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PRESS RELEASE

Wiley Rein Files *Amicus* Brief in First Amendment Trademark Case, *Pro-Football, Inc. v. Amanda Blackhorse*

November 6, 2015

Today Wiley Rein LLP partner Megan Brown and a team of appellate lawyers filed an *amicus brief* on behalf of the firm's clients, theCato Institute and The Rutherford Institute, in *Pro-Football, Inc. v. Amanda Blackhorse*. This prominent First Amendment case, now before the U.S. Court of Appeals for the Fourth Circuit, questions the constitutionality of the Lanham Act's bar on registration of "disparaging" trademarks.

The *amicus* brief was filed in support of Pro-Football Inc., which is appealing a July 2015 federal court ruling that upheld the U.S. Patent and Trademark Office's (PTO) cancellation of the trademark registrations for the Washington Redskins football team. Another case involving the same issue, in which Wiley Rein also filed an *amicus* brief, is pending en banc before the Federal Circuit. Both cases raise fundamental questions about the federal government's ability to disfavor expressive speech based on its message.

Wiley Rein's brief in *Pro-Football, Inc. v. Amanda Blackhorse* asks the Fourth Circuit to "clarify that the First Amendment applies to trademark registration, and correct the District Court's unwarranted extension of the 'government speech' doctrine, ensuring that the First Amendment remains a restraint on government."

Given the variety of offensive trademarks already registered, the subjective review required by the Lanham Act's bar on "disparaging" marks smacks of a "heckler's veto" that the Supreme Court of the United States has long rejected. "It is *precisely* when speech might offend that the First Amendment is most critical, because this type of

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speech invites regulation in the first instance," the brief further states.

Wiley Rein's November 6 brief concludes: "This Court should reverse the district court's decision, and hold that the disparagement clause of § 2(a) of the Lanham Act is facially unconstitutional to the extent it permits the benefits of trademark registration to be denied to a speaker on the ground that the government believes that the communication would offend."

The appeal, filed in August 2015, stems from a June 2014 vote by the PTO's Trademark Trial and Appeal Board to cancel the team's trademarks on the grounds that the trademarks may be disparaging to Native Americans and thus do not qualify for federal registration under Section 2(a). On July 8, 2015, U.S. District Judge Gerald Bruce Lee in Alexandria, Virginia, affirmed the PTO decision, ruling that the team's trademarks disparage Native Americans and that the law allowing for cancellation did not violate free speech rights of the First Amendment.

The Cato Institute is a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. The Rutherford Institute is an international civil liberties organization. Both litigate First Amendment issues and oppose government burdens on speech protected by the First Amendment.

The Wiley Rein team that authored the brief, along with Ms. Brown, includes partner Joshua S. Turner, Trademark Practice chair Christopher Kelly, of counsel Jennifer L. Elgin, and associate Dwayne D. Sam.

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