However, none of the government's arguments turn on the absence of a public forum. Government speech, for example, is government speech even if it takes place in a public forum like a park, *e.g.*, *Pleasant Grove*. Ditto for the issues of government subsidies, commercial speech, and viewpoint neutrality. None of these matters turn on forum questions. Hence, embrace of the government's arguments in the present context would set the rule for the gamut.

[8]The University of Central Florida, for example, one of the largest public universities in the nation, lists numerous "registered student organizations," some of which could have missions that run counter to a given administrations' interests or policies on various fronts: the Body of Animal Rights Campaign, College Democrats, College Republicans, Dream Defenders, Gun Club, NORML@UCF, Progressive Action at UCF, VOX: Voices for Planned Parenthood, and Young Americans for Freedom. *See* Student Organizations, http://osi.ucf.edu/student-orgs/ (click on "See List of RSOs").

within the scope of a government program. Pet. Br. at 15. This is plainly wrong. The private entities seeking contributions from government employees (*Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788 (1985)) or access to teachers (*Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983)) spoke within the scope of government programs (the Combined Federal Campaign and the school's internal mail system, respectively). All communications to and from prisoners take place within the scope of state penal programs. *Thornburgh v. Abbott*, 490 U.S. 401 (1989). The private speakers in this Court's "equal access" cases spoke within the scope of some facilities use program (*Widmar v. Vincent*, 454 U.S. 263 (1981); *Lambs Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993); *Good News Club v. Milford Central School*, 533 U.S. 98 (2001)) or educational program (*Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819 (1995)). Yet in none of these cases did this Court apply the government speech doctrine, which would have left the restricted speech devoid of First Amendment protection.

Practically everything the government does can be characterized as a "government program." If that were enough to label all speech therein "government speech," then the government would possess plenary censorship power over the private speakers in public parks, schools and universities, work spaces, and any enterprise that receives a drop of government funding.

D. Inapplicability of *Walker v. Texas Division*

The government analogizes the present case to this Court's recent license plate decision, *Walker v. Texas*

Div., Sons of Confederate Veterans, 135 S. Ct. 2239 (2015), to support its contention that the government cannot be forced to utter or associate with messages it considers repugnant. Pet. Br. at 37-41.[9] But the *Walker* Court's holding, that the specialty plates at issue there were government speech, turned on a long list of factors inapplicable here, such as government ownership and editorial control of the message, selectivity of the messages accepted for specialty plates, and the historic use of the specialty license plates as government identification and promotional devices, 135 S. Ct. at 2247-50. By contrast, the federal government does not edit trademarks, there is no selectivity – the government registers all otherwise eligible comers (aside from the haphazardly applied tastefulness limits at issue here) – and trademarks are not IDs or marketing channels *for the government*.

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[9]There are several problems with the government's repeated invocation of the prospect of registering the "most repellant" slurs and "demeaning" or "crude" messages, Pet. Br. at 28. First, it is difficult to take seriously the government's asserted interest, when the government already registers numerous trademarks expressly referring to "porn," "slut," and various crude excretory and anatomical terms. *See* tmsearch.uspto.gov. Second, there will be a natural disincentive for trademark owners to use, much less register, the most repugnant names, as this would risk alienating potential customers or supporters. *Cf.* Amici Br. of Certain Members of Congress in Support of Neither Party § III (conceding slurs make "poor trademarks"). Market forces therefore already target the asserted evil, reducing any need for the government to inject its own force to "encourage" (Pet. Br. at 11, 16) civility in trademarks. And third, resort to theoretical extreme abuses proves too much: that argument could be used against *any* free speech (or other rights) claim. *Cf. Cohen v. California*, 403 U.S. 15 (1971).

True, the asserted interest in disassociating from a message is common to this case and *Walker*, but that interest does not itself convert private speech into government speech. Third-party speech on the grounds of a shopping mall does not become the speech of the mall owners just because the owners might object to being associated with the message. *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 85-88 (1980). A protest on government property does not become government speech just because the government fears being associated with the message. *United States v. Grace*, 461 U.S. 171 (1983). And the desire of a public school or university to distance itself, for anti-establishment purposes, from the religious message of private users, as in *Widmar*, *Lambs Chapel*, *Good News Club*, etc., does not morph the private speech into government speech. Merely *allowing* private speech does not make it government speech: "The proposition that [government bodies] do not endorse everything they fail to censor is not complicated." *Board of Educ. v. Mergens*, 496 U.S. 226, 250 (1990) (plurality). Likewise, merely *recognizing* (by registering) private speech does not convert that speech into the government's own speech. The government's desire to disassociate itself from a private message goes to the asserted *justification* for the restriction on private speech, not the nature of the speech itself.

Indeed, the government's argument that the government speech doctrine applies "when communication takes place over a government platform," Pet. Br. at 42, aims a dagger at the heart of free speech. Public parks and sidewalks are "government platforms." A government-sponsored event like a graduation or a panel on climate change

can literally provide a "government platform." After-school facilities and university meeting rooms are "government platforms." This does not mean any speaker in such a context utters "government speech" subject to unlimited government censorship.

II. REGISTERING A TRADEMARK IS NOT A SUBSIDY.

The government relies upon this Court's government subsidy cases. That reliance is ill-founded. There is no subsidy here that would warrant giving the federal government censorship powers over its listing of trademarks. And even if there were a subsidy here, government may not "leverage . . . subsidies . . . into a penalty on disfavored viewpoints," *NEA v. Finley*, 524 U.S. at 587.

A. Scope and Inapplicability of Government Subsidy Doctrine

The treatment of discretionary government subsidies under the First Amendment is akin to the government speech doctrine. Basically, just as the government gets to say what it wants (assuming no independent constitutional violation), the government gets to direct its discretionary funding so as to further its program goals, including shaping any messages that are part of that program goal. "Government may allocate competitive funding according to criteria that would be impermissible were direct regulation of speech or a criminal penalty at stake." *NEA v. Finley*, 524 U.S. at 587-88.

The government subsidy doctrine does *not* apply where the government is providing some standard

service or benefit (e.g., flood relief, interstate highway passage, taxpayer information and assistance, adjudication of legal claims). Certainly those government programs, like all government actions, entail the expenditure of funds. But that is not enough to nullify First Amendment concerns. The government cannot willy-nilly use the carrot of taxpayer funding to obtain the forfeiture of constitutional rights. While he who "pays the piper" generally gets to "call the tune," *Democratic Senatorial Comm. v. FEC*, 660 F.2d 773, 781 (D.C. Cir. 1980) (per curiam opinion of Wright and GINSBURG, JJ.), this Court has repeatedly "recognize[d] a limit on Congress' ability to place conditions on the receipt of funds," *Rumsfeld v. FAIR*, 547 U.S. 47, 59 (2006). In particular, "the Government may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech even if he has no entitlement to that benefit." *Agency for Int'l Development v. Alliance for Open Soc'y Int'l, Ltd.* [*AID v. AOSI*], 133 S. Ct. 2321, 2328 (2013) (internal quotation marks and citations omitted). A number of this Court's cases exemplify this "unconstitutional conditions" doctrine. *E.g.*, *AID v. AOSI*; *FCC v. League of Women Voters of Cal.*, 468 U.S. 364 (1984); *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533 (2001). Where the government denies generally available public benefits or services because the target declines to adopt a particular policy – e.g., no welfare benefits to those who do not profess support for reducing the federal budget, or no Library of Congress research services for those who refuse to support gun control – this blatantly infringes upon the First Amendment right to free speech (and freedom of thought as well). The government cannot make ideological conformity the price of the incidents of

citizenship. "Authority here is to be controlled by public opinion, not public opinion by authority." *West Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 641 (1943). "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *Id.*

Here the government is essentially attempting to shun those entities with politically disfavored names. "You can call yourself that," the government says, "but if you do, you can't get the same trademark registration as everyone else." That violates not just the First Amendment, but limits on federal power to condition funding: funding conditions must at a minimum be related to the legitimate government interests that the program is intended to further. *South Dakota v. Dole*, 483 U.S. 203, 207-08 (1987). Excluding entities from federal funding programs just because, in the government's view, they espouse or reflect a particular undesirable viewpoint, regardless of the lack of a connection to the purposes of the particular program at issue, would fail this threshold test and thus unconstitutionally penalize those entities for their speech (or refusal to speak).

B. Limiting *CLS v. Martinez*

One fairly recent decision of this Court is in some tension with these crucial principles – *Christian Legal Society v. Martinez*, 561 U.S. 661 (2010) – but that case should not control the analysis going forward, either because it should be limited to its facts or because it should be repudiated (or ignored, as in *AID v. AOSI*).

In *CLS*, a government entity imposed the requirement that, as a condition of the benefits available to student clubs, every club must adopt a policy of indifferentism regarding religion and sexual behavior. *Id.* at 670-73. In other words, student groups were relegated to second-class status unless they in effect professed that a member's religious beliefs were irrelevant to the identity and effectiveness of a religious club, and that one's departure from traditional Christian sexual norms – and the consequent scandal – was irrelevant to the mission integrity of a Christian group.

Contrary to the principles described above, the policy requirement in *CLS* was not limited to participation in a particular, discretionary government program – e.g., a student work camp project aimed at helping AIDS victims. Nor was the requirement limited to a small subset of the population for whom the policy might arguably represent a job qualification, e.g., those applying for an assistantship position in the "diversity office" or campus chaplaincy. Instead, the rule was imposed upon the entire relevant universe – all students attending the state law school – as a condition of a standard, generally available benefit – forming a recognized club. Furthermore, the requirement was not directly linked to the program at issue: a policy on religion or sexual behavior generally has nothing to do with student club activities, and where such a policy might be relevant, it could as easily be completely counterproductive, indeed nonsensical – e.g., forcing a Jewish club to allow Muslim or Christian officers.

To the extent that *CLS* stands for the proposition that the government may impose ideological strings on benefits, it should be overruled as inconsistent with

this Court's First Amendment and unconstitutional conditions cases. To the extent that *CLS* says a government body – in that case, a law school, but by parity of reasoning also a municipality, a state, or the federal government – can extract a pledge of submission to the currently regnant ideology or else impose second-class status upon the population it governs, the *CLS* decision is deeply and fundamentally inconsistent with liberty in general and free speech in particular, and should be overruled.

At a minimum, *CLS* must be read as limited to its peculiar facts. The *CLS* Court observed that, while a Christian group bizarrely had to agree that its officers need not be Christian and need not profess to follow Christian norms, such a group could nevertheless adopt "generally applicable membership requirements unrelated to status or beliefs." *Id*. at 671 n.2 (internal quotation marks omitted). If these permissible "good-behavior," "attendance, [and] skill measurements" requirements, *id*., allow a club to maintain its identity and integrity – e.g., by treating profound ignorance or disregard of the club's Christianity-derived norms as a disqualifier – then *CLS* would stand only for the dangerous, but more narrow, proposition that clubs must *profess* indifference to their identity but may nevertheless *maintain* group mission coherence through conduct and skill requirements.

In sum, if *CLS* were taken at face value, a government body could relegate to second-class status, by refusal to register (or fund, *contra AID v. AOSI*), those groups which do not profess adherence to a deeply controversial policy position, even in the context of access to a speech forum. *A fortiori*, a government body could relegate to second-class status, by a refusal to register, those trademarks that do not comport with

the government's current ideological position. But because *CLS* is so profoundly inconsistent with broader, preexisting First Amendment principles – principles *CLS* did not purport to overturn – this Court should not rely upon *CLS* here, but rather should disavow its pernicious holding.[10]

III. TRADEMARKS ARE NOT COMMERCIAL SPEECH.

The government's contention that the trademarks it registers are "commercial speech" and therefore subject to lesser First Amendment scrutiny, Pet. Br. at 48, is plainly incorrect. Trademarks are names, not sales pitches. One need not be commercial to have a trademark. For example, the following are all registered trademarks: American Civil Liberties Union (Serial No. 74459922), NAACP (Serial No. 73213726), PETA (Serial No. 74166556), American Jewish Congress (Serial No. 85148742), Catholic Charities USA (Serial No. 85343169), Jewish Women International (Serial No. 76485716), NEA (Serial No. 85118805), Institute for Justice (Serial No. 77618391), and National Federation of the Blind (Serial No. 86403086). That commercial entities have trademarked names no more makes such names commercial speech than does the fact that donor-

[10]It is perhaps reflective of the outlier status of *CLS* that, since its issuance, this Court has *not once* cited the case for its merits holding (even in a case like *AID v. AOSI*, where it was obviously relevant), and neither petitioner nor its supporting amici cite the case at all, despite its plain relevance to the questions of viewpoint neutrality, government benefits, and First Amendment claims in the context of a government program.

supported nonprofits have trademarked names make such trademarks "solicitations."[11]

IV. A PROHIBITION ON REGISTERING DISPARAGING SPEECH IS VIEWPOINT-BASED.

The government takes the position that a ban on "disparaging" speech is not viewpoint-based.[12] This is untenable. A law that prohibited "disparaging" public office holders, for example, would most assuredly be viewpoint-based, as it would eliminate only *critical* speech, not praise. Likewise, a law that denied tax exemption to any religious group that "disparages" any other religious beliefs would be viewpoint-based – the

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[11]Of course a trademark can be *used* in a solicitation or in commercial speech (*e.g.*, *Friedman v. Rogers*, 440 U.S. 1, 11 (1979)), just like a phrase from Shakespeare can be used in a solicitation or in commercial speech (*see* David Smith, "He's the real thing: how Shakespeare influenced the American ad industry," *The Guardian* (Apr. 7, 2016)). Such *use* no more makes a trademark itself commercial or a solicitation than would analogous use alter the nature of Shakespeare's lines themselves.

[12]The question whether the challenged provision is viewpoint-based can sometimes be result-determinative, as in nonpublic forum cases, where content restrictions are permissible but viewpoint limits are not, *Rosenberger*, 515 U.S. at 829-30. In other contexts, however, content restrictions trigger strict scrutiny, regardless of viewpoint neutrality. *E.g.*, *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2229-30 (2015). The government does not dispute that the bar on "disparaging" trademarks is content-based. To the extent that fact suffices to warrant strict scrutiny, the question whether the restriction is also viewpoint-based is, as to this case, academic. That is all the more reason for this Court not to embrace an argument – the government's – that would impair First Amendment jurisprudence going forward.

group's members could laud, but not point out the baselessness or incoherence of, any other competing religious claims, even when done with charity and intellectual rigor.

The cases cited by the government and the court below do not support the contention that a restriction on "disparaging" speech is viewpoint-neutral.

In *Boos v. Barry*, 485 U.S. 312 (1988), this Court reviewed a First Amendment challenge to a law that banned, within a certain distance of embassies, speech that tends to "bring into public disrepute" any foreign government or officer thereof, *id.* at 316 (quoting statute). The lead opinion states that this provision is "not directly viewpoint-based", *id.* at 319 (plurality of O'Connor, J., joined by Stevens & Scalia, JJ.). However, (1) this was a plurality opinion, not a majority; (2) the statement was dicta, as the Court in any event struck the provision down as a content-based restriction that failed strict scrutiny, *id.* at 319-29; and, (3) the plurality's rationale – the provision is viewpoint neutral because it "determines *which viewpoint is acceptable* in a neutral fashion," *id.* at 319 (emphasis added) – itself concedes the viewpoint focus of the law and thus is internally incoherent.

In *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), the Court reviewed a First Amendment challenge to a hate crimes ordinance. The government points out that the *R.A.V.* Court observed that "[d]isplays containing some words – odious racial epithets, for example – would be prohibited to proponents of all views," *id.* at 391; the government reads that *description* as a *holding* that a ban on "odious" epithets would be viewpoint neutral. But this badly misreads *R.A.V.* First of all, the ordinance at issue had been construed only to apply to "fighting words," *id.* at 391. Hence, any speech the

ordinance reached already fell outside the protection of the First Amendment. *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942). So the reference to "odious racial epithets" must be understood as connoting only unprotected fighting words. Here, by contrast, there is no question that the name for which respondent sought a registered trademark is protected speech. Second, the Court *nevertheless found the ordinance impermissibly viewpoint-based*. To illustrate this, the Court explained that the fighting words in question were not prohibited in a viewpoint-neutral fashion:

> Displays containing some words – odious racial epithets, for example – would be prohibited to proponents of all views. But **"fighting words" that do not themselves invoke race, color, creed, religion, or gender** – aspersions upon a person's mother, for example – **would seemingly be usable** *ad libitum* **in the placards of those arguing in favor** of racial, color, etc., tolerance and equality, **but** could **not** be used by **those speakers' opponents**. One could hold up a sign saying, for example, that all "anti-Catholic bigots" are misbegotten; but not that all "papists" are, for that would insult and provoke violence "on the basis of religion."

R.A.V., 505 U.S. at 391-92. In the present case, disparaging persons, institutions, and beliefs precludes registration, but disparaging other things – certain music, foods, sports, etc. – does not. Moreover, extolling those same persons, institutions, or beliefs does not preclude registration. The challenged trademark provision is therefore viewpoint-based

precisely under the holding of *R.A.V.* – and more so, since the speech at issue here is not a First Amendment outsider like "fighting words."[13]

* * *

The government asserts the power to refuse to register any such trademark just because a government agent or agency deems the name to disparage some person, institution, or belief. The boundless subjectivity of such government oversight is plain: a government trademark official or reviewing board conceivably could, for example, disallow the following current trademarks: Association for Retarded Citizens (Serial No. 77207396) (disparaging to the intellectually disabled?), Ecolocaust (Serial No. 85860627) (disparaging to Holocaust victims by equating their harm with environmental degradation?), Abortion Must End Now (Serial No. 77720117) (disparaging to abortionists or post-abortion women?), or Animals Are Not Ours to Eat, Wear, Experiment on or Use for Entertainment (Serial No. 76538386) (disparaging to non-vegetarians, fur clothing purchasers, lab researchers, and circus performers?). Thankfully, the First Amendment no more permits a Ministry of Civility than it permits a

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[13] *Parker v. Levy*, 417 U.S. 733 (1974) (upholding, against vagueness and overbreadth challenges, in special context of military, a conviction for disloyal speech deemed "conduct unbecoming an officer and a gentleman") is inapposite. The present case does not involve the "different character of the military community and of the military mission" which necessitate "different application of First Amendment doctrines," *id.* at 758.

Ministry of Truth, *United States v. Alvarez*, 132 S. Ct. 2537, 2547 (2012).

CONCLUSION

This Court should affirm the judgment of the en banc Federal Circuit.

Respectfully submitted,

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