

Imagine you are a state legislator considering a proposed bill has been challenged as inconsistent with the First Amendment. Before proceeding further on it, you and your fellow legislators want to consult the text of the First Amendment and a recent Supreme Court case;

### **First Amendment:**

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

[The Fourteenth Amendment applies the First Amendment to the states, so that state governments must now, like Congress, also follow the guarantees of the First Amendment].

### ***Matal v. Tam***

**582 U.S. \_\_\_ (2017); June 19, 2017**

*Simon Tam, the lead singer of a rock group called "The Slants," sought to register that name as a trademark. The Patent and Trademark Office (PTO) denied the application under the so-called "disparagement clause" in the Lanham Act, which established the rules for trademarks. This provision prohibited the registration of trademarks that may "may disparage . . . persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute." Tam argued that this was a violation of his First Amendment protection of freedom of speech.*

JUSTICE ALITO delivered the opinion of the Court, joined by CJ ROBERTS, THOMAS, and BREYER.

This case concerns a ... band's application for federal trademark registration of the band's name, "The Slants." "Slants" is a derogatory term for persons of Asian descent, and members of the band are Asian-Americans. But the band members believe that by taking that slur as the name of their group, they will help to "reclaim" the term and drain its denigrating force.

The Patent and Trademark Office (PTO) denied the application based on a provision of federal law prohibiting the registration of trademarks that may "disparage . . . or bring . . . into contemp[t] or disrepute" any "persons, living or dead." We now hold that this provision violates the Free Speech Clause of the First Amendment. It

offends a bedrock First Amendment principle: Speech may not be banned on the ground that it expresses ideas that offend.....

Our cases use the term "viewpoint" discrimination in a broad sense, and in that sense, the disparagement clause discriminates on the bases of "viewpoint." To be sure, the clause evenhandedly prohibits disparagement of all groups. It applies equally to marks that damn Democrats and Republicans, capitalists and socialists, and those arrayed on both sides of every possible issue. It denies registration to any mark that is offensive to a substantial percentage of the members of any group. But in the sense relevant here, that is viewpoint discrimination: Giving offense is a viewpoint.

We have said time and again that the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers. See *Texas v. Johnson* (1989) arguing that ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable"); *Hustler Magazine, Inc. v. Falwell*, (1988); ... *Terminiello v. Chicago* (1949)

For this reason, the disparagement clause cannot be saved by analyzing it as a type of government program in which some content- and speaker-based restrictions are permitted.

... the Government asserts an interest in preventing " 'underrepresented groups' " from being " 'bombarded with demeaning messages in commercial advertising.' " A [legal brief] supporting the Government refers to "encouraging racial tolerance and protecting the privacy and welfare of individuals. no matter how the point is phrased, its unmistakable thrust is this: The Government has an interest in preventing speech expressing ideas that offend. And, as we have explained, that idea strikes at the heart of the First Amendment. Speech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express the thought that we hate...

JUSTICE KENNEDY, with whom GINSBURG, SOTOMAYOR, and KAGAN join, concurring in part and concurring in the judgment.

...This separate writing explains in greater detail why the First Amendment's protections against viewpoint discrimination apply to the trademark here...

Those few categories of speech that the government can regulate or punish—for instance, fraud, defamation, or incitement—are well established within our constitutional tradition... Aside from these and a few other narrow exceptions, it is

a fundamental principle of the First Amendment that the government may not punish or suppress speech based on disapproval of the ideas or perspectives the speech conveys.

The First Amendment guards against laws “targeted at specific subject matter,” a form of speech suppression known as content based discrimination. *Reed v. Town of Gilbert* (2015). This category includes a subtype of laws that go further, aimed at the suppression of “particular views . . . on a subject.” A law found to discriminate based on viewpoint is an “egregious form of content discrimination, which is “presumptively unconstitutional.

At its most basic, the test for viewpoint discrimination is whether—within the relevant subject category—the government has singled out a subset of messages for disfavor based on the views expressed. The disparagement clause the Government now seeks to implement and enforce identifies the relevant subject as “persons, living or dead, institutions, beliefs, or national symbols.” Within that category, an applicant may register a positive or benign mark but not a derogatory one. The law thus reflects the Government’s disapproval of a subset of messages it finds offensive. This is the essence of viewpoint discrimination...

The First Amendment’s viewpoint neutrality principle protects more than the right to identify with a particular side. It protects the right to create and present arguments for particular positions in particular ways, as the speaker chooses. By mandating positivity, the law here might silence dissent and distort the marketplace of ideas...

The Government may not insulate a law from charges of viewpoint discrimination by tying censorship to the reaction of the speaker’s audience. The Court has suggested that viewpoint discrimination occurs when the government intends to suppress a speaker’s beliefs. but viewpoint discrimination need not take that form in every instance. The danger of viewpoint discrimination is that the government is attempting to remove certain ideas or perspectives from a broader debate. That danger is all the greater if the ideas or perspectives are ones a particular audience might think offensive, at least at first hearing. An initial reaction may prompt further reflection, leading to a more reasoned, more tolerant position.

Indeed, a speech burden based on audience reactions is simply government hostility and intervention in a different guise. The speech is targeted, after all, based on the government’s disapproval of the speaker’s choice of message. And it is the government itself that is attempting in this case to decide whether the relevant audience would find the speech offensive. For reasons like these, the Court’s cases have long prohibited the government from justifying a First Amendment burden by pointing to the offensiveness of the speech to be suppressed. ...

...It is telling that the Court's precedents have recognized just one narrow situation in which viewpoint discrimination is permissible: where the government itself is speaking or recruiting others to communicate a message on its behalf. The exception is necessary to allow the government to stake out positions and pursue policies. But it is also narrow, to prevent the government from claiming that every government program is exempt from the First Amendment...

A law that can be directed against speech found offensive to some portion of the public can be turned against minority and dissenting views to the detriment of all. The First Amendment does not entrust that power to the government's benevolence. Instead, our reliance must be on the substantial safeguards of free and open discussion in a democratic society.

For these reasons, I join the Court's opinion in part and concur in the judgment.

JUSTICE GORSUCH did not participate in the discussion or decision of this case

## **Proposed Bill for Community Peace**

Two of the towns in your state have become involved in a bitter dispute- a disagreement over who has the right to use a river and how. The citizens of each of the towns have begun calling each other names. Some of these are generic — "water thief" and the like, but others have come up with insults specifically based on the name of the town and use these as slurs. Some inhabitants of the towns have taken to sneaking into graffitiing each other's town halls at night, and even vandalizing the buildings by breaking glass or kicking doors in. Still others have taken to organizing efforts by groups to go into the opposite town and punch citizens there.

To try to put a stop to this, the state government has proposed a law that has the following features, aiming to smooth relations between the towns by suppressing hateful speech and actions between the two communities.

- 1:** It raises the state penalty for graffitiing public property in general to a \$500 fine.
- 2:** It adds an additional \$500 penalty for graffitiing insults based on where one lives.
- 3:** It imposes a \$100 fine on using an insult based on what town someone lives in.
- 4:** It imposes a \$250 fine to use a newspaper or blog post to print insults based on where one lives, while promising to give \$250 to anyone who publishes an article or blog post saying good things about the people of the adjacent town.

**5:** It raises the penalty for assaulting someone to 3 years in state prison.

**6:** In order to discourage the mugging of citizens, it makes it illegal to incite an attack on a citizen of the state. (Inciting means convincing someone to do something immediately/imminently, with a high likelihood that he or she will do it.)

**7:** It raises the penalty for trespassing to a \$500 fine.

Each of these provisions has been challenged as inconsistent with the First Amendment, and state legislators are trying to decide which sections, if any, are unconstitutional, so they can be removed before passing the bill.