

CLIENT NEWS BRIEF

Supreme Court Finds Trademark Disparagement Clause Unconstitutional

The United States Supreme Court has held that trademarks are private speech protected by the First Amendment, even if some find the ideas they express offensive.

In *Matal v. Tam* (2017) 582 U.S. ___, the Court held the Lanham Act's disparagement clause to be unconstitutional because it discriminated based on a viewpoint. The Court, noting that the First Amendment is a bedrock principle of government, wrote that the public expression of ideas may not be prohibited merely because some may find the ideas offensive.

In *Matal*, a dance-rock band named the The Slants applied for federal trademark registration of the band's name. The application was denied under the Lanham Act's disparagement clause because the band name is a derogatory term for individuals of Asian descent.

The Court concluded that trademarks are private speech protected by the First Amendment, not government speech, since concluding otherwise would mean the government could silence or muffle expression of disfavored viewpoints by simply affixing a government seal of approval such as a trademark. The Court also rejected the contention that the disparagement clause is commercial speech.

In holding that denial of the trademark application was an unconstitutional bar on private speech, the Court rejected the notion that a trademark is a form of government subsidized speech because the Patent and Trademark Office does not pay money to parties seeking registration of a mark – an applicant for registration must pay a filing fee. The Court also struck down the argument that the disparagement clause is constitutional under a "government program" doctrine which is based on a merger of government speech and subsidy cases.

School districts should keep in mind that staff and students have a right to freedom of speech while on school grounds, subject to certain limitations. Therefore, before regulating the speech of a student or a staff member, districts should ensure that the regulation is not based on the content of the viewpoint being expressed, even if that viewpoint might be offensive to the school board or others in the school community. As a general rule, districts should assume that the speech is lawful and then do a careful analysis to determine if the speech can be regulated before acting.

For more information on the *Matal* case or on free speech issues in general, please contact the authors of this Client News Brief or an attorney at one of our [eight offices](#) located statewide. You can also visit our [website](#), follow us on [Facebook](#) or [Twitter](#) or download our [Client News Brief App](#).

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