

PRESS RELEASE

Wiley Rein Files *Amicus* Brief Testing the Constitutionality of the Lanham Act's Bar on "Disparaging" Trademarks

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Wiley Rein LLP partner Megan L. Brown and a team of appellate and trademark experts filed an *amicus* brief in a major en banc case testing the constitutionality of the Lanham Act's bar on "disparaging" trademarks. Representing the Rutherford Institute and the Cato Institute, Wiley Rein's brief argues that "The Lanham Act's disparagement bar, and its application by the government, openly require the government to discriminate based on the content of speech, and cannot co-exist with the First Amendment." This part of the Lanham Act requires the government to disfavor certain trademarks based on the message that is conveyed, if they might offend a group or individual that objects or that the government decides needs protection. The constitutional violation is clear from the "subjective and paternalistic review by government employees of the potential for offense from the message to be conveyed in the trademark." The regime is the quintessential "heckler's veto," which the Supreme Court has repeatedly said cannot coexist with the First Amendment.

In the case, the trademark office denied registration of THE SLANTS on the basis that its use by an Asian music band might offend a substantial composite of Asians. The Federal Circuit upheld the denial under its precedent finding that denial of trademark registration did

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not implicate the First Amendment. The Federal Circuit decided, on its own, to rehear the case en banc after Judge Moore published lengthy "additional views" explaining that it was time to review Federal Circuit precedent. The brief urges the Federal Circuit to find that the "disparagement" bar in Section 2(a) of the Lanham Act is unconstitutional. Oral argument in the case has been set for October 2.

The Wiley Rein team was led by Ms. Brown, and included partners Christopher Kelly and Joshua S. Turner, of counsel Jennifer L. Elgin, and associate Dwayne D. Sam.

- A copy of the Wiley Rein *amicus* brief is [here](#).