

No. 15-_____

IN THE
Supreme Court of the United States

PRO-FOOTBALL, INC.,
Petitioner,

v.

AMANDA BLACKHORSE; MARCUS BRIGGS-CLOUD;
PHILLIP GOVER; JILLIAN PAPPAN; COURTNEY TSOTIGH,
Respondents.

UNITED STATES OF AMERICA,
Intervenor-Respondent.

**On Petition for a Writ of Certiorari
Before Judgment to the United States
Court of Appeals for the Fourth Circuit**

**PETITION FOR A WRIT OF CERTIORARI
BEFORE JUDGMENT**

VOLUME I OF II

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QUESTIONS PRESENTED

The “disparagement clause” in § 2(a) of the Lanham Act bars the registration of a trademark that “may disparage ... persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute.” 15 U.S.C. § 1052(a).

The questions presented are:

1. Whether § 2(a)’s disparagement clause violates the First Amendment.
2. Whether § 2(a)’s disparagement clause is impermissibly vague, in violation of the First and Fifth Amendments.
3. Whether the government’s decades-long delay between registering a trademark and cancelling the registration under § 2(a)’s disparagement clause violates due process.

RULE 29.6 STATEMENT

Pro-Football, Inc. is wholly owned by WFI Group, Inc., which in turn is wholly owned by Washington Football, Inc. No corporation or publicly held company owns ten percent or more of Washington Football, Inc.'s stock.

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OPINIONS BELOW

The opinion of the district court is reported at 112 F. Supp. 3d 439. Pet. App. 1a-89a. The opinion of the Trademark Trial and Appeal Board, an administrative body within the U.S. Patent and Trademark Office (“PTO”), is available at 2014 WL 2757516. Pet. App. 92a-362a.

JURISDICTION

The district court issued its decision on July 8, 2015. Pet. App. 1a. Petitioner Pro-Football, Inc. (the Team) filed its notice of appeal on August 4, 2015. Pet. App. 90a-91a. The Fourth Circuit docketed the appeal on August 6, 2015, as No. 15-1874. This Court has jurisdiction under 28 U.S.C. § 1254(1) and § 2101(e).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the U.S. Constitution provides in pertinent part that “Congress shall make no law ... abridging the freedom of speech.” U.S. Const. amend. I.

The Fifth Amendment to the U.S. Constitution provides in pertinent part that “[n]o person shall be ... deprived of life, liberty, or property, without due process of law.” U.S. Const. amend. V.

Section 2(a) of the Lanham Act provides in pertinent part that “[n]o trademark ... shall be refused registration on the principal register on account of its nature unless it ... [c]onsists of or comprises ... matter which may disparage ... persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute.” 15 U.S.C. § 1052(a).

INTRODUCTION

On April 20, 2016, the United States sought certiorari from an en banc Federal Circuit decision holding that the disparagement clause in § 2(a) of the Lanham Act is facially invalid under the First Amendment. *See* Pet. for Certiorari, *Lee v. Tam*, No. 15-1293 (filed Apr. 20, 2016). That clause bars registration of trademarks that “may disparage ... persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute.” 15 U.S.C. § 1052(a). The en banc Federal Circuit in *Tam* held that the clause imposes impermissible content-based and viewpoint-discriminatory burdens on protected speech. The court thus reversed a PTO decision refusing to register a rock band’s mark, THE SLANTS, that the PTO thought disparages Asian Americans. The government’s petition for certiorari in *Tam* raises the single question whether § 2(a)’s disparagement clause on its face violates the First Amendment.

In this case, the PTO in 2014 invoked § 2(a)’s disparagement clause to cancel six registrations of the NFL’s Washington Redskins (“Team”). The PTO did so not because the marks are disparaging *today*, but because the PTO believed the marks disparaged Native Americans *decades ago*, when the PTO registered the marks in 1967, 1974, 1978, and 1990. The U.S. District Court for the Eastern District of Virginia affirmed the cancellations, rejecting the Team’s arguments that § 2(a) violates the First Amendment, that § 2(a) is unconstitutionally vague, and that the government’s nearly 50-year delay between the first registration and the cancellation violates procedural due process. Pet. App. 2a-4a. The

Team appealed, and the appeal is fully briefed and awaiting oral argument in the Fourth Circuit.

The Team believes that *Tam* was correctly decided and does not warrant this Court's review. The Court instead should consider whether § 2(a)'s disparagement clause violates the Constitution, if at all, only after the Fourth Circuit decides this case. But if this Court nonetheless grants review in *Tam*, the Court also should grant this petition to consider this case as an essential and invaluable complement to *Tam*.

Assuming the Court grants review in *Tam*, this case is the paradigmatic candidate for certiorari before judgment because it is a necessary and ideal companion to *Tam*. The Court often has granted certiorari before judgment to consider complementary companion cases together, especially when the two cases raised important questions of constitutional law. Granting certiorari before judgment allows the Court to consider the question presented in a wider range of circumstances, resolve intertwined, equally important questions, and avoid piecemeal review. All of that is true here.

As in other cert-before-judgment cases, this case would allow the Court to consider *Tam*'s First Amendment question in the full range of circumstances, including both initial denials of registration and after-the-fact cancellations. The cancellation context here not only rounds out the scenarios in which § 2(a) applies, but also poses the gravest threat to free speech and is by far the most constitutionally suspect. Thus, even were the government to prevail in *Tam*, this Court's decision likely would not govern the cancellation context.

Moreover, this case would allow the Court to consider other important constitutional objections to § 2(a) that are intertwined with *Tam*'s solitary First Amendment question. Although *Tam* suggested that § 2(a) is impermissibly vague and concurring judges would have so held, the en banc court did not decide the vagueness question. And because *Tam* involved only an initial denial of registration, the Federal Circuit had no occasion to consider whether due process protects registration-holders when the government's delay in cancelling a registration has led to the loss of critical evidence and the death of key witnesses. By contrast, the district court in this case decided both questions, holding that § 2(a) is not impermissibly vague, and that the decades-long delay between registration and cancellation did not even trigger due process. This petition therefore squarely presents both questions.

Finally, the Team is better situated than *Tam* to address not only the vagueness and due process questions, but also the First Amendment question in *Tam*. In the Federal Circuit, *Tam* asserted that trademarks are commercial speech. The en banc court rejected that view and instead adopted the Team's position that § 2(a) regulates core expressive activity—and does so for reasons unrelated to any commercial purpose. *Tam* indeed adopts virtually all of the First Amendment arguments made in the Team's opening brief in the Fourth Circuit, which the Team filed two months before the Federal Circuit decided *Tam*. The Team—not *Tam*—is thus best positioned to ensure that this Court enjoys the full benefits of the adversarial process when considering whether § 2(a) violates the Constitution. Those benefits are best achieved if the Team is a party, and

if the Court considers the full range of claims the Team presents.

STATEMENT

A. The Lanham Act

“Congress enacted the Lanham Act in 1946 in order to provide national protection for trademarks used in interstate and foreign commerce.” *Park ‘N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 193 (1985). The Act “secure[s] to the owner of the mark the goodwill of his business and ... protect[s] the ability of consumers to distinguish among competing producers.” *Id.* at 198 (quoting S. Rep. No. 79-1333, at 3, 5 (1946)).

The Act permits trademark owners to “register” marks with the PTO. *B & B Hardware, Inc. v. Hargis Indus., Inc.*, 135 S. Ct. 1293, 1299-1300 (2015). “Registration is significant”—it confers “important legal rights and benefits,” including many “procedural and substantive legal advantages.” *Id.* at 1300 (quotation marks omitted). Those protections include a cause of action for infringement, 15 U.S.C. § 1114; evidentiary advantages and remedies in litigation, *id.* §§ 1065, 1072, 1115(a), 1117, 1125(c)(6); U.S. Customs’ assistance to prevent illegal imports, *id.* § 1124; and enhanced protection overseas, *id.* § 1141b.

This petition—and the government’s petition in *Tam*—concerns the “disparagement clause” in § 2(a) of the Lanham Act. That clause bars registration of marks that “may disparage ... persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute.” *Id.* § 1052(a). The PTO invoked this provision in refusing Tam’s application to register THE SLANTS.

Once the PTO registers a trademark, “any person who believes that he is or will be damaged” may petition the PTO to cancel the registration, as the individual respondents did here. *Id.* § 1064. If the registration was “obtained ... contrary to the provisions of” § 2(a), a petitioner can seek cancellation “[a]t any time.” *Id.* The PTO’s Trademark Trial and Appeal Board (“Board”) hears appeals of examiner registration decisions and reviews cancellation petitions. *Id.* § 1067. Board decisions are reviewable in federal court. *Id.* § 1071(b).

In determining whether a proposed or existing mark violates § 2(a)’s disparagement clause, the PTO applies a two-part test: (1) “[w]hat is the likely meaning of the matter in question,” and (2) “[i]f that meaning is found to refer to identifiable persons, institutions, beliefs or national symbols, whether that meaning may be disparaging to a substantial composite of the referenced group.” PTO, *Trademark Manual of Examining Procedure* (TMEP) § 1203.03(b)(i) (Oct. 2015). In the cancellation context, the PTO asks whether the mark was disparaging when registered, not whether the mark is disparaging today. *See* Pet. App. 100a.

B. Factual Background

For 83 years, since 1933, the Team has been known as the Redskins. In 1967, the PTO registered the mark THE REDSKINS for entertainment services. *Pro-Football, Inc. v. Harjo*, 284 F. Supp. 2d 96, 104-05 (D.D.C. 2003). Over the next 23 years, in 1974, 1978, and 1990, the PTO registered five additional Redskins marks. “[T]he six marks at issue were published and registered without opposition from Native Americans or anyone else on twelve different occasions”—six

publications for comment by the public followed by six registrations. *Id.* at 136 n.34.

The Team has since invested tens of millions of dollars in advertising and promoting its brand. According to public reports, as of August 2014, the Team was valued at \$2.4 billion, approximately \$214 million of which is attributable to the Redskins brand.

For the 25-year period from 1967 to 1992, not one person objected to the PTO or sought to cancel the Redskins' registrations. But in 1992, Suzan Harjo and six other Native Americans successfully petitioned the PTO to cancel the Redskins' registrations on the ground that the marks disparaged Native Americans when they were registered.

The U.S. District Court for the District of Columbia reversed, holding that laches barred the petition and that the PTO lacked substantial evidence to find the marks "disparaging" at the times the PTO registered them. *Harjo*, 284 F. Supp. 2d at 144-45. After an initial remand, the D.C. Circuit in 2009 affirmed based on laches without reaching the district court's holding that substantial evidence failed to show that the marks were "disparaging" in the context of a professional football team. *Pro-Football, Inc. v. Harjo*, 565 F.3d 880, 881 (D.C. Cir. 2009).

C. Proceedings Below

1. In 2006, while *Harjo* was pending, the five individual respondents here petitioned the Board to cancel the Redskins' registrations. Pet. App. 98a. The Board suspended the matter pending *Harjo*, then reopened it after the D.C. Circuit ruled for the Team.

In 2014, a divided Board again cancelled the registrations. *Id.* The majority concluded that the individual respondents had shown by a preponderance of the evidence that a “substantial composite” of Native Americans found the Team’s name disparaging between “1967-1990.” *Id.* at 178a. “[A] ‘substantial composite’ of the referenced group,” the Board held, “is not necessarily a majority.” *Id.* at 101a. The cancellations will take effect only if the Board’s decision is affirmed.

One Board member dissented, concluding that the “evidence submitted by [the individual respondents] can most charitably be characterized as a database dump”; that the individual respondents did not “introduce any evidence or argument as to what comprises a substantial composite of [the Native American] population”; and that they failed to show that the term Redskins was disparaging in 1967, 1974, 1978, or 1990. *Id.* at 190a.

2. The Team filed this action against the individual respondents in the Eastern District of Virginia under 15 U.S.C. § 1071, challenging the cancellations on constitutional and statutory grounds. The United States intervened to defend § 2(a)’s constitutionality but did not defend the Board’s decision. *See* Pet. App. 10a.

On July 8, 2015, the district court entered summary judgment for the individual respondents and the United States and denied the Team’s summary judgment motion. Pet. App. 1a-4a. The court held that § 2(a) “does not implicate the First Amendment” because “cancellations do not burden, restrict or prohibit” speech. *Id.* at 17a-22a. The court further held that registration is “government speech” or a

government-subsidized “program,” “exempt from First Amendment scrutiny.” *Id.* at 22a-37a.

The court next rejected the Team’s claim that § 2(a) is impermissibly vague. The court held that the existence of dictionary definitions of the word “disparage” and the fact that the term “disparage” appeared in Supreme Court opinions precluded a finding of vagueness. *Id.* at 39a-40a. The court further held that § 2(a) does not foster “arbitrary and discriminatory enforcement” because the PTO “publishes [its] decisions ... on its website,” provides unspecified “instructions” for “Examining Attorneys,” and has offered a test for disparagement in a published opinion. *Id.* at 40a-41a. And the court rejected the Team’s as-applied vagueness challenge. The Team argued that it lacked “fair notice” because the PTO repeatedly had registered the Redskins marks, six times between 1967 and 1990, each time without objection from anyone, and each time concluding that the marks were not disparaging to Native Americans. The court nonetheless held that the Team was “on notice” because of dictionary definitions of the term “redskin” and because the PTO refused new applications using that term beginning in 1992—*i.e.*, two years after registering a Redskins mark for the sixth time in 1990. *Id.* at 41a-42a.

The district court next rejected the Team’s argument that the nearly 50-year delay between the PTO’s registration of the first Redskins mark in 1967 and its cancellation decision in 2014 deprived the Team of procedural due process. The court did not deny that the delay led to the loss of important, contemporaneous evidence and the death of key witnesses. The court rather ruled that the Due Process Clause did not apply at all, because cancelling

registrations for trademarks worth hundreds of millions of dollars did not implicate any protectable “property interest.” *Id.* at 43a.

The court further concluded that the Redskins marks were “disparaging” when the PTO registered them in 1967, 1974, 1978, and 1990, *id.* at 44a-83a, and that the “public interest” and the pendency of the *Harjo* case barred the Team’s laches defense, *id.* at 83a-86a. The Team does not ask this Court to grant certiorari before judgment with respect to these two aspects of the decision.

3. The Team timely appealed to the Fourth Circuit on August 4, 2015. Pet. App. 90a-91a. Briefing closed on March 18, 2016, and the Fourth Circuit has not yet scheduled oral argument.

Two months after the Team filed its opening brief in the Fourth Circuit, the en banc Federal Circuit held that § 2(a)’s disparagement clause facially violates the First Amendment. *In re Tam*, 808 F.3d 1321 (Fed. Cir. 2015) (en banc). On April 20, 2016, the United States sought certiorari in *Tam*, and that petition is now pending. *See* Pet. for Certiorari, *Tam*, No. 15-1293 (“*Tam* Pet.”).

REASONS FOR GRANTING THE PETITION

I. THE COURT SHOULD GRANT CERTIORARI BEFORE JUDGMENT TO CONSIDER THIS CASE TOGETHER WITH TAM

If this Court grants certiorari in *Tam*, the Court should grant certiorari before judgment here to consider this case as an ideal and essential companion to *Tam*. This Court repeatedly has granted certiorari before judgment on those occasions, like this one,

when the consideration of complementary companion cases offers the best way to decide important questions of constitutional law. As the government acknowledges, this case squarely presents the same First Amendment question presented in *Tam*, a question of undeniable, fundamental national importance. *Tam* Pet. 23 n.8.

But this case differs from *Tam* in multiple critical ways. This case involves the *cancellation* context, and so the two cases together present the Court with the full range of circumstances in which § 2(a)'s disparagement clause applies. This case raises two additional, intertwined constitutional challenges—vagueness and procedural due process—that the Court should have before it when considering the validity of § 2(a) under the First Amendment. And the Team argues in the Fourth Circuit that § 2(a) can be narrowly construed to avoid any constitutional issue. The Court manifestly should consider this constitutional avoidance argument before reaching the question of § 2(a)'s constitutionality. Finally, the Team is better positioned than the respondent in *Tam* to make the case that § 2(a) violates the Constitution. Granting certiorari before judgment will ensure that this Court enjoys the full benefits of the adversary system when the Court evaluates the validity of § 2(a).

A. This Court Often Grants Certiorari Before Judgment To Consider Companion Cases Together

This Court will grant certiorari before judgment “only upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court.” Sup. Ct. R. 11. That standard is satisfied when a case pending in

a court of appeals is a valuable companion to another case on the Court's docket. That is especially true in cases, like this one, that involve significant constitutional challenges to federal or state action.

For example, the Court granted certiorari before judgment in *United States v. Fanfan*, 542 U.S. 956 (2004), so that the Court could hear that case together with *United States v. Booker*, 543 U.S. 220 (2005). *Booker* presented a constitutional challenge to the federal sentencing guidelines, and *Fanfan* presented the separate question whether the allegedly offending portions of the guidelines were severable. *See id.* at 267. Hearing the two cases together allowed the Court to resolve both the constitutional and severability questions at the same time, rather than in piecemeal fashion. *See id.* at 229. Similarly, the Court granted certiorari before judgment in *Gratz v. Bollinger*, 539 U.S. 244 (2003), to hear the case together with *Grutter v. Bollinger*, 539 U.S. 306 (2003). While *Grutter* involved a challenge to the race-conscious admissions policy at University of Michigan's law school, *Gratz* involved a similar challenge to the University's different race-conscious policy for admitting undergraduates. *Gratz* thus allowed this Court to "address the constitutionality of the consideration of race in university admissions in a wider range of circumstances." 539 U.S. at 359-60.

Other, earlier examples abound. In *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963), which addressed whether the National Labor Relations Act applied to certain foreign maritime operations, the Court granted certiorari before judgment in a companion case that "present[ed] the question in better perspective." *Id.* at 16. The Court later "chose[] [the companion case] as the vehicle for

[its] adjudication on the merits.” *Id.* In *Brown v. Board of Education*, 247 U.S. 483 (1954), the Court granted certiorari before judgment in the companion case of *Bolling v. Sharpe*, 347 U.S. 497 (1954). While *Brown* challenged school segregation in the states under the Fourteenth Amendment, *Bolling* presented the inevitable follow-on question whether segregation in D.C. public schools violated the Fifth Amendment. In *Taylor v. McElroy*, 360 U.S. 709 (1959), the Court granted certiorari before judgment “because of the pendency here” of *Greene v. McElroy*, 360 U.S. 474 (1959), which involved similar constitutional issues relating to the denial of a security clearance. *Taylor*, 360 U.S. at 709. And in *Porter v. Dicken*, 328 U.S. 252, 254 (1946), the Court granted certiorari before judgment “by reason of the close relationship of the important question raised to the question presented in” *Porter v. Lee*, 328 U.S. 246 (1946).

**B. This Case Is an Ideal Companion to
Tam and Essential To Resolve § 2(a)’s
Constitutionality**

Like the cases discussed above, this case presents an essential companion to a pending petition involving issues of imperative public importance, and warrants certiorari before judgment.

1. This case offers the opportunity to consider the First Amendment challenge to § 2(a) in the context of cancellation, a context that is necessary to comprehensively assess § 2(a)’s constitutionality. Like *Tam*, this case presents the question whether banning registration of disparaging marks imposes content-based and viewpoint-discriminatory burdens in violation of the First Amendment. But the government had never registered *Tam*’s mark, while the PTO here

retroactively cancelled registrations that the agency first approved nearly 50 years ago.

Cancellation fundamentally differs from an initial denial of registration for purposes of the First Amendment analysis. First, the government's asserted interest in denying registration of disparaging marks makes no sense in the cancellation context. The government primarily asserts an interest in dissociating itself from, and discouraging the adoption of, "offensive or disparaging marks." *Tam* Pet. 21-22. As the Federal Circuit explained, that interest does not justify § 2(a) even in the initial denial context. *Tam*, 808 F.3d at 1355-57. But a disassociation interest is utterly incomprehensible in the context of cancellation. In a cancellation proceeding, the PTO does not consider whether the mark is disparaging today, but rather whether the mark was disparaging when the PTO originally registered it. The government thus cancelled the Redskins' registrations not because the marks disparage anyone today, but because they supposedly disparaged Native Americans 50 years ago.

To illustrate the absurdity, under the government's theory, § 2(a) would require cancellation of a registration for a mark that once was thought disparaging but that the referenced group has since reclaimed as a source of pride. Whatever the merits of disassociating from speech the government finds offensive today, the United States has no legitimate interest in disassociating itself from speech on the ground that the speech may have offended some people several decades ago.

Second, after-the-fact cancellation imposes an exponentially greater burden on the mark owner's free speech rights. In the initial denial context, the owner

may never even have used the mark he or she seeks to register. Even if the owner has used the mark, he or she has not relied on the benefits of registration in investing to build goodwill in the mark. In sharp contrast, the Team has used the Redskins name since 1933 and has relied on the protections that federal registration affords since 1967, when the PTO first registered the Redskins marks. The Team has invested tens of millions of dollars building its brand around the name. Losing the protections attendant to registration would be immensely burdensome and costly to the Team, because it has built up enormous goodwill in its name and brand.

The cancellation context also highlights the immeasurable *ex ante* chill on protected speech in a way that the initial denial context does not. It is bad enough for the PTO to deny registration because a mark bears a potentially controversial message. But it is beyond the pale for the PTO to register a mark—a decision that, by necessary implication, contains a finding that the mark is not disparaging—but reserve the right to reverse course and cancel the registration at any time, even decades later. Faced with the prospect of cancellation after decades of investment, people will eschew potentially controversial names.

Considering this case and *Tam* jointly will present the Court with a more comprehensive picture and a more substantial record to resolve the common question whether § 2(a)'s disparagement clause violates the First Amendment. Moreover, the First Amendment issues raised by the cancellation context are separately worthy of this Court's review. Even were the government to prevail in *Tam*, the First Amendment would not permit the government to retroactively cancel a registration on the ground that

the government erred when it registered the mark 50 years earlier. Further, the issue is recurring: barely two months ago, a group of Native Americans petitioned the Board to cancel the registration for the Cleveland Indians' longstanding Chief Wahoo logo. See Pet. for Cancellation, *People Not Mascots, Inc. v. Cleveland Indians Baseball Co. LP*, No. 92063171 (T.T.A.B. filed Feb. 16, 2016).

Efficiency and judicial economy also support deciding these overlapping but complementary cases together, as in *Booker/Fanfan*, *Grutter/Gratz*, and many other examples. It would make little sense to hear *Tam* now while delaying the cancellation question until after the Fourth Circuit rules in this case.

2. In addition to presenting an essential, complementary angle to *Tam*'s First Amendment question, this case presents additional but related constitutional questions that this Court should consider at the same time: whether § 2(a)'s disparagement clause is unconstitutionally vague, and whether waiting 50 years to cancel a registration violates procedural due process. Both questions merit this Court's review, and both should be considered in tandem with the First Amendment question. But the government's petition in *Tam* does not present either question. *Tam* Pet. i.

a. This Court routinely considers First Amendment and vagueness challenges together, e.g., *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2320 (2012); *Holder v. Humanitarian Law Project*, 561 U.S. 1, 8 (2010), and § 2(a)'s disparagement clause is a textbook example of an unconstitutionally vague provision. It "fails to provide a person of ordinary intelligence fair notice of what is prohibited," fosters arbitrary and

discriminatory enforcement, and permits the government to make impermissibly “abrupt” “regulatory changes” regarding what counts as disparaging. *Fox*, 132 S. Ct. at 2317-18.

With respect to fair notice, the PTO itself has repeatedly acknowledged that § 2(a)’s disparagement clause is “somewhat vague” and assessing disparagement is “highly subjective.” *In re In Over Our Heads*, 1990 WL 354546, at *1 (T.T.A.B. 1990); *Harjo v. Pro-Football, Inc.*, 1999 WL 375907, at *34-35 (T.T.A.B. 1999). Federal courts of appeals have found terms like “demeaning,” “slurring,” “negative,” “offensive,” or “discredit” to be unconstitutionally vague. *See, e.g., Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177, 1182, 1184 (6th Cir. 1995); *Bullfrog Films, Inc. v. Wick*, 847 F.2d 502, 513 (9th Cir. 1988). This Court similarly found the term “annoying” to be unconstitutionally vague. *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971).

The PTO’s “test” for disparagement only compounds the vagueness. The PTO asks whether the trademark may disparage a “substantial composite” of the “referenced group.” TMEP § 1203.03(b)(i). But the PTO has repeatedly declined to clarify the term “substantial composite,” announcing only that it is “not necessarily a majority.” Pet. App. 101a, 174a. The court below thus held that no “specific threshold” was required. Pet. App. 79a. This leaves registration-holders in a state of crippling uncertainty: it is impossible to defend against the claim that a mark may disparage a “substantial composite” of Native Americans if no one will say what that term means. The problem is most acute in the cancellation context, where the “disparagement” inquiry turns on the state of the world at the time of registration, potentially

decades in the past. Humans are not up to the task of evaluating whether a term might have been “disparaging” to a “substantial composite” of a particular group 50 years ago or more.

Arbitrary and discriminatory enforcement is an independent reason to find a law unconstitutionally vague. *Fox*, 132 S. Ct. at 2317. Here the risk of arbitrariness is, if anything, even higher. In the PTO’s view, its decision whether to register one trademark is irrelevant to its decision whether to register another. The PTO’s prior registration of marks that are “similar to the applicant’s ... does not bind the [PTO].” *In re Heeb Media LLC*, 2008 WL 5065114, at *9 (T.T.A.B. 2008). “The often-stated maxim that ‘each case must be decided on its own facts’ never rings so loudly as it does in Section 2(a) refusals.” *In re Hines*, 1994 WL 456841, at *5 (T.T.A.B. 1994). One can hardly glean much guidance from that “policy.”

The Team and its amici have identified dozens of instances in which the PTO granted and refused indistinguishable registrations under § 2(a), with no apparent rationale. For example, the PTO registered HEEB magazine but denied HEEB clothing, registered DYKE NIGHT but denied 2 DYKE MINIMUM, registered WILD INJUN but denied URBAN INJUN, registered WANKER beer but denied WANKER clothing, registered PUSSYPOWERREVOLUTION clothing but denied PUSSY POWER entertainment services, and registered THE DEVIL IS A DEMOCRAT but denied HAVE YOU HEARD SATAN IS A REPUBLICAN? because it disparaged Republicans. We could go on.¹

¹ Brief of Pro-Football at 39, *Pro-Football, Inc. v. Blackhorse*, No. 15-1874 (4th Cir. Oct. 30, 2015); *Tam*, 808 F.3d at 1342 n.7.

This case exemplifies the sheer arbitrariness of § 2(a) and the absence of fair notice. The PTO repeatedly registered the Redskins marks in 1967, 1974, 1978, and 1990, necessarily concluding that the marks were not disparaging. In 1999, the PTO reversed course and concluded that the marks *were* disparaging *at those times*, without so much as a sentence explaining how PTO officials erred on six separate occasions respecting such a famous mark. The D.C. district court in 2003 reversed the PTO's cancellations on the merits based on its own review of the evidence. But in 2014 the PTO doubled down, again concluding that the marks were disparaging when the PTO registered them. And in 2015, parting ways with the D.C. district court, the court below affirmed the PTO's latest determination. The government's position is that the Lanham Act grants the PTO *carte blanche* to change its mind and retroactively cancel registrations anytime anyone files a petition. That is the very kind of retroactive regulatory change that established a lack of fair notice in *Fox*. 132 S. Ct. at 2317-18.

The vagueness challenge to § 2(a) is at least as important and worthy of review as the First Amendment question the government raises in *Tam*. The en banc court in *Tam* strongly hinted that § 2(a) is unconstitutionally vague, 808 F.3d at 1341-42 & nn.6-8, and two judges wrote a separate concurrence expressly so concluding, *id.* at 1363. And the First Amendment and vagueness questions are interrelated, *see Fox*, 132 S. Ct. at 2317, and should be considered together.

Granting certiorari before judgment in this case offers the Court the best opportunity to consider the vagueness challenge. The parties in *Tam* did not brief

vagueness to the en banc Federal Circuit; the en banc court did not actually decide it; and government's petition in *Tam* does not present the question. By contrast, the Team independently challenged § 2(a)'s disparagement clause as vague, and the court below decided the issue. *See* Pet. App. 3a, 12a-13a.

Although the Court could direct the parties in *Tam* to brief the vagueness question, granting certiorari before judgment in this case is the better course for several reasons. First, granting certiorari here will ensure a complete presentation of the issue. The respondent in *Tam* briefed the vagueness question at the panel stage in the Federal Circuit, but omitted key points, failing to identify any examples of arbitrary and discriminatory enforcement and failing to argue that the "substantial composite" aspect of the test is independently impermissibly vague. That issue and claim must be before the Court if the Court is to decide whether § 2(a) is unconstitutionally vague.

Second, the facts and context of this case will be indispensable in considering the vagueness question. This case starkly illustrates the hopelessly subjective nature of the statute, because the PTO registered the Redskins marks six times before concluding the marks had been ineligible for registration all along. And only this case presents the question whether, under *Fox*, those facts can render § 2(a) unconstitutionally vague as applied. More generally, the cancellation context highlights additional aspects of § 2(a)'s vagueness problem that might go overlooked if this case is not considered in tandem with *Tam*. This case squarely presents the question whether the retrospective nature of the disparagement inquiry renders § 2(a) unconstitutionally vague. *Supra* at 17-18. Moreover, although no one objected for 25 years after the PTO

first registered the Redskins mark, the PTO cancelled the registrations because the five individual respondents asked it to in 2006. This case also will allow this Court to consider whether the PTO's decision to delegate enforcement discretion to the whim of 300 million citizens—five of whom are responsible for the cancellation of the Redskins' registrations—is consistent with the vagueness doctrine's prohibition on arbitrary and discriminatory enforcement.

b. This case also presents the question whether the protections of procedural due process apply to the government's decision to cancel a trademark registration. The Team argues that the massive delay between registration and cancellation independently violates "[t]he fundamental requirement of due process"—"the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quotation marks omitted).

The delay deprived the Team of a hearing at a "meaningful time" because it "hampered the [Team] in presenting a defense on the merits, through, for example, the loss of witnesses or other important evidence." *United States v. Eight Thousand Eight Hundred & Fifty Dollars (\$8,850) in U.S. Currency*, 461 U.S. 555, 569 (1983). The Team has been unable to take contemporaneous surveys of the views of Native Americans at the relevant times or procure *any* contemporaneous testimony about prevailing viewpoints in the 1960s and 1970s. Meanwhile, a critical witness—Edward Bennett Williams, the Team's president for the key period of 1965-1980—died in 1988, well before anyone ever objected to the PTO. He was a participant in a 1972 meeting the court

below deemed “strong evidence” that the Redskins marks violated § 2(a), Pet. App. 69a, and the significance of the absence of his testimony cannot be overstated.

The court did not deny that the delay prejudiced the Team, but instead held that the prejudice was legally irrelevant. The court held that a trademark registration is not a “property interest,” and that the protections of procedural due process thus do not apply. Pet. App. 43a.

That holding is astounding and plainly wrong. The government cannot retroactively cancel decades-old registrations for exceptionally valuable marks without respecting procedural due process. This Court has repeatedly held that the revocation of licenses or other kinds of “protected status” triggers procedural due process. *Paul v. Davis*, 424 U.S. 693, 710-11 (1976); *Bell v. Burson*, 402 U.S. 535, 539 (1971); *Barry v. Barchi*, 443 U.S. 55, 64 n.11 (1979). And in direct conflict with the decision below, two circuits have held that cancelling trademark registrations triggers due process. *J.C. Eno (U.S.) Ltd. v. Coe*, 106 F.2d 858, 859-60 (D.C. Cir. 1939); *P.A.B. Produits et Appareils de Beaute v. Satinine Societa in Nome Collettivo di S.A.e.M. Usellini*, 570 F.2d 328, 332-34 (C.C.P.A. 1978).

In its Fourth Circuit brief, the government does not defend the district court’s conclusion that procedural due process does not apply. Instead the government argues that delay can *never* violate due process—no matter the length, circumstances, or prejudice—because the Lanham Act provides for a pre-cancellation hearing and judicial review. Brief of the United States at 48-49, *Pro-Football, Inc.*, No. 15-1874 (4th Cir. Feb. 4, 2016). The government does not

dispute that the death of witnesses and the inability to take a contemporaneous survey prejudiced the Team. Rather the government contends that a hearing before the Board and the right of appeal is all the process that is due, *id.* at 49, whether or not that hearing occurs at a “meaningful time.”

The question whether cancellation triggers procedural due process, and whether the government’s decades-long delay can violate procedural due process, is independently worthy of this Court’s review. That question is immensely significant for the over two million trademarks currently registered in this country,² which can be cancelled at the government’s whim under the decision below—however old and valuable, and regardless of the circumstances.

Tam does not present this question, however, and this Court should not consider the constitutional question presented in *Tam* without considering whether procedural due process applies—because the procedural due process question has important implications for the First Amendment question raised by *Tam*. If registration-holders are not even entitled to procedural due process before the government deems their marks disparaging and revokes the marks’ legal protection, that result would greatly magnify § 2(a)’s chilling effect on speech. The same is true under the government’s theory. An owner who wishes to register its mark would face the very real worry that the government will approve the mark, but that even one citizen could object decades or centuries later when the best evidence that the mark was non-

² PTO, Performance and Accountability Report FY 2014, at 157, <http://www.uspto.gov/about/stratplan/ar/USPTOFY2014PAR.pdf>.

disparaging when registered is gone. These due process and First Amendment issues are linked and this Court should consider them together, not seriatim.

c. Finally, this Court should not decide a constitutional question “if there is some other ground upon which to dispose of the case.” *Bond v. United States*, 134 S. Ct. 2077, 2087 (2014) (quotation marks omitted). The Team vigorously argues in the Fourth Circuit that it is “fairly possible” to construe § 2(a) to avoid *any* constitutional issue. *Almendarez-Torres v. United States*, 523 U.S. 224, 237 (1998). The doctrine of constitutional avoidance and ordinary principles of statutory construction compel the conclusion that § 2(a)’s prohibition of disparagement of “persons, living or dead,” 15 U.S.C. § 1052(a), refers only to identifiable individuals or juristic persons—not groups *as a whole*, like lawyers, gardeners, vegetarians, women, or racial and ethnic groups. Indeed, the phrase “living or dead,” which modifies “persons,” makes little sense as a modifier of an entire group, such as a gender. The Lanham Act’s definition of the term “person” supports this conclusion. It provides that an “association” qualifies as a “person” that can be disparaged under § 2(a) only if the association is “capable of suing and being sued.” 15 U.S.C. § 1127. That restriction would be meaningless if “persons” in § 2(a) included any group of individuals sharing some quality or affinity, whether or not the group could sue and be sued.

And interpreting § 2(a) to refer to identifiable individuals is the only reading of the statute that comports with common sense. Congress could not possibly have wanted to prohibit trademarks “disparaging” *any* amorphous group of persons, including birders and bookworms. But the statute

does not restrict itself to minority groups, and interpreting § 2(a) to apply to Native Americans in this case or persons of Asian ancestry in *Tam* means that § 2(a) applies to any broadly defined group of people, including billionaires and politicians.

The Court should have this constitutional avoidance argument before it when deciding the constitutionality of § 2(a). The First Amendment implications of a statute banning registration for a mark like “Smelly Jane R. Doe” are very different than the First Amendment implications of a statute banning registration for a mark like “Filthy Politicians.” The government itself acknowledges that this “other statutory” argument by the Team means that a court “may decide the [Redskins] case without reaching the constitutional question.” *Tam* Pet. 23 n.8. The Team’s interpretation of § 2(a) would thus avoid the constitutional issue in *Tam*, highlighting the benefit of hearing the cases together.

Although the Team did not make this argument in the district court, the Team has extensively done so on appeal, and will vigorously press the point if this Court grants certiorari before judgment. But *Tam* has never made the argument.

C. Petitioner Is Better Situated than Tam To Challenge § 2(a)

This Court relies on a robust adversarial process to fully vet questions before it. The Team, not *Tam*, is the best suited to serve this function here.

Tam is not well-positioned to challenge § 2(a) under the First Amendment. In the en banc Federal Circuit, *Tam* filed an undersized brief that was barely half the word limit. The brief asserted that “trademarks are commercial speech.” Brief of Appellant at 16, *Tam*,

808 F.3d 1321 (No. 14-1203). Tam even went so far as to note that the United States agreed with him that “trademarks are a form of commercial speech.” *Id.* (quoting Brief of the United States at 35 n.5, *Tam*, 808 F.3d 1321). And Tam’s counsel reiterated at oral argument that trademarks are commercial speech. Oral Argument at 02:38, *Tam*, 808 F.3d 1321, http://oralarguments.cafc.uscourts.gov/default.aspx?fl=2014-1203_1022015.mp3.

The en banc Federal Circuit rightly did not accept Tam’s view that § 2(a) restricts commercial speech. The court, rather, found that trademarks “very commonly do much more than” convey information about who is selling a product and for how much. *Tam*, 808 F.3d at 1338. And “critically, it is always a mark’s expressive character, not its ability to serve as a source identifier, that is the basis for the disparagement exclusion from registration.” *Id.* The court thus assessed § 2(a) “under First Amendment standards applicable to what it targets, which is not the commercial-speech function of the mark.” *Id.*

The Federal Circuit’s analysis substantially mirrors the arguments the Team made in its Fourth Circuit brief filed just two months before the decision in *Tam*. In contrast to Tam, the Team argued that:

Central Hudson ... is inapplicable because trademarks do not themselves propose commercial transactions. Trademarks are brand identifiers that are both expressive in their own right and enable mark-owners to associate all of their other speech with their brands. For example, an individual uses his name both at home, work, and church. Sports teams, just like ballets, musicals, or improvisational comedies, similarly must

have an identity to communicate effectively with audiences. That they act for a profit is of no moment.... Also, countless non-profit organizations use registered trademarks, and profit-seeking companies use their registered names to engage in political speech.

Brief of Pro-Football at 21, *Pro-Football, Inc.*, No. 15-1874 (4th Cir. Oct. 30, 2015) (“Team CA4 Br.”).

The Team further stressed that “the sole reason for cancellation is the PTO’s disagreement with the cultural, philosophical, and political viewpoint the marks supposedly expressed.” *Id.* at 22 (quotation marks omitted). And unlike Tam, the Team argued that, because this includes a facial challenge, the government must show that commercial marks and purposes outweigh noncommercial marks (e.g., political parties and organizations, charities), commercial marks used for expressive purposes (e.g., music, sports teams, universities, plays, museums, newspapers, etc.), and non-commercial uses of commercial marks (e.g., lobbying by manufacturers). See *United States v. Stevens*, 559 U.S. 460 (2010). The government has never attempted that showing.

Beyond that, the Federal Circuit repeatedly relied on the Team’s arguments in the Fourth Circuit. For example:

- *Tam* adopts the Team’s argument that “[t]he PTO’s processing of registration applications no more transforms private speech into government speech than when the government issues permits for street parades; grants medical, hunting, fishing, or drivers’ licenses; records property titles or birth certificates; or issues articles of

incorporation.” Team CA4 Br. 27. *Tam* held: “The PTO’s processing of trademark registrations no more transforms private speech into government speech than when the government issues permits for street parades, copyright registration certificates, or, for that matter, grants medical, hunting, fishing, or drivers licenses, or records property titles, birth certificates, or articles of incorporation.” *Tam*, 808 F.3d at 1348.

- The Team refuted the argument that publishing registered marks in a “Principal Register” turns them into government speech. The Team argued: “[T]he government publishes copyright registrations, and thus the court’s theory would permit the government to discriminate against books based on content and viewpoint. The government could refuse to provide permits for unpopular rallies if it simply posted all permits on the Internet.” Team CA4 Br. 28. *Tam* concludes: “If being listed in a government database or published in a list of registrations were enough to convert private speech to government speech, nearly every action the government takes—every parade permit granted, every property title recorded, every hunting or fishing license issued—would amount to government speech. The government could record recipients of parade permits in an official database or publish them weekly, thus insulating content-based grants of these

permits from judicial review.” *Tam*, 808 F.3d at 1347-48.

- The Team explained that no one reasonably perceives trademark registration as government endorsement, stating: “Nor does anyone think the government’s copyright registration of Randall Kennedy’s *Nigger: The Strange Career of a Troublesome Word* (Copyright No. TX0005492813), E.L. James’ *Fifty Shades of Grey* (Copyright No. TX0007583125), or the song ‘Hail to the Redskins’ (Copyright No. RE0000325231), reflects government association.” Team CA4 Br. 23. *Tam* concludes: “Just as the public does not associate the copyrighted works *Nigger: The Strange Career of a Troublesome Word* or *Fifty Shades of Grey* with the government, neither does the public associate individual trademarks such as THE SLANTS with the government.” *Tam*, 808 F.3d at 1347.
- The Team’s brief asserted: “The government’s asserted interest in disassociating itself from marks it finds disparaging to Native Americans only underscores the government’s hostility to the message conveyed by the marks.” Team CA4 Br. 16. *Tam* similarly states: “Underscoring its hostility to these messages, the government repeatedly asserts in its briefing before this court that it ought to be able ... ‘to dissociate itself from speech it finds odious.’” *Tam*, 808 F.3d at 1336

(quoting Brief of the United States at 41, *Tam*, 808 F.3d 1321 (No. 14-1203)).

- The Team contested the government's theory that § 2(a) advances an interest in reducing the amount of disparaging speech, stating: "Disparaging speech ... abounds on the Internet and in books and songs bearing government-registered copyrights." Team CA4 Br. 26. *Tam* observes: "Disparaging speech abounds on the Internet and in books and songs bearing government registered copyrights." *Tam*, 808 F.3d at 1357.
- The Team argued: "The disparagement clause is not a valid content-based restriction. The clause does not further a trademark's purpose but only burdens disfavored expression. 'Disparaging' marks prevent consumer confusion and secure to owners the fruits of their investments every bit as much as non-disparaging marks. If anything, § 2(a) undermines these objectives. By making it harder to police infringement, cancellation makes it harder for consumers to detect the source of goods and for owners to capitalize on their investments." Team CA4 Br. 32-33. Though *Tam* did not involve cancellation, the Federal Circuit similarly found that "§ 2(a)'s exclusions can undermine those interests because they can even be employed in cancellation proceedings challenging a mark many years after its issuance and after the markholder has invested millions of dollars protecting its

brand identity and consumers have come to rely on the mark as a brand identifier.” *Tam*, 808 F.3d at 1329-30. “Preventing disparaging marks does not protect trademark owners’ investments; in fact, because § 2(a) can be brought in cancellation proceedings decades after a mark is granted, this provision actually undermines this important purpose of the Lanham Act.” *Id.* at 1354.

The Team filed an *amicus* brief in the Federal Circuit, but that court nonetheless relied on the arguments the Team made in the Fourth Circuit, when the Team presented its arguments in a fulsome manner as a party. In all events, the Court did not rely on the arguments presented in Tam’s brief. The Team’s participation as a party is thus likely to materially assist this Court as well.

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CONCLUSION

If the Court grants certiorari in *Tam*, the Court also should grant this petition for a writ of certiorari before judgment.

Respectfully submitted,

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